



ASIC
Australian Securities &
Investments Commission

CONSULTATION PAPER 331

Remaking ASIC class orders on unlicensed COI lenders and credit disclosure obligations

July 2020

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on unlicensed carried over instrument (COI) lenders. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

We are seeking feedback from the credit industry on our proposals to remake, without significant changes, the following class orders:

- Class Order [CO 10/381] *Notice lodgement requirement for certain persons who are credit providers or lessors in relation to a carried over instrument*, which is due to expire on 1 October 2020; and
- Class Order [CO 10/1230] *Clarification of credit disclosure obligations—including commencement*, which is due to expire on 1 April 2021.

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 29 July 2020 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 Thursday 20 August 2020 to:

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What will happen next?

Stage 1	29 July 2020	ASIC consultation paper released
Stage 2	20 August 2020	Comments due on the consultation paper
Stage 3	September 2020– March 2021	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 preserve them. We will consult on all sunsetting legislative instruments that have more than a minor or machinery regulatory impact.

Purpose of 'sunsetting' legislative instruments

- 1 Under the *Legislation Act 2003* (Legislation Act), legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the tenth anniversary of its registration on the Federal Register of Legislation. 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 sunsetting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.

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 vision of a fair, strong and efficient financial system for all Australians.
- 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 sunsetting, to ensure that:
 - (a) we 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 [*Australian Government guide to regulatory impact analysis*](#). We will review, including following public consultation, all class orders that have a significant regulatory impact before the scheduled sunset date.

- 6 Where our review finds that a class order is not operating effectively and efficiently, we will undertake regulatory impact analysis to assess our proposed changes to the class order. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes and without preparing a RIS.

B Remaking ASIC class orders

Key points

We are proposing to remake:

- Class Order [CO 10/381] *Notice lodgement requirement for certain persons who are credit providers or lessors in relation to a carried over instrument*, which would sunset on 1 October 2020 (if not exempt under s54(1) of the Legislation Act); and
- Class Order [CO 10/1230] *Clarification of credit disclosure obligations—including commencement*, which sunsets on 1 April 2021.

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

Each class order will be redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The new ASIC instruments will reflect the minor amendments proposed in this paper and will largely replicate class orders [CO 10/381] and [CO 10/1230], which can be found at www.legislation.gov.au by clicking on the following links: [\[CO 10/381\]](#) and [\[CO 10/1230\]](#).

Your feedback

- 7 You are invited to comment on any of our proposals to remake the ASIC class orders in this section, including whether the class orders are currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

Class Order [CO 10/381] *Notice lodgement requirement for certain persons who are credit providers or lessors in relation to a carried over instrument*

Background

- 8 The purpose of [CO 10/381] was to give effect to the intention of item 39A of Sch 2 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Transitional Act) that unlicensed carried over instrument (COI) lenders give certain information to ASIC.

The regime for carried over instruments

- 9 A 'carried over instrument' is a credit contract or other instrument that was:
- (a) made and in force immediately before 1 July 2010; and

- (b) subject to the old Credit Code of a referring State or a Territory (the Uniform Consumer Credit Code) immediately before 1 July 2010.

Note: See s4 (definition of ‘carried over instrument’) of the Transitional Act.

10 After this time, the regime in the *National Consumer Credit Protection Act 2009* (National Credit Act) generally applies to consumer credit contracts in Australia.

11 There is a modified regulatory framework for COI lenders who are not writing any new business. This provides an alternative to holding an Australian credit licence for these businesses.

12 Credit providers or lessors who operate under this framework are known as ‘unlicensed COI lenders’. The framework commenced on 24 May 2010.

Note: See Sch 2 to the National Consumer Credit Protection Regulations 2010 (National Credit Regulations), inserted by reg 25E of the National Consumer Credit Protection Amendment Regulations 2010 (No. 2), and Sch 2 to the Transitional Act.

13 The new framework included the requirement in item 39A of Sch 2 to the Transitional Act that lenders notify ASIC of their status as unlicensed COI lenders. [CO 10/381] was made in June 2010 to address problems with item 39A.

Note: Item 39A of Sch 2 to the Transitional Act was notionally inserted by reg 16E of the National Consumer Credit Protection (Transitional and Consequential Provisions) Regulations 2010.

The notification requirement

14 Item 39A of Sch 2 to the Transitional Act was intended to introduce a requirement for lenders to lodge a form notifying ASIC that:

- (a) they intended to become an unlicensed COI lender—if before 1 July 2010; or
- (b) they had become an unlicensed COI lender—if after 1 July 2010.

Note: See [Form COI1](#) *Notice of carried over instruments*.

