23 August 2019

Alan Worsley
Senior Specialist
Australian Securities and Investments Commission
Brisbane QLD 4001

By email: policy.submissions@asic.gov.au

Dear Mr Worsley

ASIC CP 315 – Foreign financial services providers

The Australian Financial Markets Association (AFMA) is making comment on *Consultation Paper 315 – Foreign financial service providers* (CP 315). Our comments in the Attachment are divided into two sections.

The first section restates our views set out in response to CP 301 on why the path being taken with the proposals in CP 315 to use licensing is flawed at a policy level and the steps we will take as an association to raise the need for a fit for purpose made regulation to give ASIC the toolkit it needs. AFMA is of the view that a proper long term solution needs to be found with regard to the extra-territorial application of the Corporations Act in respect of foreign financial services providers which are not operating in Australia. AFMA wishes to work collaboratively with ASIC and the Government in developing a suitable regulation to meet this need.

The second section is directed to responding directly to the issues raised in CP 315 from a practical perspective. The technical comments should not be taken as implied agreement with the proposals in CP 315. In fact, many of the comments illustrate the inconsistency, anomalies and problems with the licensing and limited exemptions path.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au if further clarification or elaboration is desired.

Yours sincerely

David Love
General Counsel & International Adviser

ASIC CP 315 – Foreign financial services providers

1. A better solution is required

AFMA is re-voicing its fundamental concern to the way ASIC is addressing legitimate policy concerns around the activities of a small number of entities by proposing an approach which fosters further market fragmentation and runs counter to Australia's proud long-standing tradition of promoting free trade in services and demonstrating best international practice in financial services regulation.

The concerns raised here relate to the efficient functioning of wholesale professional markets operating cross-border and not to questions relating to retail investor protection. The consequences of fragmentation include increased barriers to entry, a reduction in services available to end users, and reduced market liquidity. Additionally, some unaligned rules have such extra-territorial impacts as to require market participants to restructure their businesses and inevitably impact market development in affected jurisdictions in some cases. For end users fragmentation can reduce their ability to properly manage risks. AFMA is also concerned with the anomalous outcomes that will result from have a regime based on licensing exemptions rather than a coherent fit for purpose rules that deal with foreign financial service providers in a coherent and logical manner.

1.1. Minimising fragmentation in cross-border regulation

The propensity of national regulatory authorities to seek to extend the reach of their rules and processes beyond their territorial borders and not consider conflicting laws and other legal consequences has added considerable layers of regulatory duplication, fragmentation and incompatibility over the last decade. The result of this regulatory inconsistency is growing incoherence and conflicting rules surrounding rights of access and the regulation of cross-border business. Proper cross-border regulation is vital for an open economy like Australia's. The ever-increasing granularity of regulation complicates attempts at greater mutual recognition and adds unnecessary friction to cross-border investment and trade.

IOSCO established a Follow-Up Group to the 2015 Task Force to examine market fragmentation in wholesale securities and derivatives markets, specifically as it arises as an unintended consequence of regulation. The purpose of the work was to better understand where and why regulatory-driven market fragmentation is occurring, and what action(s), if any, IOSCO and its members could pursue to minimise its adverse effects.

In its June 2019 *Report Market Fragmentation & Cross-border Regulation* IOSCO lamented that "despite the progress made, some respondents noted concerns on ongoing

regulatory developments in certain jurisdictions such as amendments to EMIR on CCP supervision and the Australian Foreign Financial Service Providers proposal."[1].

The paper prepared by IOSCO for the G20 Fukuoka meeting is founded on the greater recognition amongst regulators of the risks associated with unintended fragmentation (so, for example, deference would become more common) and it seeks to build on a toolkit IOSCO issued in 2015 to improve the efficiency of cross-border regulation. Initiatives proposed by IOSCO in the paper that it is now considering its approach to include:

- Use of regional committees (including the Asia-Pacific Regional Committee that ASIC participates in) to develop knowledge of cross-border issues;
- More systematic reporting of harmful fragmentation and exchange of information by regulators on approaches to cross-border regulation; and
- Exploration of possible steps to strengthen collaboration and cooperation in supervision.

Nevertheless, as the CP 315 proposal illustrates there are still practical challenges that require further consideration and remain to be addressed by the international standard setters and national regulators, such as:

- How to take account in the making of regulation that applies cross-border of the relative scale, development and culture of other countries financial systems that are impacted – especially financial systems that are smaller or less developed than those in the major economies;
- Development of systematic processes that can be incorporated into national policy and regulatory processes to properly:
  - take account of third country concerns during the development of national policy;
  - ensure that communications to affected parties in third countries is effective;
  - provide administrative mechanisms for affected parties in third countries to obtain clarification on the relevant measures from the regulator, to receive assistance from the regulator as they navigate the implementation process and to deal with regulatory uncertainty that may present over the course of time.

The work that has been undertaken by the global industry on market fragmentation to date has led to a deeper understanding of its adverse consequences and a stronger commitment by governments, international standard setters and national regulators to try to address the problem. Nonetheless, there is more work to be done to contain the problem and reduce its incidence.

For its part, Australia has been a global leader in seeking to ensure that our national financial services regulation enables effective connections to the global capital, banking and risk management markets. However, the concerns reported in the IOSCO report

[1] International Organization of Securities Commissions, Market Fragmentation & Cross-border Regulation Report, June 2019, FR07/2019, p15

about ASIC's current proposals in relation Foreign Financial Services Providers (FFSPs) is a timely reminder that we must be careful not to lose ground in this respect, especially given the interconnection and reliance of our economy with the global economy. The introduction of faulty policy or regulatory settings in this area would reduce competition and more generally be costly to our economy. It would also be at odds with the renewed G20 commitment.

1.2. Avoiding anomalous treatment

The complete removal of the class order regime will create more anomalous outcomes. AFMA's position is that the regulatory regime should accommodate in a more proportionate way what can be highly bespoke and unique services provided to Australian customers in circumstances where a product or service is not otherwise available in Australia, and particularly where the entity providing the service is closely regulated in its home jurisdiction.

For example, RG121 sets out what constitutes "inducing": *You are a broker in the UK and you directly contact and encourage a small number of people in Australia to buy parcels of shares on the LSE* – RG121 says you are likely to need an AFS licence. In this situation, following expiry of CO 03/824, it appears that the current available exemption would no longer be available, even though there may be such limited activity it would not be worth applying for an Australian licence. A broker could perform exactly the same activity with a professional investor in an FX product or derivative without a licence, notwithstanding that the securities transaction is executed on a highly regulated market. AFMA believes that there is a better and simpler way to deal with the anomalies that will be thrown up through a new regulation rather than licensing. We will return to this suggestion.

1.3. Business implications

The proposals set out in the consultation paper reflect decisions of a regulatory policy nature that may have significant economic policy consequences. This is implicitly recognised by ASIC in its decision to accommodate funds management by not requiring licensing. It is not clear to why a specific exemption has been granted for funds management services without a similar exemption being granted for other financial services. For example, equities or other brokerage services where offshore brokers provide execution services to Australian clients without any direct solicitation in the country. In many jurisdictions trades in local securities must be arranged through a broker in the local jurisdiction. Given the significant costs and resources associated with obtaining and maintaining an AFSL, and the relatively small number of clients accessing each market, most offshore brokers will cease providing these services, restricting the ability of Australian clients to access offshore markets.

Some broker type FFSPs which engage in trading, execution and clearing activities from overseas may encounter complications in obtaining memberships on the local exchange, particularly where the FFSP's related entity has a membership on the exchange.

Another way the changes will have wider ramifications will be for Australian institutional investors that have established Offshore Business Units (OBU) with FFSPs overseas. It needs to be noted here that Australia's OBU tax regime has been reviewed by the OECD and the Government has committed to amend the OBU regime to address the OECD concerns. The OBU regime from an Australian tax perspective requires all transactions to be offshore. Australian institutional investors will be disadvantaged, if those FFSPs are licensed and therefore could be construed as establishing a business in Australia. This is because, their account with FFSP can be considered an account with an Australian entity and will be taxed as a local account. The implication of this is that Australian clients will only enter into relationships with those FFSPs who are able to remain fully offshore. This will also have an impact on the Australian economy as local investors will be less incentivised to expand globally.

This is not a debate about whether financial service providers providing local services to the retail market should be licensed. They are required to by current law and retail investor protection needs are well met by the current law. This is a debate about the efficient international operation of financial markets where professional investors are involved. These markets are predominantly centred in well regulated jurisdictions such as those covered by the sufficient equivalence recognitions but also places such as Japan, India and Brazil. Big corporate clients need their businesses serviced at a global level. They gravitate to those financial service providers with the international networks and access that allows their bespoke needs to be met across many jurisdictions. We see them accessing those services through local AFSL holders who can make connections to necessary local expertise through affiliates. Such financial service providers are operating and providing services in their own regulated jurisdictions and corporate clients as well as funds managers are able to look after their own commercial interests in the case of a dispute over a financial service.

This becomes clear when the type of limited connections that would be caught are examined where, for example, a local Australian Financial Services Licensee (AFSL) is providing cash equities products and are required to books the trades to a local entity in the relevant jurisdiction. No solicitation occurs in Australia by the foreign entity.

In Japan, execution of Japanese cash equities must be booked by a local Japanese entity. Similarly, in India cash equities execution in respect of Indian underlyings / securities must be booked to a local Indian entity. For these reasons an Australian fund would necessarily be on-boarded to an Indian entity. Such funds are represented by investment managers, either based onshore (i.e. Australian) or offshore. Indian representatives (sales and traders) speak with the investment managers only (not the underlying funds). Settlement for the trades is via the custodians for the funds. The custodians are each Indian intermediary registered with SEBI. The India entity does not market to Australian clients and deals on the basis of a reverse enquiry.

In the case of Brazil, foreign fund managers, commonly in the United States may allocate trades to Australian mandates in respect of the execution of Brazilian underlyings for equities and fixed income transactions. In such cases there is no direct contact with Australian clients.

In the case of a European Union jurisdiction like The Netherlands one may see a BV entity issue notes, certificate or other instruments to a group entity which sells these instruments to Australian clients. In order to do this reliance is made on 03/824 to the extent it sends out notices to the Australian clients (as holders of the notes/certificates) or offers redemptions and similar.

Taiwanese and Korean brokerage firms may also need to deal with Australian clients to deal in cash equities in reliance on 03/824, due to Korea and Taiwan being inter-dealer markets. It would not be practical to rely on a reverse solicitation exemption, other than for an initial contact. Some of the initial contact may come about through licensed entities or exempt entities cross-selling global business and not through direct marketing/inducement activities in Australia but subsequent business would be solicited, if permitted. It would be the case that not all contact would be intermediated or introduced by an Australian licensed entity.

Some FFSPs that carry on banking business overseas may also need to register with APRA for a banking licence or apply for an exemption from APRA, before they apply for a FAFSL, if the offshore business' name incorporates the word "Bank" and/or their primary financial services include banking in overseas jurisdictions. This will involve significant amount of time, cost and resourcing and may be a further disincentive to investment.

The steady increase of impediments to doing business with Australia exemplified by the proposals in CP315 has a cumulative effect which at some point means that global firms' in Australia providing services to wholesale investors decide cease and limit access of Australian investors to offshore markets. Businesses participating in global markets may cease trading in Australian markets as a hedge to those global positions will a flow on effect on the Australian economy by reducing offshore investment in Australian financial markets, such as those conduct by the ASX. Such changes are not immediate and often hard to directly correlate to particular regulatory developments in simple figures. Often there will be a combination of reasons which accumulate to a tipping point leading to a business to discontinue a service because it is no longer commercially viable. The impact of this discontinuance of services may be discounted by the authorities while the economy continues to grow and there is sufficient domestic activity, but the downside becomes much more evident during recessionary times when the availability of counterparties to hedge with is greatly diminished. Maintaining global networks to access services is of great importance to a trading nation like Australia. A key goal of nation developmental economics is to build cross-border connectivity through the establishment of resilient financial services networks to assist economic growth. These networks take years to build and need to be cultivated and kept active, especially for recessionary times to keep commercial life going. Australia has been resilient in the past partly due to such networks. They should not be diminished and impeded.

1.4. Way forward

The fundamental point is that licensing is not the right way to deal with foreign service providers with an only incidental connection to financial services in this jurisdiction and

this is leading us down the path to dual regulation rather than deference. The removal of the existing reliefs, to be replaced by licensing requirements, adds more sand in the Australian economic machine. Given the international trade in services implications of these restrictions on free trade and contradiction with our Government's trade policy position and cross-border tax implications of ASIC's proposal it is unfortunate that the departments of the Treasury and Foreign Affairs and Trade have not been more closely engaged in work on this subject.

We recognise the concerns that ASIC has with a permanent exemption regime and its need to have access to information about services being provided in the market. The need for permanent exemptions is a demonstration of shortcomings with the structure of the law not with the objectives of the exemption. There are no demonstrated systemic problems with the current arrangements in the regulatory impact assessment in CP 315 or failures by foreign regulators that warrant attempts at dual regulation. It is important for ASIC to demonstrate confidence in its peer regulators as countries cannot prosper without cross-border cooperation and good-will. Regulation which creates trade in services barriers is most earnestly opposed as it has proven to not been in the best interests of consumers and encourages uncompetitive outcomes within the domestic economy. The origins of the problem lie in the ad hoc solutions to transition problems encountered with the introduction and implementation of the financial services reforms and the licensing of financial service providers in Australia in 2004.

