



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 280

ASIC class order on wholesale equity schemes: Licensing relief for trustees— [CO 07/74]

March 2017

About this paper

This consultation paper sets out ASIC's proposals to either remake or repeal Class Order [CO 07/74] *Wholesale equity schemes: Licensing relief for trustees*. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from trustees and managers of wholesale equity schemes and other stakeholders on our proposals to either remake [CO 07/74], without significant changes, or to repeal it if it no longer forms a useful part of the legislative framework. [CO 07/74] is due to expire on 1 October 2017.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 280.

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 15 March 2017 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

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on wholesale equity schemes. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section C, 'Regulatory and financial impact'.

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 13 April 2017 to:

Caitilin Hawkins
Senior Lawyer, Investment Managers and Superannuation
Australian Securities and Investments Commission
Level 7, 120 Collins Street
Melbourne VIC 3000
facsimile: 03 9280 3444
email: caitilin.hawkins@asic.gov.au

What will happen next?

Stage 1	15 March 2017	ASIC consultation paper released
Stage 2	13 April 2017	Comments due on the consultation paper
Stage 3	September 2017	Commencement of remade instrument <i>or</i> repeal of instrument (with transitional relief)

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 If 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.

Our approach to remaking legislative instruments

- 4 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's priorities of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.
- 5 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
 - (a) we are able to carefully consider the continuing regulatory and financial impact of the instrument; and
 - (b) the instrument retains its effectiveness in addressing an identified issue or problem.

- 6 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess any proposed changes to the class order that are not minor and machinery. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes.

B Proposals to remake or repeal ASIC class order

Key points

We are proposing to either:

- remake Class Order [CO 07/74] *Wholesale equity schemes: Licensing relief for trustees*, without significant changes, if it continues to form a useful part of the legislative framework; or
- repeal [CO 07/74] if it no longer forms a useful part of the legislative framework.

[CO 07/74] sunsets on 1 October 2017.

If we remake [CO 07/74], it will be redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at www.asic.gov.au/cp under CP 280.

If we repeal [CO 07/74], we are proposing that transitional relief will be provided until 1 October 2018 to provide sufficient time for entities that rely on the relief to make alternative arrangements.

Class Order [CO 07/74] *Wholesale equity schemes: Licensing relief for trustees*

Background

- 7 A 'wholesale equity scheme' is essentially an unregistered managed investment scheme that primarily invests in securities of unlisted companies and whose members are all wholesale clients. For tax reasons, wholesale equity schemes are usually structured by the manager using a multiple unit trust structure with separate corporate trustees that are related bodies corporate of the manager.
- 8 Part 7.6 of the *Corporations Act 2001* (Corporations Act) is likely to require a trustee of a wholesale equity scheme to hold an Australian financial services (AFS) licence to provide 'wholesale equity financial services' by:
- (a) dealing in investment products that form part of the trust property of the wholesale equity scheme; and
 - (b) providing a custodial or depository service in relation to the investment products of the trust.

This is even though the scheme is effectively being operated by the manager that already holds an AFS licence and that takes responsibility for the operation of the scheme.

- 9 [CO 07/74] provides relief to trustees of wholesale equity schemes from the requirement to obtain an AFS licence in the circumstances specified in the class order. This relief has been provided to remove impediments in the venture capital industry by removing unnecessary regulatory burdens.
- 10 In 2013, as part of our wider review of the financial and custody requirements applicable to AFS licensees, we strengthened the financial requirements for responsible entities and custodial and depository service providers, imposing:
- (a) new financial requirements relating to net tangible assets (NTA), cash flow projections and liquidity; and
 - (b) minimum standards (or custody requirements) for providers of custodial or depository services.
- 11 The financial requirements are outlined in [Regulatory Guide 166 Licensing: Financial requirements](#) (RG 166) and are implemented through [Class Order \[CO 13/760\] Financial requirements for responsible entities and operators of investor directed portfolio services](#) and [Class Order \[CO 13/761\] Financial requirements for custodial or depository service providers](#).
- 12 The custody requirements are outlined in [Regulatory Guide 133 Managed investments and custodial or depository services: Holding assets](#) (RG 133) and implemented through [Class Order \[CO 13/1410\] Holding assets: Standards for providers of custodial and depository services](#).
- 13 The financial and custody requirements are not currently reflected in [CO 07/74].

