



ASIC

Australian Securities &
Investments Commission

CONSULTATION PAPER 374

Remaking ASIC class order on exchange traded funds: [CO 13/721]

November 2023

About this paper

This consultation paper sets out ASIC's proposals to remake Class Order [\[CO 13/721\]](#) *Relief to facilitate quotation of exchange traded funds on the AQUA Market*. Under the *Legislation Act 2003*, this class order will expire ('sunset') on 1 April 2024 if not remade.

We are seeking feedback from the investment management sector on our proposal to remake this class order with minor and technical changes.

Note: The draft ASIC instrument is available on our website at www.asic.gov.au/cp under CP 374.

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 24 November 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.

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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 on 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 5 January 2024 to:

Financial Advice and Investment Management
Regulation & Supervision
Australian Securities and Investments Commission
GPO Box 9827
Brisbane QLD 4001
email: im.sunsettingconsultation@asic.gov.au

What will happen next?

Stage 1	24 November 2023	ASIC consultation paper released
Stage 2	5 January 2024	Comments due on the consultation paper
Stage 3	1 April 2024	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 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 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.
- 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 [\[CO 13/721\]](#) *Relief to facilitate quotation of exchange traded funds on the AQUA Market*, which sunsets on 1 April 2024.

We have formed the preliminary view that the 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 374.

We are proposing that the new legislative instrument will have a term of five years with an expiry date of 1 April 2029.

Your feedback

- 7 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. This proposal is only an indication of the approach we may take and is not our final policy.

Class Order [CO 13/721] *Relief to facilitate quotation of exchange traded funds on the AQUA Market*

Background

- 8 In this paper, exchange traded fund (ETF) refers to an open-ended registered managed investment scheme or a sub-fund of a corporate collective investment scheme (CCIV), where the interests or shares (or a class of interests or shares) can be traded on a licensed Australian exchange operated by ASX Limited (ASX) or Cboe Australia Pty Ltd (Cboe).
- 9 Information Sheet 230 *Exchange traded products: Admission guidelines* ([INFO 230](#)) sets out the regulation and good practice requirements for ETFs. INFO 230 was reissued in November 2022, including to reflect the updated naming conventions for certain ETFs.

- 10 In order to operate, relief—substantively in the form of [CO 13/721]—is required by certain ETFs quoted and operated on:
- (a) the ASX under the ASX Quoted Assets (AQUA) Rules framework; or
 - (b) Cboe under the quoted managed funds framework.
- 11 [\[CO 13/721\]](#) provides exemptions from and modifies provisions of the *Corporations Act 2001* (Corporations Act), in respect of:
- (a) equal treatment relief for responsible entities and corporate directors, enabling them to limit redemptions and provide certain information to authorised participants only;
 - (b) modifications to the ongoing disclosure requirements for responsible entities and corporate directors;
 - (c) relevant interest relief for authorised participants in relation to their underlying holdings of shares and interests in an ETF; and
 - (d) substantial holding and beneficial tracing relief for relevant interests acquired through the underlying securities in an ETF.

Proposal

- B1** To preserve its effect beyond the sunset date of 1 April 2024, we propose to continue the relief currently given by [CO 13/721] in a new legislative instrument that reflects current drafting practice, with minor and technical amendments that:
- (a) extend the current relief to all types of quoted ETFs—not limited to those prescribed in [CO 13/721] that are passively managed and track an index—excluding those that use internal market making; and
 - (b) set an expiry date of 1 April 2029.

See draft *ASIC Corporations (Relief to Facilitate Admission of Exchange Traded Funds) Instrument 2024/XX* at Attachment 1 to this consultation paper. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 13/721\]](#).

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 Will the proposed relief need to be extended to ETFs that use internal market making? If so, please explain which form of relief is required, if any, and why.

Rationale

- 12 We have reached the preliminary view that [\[CO 13/721\]](#) is operating effectively and efficiently, and continues to form a necessary and useful part of the legislative framework. The fundamental policy principles that underpin [\[CO 13/721\]](#) have not changed. We are not aware of significant issues with the current operation of this class order.
- 13 Remaking [\[CO 13/721\]](#) as an ASIC instrument will enable ETFs to operate as intended. Without this relief, the operation of ETFs will become impractical or unduly burdensome.
- 14 We also propose to extend the relief to all types of ETFs, and not limit it to those that are passively managed and track an index. The relief under [\[CO 13/721\]](#) is currently confined to those funds that fall within the definition of ‘exchange traded fund’ in the superseded naming conventions. The terms used in [\[CO 13/721\]](#) do not accurately reflect the updated naming conventions in [INFO 230](#). Further, ASIC generally provides relief on individual application—substantively in the form of [\[CO 13/721\]](#)—to ETFs that do not fall within the definition of ‘exchange traded fund’ in the superseded naming conventions.
- 15 We envisage that ETFs that use internal market making will be carved out of the relief, as we consider that such ETFs do not require all of the relief in the forms provided in the legislative instrument. Such ETFs will still be required to apply to ASIC for individual relief on terms that are appropriate for them.
- 16 We are proposing to give the legislative instrument an effective period of five years. We consider this period will provide sufficient certainty for industry.

Key terms

Term	Meaning in this document
AQUA Rules	ASX Quoted Assets Rules—the market segment or rule framework created by ASX to specifically manage the admission of ETFs
ASIC	Australian Securities and Investments Commission
ASX	ASX Limited or the exchange market operated by ASX Limited
Cboe	Cboe Australia Pty Ltd (formerly Chi-X Australia Pty Ltd) or the exchange market operated by Cboe
CCIV	As defined in s1222 of the Corporations Act
[CO 13/721] (for example)	An ASIC class order (in this example numbered 13/721) 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
ETF	Exchange traded fund—in this paper, meaning an open-ended registered managed investment scheme or sub-fund of a CCIV, where the interests or shares (or a class of interests or shares) can be traded on a licensed Australian exchange operated by ASX or Cboe
managed investment scheme	Has the meaning given in s9 of the Corporations Act
Pt 7.6 (for example)	A part of the Corporations Act (in this example numbered 7.6), unless otherwise specified
registered managed investment scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
RIS	Regulation Impact Statement
s9 (for example)	A section of the Corporations Act (in this example numbered 9), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect