



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 178

Foreign collective investment schemes

June 2012

About this guide

This guide is for operators of foreign collective investment schemes (FCIS) that are authorised in other jurisdictions and wish to operate an FCIS in Australia.

It explains when we may exercise some of our exemption and modification powers under the *Corporations Act 2001* (Corporations Act) to grant relief to FCIS operators from registration, licensing and certain product disclosure requirements.

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 version was issued in June 2012 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 178, issued May 2004, rebadged as a regulatory guide 5 July 2007
- Superseded Policy Statement 65 and PS 136.34(b) and PS 136.52 of Policy Statement 136 *Managed investments: Discretionary powers and closely related schemes*, rebadged as a regulatory guide 5 July 2007

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC can grant discretionary relief to foreign collective investment scheme (FCIS) operators authorised in other jurisdictions, to enable them to operate in Australia without being subject to all the usual regulatory requirements.

We may give three types of relief to an FCIS operator:

- registration relief;
- licensing relief; and
- product disclosure relief.

This guide discusses:

- our approach to granting relief (see Section B);
- the types of relief available (see Section C);
- how to obtain relief (see Section D); and
- complying with the conditions of relief (see Section E).

Discretionary relief for FCIS operators

RG 178.1 Generally, if you operate a ‘managed investment scheme’ (as collective investment schemes are known in Australia), you will be subject to certain regulatory requirements, including registration, licensing and product disclosure requirements, unless relief is granted.

Note: The term ‘managed investment scheme’ does not include corporations: see Appendix 1. This guide also deals with relief for corporations that are investment companies.

RG 178.2 Many collective investment schemes are ‘managed investment schemes’ under the *Corporations Act 2001* (Corporations Act). They are regulated by ASIC under Chs 5C and 7, which require:

- (a) some managed investment schemes to be registered and to conform with certain structural and compliance requirements (registration requirements);
- (b) responsible entities of registered schemes to be licensed (licensing requirements); and
- (c) certain disclosures to be made to retail investors who invest in registered managed investment schemes (product disclosure requirements).

Note: References in this guide to sections (s), chapters (Chs) and parts (Pts) are to the Corporations Act.

Our approach to granting relief

RG 178.3 Section B discusses when we will use our exemption or modification powers to grant an FCIS operator relief.

RG 178.4 Generally this is *only* if:

- (a) the overseas regulatory regime which the foreign collective investment scheme (FCIS) operator is subject to, is sufficiently equivalent to the Australian regulatory regime for registered managed investment schemes or, for disclosure relief, its disclosure regulatory regime is sufficiently equivalent to the Australian disclosure regulatory regime (see RG 178.16–RG 178.28);

Note: If a jurisdiction has been previously assessed as sufficiently equivalent, we will take this into account when assessing any future applications relating to that jurisdiction.

- (b) there are effective cooperation arrangements between the overseas regulatory authority and ASIC (see RG 178.29–RG 178.36);
- (c) adequate rights and remedies are practically available to Australian investors (see RG 178.37–RG 178.39); and
- (d) the FCIS operator meets all the conditions of relief for the relevant exemption (see Section E).

Types of relief available

RG 178.5 Section C of this guide describes the three types of relief available to an FCIS operator wishing to operate a scheme in Australia: registration relief, licensing relief and product disclosure relief. Relief may be provided under a class order or an individual relief instrument, depending on the applicant(s).

How to apply for relief

RG 178.6 Section D sets out what an applicant needs to do to apply for relief.

RG 178.7 We have also included two appendices to assist those wishing to apply for relief:

- (a) *Appendix 1* sets out our interpretation of the Corporations Act as it applies to an FCIS; and
- (b) *Appendix 2* sets out examples of questions about an FCIS operator's overseas regulatory regime that an applicant should generally address.

RG 178.8 This guide deals only with applications for relief received from:

- (a) a body corporate that is an FCIS;
- (b) an operator of a managed investment scheme that is an FCIS; or
- (c) an industry association.

RG 178.9 If an overseas regulatory authority wishes to initiate an approval process for the purposes of obtaining relief for a group of FCIS operators regulated by them, it should contact us to express its interest and discuss an appropriate process. In considering an application from an overseas regulatory authority, we will be guided by the approach in Regulatory Guide 54 *Principles for cross-border financial regulation* (RG 54) and will consider whether it would be appropriate to pursue a mutual recognition arrangement with that authority in the circumstances.

Note: New Zealand issuers wishing to offer securities or interests in collective investment schemes in Australia may do so under the Trans-Tasman mutual recognition scheme, which allows an issuer to use one disclosure document prepared under regulations in New Zealand, provided that they comply with some minimal entry and ongoing requirements in Australia. For more information, see Regulatory Guide 190 *Offering securities in New Zealand and Australia under mutual recognition* (RG 190). Another example of a mutual recognition arrangement includes the *Declaration of mutual recognition* entered into by ASIC and the Hong Kong's Securities and Futures Commission, under which each regulator agreed to reduce regulatory duplication around the sale of retail funds to investors in each other's market.

RG 178.10 We may provide an opportunity for public comment on a proposed extension of class order relief under this guide. For example, we may invite comment on whether there is any reason to believe that the overseas regulatory regime is not sufficiently equivalent to Australia's regulatory regime.

Complying with the conditions of relief

RG 178.11 Standard conditions of relief will be imposed on all FCIS operators that have relief under this policy: see Section E. These standard conditions fall into two categories:

- (a) standard regulatory conditions; and
- (b) standard investor protection conditions.

RG 178.12 The standard conditions are intended to:

- (a) provide enough information for us to assess whether the FCIS operator is complying with the conditions of its authorisation and other aspects of the overseas regulatory regime and to take appropriate action to remove relief from an FCIS operator when there is material non-compliance with the overseas regulatory regime;
- (b) help investors resident in Australia to enforce their legal rights; and
- (c) help us enforce the law and our conditions of relief, both under our own powers and in cooperation with the FCIS operator's overseas regulatory authority.

RG 178.13 We may also impose further conditions on product disclosure relief and/or tailored conditions of relief in particular circumstances.

B Our approach to granting relief

Key points

For an FCIS operator to be eligible for conditional relief from registration and licensing requirements, and certain product disclosure requirements:

- the relevant overseas regulatory regime must be sufficiently equivalent to the Australian regulatory regime;
- the relevant overseas regulatory authority must have effective cooperation arrangements with ASIC; and
- investors resident in Australia must have access to adequate rights and remedies.

General approach

- RG 178.14 If an FCIS operator wishes to operate a managed investment scheme in Australia or offer its securities, we will provide conditional relief from registration and licensing requirements, and certain product disclosure requirements, to the FCIS operator where:
- (a) the relevant overseas regulatory regime is, and continues to be, sufficiently equivalent to the Australian regulatory regime for registered managed investment schemes or, for disclosure relief, its disclosure regulatory regime is sufficiently equivalent to the Australian disclosure regulatory regime (see RG 178.16–RG 178.28);
 - (b) we have effective cooperation arrangements with the relevant overseas regulatory authority (see RG 178.29–RG 178.36); and
 - (c) adequate rights and remedies are practically available to investors who are resident in Australia if the FCIS operator breaches the relevant provisions of its overseas regulatory regime or, for disclosure relief, its disclosure regulatory regime (see RG 178.37–RG 178.39).

Note: For details on how to apply for relief, see Section D. For details on conditions of relief, see Section E.

- RG 178.15 Our approach to granting relief to an FCIS operator from the Corporations Act provisions is guided by RG 54 and the IOSCO Objectives and Principles of Securities Regulation.

‘Sufficient equivalence’ of overseas regulatory regime

- RG 178.16 Relief may mean that the integrity of Australian markets and the protection of investors resident in Australia depend on an overseas regulatory regime. To ensure that there are no regulatory or enforcement gaps, it is important that the relevant overseas regulatory regime delivers regulatory outcomes sufficiently equivalent to our own regulatory regime.
- RG 178.17 We have derived our outcomes-based test for being ‘sufficiently equivalent’ from Principle 1 of RG 54. In doing so, we consider equivalence largely from the point of view of:
- (a) the protection of investors resident in Australia;
 - (b) the integrity of Australian markets; and
 - (c) the reduction of systemic risk in the Australian financial system.
- RG 178.18 The following criteria are used to assess equivalence. Regulation by an overseas regulatory regime responsible for an FCIS is sufficiently equivalent to regulation by ASIC if that overseas regulatory regime:
- (a) is clear, transparent and certain (see RG 178.19–RG 178.20);
 - (b) is consistent with the IOSCO Collective Investment Scheme (CIS) Principles and the IOSCO Objectives and Principles of Securities Regulation (see RG 178.21–RG 178.22);
 - (c) is adequately enforced in the home jurisdiction (see RG 178.23–RG 178.25); and
 - (d) achieves the investor protection and market integrity outcomes that the Australian regulatory regime seeks to achieve for registered managed investment schemes (see RG 178.26–RG 178.28).