AFMA considers it is time to regularise and rationalise the supervisory arrangements for foreign financial service providers. We also recognise that ASIC is limited by the constraints of the current statutory and regulation provisions. We consider that a better way forward is to look to the ample regulation making powers conferred under the relevant part of the Corporations Act to craft a fit for purpose regime not based on licensing that does not impede economic activity, rationalises current arrangements and would give ASIC relevant authority to make inquiries and take action.

Much of the thinking for what is required through regulation already exists and is not a large task. AFMA would be please to share its thinking on a regulation proposal with ASIC and work in collaboration with you on the proposal. AFMA wishes to take this issue forward to the Government in a collaborative spirit to develop a fit for purpose regime that meets both professional investor and regulatory needs.

Section 2 – Comments on CP 315 Questions

B1

We propose to provide relief to FFSPs that provide funds management financial services - subject to a cap on the scale of the FFSP's services provided to professional investors in Australia (see proposal B3) and conditions that apply to the operation of the relief (see proposal B4). A person engages in a funds management financial service if they provide:

(a) ***any of the following financial services to a professional investor in Australia:***
- ***(i) dealing in interests of a managed investment scheme established outside Australia (scheme) or securities of a body***
- ***(ii) that carries on a business of investment that is not incorporated in Australia (body);***
- ***(iii) providing financial product advice in relation to the interests or securities of the scheme or body; and***
- ***(iv) making a market in relation to the interests or securities of the scheme or body; and***

(b) ***portfolio management services to a limited category of professional investors ('eligible Australian users')***

B1Q1

Do you agree with our proposal to provide AFS licensing relief to permit FFSPs to provide funds management financial services to professional investors (subject to the cap in proposal B3 and the conditions in proposal B4)? If not, why not? Please be specific in your response.

Response to B1Q1

The offshore fund exemption should also be extended to cover dealing in the assets (financial products) of the offshore fund on behalf of investors, as this is another integral component of operating an offshore fund that does not adopt a corporate structure.

An offshore fund may be operated by more than one entity, such as a general partner or trustee, an investment adviser/manager and an administrator. One or more of these roles may involve providing financial services to investors. The relief may require each of these entities to comply with the conditions, including lodging the required deed with ASIC and meeting the revenue cap. Further, it would appear that a corporate fund, as a legal entity in its own right, would need to meet the conditions. Regulatory expectations in relation to the entities that would need to meet the relief conditions need to be clarified?

It is likely that many offshore funds/fund managers will not find it viable on a cost versus return basis to obtain an Australian license. If the funds management relief remains

limited to professional investors there are strong arguments that there will be insufficient investment diversity available for wholesale clients.

ASIC should reconsider and extend the funds management relief to wholesale clients. Using offshore based funds allows wholesale clients to access global expertise and deliver superior financial outcomes than if limited to the Australian domiciled fund universe.

Invested Offshore Funds are split between Hedge Funds, International Equities, Private Equity, AUD, Property and Fixed Income. Each of these asset classes permit clients to diversify their returns. Often Australian based funds will have a limited capability or scope in these asset classes. It is in the interest of the investor for analysis of financial assets to be conducted in the jurisdiction in which those assets reside. Just as we expect an Australian equities manager to be based in Australia, investors prefer US equities managers that are based in the US and European equities managers that are based in Europe. Furthermore, by opening up to a global talent pool, clients are able to access a level of expertise that is not present in Australia (notably in certain types of Hedge Funds). The following are the main offshore regulatory regimes for funds management:

- ICAV (Irish Collective Asset-Management vehicle)
- SICAV (European investment fund structure)
- UCITS (European retail investment funds)
- Luxembourg - special limited partnerships (*société en commandite spéciale)*
- United Kingdom - limited partnerships.

B1Q2
Do you agree with our proposal to not provide relief in relation to the provision of a custodial or depository service on the basis that it is covered by r
eg 7.6.01(1)(k)? If not, why?

Response to B1Q2

As set out in section there is no clear rationale or regulatory impact assessment which makes sense as to why the proposed relief has been limited to funds management when other financial services such as equities brokerage services where offshore brokers provide execution services to Australian clients without any direct solicitation in the country.

The existing sufficient equivalence relief for UCITS is usually wide enough to include advice, dealing, making a market and provision of custodial or depository service. The services covered under the funds management relief should be extended to include provision of custodial or depository service if it is to provide cover usually required for offshore funds management businesses.

7.6.01(1)(k) applies only to custodians who have an arrangement with an Australian financial services licensee. This is unlikely to be the case for offshore funds.

Similar principles applied to funds management should be applied to other financial services. A failure to do so will present a significant impediment to Australian investors from accessing offshore markets. Given that these services are provided to a limited number of clients (generally on a reverse enquiry basis), they would not warrant the cost and resources required to obtain and maintain an AFSL, as recognized by ASIC in paragraph 45 of CP315. Further, these services may be provided in locations that possibly will not qualify for sufficient equivalence. We do not believe the licensing exemptions granted in reg 7.6.02AG provide sufficient relief to allow these services.

The proposal to exclude custodial or depository services from the offshore fund exemption is a significant limitation, as the alternative relief referred to in regulation 7.6.01(1)(k) is not sufficient. In particular, the alternative relief would not be applicable where the responsible entity of a registered scheme invests in the offshore fund, as the appointed "master custodian" would not be providing a custodial or depository service to the responsible entity as required by paragraph (k)(iii) of the exemption – holding the assets of a registered scheme (in this case the units or other interests in the offshore fund) is excluded from the definition of custodial or depository service under section 766E(3)(b) of the Corporations Act.

The alternative exemption also requires the "master custodian" to hold a beneficial interest in the assets of the offshore fund, which raises a very technical issue concerning the nature of the interest held by an investor in the particular offshore fund. Some offshore funds may not provide a beneficial interest in a particular fund asset or assets. More broadly, there does not appear to be a valid policy reason for excluding custodial or depository services from the exemption. They are an integral component of operating a fund that does not adopt a corporate structure, such as a trust or limited partnership, which invests in financial products.

