



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 282

Remaking ASIC class orders on financial counselling licensing relief

May 2017

About this paper

This consultation paper sets out ASIC's proposals to remake three ASIC instruments on financial counselling licensing relief. Under the *Legislation Act 2003*, these instruments will expire ('sunset') if not remade.

We are seeking feedback from community sector service providers—in particular, financial counselling agencies and rural financial counselling service providers—on our proposals to:

- remake, without significant changes, Class Order [CO 03/1063] *Licensing relief for financial counselling agencies*, which sunsets on 1 October 2017; and
- remake as a single new instrument, without significant changes, Class Order [CO 11/926] *Credit licensing exemptions for NGOs (non-government organisations) providing credit assistance to consumers*, which sunsets on 1 April 2022, and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992, which sunsets on 1 April 2026.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 282.

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 17 May 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

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 15 June 2017 to:

Tegan Lemm
 Lawyer, Deposit Takers, Credit and Insurers
 Australian Securities and Investments Commission
 Level 7, 120 Collins Street
 Melbourne VIC 3001
 facsimile: 03 9280 3200
 email: Tegan.Lemm@asic.gov.au

What will happen next?

Stage 1	17 May 2017	ASIC consultation paper released
Stage 2	15 June 2017	Comments due on the consultation paper
Stage 3	By 1 October 2017	Commencement of remade instruments

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.

Our approach to remaking legislative instruments

- 3 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.
- 4 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.
- 5 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 Remaking ASIC class orders

Key points

We are proposing to:

- remake Class Order [CO 03/1063] *Licensing relief for financial counselling agencies*, which sunsets on 1 October 2017 (the Australian financial services (AFS) licensing exemption); and
- remake, as a single new instrument, Class Order [CO 11/926] *Credit licensing exemptions for NGOs (non-government organisations) providing credit assistance to consumers*, which sunsets on 1 April 2022, and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992, which sunsets on 1 April 2026 (the credit licensing exemption).

We have formed the preliminary view that these instruments are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework.

The instruments have been redrafted using ASIC's current style and format, while preserving their current effect. The draft ASIC instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 282.

Your feedback

- 6 You are invited to comment on our proposals to remake [CO 03/1063], [CO 11/926] and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992, including whether they are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

AFS licensing exemption for financial counselling agencies

Background to [CO 03/1063]

- 7 Financial counselling agencies provide free and independent services to people in financial difficulty to help them understand and improve their financial situation. In providing this assistance, a financial counsellor and their client may discuss matters relating to particular financial products.
- 8 When discussing particular financial products with their clients, financial counsellors may provide financial product advice if the client receives recommendations or statements of opinion that are (or could reasonably be

regarded as being) intended to influence the client in making a decision about a financial product or class of financial product: see s766B of the *Corporations Act 2001* (Corporations Act). The advice may be personal advice in some circumstances: see s766B(3).

- 9 [CO 03/1063] exempts financial counselling agencies from the requirement to hold an AFS licence when providing financial product advice as part of their financial counselling service. The exemption is available where any advice relates to deposit products, non-cash payments, insurance, retirement savings account products or superannuation products (or where the advice is to dispose of a security, an interest in a managed investment scheme or a government-issued debenture, stock or bond).
- 10 Without the relief in [CO 03/1063] a financial counsellor who provides clients with financial product advice will be subject to the AFS licensing, conduct and disclosure obligations in Ch 7 of the Corporations Act. Depending on the nature of the advice, this could include the personal advice requirements in Div 3 of Pt 7.7 of the Corporations Act.
- 11 We made [CO 03/1063] because we considered that full compliance with Ch 7 of the Corporations Act in relation to certain kinds of advice may be unduly burdensome and could affect the ongoing viability of some financial counselling agencies. In these circumstances, we considered that the benefits of relief to clients and potential clients of financial counselling agencies outweighed the resulting regulatory detriment.
- 12 We included conditions on the relief to ensure that it was tailored to free and independent financial counselling services and minimised the risk of consumer detriment. For example, the exemption is not available:
- (a) for advice to acquire complex or illiquid products; and
 - (b) where the client pays for the service or where the client's actions may influence remuneration received by the financial counselling agency, their representatives or associates.
- 13 The conditions that apply to [CO 03/1063] were amended in 2015 due to the Business Services Wage Assessment Tool (BSWAT) Payment Scheme: see [ASIC Corporations \(Amendment\) Instrument 2015/991](#). The changes enable government funding for financial counselling services to specific client groups while maintaining independent and unconflicted services.
- 14 We note that there have been changes in the industry since [CO 03/1063] was made. These include [Standards for agencies employing financial counsellors](#) and [National standards for membership and accreditation](#).

Proposal

- B1** To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 03/1063] in a new

legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Financial Counselling Agencies) Instrument 2017/XX at Attachment 1 to this consultation paper. You can access the current instrument on www.legislation.gov.au by clicking on the following direct link: [\[CO 03/1063\]](#).

The only changes proposed are to:

- (a) update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current document;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions;
- (e) correct any minor drafting errors;
- (f) update the names of the relevant financial counselling associations and include the associations that have been created since [CO 03/1063] was made; and
- (g) amend paragraph (d) of [CO 03/1063] (proposed section (5)(2)(c)) to clarify the recipients of payments made on behalf of the financial counselling agency, its representatives or associates.

Rationale

- 15 We have reached the preliminary view that [CO 03/1063] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. In reaching this position, we have spoken to some industry participants about the current arrangements.
- 16 Financial counsellors provide an essential service to disadvantaged and vulnerable individuals experiencing financial difficulty. Full compliance with the AFS licensing, conduct and disclosure obligations in Ch 7 of the Corporations Act would impose costs on financial counselling agencies that could affect the ongoing viability of their services.
- 17 Our preliminary view is that the conditions associated with the relief are broadly appropriate. The intention of these conditions is to ensure that clients can have a high degree of confidence that when their financial counsellor provides them with advice, they do so free from any conflicts of interest, and with an acceptable level of skills, knowledge and professionalism.
- 18 For these reasons, we are proposing to remake [CO 03/1063] without substantive changes. However, we welcome stakeholder feedback on our proposal, as well as the operation of the current arrangements, such as the requirements on the exemption that relate to:
 - (a) remuneration, fees or charges;

- (b) training for financial counsellors; and
- (c) changes made to accommodate the BSWAT Payment Scheme.

Minor changes

- 19 We are proposing to clarify the restrictions on the persons that may not receive payments to ensure it applies in the intended way.
- 20 We note the creation of the [National standards for membership and accreditation](#) provide guidance on financial counselling associations' membership eligibility. This does not change the substance of the condition that requires financial counsellors to be eligible to join a financial counselling association.
- 21 We are also proposing to make similar changes to the credit licensing exemption: see proposal B2.

Credit licensing exemption for financial counselling agencies

Background to [CO 11/926]

- 22 The National Consumer Credit Protection Regulations 2010 (National Credit Regulations) contain an exemption from the requirement to hold an Australian credit licence (credit licence) in relation to credit assistance provided during financial counselling services. This exemption is based on the AFS licensing exemption in [CO 03/1063] and applies to 'counselling and advocacy service[s] provided predominantly to assist individuals in financial difficulty to resolve their problems'.
- 23 However, there is uncertainty about whether this exemption applies to similar services, known as rural financial counselling services, which differ from other financial counselling services in that:
- (a) their target group is primary producers and rural small businesses; and
 - (b) they principally focus on the viability of small rural businesses, including assisting them to analyse their financial position, apply for government grants and liaise with creditors.
- 24 While rural financial counselling services may provide 'credit assistance' from time to time, this is dependent on the circumstances and financial position of the rural small business, and not the core focus of the service. As a result, it was unclear whether these services could rely on the exemption in the National Credit Regulations.

- 25 We made [CO 11/926] to resolve this uncertainty. [CO 11/926] provides that a rural financial counsellor does not need to hold a credit licence to provide credit assistance in the context of a rural financial counselling service.
- 26 This exemption ensures that services can continue to be provided to primary producers and rural small businesses in financial difficulty. In providing the exemption, we recognised the important assistance and support these services provide to rural small businesses.
- 27 The exemption is available where:
- (a) the credit assistance is provided as part of the rural financial counselling service;
 - (b) no fees or charges are payable by the consumer for any aspect of the rural financial counselling service; and
 - (c) the service provider ensures its representatives have adequate skills, knowledge and experience to satisfactorily provide the credit assistance and any other aspect of the rural financial counselling service.

Background to ASIC Credit (Financial Counselling Agencies) Instrument 2015/992

- 28 Regulation 20(5) of the National Credit Regulations exempts financial counselling agencies from the requirement to hold a credit licence when engaging in a credit activity as part of the financial counselling service. In discussing a consumer's financial situation, a financial counsellor may be engaging in credit activities by, for example, providing credit assistance if they:
- (a) suggest the consumer apply for, apply for an increase in, or remain in a particular credit contract; or
 - (b) assist the consumer to apply for, or apply for an increase in, a particular credit contract (see s8 of the National Credit Act).
- 29 The conditions that apply to reg 20(5) were amended in 2015 due to the BSWAT Payment Scheme. For the purpose of this scheme, registered financial counsellors can receive a fee from the government for providing a financial counselling service.
- 30 ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 amends reg 20(5) to allow financial counsellors to receive a service fee that is payable by the Commonwealth or a state or territory. Without the amendment, financial counselling agencies would lose the benefit of the existing exemption, which may discourage participation in the BSWAT Payment Scheme.
- 31 The limitations in ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 (in addition to reg 20(5)) are aimed at ensuring that clients can

have a high degree of confidence that the financial counselling agency whose services they seek will act in the interests of the client, free from any conflicts of interest.

Proposal

B2 To preserve their effect beyond the respective sunset dates of 1 April 2022 and 1 April 2026, we propose to continue the relief currently given by [CO 11/926] and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Credit (Financial Counselling Agencies) Instrument 2017/XX at Attachment 2 to this consultation paper. You can access the current instruments on www.legislation.gov.au by clicking on the following direct links: [\[CO 11/926\]](#) and [ASIC Credit \(Financial Counselling Agencies\) Instrument 2015/992](#).

The only changes proposed are to:

- (a) combine the effects of [CO 11/926] and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 into a single instrument and update the name of the legislative instrument;
- (b) reflect current drafting practice and update the format of the current documents;
- (c) simplify the drafting to give greater clarity;
- (d) update legislative references and definitions;
- (e) correct any minor drafting errors; and
- (f) amend section (5)(c) of [CO 11/926] (proposed section (5)(2)(c)) to clarify the recipients of payments.

Rationale

32 We have reached the preliminary view that [CO 11/926] and ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 are operating effectively and efficiently, and continue to form a necessary and useful part of the legislative framework. In reaching this position, we have spoken to some industry participants about the current arrangements.

33 We are proposing to consolidate all our credit licensing relief for financial counselling agencies and rural financial counselling service providers in the one instrument for ease of reference.

Remaking [CO 11/926]

34 Rural financial counselling is an important service to primary producers, fishers and small rural businesses that are suffering financial hardship. The licensing, conduct and disclosure obligations in the National Credit Act impose costs on rural financial counselling service providers, which, without our relief, could threaten the ongoing viability of their services.

- 35 We consider that [CO 11/926] contributes to the continued availability of rural financial counselling service providers to primary producers, fishers and small rural businesses that are suffering hardship.
- 36 We are proposing to make some minor amendments to the exemption to ensure it applies in the intended way, similar to the proposed changes to the AFS licensing exemption. In particular, we are proposing to make changes to:
- (a) clarify the restrictions on the persons that may not receive payments; and
 - (b) make clear that the rural financial counselling agency, its representatives or associates may only engage in credit activities permitted under the relief.

Remaking ASIC Credit (Financial Counselling Agencies) Instrument 2015/992

- 37 Financial counsellors provide an essential service to disadvantaged and vulnerable individuals who are experiencing financial difficulty. Full compliance with credit licensing, conduct and disclosure obligations in the National Credit Act would impose costs on financial counselling agencies that could affect the ongoing viability of their services and may discourage participation in the BSWAT Payment Scheme.
- 38 Our preliminary view is that ASIC Credit (Financial Counselling Agencies) Instrument 2015/992 contributes to the continued availability of financial counselling services to disadvantaged and vulnerable individuals.
- 39 In remaking and consolidating the financial counselling relief from credit licensing requirements we are proposing to make some minor changes to the exemption in reg 20(5) of the National Credit Regulations for consistency reasons, similar to the proposed changes for [CO 03/1063].

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
BSWAT Payment Scheme	Business Services Wage Assessment Tool Payment Scheme
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
[CO 03/1063] (for example)	An ASIC class order (in this example numbered 03/1063) 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
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
Div 3 (for example)	A division of the Corporations Act (in this example numbered 3), unless otherwise specified
financial product	A facility through which, or through the acquisition of which, a person does one or more of the following: <ul style="list-style-type: none"> • makes a financial investment (see s763B); • manages financial risk (see s763C); • makes non-cash payments (see s763D) Note: This is a definition contained in s763A of the Corporations Act: see also s763B–765A.
financial product advice	A recommendation or a statement of opinion, or a report of either of these things, that: <ul style="list-style-type: none"> • is intended to influence a person or persons in making a decision about a particular financial product or class of financial product, or an interest in a particular financial product or class of financial product; or • could reasonably be regarded as being intended to have such an influence. This does not include the provision or giving of an exempt document or statement, except for the purpose of s766B(1B) of the Corporations Act. Note: This is a definition contained in s766B of the Corporations Act.

Term	Meaning in this document
National Credit Act	<i>National Consumer Credit Protection Act 2009</i> , including regulations made for the purposes of that Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
personal advice	<p>Financial product advice given or directed to a person (including by electronic means) in circumstances where:</p> <ul style="list-style-type: none"> • the person giving the advice has considered one or more of the client's objectives, financial situation and needs; or • a reasonable person might expect the person giving the advice to have considered one or more of these matters <p>Note: This is the definition contained in s766B(3) of the Corporations Act.</p>
reg 20(5) (for example)	A regulation of the National Credit Regulations (in this example numbered 20(5)), unless otherwise specified
RIS	Regulation Impact Statement
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