Clear, transparent and certain

- RG 178.19 The equivalence test means that we will assess the outcomes of the overseas regulatory regime against those of the Australian regime. This includes testing whether the overseas regime is:
- (a) a ‘clear’ regulatory regime—that is, one that is clearly articulated and easily understood;
 - (b) a ‘transparent’ regulatory regime—that is, where the rules, policies and practices are readily available to, and known by, all relevant persons; and
 - (c) a ‘certain’ regulatory regime—that is, one that is consistently applied and is not subject to indiscriminate application or changes.

Note: See Principle 7 of RG 54 for further details.

- RG 178.20 To facilitate our assessment of an overseas regulatory regime, we may require either:
- (a) an English translation of any relevant parts of the regulatory regime; and/or
 - (b) independent verification of the relevant details of the regulatory regime.

Note: If we seek verification of any English translation or other relevant details of an overseas regulatory regime, we will require the applicant to meet the costs of such verification.

Consistent with IOSCO CIS Principles and IOSCO Objectives and Principles of Securities Regulation

- RG 178.21 We require an overseas regulatory regime to be consistent with the IOSCO CIS Principles and IOSCO Objectives and Principles of Securities Regulation. In assessing whether an overseas regulatory regime meets these standards, we will consider whether:
- (a) the overseas regulatory authority has assessed its regulatory regime against the IOSCO CIS Principles and IOSCO Objectives and Principles of Securities Regulation and has reasonably determined that the regulatory regime broadly complies with them; and
 - (b) other international organisations have assessed the regulatory regime against the IOSCO CIS Principles and IOSCO Objectives and Principles of Securities Regulation and have reasonably determined that the regulatory regime broadly complies with them. For example, the International Monetary Fund, the World Bank and the Financial Stability Board all assess national financial systems against these objectives and principles.

- RG 178.22 The Australian regulatory regime is measured against, and complies with, the IOSCO CIS Principles and the IOSCO Objectives and Principles of Securities Regulation. An overseas regulatory regime would need to share a similar regulatory philosophy. Adherence to these objectives and principles would be an indication, at least at a high level, of equivalence.

Note: See Principle 8 of RG 54 for further details.

Adequately enforced

- RG 178.23 A regulatory regime is adequately enforced if the regulatory authority:
- (a) has sufficient powers of investigation and enforcement;
 - (b) has sufficient resources to use those powers;
 - (c) uses those powers and resources consistently to promote compliance with its regulatory regime; and
 - (d) operates within a legal system that is independent and has a well-founded reputation for integrity.

RG 178.24 We will assess the adequacy of an overseas regulatory regime's enforcement capability with reference to:

- (a) the international reputation of that regulatory regime;
- (b) any IOSCO assessments of the regulatory regime, including any self-assessments or assessments by other IOSCO members; and
- (c) any generally available assessments of the regulatory regime by international financial institutions or other international organisations, such as the International Monetary Fund and World Bank *Financial Sector Assessment Program* reports.

RG 178.25 It is unlikely that an overseas regulatory regime that is infrequently or inconsistently enforced will provide sufficiently equivalent regulatory outcomes to the Australian regulatory regime. An inadequately enforced regulatory regime will not reliably maintain market integrity or protect investors.

Note: See Principle 9 of RG 54 for further details.

Achieving investor protection and market integrity outcomes

RG 178.26 Whatever its regulatory mechanisms, a sufficiently equivalent regulatory regime must achieve regulatory *outcomes* that are assessed as sufficiently equivalent to the Australian regulatory regime. We will assess whether these outcomes are sufficiently equivalent from the perspective of Australian investors, Australian markets and the Australian financial system.

RG 178.27 In assessing equivalence, we will consider the particular regulatory outcomes achieved by the Australian regime concerning:

- (a) the registration of managed investment schemes and licensing of responsible entities when registration and licensing relief are sought; and
- (b) the fundraising or financial product disclosure provisions when disclosure relief is sought.

RG 178.28 The outcomes achieved by the Australian regulatory regime through scheme registration and licensing are set out at RG 178.46–RG 178.47. The outcomes achieved through our regulation of product disclosure are set out at RG 178.68.

Note: See Principle 10 of RG 54 for further details.

Effective cooperation arrangements

RG 178.29 We will grant relief only if we are satisfied that there are effective cooperation arrangements between the relevant overseas regulatory authority and ASIC. This is a matter for ASIC to decide, in consultation with the relevant overseas regulatory authority. It cannot be dealt with by FCIS operators in an application for relief.