B2

For the purposes of the funds management
relief, we propose to define 'portfolio management services' to mean the management of assets located outside Australia by a manager on behalf of 'eligible Australian users'. We propose to define eligible Australian users to include:

- (a) ***a person in Australia who is a trustee of:***
  - ***(i) a superannuation fund, within the meaning of the Superannuation Industry (Supervision) Act 1993 (SIS Act), with net assets of at least A$10 million;***
  - ***(ii) an approved deposit fund, within the meaning of the SIS Act,***
  - ***(iii) with net assets of at least A$10 million;***
  - ***(iv) a pooled superannuation trust, within the meaning of the SIS Act, with net assets of at least A$10 million;***
  - ***(v) a public sector superannuation fund, within the meaning of the SIS Act, with net assets of at least A$10 million;***

> *(b)* ***a person in Australia who operates a managed investment scheme, with net assets of at least A$10 million;***
> *(c)* ***a person who operates a statutory fund***
> *(d)* ***under the Life Insurance Act 1995 in Australia; and***
> *(e)* ***an exempt public authority, as defined in s9 of the Corporations Act.***

> *B2Q1*
> *Do you agree with our proposed inclusion of 'portfolio management services' as a discrete type of funds Management financial service that FFSPs can provide under the relief? If not, why not? Please be specific in your response.*

Response to B2Q1

Further clarity is sought as to whether the exemption under reg 7.6.01(1)(k) would apply in circumstances where foreign market requirements necessitate Australian wholesale clients/ professional investors and foreign sub-custodians to enter into direct contractual arrangements in addition to the master custodian agreement the Australia wholesale client/ professional investor executes with the AFS License holder.

> *B2Q1*
> *Do you agree with our proposed inclusion of 'portfolio management services' as a discrete type of funds Management financial service that FFSPs can provide under the relief? If not, why not? Please be specific in your response.*

Response to B2Q1

The categories of permitted clients in the definition of "portfolio management service" are considered too limited and will have the unintended consequence of excluding some institutional investors and their investment structures. For this reason, the relief should cover services to all "professional investors", consistent with the exemption relating to offshore funds. In particular:

- The current client categories do not cover listed investment companies, authorised deposit-taking institutions or general insurance companies investing their own funds;
- It is common practice for institutional investors, such as large superannuation funds, to establish structures through which investments are made, such as proprietary companies wholly owned by the fund. These structures may be established to quarantine potential liability or for other good reasons. These investee entities would not be covered by the proposed permitted client categories.

This particular exemption should also extend to clients that control at least $10 million, all bodies regulated by APRA, licensees and investment companies, as provided for in the

current Corporations Act definition of “professional investor”.

- The exemption only applies in relation to “assets located outside this jurisdiction” (Australia). This limitation would likely exclude access to many global equity portfolios, which often have an Australian component (however small). The limitation is therefore inappropriate and should be either revised or preferably deleted. As a minimum, a reasonable maximum Australian component of the portfolio should apply such as 50%, consistent with the offshore fund exemption.
- The exemption is expressed to apply in relation to the “management of assets”. We suggest that this could be clarified to read “management of assets (including dealing and financial product advice)”. Portfolio managers typically provide portfolio reports or commentary and recommendations in relation to mandate terms or composition, which can be financial product advice, and will also conduct meetings, whether face to face or otherwise, with their Australian clients to discuss the provision of their services. Dealing services would relate to the portfolio assets and the portfolio management service itself, which may technically be a financial product (eg a facility for making a financial investment or interest in a managed investment scheme).

B2Q2
Do you agree with our proposed definition of ‘portfolio management services’? If not, why not? Please be specific in your response.

Response to B2Q2

The term ‘portfolio management services’ is too narrow because it is unlikely to include portfolio advisory/emulation services, such as services where an entity provides a list of stocks held within a specific type of investment strategy, and the client assesses that list and then acquires/disposes of any or all of the securities included (or no longer included) on that list.

AFMA does not agree with the proposed definition of ‘portfolio management services’. The limitation of the scope to ‘assets located outside Australia’ could lead to unforeseen consequences, such as a mandate of global equities would not fall under the scope if it included just one or more Australian equities. Further, the categories of services permitted in the definition are too limited and could have the unintended consequence of excluding some institutional investors and their investment structures.

B2Q3
Do you agree with our proposed definition of ‘eligible Australian users’ of portfolio management services? If not, why not? Please be specific in your response.

Response to B2Q3

AFMA does not agree with the proposed definition of 'eligible Australian users' as we do not see a rationale to introduce a new sub-set of wholesale clients.

A portfolio management services should be able to be provided to "professional investors" rather than creating a new category of "eligible Australian users".

The proposed definition of 'eligible Australian users' is too narrow. In summary, the complete S.9 Corporations Act definition of 'professional investor' (excluding paragraph (i) should be adopted.

Unnecessary focus on funds sourced from SIS regulated entities:

The emphasis of the proposed definition is too strongly skewed towards monies sourced from certain superannuation entities. There is no need to limit the definition in this manner in order to protect 'smaller' wholesale clients. There will be some institutional investors who will not fall within this definition as currently drafted, and that are currently accessing services from offshore financial services providers. Alternatively, there will be additional work required when assessing some bodies that are a creature of statute, in order to definitively confirm whether or not they fall within the proposed definition as currently drafted.

If however the current Corporations Act definition of 'professional investor' were used, this extra work, and indeed uncertainty, would not arise. Presumably the underlying policy imperative for ASIC is to exclude from the list of potential clients those investors who only meet the Corporations Act 'wholesale client' test on the basis of having more than $500,000 to invest. Such persons are most unlikely to fall within the definition of a 'professional investor'.

Other entity types:

The complete list of persons/entities in the S.9 Corporations Act definition of 'professional investor' should be used to ensure that no current clients of offshore operators are prejudiced by the proposed changes. There does not appear to be any regulatory upside or additional protection required in relation to the types of entities in the S.9 'professional investor' definition that have been excluded from the CP 315 definition. There are large institutional investors currently appointing offshore managers who are not necessarily SIS regulated, nor life insurers and so may not fall within the proposed definition – for example, an entity that merely holds an AFSL would not automatically qualify as an 'eligible Australian user'.

Sub-delegation arrangements; Australian client an AFSL holder:

The proposed definition does not include an entity that is an AFSL holder but does not otherwise satisfy the proposed criteria of 'eligible Australian user'. This is presumably an unintended oversight.

This may mean that sub-delegation from a locally licensed intermediary to the offshore operator becomes difficult or impossible, where that Australian intermediary does not qualify as an 'eligible Australian user', but is a 'wholesale client' for the purposes of the Corporations Act, because, for example, it holds an AFSL, or is an entity controlling more than $10mil to invest. These types of entities should also be able to avail themselves of the services of a foreign offshore provider which falls under the funds management equivalence exemption.

Scope of professional investors

In the case that the exemption is limited to a sub-set of professional investors, we recommend ensuring that other types of professional investors are included within the definition, such as family offices and listed investment companies. These types of entities will not necessarily constitute 'eligible Australian users'.

B3
To ensure that the funds management financial services are provided on a limited basis, we propose that the FFSP will only have the benefit of the funds management relief if less than 10% of its annual aggregated consolidated gross revenue, including the aggregated consolidated gross revenue of entities within its corporate group (for each of the previous and current financial years), is generated from the provision of funds management financial services in Australia (aggregated revenue cap).