15 ASIC publishes and maintains a public register of unlicensed COI lenders under s213(2) of the National Credit Act. The register contains the information prescribed by reg 30A of the National Credit Regulations. It gives consumers access to information about who to contact if they have any problems with or complaints about their carried over instrument.

Effect of the class order

- 16 The class order was required to fix two minor technical defects in the legislation which meant that the notification requirement did not apply as intended.
- 17 The first defect involved the requirement in item 39A that unlicensed COI lenders give certain information to ASIC between 24 May 2010 and 30 June 2010. The definition of ‘unlicensed COI lender’ meant that no party could be one until on or after 1 July 2010, so the notification requirement had no effect.
- 18 The second defect involved the intention that item 39A should apply to parties who became unlicensed COI lenders after 1 July 2010 (i.e. parties who sometime after 1 July 2010 ceased to be licensed but still had carried over instruments). Item 39A was not drafted broadly enough to capture these parties, as it only imposed the notification requirement from 24 May to 30 June 2010.
- 19 The first defect is no longer an issue after 1 July 2010. However, the second defect continues to be an issue, as there are still lenders who became unlicensed COI lenders after 1 July 2010.
- 20 In May 2020, there were 62 unlicensed COI lenders on ASIC’s public register. Most of these notifications were made before 1 July 2010 or within the first two-and-a-half years after the regime was introduced. ASIC has not received any new notifications in 2020 but did receive five new notifications in the 2017, 2018 and 2019 calendar years (combined) under [CO 10/381].
- 21 We did not consult publicly during the making of this class order in 2010. This is because it was made during the period of implementation of the credit licensing regime and because it was only needed to fix a drafting error. We did consult Treasury to ensure that the class order reflected the intent behind item 39A of Sch 2 to the Transitional Act.
- 22 [CO 10/381] would be due to sunset on 1 October 2020. The Federal Register of Legislation lists it as exempt from sunsetting by s54(1) of the Legislation Act. However, there is some doubt about whether s54 applies to legislative instruments made under the credit legislation.
- 23 We are reviewing this class order because we consider it is good practice to review the need for old legislative instruments, and for the avoidance of doubt about its status.

Proposal

B1 To preserve its effect beyond the possible sunset date of 1 October 2020, we propose to continue the relief currently given by [CO 10/381] in a new legislative instrument that reflects current drafting practice, without any significant changes. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 10/381\]](#).

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

24 We have reached the preliminary view that [CO 10/381] 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.

Class Order [CO 10/1230] Clarification of credit disclosure obligations—including commencement

Background

25 The purpose of [CO 10/1230] was to fix drafting errors that meant that regs 28L and 28N of the National Credit Regulations did not apply as intended.

Clarifying the application of reg 28L

26 Regulation 28L of the National Credit Regulations allows a licensee or its credit representatives to give specified disclosure documents to consumers electronically, provided certain conditions are met.

27 Regulation 28L was intended to apply to credit guides, proposal documents, quotes and other pre-contractual disclosure and information statements. However, reg 28L(1), which lists the provisions of the National Credit Act under which reg 28L is made, inadvertently refers to s18 of the National Credit Code (credit provider's contract document) and does not refer to s16 of the Code (pre-contractual disclosure). Consequently, reg 28L as drafted has no operation in relation to pre-contractual disclosure.

Effect of the class order on reg 28L

28 Paragraphs 4(a) and (b) of the declaration in the class order omit the references to:

- (a) pre-contractual disclosure in s16 of the National Credit Code—in the definition of ‘disclosure document’ in reg 26 of the National Credit Regulations; and
- (b) the ‘credit provider’s contract document’—in reg 28L(1)(m) of the Regulations.

29 The exemption in paragraphs 5 and 6 of the class order replicates reg 28L for pre-contractual disclosure under s16 of the National Credit Code.

30 One effect of the declaration and exemption is that a credit provider may give pre-contractual disclosure in the same way it gives other disclosure documents under reg 28L if it chooses to comply with the requirements in the class order.

Note: Alternatively a credit provider can provide precontractual disclosure under s16 of the National Credit Code, either by traditional methods of delivery, or by electronic disclosure (see paragraphs 34–38), by complying with the relevant conditions.

31 Another effect is that potential doubt about the operation of reg 28L is removed by omitting the misleading reference to:

- (a) ‘credit provider’s contract document’ in reg 28L(1)(m) of the National Credit Regulations; and
- (b) pre-contractual disclosure in reg 26 (paragraph (e) of the definition of ‘disclosure document’).

Clarifying the application of reg 28N

32 Regulation 28N of the National Credit Regulations was intended to delay the commencement of the requirement to provide a credit guide and proposal disclosure document until 1 October 2011, provided certain requirements were met. Regulation 28N as drafted was broader than intended, as the exemption applied to ‘a relevant provision of the [National Credit] Act, other than section 114 or 137’. This meant that pre-contractual disclosure was included unintentionally.

33 Paragraphs 4(c) and (d) of the class order modify reg 28N so that it applies as intended.

Providing electronic documents

34 Since 2010, ASIC has taken steps to facilitate the electronic provision of documents, including by providing relief from obligations under the *Corporations Act 2001* (Corporations Act) for certain financial services businesses.

Note: ASIC’s relief is contained in [ASIC Corporations \(Facilitating Electronic Delivery of Financial Services Disclosure\) Instrument 2015 2015/647](#) and [ASIC Corporations \(Removing Barriers to Electronic Disclosure\) Instrument 2015 2015/649](#); see [Media Release 15-198MR](#) *New digital disclosure measures to enhance consumer understanding and cut red tape*, 28 July 2015.

- 35 ASIC has also issued [Regulatory Guide 221](#) *Facilitating digital financial services disclosures* (RG 221). The guide explains that most disclosures can be delivered digitally. It provides ‘good practice guidance’ for digital disclosure which helps businesses ensure that clients receive clear, concise and effective information. RG 221 also explains the operation of ASIC’s relief from the Corporations Act.
- 36 Other obligations affect when documents may be given electronically, including obligations under the *Electronic Transactions Act 1999* (Electronic Transactions Act) and the Electronic Transactions Regulations 2000 (Electronic Transaction Regulations). The Electronic Transactions Act promotes the use of electronic communications in dealings with government.
- 37 There is difficulty replicating the relief referred to in paragraph 35 under the National Credit Act. The obligations in the National Credit Act and the Electronic Transactions Regulations that relate to the giving of credit documents are different from the obligations in the Corporations Act, and ASIC’s powers are more limited.
- 38 If a Commonwealth law requires a party to give information in writing, provide a handwritten signature, produce a document in material form or record or retain information, the Electronic Transactions Act allows the party to complete these electronically. It applies to all Commonwealth laws unless they are specifically exempted by the Electronic Transactions Regulations.

Proposal

B2 To preserve its effect beyond the sunset date of 1 April 2021, we propose to continue the relief currently given by [CO 10/1230] in a new legislative instrument that reflects current drafting practice, without any significant changes. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 10/1230\]](#).

The only changes proposed are to:

- (a) remove paragraphs 4(c) and (d) as the exemption in reg 28N ceased to have effect on 1 October 2011;
- (b) update the name of the legislative instrument;
- (c) reflect current drafting practice and update the format of the current document;
- (d) simplify the drafting to give greater clarity;
- (e) update legislative references and definitions; and
- (f) correct any minor drafting errors.

Rationale

- 39 We have reached the preliminary view that [CO 10/1230] is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. We are not aware of any significant issues with the current operation of this class order.
- 40 ASIC proposes [CO 10/1230] be remade in part in its current form without the need for substantive policy review. Paragraphs 4(c) and (d) of the class order modify reg 28N of the National Credit Regulations which (under reg 28N(5)) ceased to have effect on 1 October 2011. Therefore, these subparagraphs do not need to be included in the new instrument.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
carried over instrument	Has the meaning given in s4 of the Transitional Act
[CO 10/381] (for example)	An ASIC class order (in this example numbered 10/381) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
COI lender	A credit provider or lessor with carried over instruments as set out in paragraph 9
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	<i>Corporations Regulations 2001</i>
credit licence	An Australian credit licence under s35 of the National Credit Act that authorises a licensee to engage in particular credit activities
Electronic Transactions Act	<i>Electronic Transactions Act 1999</i>
Electronic Transactions Regulations	Electronic Transactions Regulations 2000
Legislation Act	<i>Legislation Act 2003</i>
National Credit Act	<i>National Consumer Credit Protection Act 2009</i>
National Credit Code	National Credit Code at Sch 1 to the National Credit Act
National Credit Regulations	National Consumer Credit Protection Regulations 2010
RIS	Regulation Impact Statement
reg 8 (for example)	A regulation of the National Credit Regulations (in this example numbered 8), unless otherwise specified
RG 221 (for example)	An ASIC regulatory guide (in this example numbered 221)
s35 (for example)	A section of the National Credit Act (in this example numbered 35), unless otherwise specified
Sch 2 (for example)	A schedule of the National Credit Regulations (in this example numbered 2), 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
Transitional Act	<i>National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009</i> , including regulations made for the purposes of that Act
unlicensed COI lender	Has the meaning given in s5 of the National Credit Act as modified by item 2.4 of Sch 2 to the National Credit Regulations