- RG 178.30 Effective cooperation arrangements will usually be in the form of a Memorandum of Understanding (MOU), or some other documented arrangement, although they may be established or supplemented by less formal arrangements.
- RG 178.31 Effective cooperation arrangements will provide for:
- (a) the prompt sharing of information by the relevant overseas regulatory authority; and
 - (b) effective cooperation on:
 - (i) supervision and investigation; and
 - (ii) enforcement.
- RG 178.32 We will also rely on effective cooperation arrangements with the relevant overseas regulatory authority to help inform us of:
- (a) significant changes to the authorisation, licence or registration of an FCIS operator;
 - (b) significant exemptions or other relief an FCIS operator may obtain from the overseas regulatory regime;
 - (c) significant changes to the overseas regulatory regime; and
 - (d) significant investigation, enforcement or other disciplinary activity against an FCIS operator operating in Australia with the benefit of relief under this guide.
- Note: We will also impose conditions on FCIS operators to ensure, among other things, that they notify us of any significant investigation, enforcement or disciplinary action against them in an overseas jurisdiction: see RG 178.83.
- RG 178.33 Effective cooperation arrangements help us to be confident that the overseas regulatory authority will, if requested by us, take appropriate action to protect investors resident in Australia, maintain the integrity of Australian markets for financial services and financial products, and reduce systemic risk in the Australian financial system. These actions should be as effective as actions the overseas regulatory authority would take to protect investors and the integrity of markets, and reduce systemic risk in its own jurisdiction.
- RG 178.34 We consider that, particularly in the supervision of FCIS operators, effective cooperation arrangements with the overseas regulatory authority will mean that we have direct and continuing access to the relevant officers of that authority to enable prompt exchange of information and effective cooperation.
- RG 178.35 Generally, effective cooperation arrangements will not be possible unless the overseas regulatory authority has the power under its regulatory regime to cooperate with us in these ways.

RG 178.36 When assessing whether we have effective cooperation arrangements with an overseas regulatory authority, we will take into account whether:

- (a) there are supervisory cooperation arrangements between the overseas regulatory authority and ASIC that are consistent with the IOSCO Principles Regarding Cross-Border Supervisory Cooperation;

Note: These principles provide a framework for regulators seeking to establish supervisory cooperation agreements. Supervisory cooperation involves the day-to-day exchange of information for general supervisory and oversight purposes (i.e. not just for enforcement purposes).

- (b) the overseas regulatory authority is a signatory to Appendix A of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU); and

Note: The IOSCO MMOU sets an international benchmark for cross-border cooperation between securities regulators on enforcement matters. In general, we consider IOSCO MMOU Appendix A signatory status as a good indicator of effective cooperation. However, we will also consider IOSCO MMOU Appendix B signatory status as an indicator together with the particular circumstances of the relevant overseas regulatory authority.

- (c) there is an existing MOU between the overseas regulatory authority and ASIC that creates an effective cooperation arrangement.

Note: See Principle 3 of RG 54 for further details.

Investor access to rights and remedies

RG 178.37 We consider that investors acquiring interests in an FCIS in Australia should have practical access to rights and remedies that are equivalent to the rights and remedies available to investors in comparable Australian managed investment schemes or bodies corporate. In assessing this, we will consider whether the investor is retail or wholesale.

RG 178.38 Under the Corporations Act, retail investors in registered managed investment schemes have access to non-judicial remedies. Under s912A(2), retail investors have access to internal dispute resolution (IDR) and external dispute resolution (EDR) processes.

RG 178.39 In some instances, an FCIS operator's overseas regulatory regime will not give investors in Australia practical access to rights and remedies equivalent to those available in comparable Australian managed investment schemes or bodies corporate. In these circumstances, we will require the FCIS operator to comply with a modified version of those parts of the Australian regulatory regime that relate to remedies. For example, in these circumstances, we may require FCIS operators to join an Australian-approved EDR scheme: see RG 178.94.

Note: See Principle 5 of RG 54 for further details.

C Types of relief available

Key points

There are three types of relief available to an FCIS operator wishing to operate in Australia: registration relief, licensing relief and product disclosure relief.

Relief may be provided under a class order or an individual relief instrument.

General approach

- RG 178.40 Class order relief or individual relief may be available. Class order relief applies to multiple applications, a joint application or an application through an industry association for a group of FCIS regulated by a particular overseas regulatory authority. Individual relief is specific to a particular FCIS operator and its intended operation in Australia.
- RG 178.41 We may give three types of relief under the Corporations Act to an FCIS operator wishing to operate a scheme in Australia (see Table 1):
- (a) registration relief—that is, relief from the requirement under s601ED for an FCIS to be registered in Australia;
 - (b) licensing relief—that is, relief from the requirement under s911A(1) for an FCIS operator to hold an Australian financial services (AFS) licence for certain activities; and
 - (c) product disclosure relief—that is, relief from the requirement for disclosure under Pt 7.9 or Ch 6D.

Table 1: Types of relief available to an FCIS operator

Type of relief	Nature of relief	Conditions of relief
Registration relief	Relief from the requirement under s601ED for an FCIS to be registered in Australia.	Standard conditions of relief for all FCIS operators: see RG 178.83–RG 178.94. Tailored conditions may be imposed, as appropriate, for particular FCIS operators: see RG 178.96–RG 178.97.
Licensing relief	Relief from the requirement under s911A(1) for an FCIS operator to hold an AFS licence for certain activities.	Standard conditions of relief for all FCIS operators: see RG 178.83–RG 178.94. Tailored conditions may be imposed, as appropriate, for particular FCIS operators: see RG 178.96–RG 178.97.

Type of relief	Nature of relief	Conditions of relief
Product disclosure relief	Relief from the requirement for disclosure under Pt 7.9 or Ch 6D.	<p>Standard conditions of relief for all FCIS operators: see RG 178.83–RG 178.94.</p> <p>Specific conditions for product disclosure relief: see RG 178.95.</p> <p>Tailored conditions may be imposed, as appropriate, for particular FCIS operators: see RG 178.96–RG 178.97</p>

Registration relief

- RG 178.42 Under s601QA, we have the power to exempt a person from the provisions of Ch 5C. We can therefore exempt an FCIS operator from the statutory requirement for registration of a managed investment scheme under s601ED.
- RG 178.43 Relief from s601ED will give an FCIS operator an exemption from the obligations to comply with Ch 5C and the associated requirements for registered schemes operating in Australia. For example:
- (a) the provisions relating to the register of members in Ch 2C; and
 - (b) the financial reporting requirements in Ch 2M.
- RG 178.44 Where a managed investment scheme is not registered because of registration relief, the provisions for periodic reports (s1017D) and cooling off (Div 5 of Pt 7.9) will not apply. This is appropriate where product disclosure relief is also provided under this guide. Where it is not, we will require compliance with s1017D and Div 5 of Pt 7.9 as if the FCIS were a registered scheme.

When will we give registration relief?

- RG 178.45 We will provide relief from s601ED when the criteria in RG 178.14 are met. In particular, we will grant relief from s601ED if the overseas regulatory regime of the FCIS operator delivers regulatory outcomes sufficiently equivalent to the Australian regulatory regime for registered schemes, including the licensing of responsible entities.

Regulatory outcomes for registration relief

- RG 178.46 When assessing the FCIS operator's overseas regulatory regime for the purposes of giving relief from s601ED, we will measure the equivalence of the overseas regulatory regime against the following regulatory outcomes. The overseas regulatory regime must promote the following outcomes:
- (a) scheme operators and promoters, and their representatives, act efficiently, honestly and fairly;

- (b) scheme operators and promoters, and their representatives, act with due care and skill, and in the best interests of investors;
- (c) scheme operators and their representatives are competent;
- (d) scheme operators have sufficient financial and other resources to operate the scheme;
- (e) investors can understand the nature of their interests in the scheme and their legal rights; and
- (f) client assets are protected from the risk of loss and insolvency of the operator of the scheme.

RG 178.47 These outcomes reflect the underlying aims of the managed investments regime and the responsible entity licensing regime in the Corporations Act (including the dealing and custodial aspects of Pt 7.6) other than for product disclosure.

Licensing relief

RG 178.48 Under Australian law, if a managed investment scheme is registered, its operator must have an AFS licence to operate a registered scheme under Pt 7.6. If the scheme is not registered, the operator may still require a licence to operate a custodial or depository service. In the course of operating a managed investment scheme, whether or not it is registered, the operator may also require a licence to:

- (a) deal in the interests in the scheme;
- (b) deal in any financial products that it deals in on behalf of members of the scheme (i.e. the scheme assets); or
- (c) provide financial product advice about interests in the scheme.