B3Q1
Do you agree with our proposal to apply an aggregated revenue cap to ensure that the financial services provided by FFSPs under the funds management relief are provided on a limited basis? If not, why not?

Response to B3Q1

AFMA does not agree with the proposal to apply an aggregated revenue cap. It appears unnecessary, the proposed cap's calculation methodology is complex, difficult to monitor and presents several compliance issues to ensure compliance. Further a 10% cap on the FFSP's own gross revenue does not seem practical. An FFSP may follow all the necessary compliance steps but too many factors outside its control may trigger the cap.

There is the potential to disadvantage Australian investors if revenue caps are introduced. For example, given the relatively small size of the Australian equity and capital markets, and the growing size of superannuation pool of assets, Australian investors are turning more and more to overseas markets. Any type of caps will potentially prevent this market exposure being accessed.

Ideally this cap would be increased to 20% or 25%. This would still contain operators availing themselves of the relief to those with a relatively low level of Australian sourced revenue but make the exemption more accessible.

> *B3Q2*
> *What systems and processes will you need to implement to monitor your compliance with the aggregated revenue cap? Please be specific in your response*

Response to B3Q2

The provisions relating to the 10% revenue cap are complex and require FFSPs to maintain a revenue projection which meets a number of requirements. FFSPs may regard these requirements as unduly onerous. They could therefore be a significant impediment to the it being used.

To adequately address this, as a minimum, FFSPs should only be required to provide reasonable evidence to ASIC of meeting the revenue cap on ASIC request. If the cap is not in fact met, the relief will of course fall away in any event. In the case of a foreign LIC Foreign company operating as an offshore fund, the 10% cap for the revenue cap to operate satisfactorily it would need to apply to the revenue of the offshore fund's manager, and the manager and its group.

Time buffer: 10% revenue fluctuations

CP 315 does not provide for any time 'buffer' or transitional period where an operator identifies that they may have (or will) exceeded the 10% revenue cap.

There should be some leeway to accommodate revenue fluctuations that an operator reasonably considers are temporary, without material inconvenience to operators and their Australian clients.

For example, an operator could file a short notice with ASIC, advising of the event and be required to provide ASIC with a further update in 3-6 months' time. The revenue change may ultimately prove to be temporary such that there is no need to go the inconvenience of applying for a limited or full AFSL.

The CP 315 suggestion that an operator consider no longer providing the services in Australia or reducing or limiting those services is uncommercial and impracticable and will only have adverse outcomes for existing Australian clients.

Transition to growth above the 10% revenue cap

CP 315 does not expressly provide for a gradual and methodical transition for an operator that is likely to exceed the cap over time as its Australian client base grows, thereby needing to obtain a limited AFSL in the future.

There should be a simple process that an operator can initiate with ASIC where revenue growth above the percentage cap is likely to occur, so that the operator can continue to deliver seamless services to existing clients while its licence status is being upgraded by ASIC.

'Management of assets located outside of Australia'

- 'management of assets': this term should not be used, as the existing 'base line' Corporations Act definitions of 'deal 'and 'advice' should be adequate. ASIC needs to confirm that 'management' will include both 'deal' and 'advice' activities, as defined in S.9 Corporations Act, but it would be preferable to adopt existing definitions. Offshore providers, just like local providers, are typically providing 'financial product advice' to their clients, as part of managing assets for them, by virtue of regular meetings with them, and provision of regular updating reports and other written materials, depending on how expansive an interpretation of 'advice' is taken.
- 'assets': this term may be too narrow if it does not include rights relating to derivatives (depending potentially on the type of 'derivative' in question and application of technical definitions under the Corporations Act and Regulations).
- 'located outside of Australia': this jurisdictional limitation is unnecessary and will limit the scope of, for example, global equity mandates that can be awarded to offshore operators. An ASX listed (or dual listed) entity may not be able to be included in a client's portfolio, or operators and their clients may enter into complicated approaches to achieve that objective in a compliant manner. Widening this definition will not cause local Australian fund managers to lose business.

Consistency of 'client' definition

It appears that two different definitions of 'client' will apply, depending on the particular services received from an offshore operator, namely –

- 'financial services' – may be provided to a "professional investor"; but
- 'portfolio management services' – may be provided to an "eligible Australian user".

There does not appear to be any policy or regulatory protection basis for making such a distinction; the wider definition should be adopted by ASIC, for the reasons noted above,

for both types of services. Where a client is able to access a foreign vehicle under the ‘financial services’ relief, it would be nonsensical for it to be unable to access other services from the same provider because the client did not meet the narrower “eligible Australian user” definition.

> *B3Q3*
> *What are the costs associated with implementing the systems and processes to monitor compliance with the aggregated revenue cap? Please be specific in your response.*

Response to B3Q3

These limitations will be regarded as significant and uncertain limitations on the scope of the relief, particularly as Australian case law continues to take an increasingly broad view of the circumstances in which a foreign entity is regarded as carrying on business in this jurisdiction. The exemption contains other specific conditions which are sufficient to ensure it is appropriately targeted at offshore based FFSPs and offshore funds. For example, specific conditions will apply relating to formation outside Australia and a 10% Australian-sourced revenue cap will apply. This distinguishes the proposed relief from the limited connections relief, making the uncertain and factually dependent conditions related to not carrying on business/operating in Australia unnecessary.

> *B3Q4*
> *Are there any other caps that we should consider as an alternative (see Table 3 for other caps we have considered)? What are the costs associated with monitoring compliance with your alternative cap? Please be specific in your response*

Alternatives to the 10% revenue test

A maximum of 3 clients would simply be unworkable and few operators would be able to take advantage of the relief, or at least for any meaningful period.

Proposing that the 10% limit could be counted referable separately to differing activities may be unworkable and impracticable– as institutional investment management services (for example), typically cover both ‘advice’ and ‘deal’ activities.

> *B3Q5*
> *Is the proposed aggregated revenue cap able to be applied to all the types of financial services that you may provide to professional investors in Australia (e.g. providing financial product advice)? Please be specific in your response.*

No comment

B3Q6
If you currently have the benefit of the limited connection relief and intend to reduce the size of your activities in Australia to have the benefit of the proposed funds management relief, how long would it take to do so? What are the costs associated with this? Please be specific in your response.

Response to B3Q6

Some FFSPs who have relied on the limited connection relief in the past will choose to neither apply for a Foreign Australian Financial Services License (FAFSL) nor implement the funds management relief. This may be because the FFSP is not regulated in a sufficiently equivalent jurisdiction or Australian sourced revenue does not justify the steps required to implement and comply with the relief.

Existing Australian clients at the expiry of the limited connection relief may, however, receive on-going financial services. Investors in a non-corporate offshore fund would, for example, continue to receive a custodial or depository service, and a dealing service as the operator of the foreign fund trades fund investments, simply because the investor continues to hold their existing investment in the fund.

The only option for some FFSPs who currently rely on the limited connection relief may therefore be to terminate Australian clients, for example through compulsory redemption of interests in an offshore fund. This could result in significant detriment to those clients, and their underlying investors.

There should be alignment of the transitional relief of Class Order 03/824 with the intended transition relief expiry of the Foreign Financial Service Provider (FFSP) equivalence. Alignment means this happens on 31 March 2022.

The alignment would allow current offshore providers of financial services a clear and precise timeline to consider their business structures. Those entities that are relying on 03/824 and are currently not in a recognised equivalent jurisdiction/ or are in an equivalent regime but have not applied for FFSP recognition will need to have assessed their business profile, services and appetite hold a FAFSL prior to March 2020. The timelines outlined CP 315 do not allow an appropriate amount of time for entities to review, make application and seek approval from ASIC to rely on the FFSP Instruments.

An alignment will give these captured entities the opportunity to better consider, apply and structure their business accordingly. Clients of these entities will also need to be informed as whether financial services can or will or will not be provided in the future.

Proposal B4 (a) RG 176.124(a)
Foreign company registration / carrying on business in Australia

The equivalence relief will not be available to entities that carry on business in Australia.

One potential indicator of 'carrying on business' is whether an entity is registered under the Corporations Act as a foreign company.

There may be some offshore operators currently registered as a foreign company simply out of an abundance of caution, and/or potentially having received understandably conservative Australian external legal advice that registration should be obtained.

If such an entity would otherwise be able to avail itself of the proposed sufficient equivalence relief, it will be prevented from doing so if it happens to be registered as a foreign company. While the proposals give sufficient time for such entities to consider whether to relinquish that registration, ASIC should expressly confirm in RG 176 that any entity that has been registered, but is no longer registered as a foreign company at the time of lodging an application to operate under the sufficient equivalence regime, is not prohibited from availing itself of this relief.

We would also like to note that by stating that the equivalence relief does not apply to entities that carry on business in Australia, ASIC does not recognise the branch structure than many global banks operate, whereby a US or UK bank may have a Sydney branch among several other Asia-Pacific branches. An entity level restriction would preclude such other branches from being able to rely on the relief.

Related to this point, the current draft ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2019/XXX, included as Attachment 3 to the consultation, defines Singapore / Hong Kong / Luxembourg / UK / US regulated entities as being entities (or partnerships) regulated and incorporated in those jurisdictions. These definitions should also include branches of third country banks rather than solely referencing jurisdictions of incorporation. A US bank with a Singapore branch should be able to apply for the foreign AFSL to conduct limited activities with Australian clients through its Singapore branch in reliance upon the Singapore relief rather than the US relief as in practice it would be the Singapore regulatory rules (and supervisory regime) that would apply (and MAS would regulate branches in the same manner as Singapore-incorporated entities for conduct of business purposes).

Proposal B4 para (d)
Proposed Condition 6 (1)(d) - Sufficient Equivalence Relief: Application Process

The statement *"Provide a description of proposed activities"* is unnecessary because the proposed relief relates to a well-defined and limited scope of activities. ASIC does not need further information at the application stage and can obtain it at any time if needed on the basis of conditions that will apply once the relief is obtained.

C1
We are not currently proposing to give AFS licensing relief to an FFSP that provides financial services to a professional investor who made the initial application or inquiry for the financial services from the FFSP (reverse solicitation). We are concerned about our ability to monitor the conduct of FFSPs providing financial services to professional investors in Australia on a reverse solicitation basis.

C1Q1
Are there any significant reasons why ASIC should provide an AFS licensing exemption based on reverse solicitation, given our proposed funds management relief in Section B and the licensing exemptions available in reg 7.602AG?

Response to C1Q1

AFMA supports an exemption based on reverse solicitation. This will need to clearly define how ongoing services are provided where the initial interaction occurs on a reverse solicitation basis. We believe that ASIC's concerns about any reverse solicitation relief being misused (as noted in para 85 of CP315) can be addressed by a clearly defined scope and conditions (currently not the case with the 03/824 Class Order which is not precise in its language.)

Turning now to an example with the distribution of global research. A common model for global distribution of (securities) research is to distribute research though a local licensed entity on the presumption that the local entity is authorised to advise on securities and has a responsible manager to cover the activity. That local entity would be responsible for the content of that research, including any follow up communications and discussions with offshore affiliates in relation to the research. In the absence of distributing though a local licensed entity of entity which has a sufficient equivalence exemption (or in the future a FAFSL), CO 03/824 currently enables foreign entities to distribute research (or provide market-related advice) in Australia to wholesale investors which otherwise could amount to an inducement activity.

Since often clients may need to subscribe for a research publication this activity could potentially utilise a reverse solicitation exemption. This would then also be a means of monitoring the distribution jurisdictions and investor type. Monitoring of dealing activities may be means of on-boarding but this wouldn't enable monitoring/control of advisory activities which may be though emails. If sales send marketing emails via distributed lists organised by jurisdiction of client that would be a means of monitoring sales marketing activities (but it wouldn't be automated).

C1Q2 *If you are an FFSP that may not be able to rely on the proposed new funds management relief or existing statutory licensing exemptions, please outline the specific financial services you wish to provide on a reverse solicitation basis?*

Response to C1Q2

Examples from Section 1.2 are cited in response to this question.

In Japan, execution of Japanese cash equities be booked by a local Japanese entity.

Similarly, in India cash equities execution in respect of India underlyings / securities that must be booked to a local India entity. So Australian funds would be on-boarded to an Indian entity. Such funds are represented by investment managers, either based on onshore (i.e. Australian) or offshore. Indian representatives (sales and traders) speak with the investment managers only (not the underlying funds). Settlement for the trades is via the custodians for the funds. The custodians are each local Indian intermediary registered with SEBI. The India entity does not market to Australian clients and deals on the basis of a reverse enquiry.

In the case of Brazil, foreign fund managers, commonly in the United States may allocate trades to Australian mandates in respect of execution Brazilian underlyings for equities and fixed income transactions. In such cases there is no direct contact with Australian clients.

In the case of a European Union jurisdiction like The Netherlands one may see a BV entity issue notes, certificate or other instruments to a group entity which sells these instruments to Australian clients. In order to do this reliance is made on 03/824 to the extent it sends out notices to the Australian clients (as holders of the notes/certificates) or offers redemptions and similar.

For brokerage and securities advisory services it will have the effect that there will extra cost incurred for supporting Australia client's trading and brokerage business. This would typically be in the region of $500,000 which would equate to commission earned so no business to carry on and get FAFSL.

C1Q3 How significant is the volume of those specific financial services provided to Australian clients to your overall business? Please be specific in your response and include quantitative information.

