



ASIC

Australian Securities &
Investments Commission

CONSULTATION PAPER 344

Remaking ASIC class order on when debentures can be called secured notes: [CO 12/1482]

July 2021

About this paper

This consultation paper sets out ASIC's proposals to remake our class order on when debentures can be called secured notes. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from issuers of debentures and unsecured notes, law firms and other interested people on our proposal to remake, without significant changes, the following class order:

- [Class Order \[CO 12/1482\]](#) *When debentures can be called secured notes*, which is due to expire on 1 April 2022.

Note: The draft ASIC instrument is available on our website under [CP 344](#).

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 July 2021 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](#) 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 29 July 2021 to:

Dominic Clarke
Senior Analyst, Corporations
Australian Securities and Investments Commission
Level 8, 120 Collins Street
Melbourne VIC 3000
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	1 July 2021	ASIC consultation paper released
Stage 2	29 July 2021	Comments due on the consultation paper
Stage 3	1 March 2022	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.

Purpose of 'sunseting' 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 sunseting 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 sunseting, 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 the [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. 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. 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 Order [CO 12/1482]

Key points

We are proposing to remake [Class Order \[CO 12/1482\]](#) *When debentures can be called secured notes*, which sunsets on 1 April 2022.

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 under [CP 344](#).

Your feedback

- 6 You are invited to comment on our proposal to remake ASIC [Class Order \[CO 12/1482\]](#), including whether the class order is currently operating effectively and efficiently. This proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 12/1482] *When debentures can be called secured notes*

Background

- 7 Section 283BH of the *Corporations Act 2001* (Corporations Act) sets out rules on how debentures may be described in a document relating to an offer (e.g. a prospectus or advertisement).
- 8 Under s283BH there are three permitted categories for describing debentures, being a 'mortgage debenture', 'debenture' and 'unsecured note' (or 'unsecured deposit note'). The nature of any security, the type of property offered as collateral under the security and whether the property that constitutes the security is sufficient to meet the obligations under the debenture will determine how debentures may be described.
- 9 Relevantly, s283BH only considers security over 'tangible property'. 'Tangible property' is property that has an actual physical existence (e.g. goods and land). Tangible property is distinguished from intangible or incorporeal property such as a chose in action (e.g. a receivable). A charge in favour of a trustee over a loan receivable by an issuer does not constitute a

charge over the ‘tangible property’ of the issuer. The law therefore requires that debentures that are only secured by receivables and other intangible property are called unsecured notes or unsecured deposit notes.

- 10 A number of issuers in the market offer security in favour of the trustee over intangible property (e.g. loans receivable) and the law requires that their product be described as an ‘unsecured note’ or ‘unsecured deposit note’.
- 11 Before the introduction of [CO 12/1482] we had a no-action position in the market from 2005 so that the reference to ‘unsecured’ could be avoided where the ‘tangible property’ requirement was not met. We were asked to consult on the operation of the law in s283BH of the Corporations Act out of concern from issuers and their representative groups that the law was unfair and led to a misleading description of certain products. We consulted on introducing a new category to sit between ‘unsecured note’ and ‘debenture’ in the hierarchy of how these products can be described under the Corporations Act.
- 12 [CO 12/1482] introduced a new ‘secured notes’ category for the purposes of s283BH of the Corporations Act where security has been provided over intangible property, subject to various conditions.
- 13 [CO 12/1482] provides issuers who offer debentures with sufficient first ranking security that do not satisfy the higher ‘debenture’ or ‘mortgage debenture’ naming tests with an alternative to ‘unsecured notes’ for the purposes of s283BH provided they meet the terms of the class order.
- 14 The key objective of the class order is to strike an appropriate balance between helping issuers to avoid a label that their product is unsecured where there is sufficient security in place and ensuring that investors are aware of the risk of loss and readily understand the underlying security.

Proposal

B1 To preserve its effect beyond the sunset date of 1 April 2022, we propose to continue the relief currently given by [CO 12/1482] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Describing Debentures—Secured Notes) Instrument 20XX/XX at Attachment 1 to this consultation paper. You can access the current instrument at the Federal Register of Legislation by clicking on the following direct link: [\[CO 12/1482\]](#).

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

- 15 We have reached the preliminary view that [\[CO 12/1482\]](#) 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.
- 16 We have considered whether the conditions to [CO 12/1482] remain appropriately calibrated, and our preliminary view is that they are.
- 17 On the basis that our views regarding the relief provided by [CO 12/1482] are unlikely to change in the near future, we propose that the remade legislative instrument remain in force for the full 10-year period permitted under s50(1) of the Legislation Act.
- 18 We invite submissions on:
- (a) whether [CO 12/1482] is currently operating effectively and efficiently and therefore should be remade;
 - (b) whether the conditions to relief should remain unchanged; and
 - (c) whether the remade legislative instrument should remain in force for 10 years or for a shorter period of time.

Key terms

Term	Meaning in this document
ASIC	Australian Securities and Investments Commission
[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
Legislation Act	<i>Legislation Act 2003</i>
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