Proposal

B1 If we form the view that [CO 07/74] still forms a useful part of the legislative framework, we propose to continue the relief currently given by [CO 07/74] in a new legislative instrument that reflects current drafting practice, without significant changes: see draft ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/XX attached to this consultation paper. You can access the current instrument on www.legislation.com.au by clicking on the following direct link: [\[CO 07/74\]](#).

The changes proposed are to:

- (a) amend the relief to align it with [CO 13/760], [CO 13/761] and [CO 13/1410], which have come into force since the introduction of [CO 07/74];
- (b) provide transitional provisions to continue the relief under [CO 07/74] until the end of the financial year of the trustee (see Part 4 of the draft instrument);
- (c) update the name of the legislative instrument;

- (d) reflect current drafting practice and update the format of the current document;
- (e) simplify the drafting to give greater clarity;
- (f) update legislative references and definitions; and
- (g) correct any minor drafting errors.

Your feedback

- B1Q1 Do you consider that [CO 07/74] is currently operating effectively and efficiently? Please provide reasons for your view.
- B1Q2 Do you see any regulatory impacts or costs associated with amending the relief to align it with [CO 13/760], [CO 13/761] and [CO 13/1410]? Please provide reasons for your view and details of costs.
- B1Q3 Do you consider that the transitional provisions will provide sufficient time to meet the new financial and custody requirements? Please provide details about the steps that will need to be taken to meet these requirements and an estimate of the timeframe required to complete these steps.
- B1Q4 Do you see any regulatory impacts or costs associated with making any necessary changes to ASIC's systems to ensure our registers reflect the trustees and wholesale equity schemes relying on the relief and their compliance with the conditions of relief? Please provide reasons for your view and details of costs.

Rationale

- 14 Under this proposal, relief would be available under a new legislative instrument with amended conditions, subject to the transitional provisions.

Aligning financial and custody requirements for trustees

- 15 We are proposing to align the relief provided to trustees of wholesale equity schemes with the equivalent requirements for licensed providers of custodial and depository services implemented through [CO 13/761] (excluding the NTA requirements and the audit requirements insofar as they relate to compliance with the NTA requirements) and [CO 13/1410] and outlined in RG 166 and RG 133 (subject to the transitional relief discussed in paragraph 21 below).
- 16 A trustee, as a custodial and depository service provider, will need to meet:
- (a) the tailored cash needs requirement in [CO 13/761] instead of the cash needs requirement under condition 13(c) of PF 209 that applies under [CO 07/74];
 - (b) the requirement to lodge an audit report opinion on its compliance with the tailored cash needs requirement under [CO 13/761] instead of an

audit report under condition 28 of PF 209 that applies under [CO 07/74]; and

- (c) the custody requirements for providers of custodial and depository services in [CO 13/1410].

17 However, a trustee, as a custodial and depository service provider, will not need to meet the NTA requirements or lodge an audit report opinion on its compliance with the NTA requirements in [CO 13/761].

18 These financial and custody requirements were introduced in 2013 to apply to all providers of custodial and depository services to address risks associated with the provision of these services. Aligning the relief provided to trustees of wholesale equity schemes with these financial and custody requirements will promote consistency and the informed participation of investors.

Aligning financial requirements for managers

19 As an AFS licensee, the manager must already meet the financial and custody requirements implemented through [CO 13/760], [CO 13/761] and [CO 13/1410] and outlined in RG 166 and RG 133, subject to the authorisations on the AFS licence.

20 Under paragraph 5(a)(C) of [CO 07/74], managers must treat the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the AFS licence. The relevant financial conditions are defined in [CO 07/74] and in the manager's AFS licence. To promote consistency and the informed participation of investors, we are proposing to continue the requirement in paragraph 5(a)(C) of [CO 07/74] but to align it with the financial requirements in [CO 13/760] and [CO 13/761]. We are proposing to achieve this outcome through Part 3 of the draft instrument to avoid requiring an AFS licence variation.

Transitional relief

21 We are proposing to repeal [CO 07/74] on the same date as we make a new legislative instrument preserving the effect of [CO 07/74] beyond the sunset date of 1 October 2017.

22 We are proposing to provide transitional relief to a trustee that relied on the relief in [CO 07/74] immediately before its repeal to enable the relief under [CO 07/74] to continue until the end of the financial year of the trustee (if the repeal does not occur at the end of the financial year of the trustee). The transitional relief is designed to simplify the preparation of financial reports and the audit process.

Proposal

B2 If we form the view that [CO 07/74] no longer forms a useful part of the legislative framework, we propose to:

- (a) repeal [CO 07/74], which would otherwise sunset on 1 April 2017; and
- (b) provide transitional relief in the form of [CO 07/74] for a period of 12 months beyond its sunseting date to allow sufficient time for any entities relying on [CO 07/74] to make alternative arrangements.

Note: Under this proposal, relief would no longer be available after 1 October 2018.

Your feedback

B2Q1 If you are an entity that relies on [CO 07/74], please provide details about:

- (a) the wholesale equity schemes operated under [CO 07/74] (by name of manager and trustee (including ACN), and provide the name of the scheme, whether the scheme is currently operating and, for each scheme, the funds under management and the number of clients); and
- (b) compliance with paragraph 5(c)(iii) of [CO 07/74] in relation to each wholesale equity scheme operated under [CO 07/74] (including, for the period commencing 30 June 2013 to 30 June 2016 inclusive, the dates of all lodgements for each scheme with ASIC and the entity that lodged the report(s) with ASIC).

B2Q2 Do you consider that a 12-month extension of relief will be sufficient to allow alternative arrangements to be made? Please provide details about the steps that will need to be taken to comply with the Corporations Act and an estimate of the timeframe required to complete these steps.

B2Q3 What costs would you incur if we do not provide relief in the form of [CO 07/74] after 1 October 2018? Please provide details.

Rationale

23 If responses received to this consultation confirm that the number of entities currently relying on and meeting the conditions of the relief are at such a low level that relief is not warranted, then those entities that continue to rely on and meet the conditions of the relief may make alternative arrangements. We consider that transitional relief in the form of [CO 07/74] should be provided for a 12-month period (until 1 October 2018) to allow sufficient time for any entities relying on [CO 07/74] to make alternative arrangements. This could include applying for individual relief (in the form of the draft instrument attached to this consultation paper) and for these applications to be considered by ASIC.

C Regulatory and financial impact

24 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) reducing business costs; and
- (b) promoting the confident and informed participation of investors and consumers in the financial system.

25 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

26 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC will not give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

27 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

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
[CO 07/74] (for example)	An ASIC class order (in this example numbered 07/74) 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
investment product	Means: <ul style="list-style-type: none"> • a security within the meaning of s761A; • an option to acquire, by way of transfer, a security covered by paragraphs (a), (b) or (c) of the definition of 'security' in s761A; • a managed investment product within the meaning of s761A; • a financial product covered by s764A(1)(ba); • an option to acquire, by way of transfer, a financial product covered by s764A(1)(b)(i) or (ii); or • an option to acquire, by way of transfer, a financial product covered by s764A(1)(ba)(i) or (ii)
NTA	Net tangible assets
relevant financial requirements	In relation to an AFS licence, means conditions 13 (base level requirements), 21 (financial requirements for holding client money or property), 22 (financial requirements for licensee transacting with clients) and 28 (audit opinion on financial requirements) of PF 209
retail client	A client as defined in s761G of the Corporations Act and Ch 7, Pt 7.1, Div 2 of the Corporations Regulations
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified

Term	Meaning in this document
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
trust property	<p>In relation to a wholesale equity scheme means:</p> <ul style="list-style-type: none"> (a) contributions of money or money's worth to the scheme; (b) money borrowed or raised by the trustee for the purposes of the scheme; (c) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a) or (b); and (d) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b) or (c)
wholesale client	A wholesale client as defined in s761G
wholesale equity scheme	<p>A trust that is a managed investment scheme to which all of the following apply:</p> <ul style="list-style-type: none"> • the scheme is not registered; • all of the trust property (other than incidental property) consists of investment products; • at all times the value of investment products which are quoted on a financial market does not exceed 20% of the trustee's reasonable estimate of the market value of the trust property; and • no interests in the scheme have been issued to a person as a retail client