Response to C1Q3

Feedback from member indicates that generally the volume is not significant across any one entity. In most cases only a handful of clients are on-boarded for any given affiliate entity. For this reason, the cost and resource required to obtain and maintain an AFSL is not warranted. Further, often these services are provided from locations that may not qualify for sufficient equivalence. However, given the breadth of some of our global investment banks' international networks it is possible Australian clients may want to deal in securities through affiliated entities in a large number of jurisdictions where the relevant trade must be booked through a local entity. Examples of jurisdictions we have been given where the limited connections relief is relied upon includes major economies with big financial markets like Japan, India and Brazil. In these cases, trades must be booked to the local entity, no solicitation has occurred in Australia, the number of clients is very small and the clients in question are large sophisticated financial institutions.

> *C1Q4*
> *If a strong case for reverse solicitation relief, as set out in the appendix to this paper, was established, do you agree with our approach to defining reverse solicitation and how it will operate with s911D, as set out in paragraphs 104 and 107–109 respectively? If not, why not? Please be specific in your response.*

Response to C1Q4

The proposed definition of reverse enquiry is workable, but AFMA believes further clarification or scenarios could be provided to illustrate what is permissible and what is not. Situations may arise where an Australian client deals with an Australian sales person of an AFSL holders, seeking to execute trades in securities in a foreign jurisdiction. The referral of the client to an affiliate entity in the foreign jurisdiction should not prevent the use of the reverse enquiry exemption. Further, interactions with the client after the initial reverse enquiry should be permissible (such as provision of statements and contract notes).

Response to C1Q5

> C1Q5
> If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, we consider conditions should apply to the FFSP providing financial services on a reverse solicitation basis. Do you agree with the conditions we set out in paragraph 105? If not, why not?

The proposed conditions are appropriate but further clarity is required concerning "inducement" and record keeping. Record keeping requirements should not be unduly onerous or prescriptive and should permit the retention of business as usual documents

such as email correspondence and file notes. Specific formal acknowledgement from the client is likely to be administratively burdensome. Further clarification is also required as to whether ongoing records of reverse solicitation are required where the client established an ongoing relationship with the FFSP.

> ***C1Q6***
> *What are the costs associated with complying with the conditions set out in paragraph 105, including maintaining adequate records of proof of reverse solicitation and communications with the investor?*

Response to C1Q6

Provided the requirements for record keeping are sensibly flexible and simple, the costs should not be disproportionate. However, if ASIC intends to prescribe formal documentation including written client acknowledgements, particularly on an ongoing basis, the cost and administrative burden could be substantial. Further such a requirement would place an additional administrative burden on clients.

> ***C1Q7***
> *If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, are there any mechanisms that could be implemented by the FFSP or the professional investor in Australia to assist in monitoring the conduct of FFSPs to ensure that the engagement was on a reverse solicitation basis? If not, why not?*

Response to C1Q7

Members have advised AFMA of their system controls where typically any Australian client can only be on-boarded to an AFSL holder or entity holding “sufficient equivalence” class order relief. All other client on-boardings are blocked and referred to internal compliance / legal review. These type of controls provide assurance that the reverse solicitation on-boarding is appropriate and appropriate evidence is available. In addition, both first line and second line controls functions are used monitor and prevent client on-boarding which does not meet the rules.

> ***D1***
> ***We propose to:***
> (a) ***update RG 176 to include information on our proposed regulatory framework for FFSPs, including information on:***
> ***(i) the foreign AFS licensing regime; and***
> ***(ii) how we would apply the proposed funds management relief; and***

(b) ***withdraw Information Sheet 157 Foreign financial services providers: Practical guidance (INFO 157) when we release the updated version of RG 176.***

D1Q1

Do you think we have provided adequate guidance to FFSPs about how our proposed regulatory framework for FFSPs will apply?

Response to D1Q1

AFMA considers that requiring an offshore entity, in a jurisdiction deemed to be equivalent, to comply with an additional separate and distinct regulatory regime is likely to lead to confusion and potentially increased levels of non-compliance. Compliance costs are likely to be significant as additional resources will need to be hired to ensure adequate oversight. Question also how ASIC will be resourced to properly oversee compliance across the more detailed obligations foreign AFSL holders will be subject to?

The process of obtaining an AFSL will be difficult and potentially costly for entities outside the jurisdiction. There is unlikely to be a good understanding of the ASIC licensing process meaning most entities seeking an AFSL will need to engage local legal counsel (with associated costs).

New Corporations Act definitions should not be added or used; the fundamental Corporations Act definitions such as ‘deal’ and ‘advise’ are sufficient and are at the heart of Australia financial services regulation. Use of these existing ‘baseline’ or fundamental definitions rather than ‘portfolio management services’ will limit confusion and error.

Proposed sufficient equivalence regimes / RG 176.18 & Table 2

Table 2 lists six foreign jurisdictions already considered by ASIC to be ‘sufficiently equivalent’ for the purposes of the proposed foreign licensing regime. However, as disclosed by ASIC in ASIC CP 301 (pg 36), ASIC has also granted individual instruments of relief to certain operators located in Brazil, Denmark, France and Sweden. These jurisdictions are not listed in Table 2.

These four jurisdictions should also be included within RG 176 as jurisdictions of sufficient equivalence. As ASIC has already reviewed and approved these jurisdictions in the context of an individual relief application, it should update its list of approved/equivalent jurisdictions for the benefit of other operators and potential local clients. Further, once an additional jurisdiction is approved by ASIC in the future on an individual basis as ‘equivalent’, a corresponding update should be made promptly to RG 176 to reflect that new jurisdiction.

> *RG 176.19(b)(iii)*
> *The foreign AFS licensee must notify ASIC, as soon as practicable and in any event within 15 business days after it becomes aware or should reasonably have become aware, and in such form if any as ASIC may from time to time specify in writing, of the details of:*
> *(iii) each significant investigation, enforcement or disciplinary action undertaken by any overseas regulatory authority against the licensee in a foreign jurisdiction in relation to financial services provided by the licensee in that jurisdiction.*

Comment

This follows the current notification requirement and is problematic in cases where confidential and sensitive investigations are commenced and are at an early stage with a local regulator. Further, determining significance of an investigation can be difficult while at an early stage. This requirement should be clarified to require notification where permitted by the home regulator and at a point where it is clearly significant. It is also suggested that a significance test be included rather than the vague guidance currently included.

> *RG176.32*
> *While a foreign AFS licensee is exempt from specified provisions of the Corporations Act (see RG 176.33 and Table 3), a foreign AFS licensee must comply with:*
> *(a) all other applicable provisions under the Corporations Act (see RG 176.36–RG 176.37); and*
> *(b) the applicable conditions on its licence other than those applying under reg 7.6.01(a) and (d) (see RG 176.38–RG 176.39).*

Comment

Structuring the obligation on a FAFSL holder to comply with all obligations except a list of exempt provisions creates a significant challenge for offshore entities that have existing obligations in their home jurisdictions – this potentially creates duplicative requirements on the entity and leads to uncertainty around which obligations the entity is required to comply with. This is likely to lead to material compliance challenges and costs. The regime could be simplified and more certain by listing a prescribed set of key obligations that are deemed to be sufficiently material for a FAFSL holder with ie a limited set of positive obligations.

RG 176.36 - Scope of proposed licence conditions

- *Australian nexus: (RG 176.36)*

  - The conditions should apply specifically in relation to the services to be delivered to/in respect of Australian clients, not an operator's wider business.

- *Conflicts management: (RG 176.36(b))*

  - ASIC should clarify whether the licence condition extends to all conflicts within the offshore operator's business, or only to those arising in relation to the provision of services to an Australian client. This condition should not apply where ASIC has assessed a jurisdiction to be equivalent in relation to the operation and regulation of conflict management obligations.

- *Risk management systems: (RG 176.36(f))*

  - ASIC should provide more explanation as to its expectations in relation to the 'risk management systems' condition. This condition should not apply where ASIC has assessed a jurisdiction to be equivalent in relation to the operation and regulation of risk management systems.

RG 176.37 *Breach reporting requirements (see s912D)*

Comment

This obligation should have a materiality threshold, so that minor breaches of a local licence already reported in the home jurisdiction, need not be reported to ASIC.

Further clarity is required on the application of s912D to FAFSL holders. If a breach occurs by a FAFSL holder without any nexus to Australian clients, is ASIC expecting it to be reported? If not, how is the Australian nexus to be determined? This illustrates the difficulty in having dual application of regulations to the same entity.

RG 176.44 – 46 *To be eligible to apply for a foreign AFS licence, an FFSP must be authorised in a 'specified overseas regulatory regime':*

Comment

Many of the jurisdictions for which the limited connection may have been used are unlikely to meet the sufficient equivalence standard. Given the limited number of Australian clients being serviced from these locations/entities obtaining a full AFSL will not warrant the cost and resource required to obtain and maintain an AFSL. Our more general comments in Section 1 indicate the unworkability of this approach.

RG 176.51 (a) *A5 Business Description*

Comment

The current requirement is unclear as to whether the business description covers the full business of the FFSP or should be limited to the business as it relates to Australian clients only.

ASIC should clarify whether this proof needs to address the applicant's entire business or only its proposed Australian operations.

RG 176.51 (b) *People Proofs for each responsible officer, to the extent that the proofs relate to whether the responsible officer is of good fame and character—This core proof includes a criminal history check and bankruptcy check. We need this information to help us assess whether your responsible officers are of good fame and character.*

Comment

Responsible Officer does not appear to be defined anywhere in the RG. This needs to be clearly defined. Also what regulatory obligations will apply to these individuals?

ASIC should clarify whether responsible officers are to be nominated in relation to the services to be delivered in relation to Australian clients or determined on a wider basis in relation to the operator's business as a whole.

RG 176.55

ASIC should be more explicit as to the likelihood of which additional proofs may be required, and which specific proofs they could be. Offshore operators are not familiar with the AFSL licensing regime and may be concerned with this sweeping statement that additional proofs will be required. The list of possible additional proofs in RG 176.55 seems excessively long and/or irrelevant, and some of them would presumably be unlikely to be requested by ASIC in the context of an equivalent jurisdiction.

RG 176.110 Transitional arrangements apply to an FFSP that: (a) notified ASIC of its reliance on the previous sufficient equivalence relief contained in one or more of the instruments in RG 176.109, or has been granted individual relief on substantially the same terms, before 1 April 2020; (b) has not since notified ASIC that it no longer wishes to rely on that relief; and (c) was able to rely on the relief on 31 March 2020.

Comment

Transitional arrangements should also apply to entities currently relying on the limited connection relief. Given that the current proposal is for the limited connection relief to expire at the end of March 2020, and that this relief is often used by entities operating in jurisdictions that currently do not benefit from the sufficient equivalence relief, these entities will have less than 8 months from the date of the closure of the consultation period to prepare an equivalence application, seek approval and apply for a foreign AFSL. In the unlikely event that these entities were to seek a full AFSL for the foreign entity, they will have an insufficient period to establish an appropriate compliance program to cover Australian compliance obligations and prepare the application. Further, given ASIC's current backlog of licence applications and stated service charter of 150 days to process an application, it is unrealistic to expect licences to be issued prior to the 1 April 2020 date.

E. AFMA questions to ASIC

The following transitional questions are posed to ASIC.

1. *ASIC's capacity to handle foreign license applications with concurrent equivalent regime* - How does ASIC propose to handle applications from existing sufficient equivalence relief holders who have to move to the foreign license regime but who also wish ASIC to consider other regulatory regimes that they are subject to. For example, a provider from Luxembourg that has sufficient equivalence relief for UCITS is also likely to request ASIC to assess the AIFMD regime that it operates within to make the licensing commitment justifiable. Will ASIC have capacity to process both requests simultaneously?

2. *How foreign licensing regime will function in relation to related entities.* Will it be possible for a foreign licensee to authorise other entities within a corporate group that also provide financial services under the same regime or is the expectation that each entity will need to obtain an Australian licence?

3. *License processing* - Current license applications for Australian Financial Services Licenses (AFSL) could take anywhere from 9-12 months depending on the complexity of the business and discussions / approvals with the ASIC licensing team. On this basis it is quite possible a current FFSP applying for a FAFSL may need to have made application by no later than March 2021, this is challenging timeline. Will ASIC process applications to meet the deadline?

    - ASIC is yet to finalise the regime requirements, offshore entities will need senior management and Board approvals prior to progressing to this regime and submitting to ASIC's jurisdiction. These decisions will likely involve discussions

with local regulators to address and potential concerns that may arise, again would add to any timeline.

- Those entities where a business case aligns with the application of a FAFSL will need to develop processes and systems to ensure compliance with the regulatory expectations. This may include the developing systems which may only allow for clients to be "onboarded" to certain entities when facing Australian domiciled clients. The cost of developing such systems, training and processes are likely to large.

- FFSP entities already established will also need to make and assessment of current and potential future product prior application by March 2021. The application and if approved the entities will need to ensure a timely transition including all client documentation, disclaimers, etc. There will also be a need to "lock down" these entities as the only entities able to face Australian domiciled clients. If these entities are unable of offer specific services (notwithstanding their local license would allow it) systems enhancement, monitoring and processes would be required. As ASIC is no doubt aware, not all entities with a group offer the same services or products.

RG 176, Table 2

Why are 'eligible deposit products' not included in the list of assets for some approved jurisdictions?