



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 285

Remaking ASIC class order on disclosure relief for an offer to a director or secretary: [CO 04/899]

June 2017

About this paper

This consultation paper sets out ASIC's proposals to remake our class order on disclosure relief for an offer to a director or secretary. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from law firms, industry and other interested people on our proposals to remake, without significant changes, Class Order [CO 04/899] *Definition of 'senior manager'—modification*, which 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 285.

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 1 June 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 30 June 2017 to:

Rosie Thomas
Strategy Group
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	1 June 2017	ASIC consultation paper released
Stage 2	30 June 2017	Comments due on the consultation paper
Stage 3	By 1 October 2017	Commencement of remade 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 and may consult on others.

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 our 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 order

Key points

We are proposing to remake Class Order [CO 04/899] *Definition of ‘senior manager’—modification*, which sunsets on 1 October 2017. This class order ensures that certain disclosure exceptions are available when securities are offered to a director or secretary of a body.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework.

The class order has been 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 285.

Your feedback

- 6 You are invited to comment on our proposal to remake the ASIC class order in this section, including whether the class order is currently operating effectively and efficiently. The proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 04/899] *Definition of ‘senior manager’—modification*

Background

- 7 [CO 04/899] ensures that certain disclosure exceptions are available when securities are offered, recommended, issued or sold to a director or secretary of a body.
- 8 Until 1 July 2004, the *Corporations Act 2001* (Corporations Act) included a definition of ‘executive officer’. This term was repealed and replaced by the term ‘senior manager’ by the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (CLERP 9).
- 9 The definition of ‘senior manager’ is different from the former definition of ‘executive officer’. The definition of ‘senior manager’, in relation to a corporation, includes a person ‘other than a director or secretary of the corporation’: see s9 (unmodified) of the Corporations Act. In contrast, a person could be an executive officer ‘whether or not the person is a director of the body’: see s9 (before CLERP 9) of the Corporations Act.

- 10 The definition of ‘senior manager’ is relevant to a range of requirements in the Corporations Act, including in relation to external administration, auditors and certain exceptions to disclosure obligations. These exceptions to disclosure obligations are in s708(12) and 1012D(9A) of the Corporations Act and relate to an offer, recommendation, issue or sale of certain securities to a person associated with a body or responsible entity (relevant disclosure exceptions). A ‘senior manager’ is one type of person associated with a body or responsible entity.
- 11 [CO 04/899] declares that Ch 6D and Pt 7.9 of the Corporations Act (which contain the relevant disclosure exceptions) apply as if paragraph (a) of the definition of ‘senior manager’ in s9 were modified to include a director or secretary, preserving the former definition of ‘executive officer’. This means the relevant disclosure exceptions continue to have their pre-CLERP 9 effect.

Proposal

B1 To preserve its effect beyond the sunset date of 1 October 2017, we propose to continue the relief currently given by [CO 04/899] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/XX attached to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 04/899\]](#).

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; and
- (e) correct any minor drafting errors.

Rationale

- 12 We have reached the preliminary view that [CO 04/899] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
CLERP 9	<i>Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004</i>
[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
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