



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 275

Repealing ASIC class order on FSG exemption for market-making services on a licensed market: [CO 03/578]

December 2016

About this paper

This consultation paper sets out ASIC's proposal to repeal a class order that we consider is no longer required and does not form a necessary and useful part of the legislative framework. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from our stakeholders on our proposal to repeal Class Order [CO 03/578] *Financial Services Guide exemption for market-making services on a licensed market*, which is due to expire on 1 April 2017.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 5 December 2016 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 31 January 2017 to:

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What will happen next?

Stage 1	5 December 2016	ASIC consultation paper released
Stage 2	31 January 2017	Comments due on the consultation paper
Stage 3	Before 1 April 2017	Repeal of instrument

A Background

Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislation (FRL). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose.
- 3 Where an instrument is deemed to no longer serve a regulatory purpose we will consult on repealing it. We will repeal instruments rather than allow them to sunset so that industry is certain of our intentions and confident that, where instruments are removed, this was our intention.

Instrument to be repealed

- 4 This consultation paper seeks feedback on our proposal to repeal Class Order [CO 03/578] *Financial Services Guide exemption for market-making services on a licensed market* because, in our view, it no longer serves a regulatory purpose. In doing this, we hope to ensure that only instruments that serve a regulatory purpose are maintained. We do not consider that the repeal of the instrument will have any practical effect. In particular, we do not consider that the repeal will require Financial Services Guides (FSGs) to be given in relation to market-making services on a licensed market.
- 5 We have a deregulatory focus. We are aware of the burden unnecessary red tape can impose on business and the potential impact of this on productivity. To address this, we continue to pursue initiatives to reduce red tape for individuals and businesses. We welcome feedback where repealing an instrument would impose a regulatory burden on business.

B Repealing ASIC class order

Key points

We are proposing to repeal [CO 03/578], which is due to expire on 1 April 2017.

We have formed the preliminary view that this class order is not required and does not form a necessary and useful part of the regulatory framework.

We do not consider that the repeal will require FSGs to be given in relation to market-making services on a licensed market.

Your feedback

- 6 In this section, we have invited specific feedback on our proposal to repeal [CO 03/578]. You are invited to comment on our proposal to repeal the class order, including whether it is operating effectively and efficiently, and whether any entities are currently relying on it. If we do not receive any submissions requesting the class order be remade, we will repeal it. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 03/578] *Financial Services Guide exemption for market-making services on a licensed market*

Background

- 7 [CO 03/578] exempts an Australian financial services (AFS) licensee and its authorised representative from having to give an FSG in relation to the provision of a financial service that consists of making a market for a financial product through a licensed market.
- 8 [CO 03/578] was made in reliance on the view that, on a licensed market:
- (a) the clients of a person who makes a market under s766D of the *Corporations Act 2001* (Corporations Act) would include those persons who formed the reasonable expectation that they will be able to regularly effect transactions at the prices stated by that ‘market maker’—regardless of whether or not the ‘client’ actually enters into any transactions with that ‘market maker’;
 - (b) though a person may not be able to identify who the ‘market maker’ is, at the time that the relevant prices are being stated, that person may still be a ‘client’ if they:

- (i) have reason to believe that some entity is regularly stating prices; and
- (ii) may reasonably expect to be able to effect transactions at the stated prices; and
- (c) as a result of (a) and (b), the clients of a person who makes a market on a licensed market under s766D would always potentially include retail clients to whom an FSG would need to be given as required by s941A.

9 This legal view was based on ASIC's interpretation of the effect of s766D.
10 [CO 03/578] was made to address the difficulty in ascertaining, on a licensed market:

- (a) whether any person has the requisite expectation under s766D;
- (b) the identity of that person; and
- (c) whether that person was a retail client.

11 Even though an exemption may apply in circumstances where there is no reasonable opportunity to give an FSG under s940B, [CO 03/578] provided certainty that an FSG would not be needed. The class order, by applying only to market making undertaken through a licensed market, also recognised that other protections existed through trading on a licensed market (e.g. market misconduct prohibitions).

Proposal

B1 We propose to repeal [CO 03/578], which would otherwise sunset on 1 April 2017. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/578\]](#).

Your feedback

- B1Q1 Do you have any concerns with our proposal to repeal [CO 03/578]?
- B1Q2 Are there any unintended consequences or other impacts of the repeal of [CO 03/578]?

Rationale

12 We have reconsidered the views expressed in paragraph 8 as to whether the Corporations Act requires a market maker on a licensed market to be given an FSG in the absence of relief.

13 We think the better view is that an FSG is not required. The definition of 'makes a market' in s766D(1) does not inform the identity of a market maker's client on a licensed market. We see little basis in the Corporations Act for the view that the clients of a market maker on a licensed market include unidentified retail clients who may transact with a market maker.

- 14 As such, we have reached the preliminary view that [CO 03/578] is no longer required and does not form a necessary and useful part of the regulatory framework.
- 15 We do not consider that there will be any practical consequences for market makers on licenced markets following the repeal of [CO 03/578]. A market maker will not be required to provide an FSG following the repeal.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
authorised representative	A person authorised by an AFS licensee, in accordance with s916A or 916B of the Corporations Act, to provide a financial service or services on behalf of the licensee Note: This is a definition contained in s761A.
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
Financial Services Guide (FSG)	A document required by s941A or 941B to be given in accordance with Div 2 of Pt 7.7 of the Corporations Act Note: This is a definition contained in s761A.
market operator	An operator of a licensed market
retail client	A retail client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of Ch 7 of the Corporations Regulations
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect