Australian Securities & Investments Commission

CONSULTATION PAPER 367

Remaking ASIC class orders on financial requirements: [CO 13/760], [CO 13/761] and ASIC Instrument 2022/449

March 2023

About this paper

This consultation paper sets out ASIC's proposals to remake our class orders on financial resource requirements for some categories of Australian financial services licensees. Under the *Legislation Act 2003*, these class orders will expire ('sunset') if not remade.

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

- Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*, which is due to expire on 1 October 2023;
- Class Order [CO 13/761] *Financial requirements for custodial or depository service providers*, which is due to expire on 1 October 2023; and
- *ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449*, which is due to expire on 1 October 2024.

Note: The draft ASIC instruments are available on our website at www.asic.gov.au/cp under CP 367.

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 3 March 2023 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.

Contents

The consultation process

You are invited to comment on the proposals in this paper to remake these ASIC class orders, 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.

As well as responding to the specific proposals and questions, please describe any alternative approaches you think would achieve our objectives. We are keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account.

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 31 March 2023 to:

Investment Managers
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: IM.sunsettingconsultation@asic.gov.au

What will happen next?

Stage 1	3 March 2023	ASIC consultation paper released
Stage 2	31 March 2023	Comments due on the consultation paper
Stage 3	29 September 2023	Latest proposed commencement date of new instrument(s)

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*, 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 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.

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 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*, which sunsets on 1 October 2023;
- Class Order [CO 13/761] *Financial requirements for custodial or depository service providers*, which sunsets on 1 October 2023; and
- *ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449*, which sunsets on 1 October 2024.

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.

We propose to issue a combined legislative instrument that will prescribe the financial resource requirements for responsible entities, IDPS operators and corporate directors of retail CCIVs. However, we will retain a separate legislative instrument that will prescribe the financial resource requirements for custodians. Each class order will be redrafted using ASIC's current style and format, while preserving the current effect of the instrument.

We are proposing that the new legislative instruments will have an expiry date of 1 October 2028.

The draft legislative instruments, which reflect the minor amendments proposed in this paper, are available on our website at www.asic.gov.au/cp under CP 367.

Class Order [CO 13/760] *Financial requirements for responsible entities and operators of investor directed portfolio services*

Background

7 Australian financial services (AFS) licensees must hold adequate resources, including adequate financial resources: see s912AA(1)(d) of the *Corporations Act 2001* (Corporations Act). Under [CO 13/760], responsible entities of registered schemes and investor-directed portfolio service operators (IDPS operators) must satisfy various financial resource requirements, which include requirements to hold, at all times, minimum amounts of net tangible assets (NTA) and cash or cash equivalents.

8 There are two levels of NTA requirements in [CO 13/760]: a higher NTA requirement and a lower NTA requirement. In broad terms, a responsible entity or IDPS operator must meet the higher NTA requirement, unless it is covered by a situation in [CO 13/760] that allows it to meet the lower NTA requirement. For

example, a licensee can rely on the lower NTA requirement where all of the scheme property (for a responsible entity) or IDPS property (for an IDPS operator), other than certain permissible exceptions, is held by a custodian: see s912AA(5)(a) of the Corporations Act, as inserted by [CO 13/760].

9 The higher NTA requirement is the greater of $10 million or 10% of the licensee's average responsible entity and IDPS revenue: see s912AA(4)(b), as inserted by [CO 13/760]. In this context, responsible entity and IDPS revenue covers all of the licensee's revenue including, where the licensee is also a corporate director of a retail CCIV. Accordingly, the lowest possible dollar value of NTA that could apply under the higher NTA requirement is $10 million.

10 The lower NTA requirement is the greater of:

(a) $150,000;

(b) 0.5% of the average value of scheme and IDPS property of registered schemes and IDPSs (if any) operated by the licensee, up to a maximum of $5 million; or

(c) 10% of average responsible entity and IDPS revenue of the licensee: see s912AA(4)(a), as inserted by [CO 13/760].

Accordingly, the lowest possible dollar value of NTA that could apply under the lower NTA requirement is $150,000.

11 Under [CO 13/760], a licensee must at all times hold cash or cash equivalents of at least $150,000 or 50% of the required NTA, whichever is higher: see s912AA(8)(a), as inserted by [CO 13/760].

12 The policy that underlies the NTA requirements for responsible entities and IDPS operators is set out in Regulatory Guide 166 *AFS licensing: Financial requirements* (RG 166) at RG 166.238 and RG 166.273. In general, the NTA requirement aims to:

(a) ensure that a licensee has adequate financial resources to meet its operating costs while it operates a registered scheme or an IDPS;

(b) align the interests of the licensee with the interests of scheme members, or investors in the IDPS, by ensuring that the licensee is an entity of substance and the licensee's shareholders have sufficient equity in the business to have a real incentive to ensure its success; and

(c) provide some level of assurance that, in the event of the failure of the licensee, there is sufficient money available for the orderly transition to a new responsible entity or to wind up each registered scheme.

13 The policy rationale for the cash or cash equivalents requirement is to assist licensees to meet expenditure in unanticipated situations in the near future: see RG 166.241–RG 166.242 and RG 166.276.

14 The NTA minimum of $150,000 or $10 million, and the cash or cash equivalents minimum of $150,000, have applied since [CO 13/760] was issued in 2013.

Proposal

B1 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/760], with some shortening and simplification but without any substantive changes:

(a) in a new legislative instrument that reflects current drafting practice and format;

(b) to incorporate the effect of the licensee also being a corporate director of a retail CCIV; and

(c) with an expiry date of 1 October 2028.

The only proposed changes to our current relief are to adjust the 0.5% of average property limb of the NTA requirement to include assets of any retail CCIVs for which the licensee is corporate director.

The new instrument will combine the financial resource requirements for responsible entities, IDPS operators and corporate directors of retail CCIVs.

See draft *ASIC Corporations (Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs) Instrument 2023/XX* at Attachment 1 to this consultation paper.

Your feedback

B1Q1 Do you agree with our proposal? If not, why not?

B1Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.

B1Q3 Is there scope for the class order to be further shortened and simplified? If so, please explain.

B1Q4 How could the readability of the new legislative instrument be improved? In particular, please provide suggested changes, including potential navigation aids, subheadings and notes.

Rationale

15 We have reached the preliminary view that [CO 13/760] 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, beyond its length and complexity.

16 Under our proposal, the new instrument would operate for five years. We consider this period will provide sufficient certainty for industry.

17 The proposed calculation of 0.5% of the average value of property limb of the NTA requirement would include any property of the retail CCIVs the licensee operates. Under [CO 13/760], the 0.5% limb of the NTA requirement applies to the average value of scheme property and IDPS property of registered schemes and IDPSs (if any) the licensee operates but does not include property of any retail CCIVs for which the licensee is the corporate director.

18 We consider that the 0.5% average property limb of the NTA requirement should be changed to include property of retail CCIVs for which the licensee is the corporate director. This change would align the new legislative instrument with ASIC Instrument 2022/449 in that the 0.5% of average property limb under this instrument covers scheme property, IDPS property and retail CCIV property.

Class Order [CO 13/761] *Financial requirements for custodial or depository service providers*

Background

19 AFS licensees that provide custodial services (custodians) are subject to the general duty under s912A(1)(d) to have adequate resources, including financial resources, available. This includes an NTA requirement, a cash or cash equivalents requirement and other financial resource requirements under [CO 13/761].

20 The NTA requirements for custodians are broadly similar to the NTA requirements for responsible entities and IDPS operators under [CO 13/760]. There is a higher NTA requirement and a lower NTA requirement.

21 A custodian that is an 'incidental provider' (defined in s912AC, as inserted by [CO 13/761]) need only satisfy the lower NTA requirement, subject to an exception in s912AC(5). The lower NTA requirement is $150,000 or 10 % of average revenue, whichever is higher: s912AC(4)(b), as inserted by [CO 13/761].

22 In broad terms, the exception in s912AC(5) applies where all of the financial products to which the licensee's custodial or depository services relate are held by another custodian, a sub-custodian appointed by that other licensee, or an eligible custodian. If this exception applies, the custodian is not subject to an NTA requirement but will still need an 'incidental provider' authorisation on its AFS licence.

23 If a custodian is not an incidental provider, it must satisfy the higher NTA requirement of $10 million or 10% of average revenue, whichever is higher: s912AC(4)(a), as inserted by [CO 13/761].

Note: An element of the definition of 'incidental provider' in s912AC(12) is that the licensee's custodial or depository services revenue must be less than 10 % of its financial services business revenue.

24 A custodian must, unless the exception in s912AC(5) applies, at all times hold cash or cash equivalents of at least 50% of the amount of NTA it is required to hold: s912AC(7)(a), as inserted by [CO 13/761].

25 The underlying policy principles for these NTA requirements and cash or cash equivalent requirements are similar to the principles that underpin the corresponding requirements for responsible entities and IDPS operators. In relation

to NTA, in light of the substantial trust that clients place in custodians, a custodian should maintain substantial operating capacity: see RG 166.300. In particular, holding an adequate level of NTA helps to ensure an orderly winding up in the event of the economic failure of a custodian and to prevent clients suffering loss. The cash or cash equivalents requirement aims to help a custodian meet expenditure in unanticipated situations in the short-term: see RG 166.308.

26 As is the case for responsible entities and IDPS operators, the NTA minimum of $150,000 requirement has applied since 2012 and the minimum $10 million requirement has applied since [CO 13/761] was issued in 2013.

Proposal

B2 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/761], with some minor simplification but without any substantive changes:

(a) in a new legislative instrument that reflects current drafting practice and format;

(b) to incorporate the effect of the licensee also holding assets of a retail CCIV; and

(c) with an expiry date of 1 October 2028.

See draft *ASIC Corporations (Financial Requirements for Custodial or Depository Service Providers) Instrument 2023/XX* at Attachment 2 to this consultation paper.

Your feedback

B2Q1 Do you agree with our proposal? If not, why not?

B2Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain.

B2Q3 Is there scope for the class order to be shortened and simplified, such as by removing the high level of prescription for certain processes in the instruments? If so, please explain.

B2Q4 How could the readability of the new legislative instrument be improved? In particular, please provide suggested changes, including potential navigation aids, subheadings and notes.

Rationale

27 We have reached the preliminary view that [CO 13/761] 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.

28 Consistent with Proposal B1, the new instrument would operate for five years. We consider this period will provide sufficient certainty for industry.

ASIC Corporations (Financial Requirements for Corporate Directors of Retail Corporate Collective Investment Vehicles) Instrument 2022/449

Background

29 AFS licensees that are corporate directors of CCIVs must have available adequate resources, including adequate financial resources to provide the financial services covered by their licence and to carry out supervisory arrangements: s912A(1)(d) of the Corporations Act.

30 Under ASIC Instrument 2022/449, corporate directors of retail CCIVs must satisfy various financial resource requirements, which include requirements to hold minimum NTA and minimum cash or cash equivalents at all times. These requirements are broadly equivalent to the requirements for responsible entities and IDPS operators under [CO 13/760].

31 The higher NTA requirement is at least the greater of $10 million or 10% of the average revenue of the licensee in its capacity as corporate director, responsible entity and IDPS: see s912AL(4)(b), as inserted by ASIC Instrument 2022/449.

32 The lower NTA requirement is at least the greatest of the following:

(a) $150,000; or

(b) 0.5% of the average value of CCIV assets, scheme property and IDPS property of the retail CCIVs, registered schemes and IDPSs (if any) operated by the licensee, up to a maximum of $5 million; or

(c) 10% of average corporate director, responsible entity and IDPS revenue of the licensee: see s912AL(4)(a) and definitions in s912AL(11), as inserted by ASIC Instrument 2022/449.

33 Corporate directors of retail CCIVs must also hold at least 50% of the required NTA (disregarding any additional amount required by the requirements relating to custody) in cash or cash equivalents (with a minimum of $150,000).

34 The policy principles that underpin the financial resource requirements for corporate directors of retail CCIVs are the same as the principles that underpin the corresponding requirements for responsible entities and IDPS operators: see RG 166.389. The financial requirements for corporate directors take into account the need for investor confidence and assessment of comparable regulatory regimes in leading financial centres: see RG 166.390. The cash requirements aim to help licensees meet expenditure in unanticipated situations: see RG 166.392.

35 The NTA minimum of $150,000 or $10 million applied to corporate directors of retail CCIVs was adopted to ensure broad equivalence with the NTA minimum applied to licensees providing similar financial services, such as responsible entities and IDPS operators.

Proposal

B3 To preserve its effect beyond the sunset date of 1 October 2024, we propose to continue the relief currently given by ASIC Instrument 2022/449 until 1 October 2028 in a new legislative instrument that combines the financial resource requirements for responsible entities, IDPS operators and corporate directors of retail CCIVs.

See draft *ASIC Corporations (Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs) Instrument 2023/XX* at Attachment 1 to this consultation paper.

Your feedback

B3Q1 Do you agree with our proposal? If not, why not?

B3Q2 Are you aware of any significant issues with the operation of this legislative instrument? If so, please explain.

B3Q3 Should the relief in this legislative instrument be remade for a period of five years or for a different period?

Rationale

36 We have reached the preliminary view that ASIC Instrument 2022/449 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.

37 We are proposing to combine this instrument with the instrument replacing [CO 13/760], giving the combined instrument an effective period of five years. We consider this period will provide sufficient certainty for industry.

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.
corporate collective investment vehicle (CCIV)	A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act Note: This is a definition contained in s9 of the Corporations Act.
corporate director	The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV Note: This is a definition contained in s1224(3) of the Corporations Act.
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
Corporations Regulations	*Corporations Regulations 2001*
custodian	A licensee that provides custodial or depository services
IDPS	An investor directed portfolio service as defined in Class Order [CO 13/763] *Investor directed portfolio services* or any instrument that amends or replaces that class order
IDPS operator	A public company that is a holder of an AFS licence that is authorised to operate an IDPS and who provides an IDPS or a function that forms part of the IDPS
NTA	Net tangible assets
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
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

List of proposals and questions

Proposal	Your feedback
B1 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/760], with some shortening and simplification but without any substantive changes: (a) in a new legislative instrument that reflects current drafting practice and format; (b) to incorporate the effect of the licensee also being a corporate director of a retail CCIV; and (c) with an expiry date of 1 October 2028. The only proposed changes to our current relief are to adjust the 0.5% of average property limb of the NTA requirement to include assets of any retail CCIVs for which the licensee is corporate director. The new instrument will combine the financial resource requirements for responsible entities, IDPS operators and corporate directors of retail CCIVs. See draft *ASIC Corporations (Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs) Instrument 2023/XX* at Attachment 1 to this consultation paper.	B1Q1 Do you agree with our proposal? If not, why not? B1Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain. B1Q3 Is there scope for the class order to be further shortened and simplified? If so, please explain. B1Q4 How could the readability of the new legislative instrument be improved? In particular, please provide suggested changes, including potential navigation aids, subheadings and notes.
B2 To preserve its effect beyond the sunset date of 1 October 2023, we propose to continue the relief currently given by [CO 13/761], with some minor simplification but without any substantive changes: (a) in a new legislative instrument that reflects current drafting practice and format; (b) to incorporate the effect of the licensee also holding assets of a retail CCIV; and (c) with an expiry date of 1 October 2028. See draft *ASIC Corporations (Financial Requirements for Custodial or Depository Service Providers) Instrument 2023/XX* at Attachment 2 to this consultation paper.	B2Q1 Do you agree with our proposal? If not, why not? B2Q2 Are you aware of any significant issues with the operation of this class order? If so, please explain. B2Q3 Is there scope for the class order to be shortened and simplified, such as by removing the high level of prescription for certain processes in the instruments? If so, please explain. B2Q4 How could the readability of the new legislative instrument be improved? In particular, please provide suggested changes, including potential navigation aids, subheadings and notes.

Proposal		Your feedback	
B3	To preserve its effect beyond the sunset date of 1 October 2024, we propose to continue the relief currently given by ASIC Instrument 2022/449 until 1 October 2028 in a new legislative instrument that combines the financial resource requirements for responsible entities, IDPS operators and corporate directors of retail CCIVs. See draft *ASIC Corporations (Financial Requirements for Responsible Entities, IDPS Operators and Corporate Directors of Retail CCIVs) Instrument 2023/XX* at Attachment 1 to this consultation paper.	B3Q1	Do you agree with our proposal? If not, why not?