RG 178.49 A foreign investment company may require an AFS licence to issue its securities or to provide financial product advice about its securities.

RG 178.50 An FCIS operator may be eligible for exemptions under the Corporations Act and Corporations Regulations 2001 (Corporations Regulations) for the following activities:

- (a) marketing interests in the FCIS to investors through a licensed Australian intermediary (see s911A(2)(b));
- (b) giving general advice to retail investors by means of a Product Disclosure Statement (PDS) (see s766B(1A) and 766B(9));
- (c) giving advice to investors by means of certain advertisements (see s911A(2)(k) and reg 7.6.01(1)(o)); and
- (d) providing financial services to wholesale clients where the overseas regulation of those financial services has been recognised by ASIC under Regulatory Guide 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers* (RG 176) (see s911A(2)(h)).

When will we give licensing relief?

- RG 178.51 If the FCIS operator has relief from the registration requirement in s601ED, we may also use our exemption power in s911A(2)(1) to grant relief to an FCIS operator from the requirement to hold an AFS licence for the following activities:
- (a) dealing in financial products that are scheme assets on behalf of its investors other than by issuing financial products;
 - (b) dealing in derivatives or foreign exchange contracts for the purpose of managing a financial risk to the FCIS that arises in the course of its operation if dealings in derivatives or foreign exchange contracts with clients in Australia is not a significant part of the FCIS operator's business; and
 - (c) holding scheme assets that are financial products or beneficial interests in financial products (i.e. providing a custodial or depository service).
- RG 178.52 We will use our exemption power in s911A(2)(1) to give relief to an FCIS operator from the requirement to hold an AFS licence in order to provide general advice about interests in the FCIS in an offer document that must be supplied, in place of a PDS or a prospectus, under our relief for product disclosure: see RG 178.63–RG 178.68. We will treat the offer document as if it were an exempt document (e.g. a PDS).
- RG 178.53 For other activities, an FCIS operator must be licensed under the AFS licensing regime, unless an exemption applies: see RG 178.50.

Dealing and custodial and depository services

- RG 178.54 In managing scheme assets that are financial products on behalf of investors in Australia, FCIS operators may be subject to the requirement to hold an AFS licence authorising them to deal in a financial product, or provide a custodial or depository service, even if those assets are not located in Australia: see s911D, 766A(1) and 766C.
- RG 178.55 Before we register a managed investment scheme, we need to be satisfied that the proposed responsible entity of the scheme has the appropriate AFS licence authorisations to operate the scheme. The licensing regime aims to promote appropriate dealings in and custody of scheme assets, including assets that are financial products. When assessing whether the FCIS operator's overseas regulatory regime is sufficiently equivalent for the purposes of registration relief, we will take into account whether the FCIS's overseas regulatory regime for dealing and custody achieves the outcomes we identify in RG 178.46–RG 178.47. This is because dealing in and custody of scheme assets are integral to the operation of a managed investment scheme.

- RG 178.56 If the FCIS operator's overseas regulatory regime is sufficiently equivalent for the purposes of registration relief, we will generally also give the FCIS operator relief from the requirement to hold an AFS licence to:
- (a) provide a financial service to investors by dealing in financial products; or
 - (b) hold financial products or beneficial interests in financial products on trust for or on behalf of investors.

Note: We will not give the FCIS operator relief from the obligation to hold an AFS licence to issue interests in the FCIS: see RG 178.60(b).

Issuing derivatives and foreign exchange contracts

- RG 178.57 Regulation 7.6.01(1)(m) provides that a person does not need an AFS licence for dealings in derivatives or foreign exchange contracts for the purpose of managing risks arising from the ordinary course of a business, where the person does not deal in derivatives or foreign exchange contracts as a significant part of their business. However, this exemption only applies to persons who act on their own behalf. In general, if a person is acting on behalf of another, an AFS licence may be needed to protect the interests of those for whom the person acts.
- RG 178.58 We will give the same exemption from the requirement to hold an AFS licence as applies under reg 7.6.01(1)(m) to the operators of an FCIS who have been given registration relief. However, unlike in reg 7.6.01(1)(m), we will allow the dealing to be entered into on behalf of others. This is because we only give an FCIS operator registration and AFS licensing relief if we are satisfied that the overseas regulatory regime sufficiently protects the FCIS's investors in any event.

General advice in foreign offer documents

- RG 178.59 An FCIS operator may use a substitute offer document regulated under its overseas regulatory regime, rather than a PDS or, for foreign investment companies, a prospectus if it is granted product disclosure relief. If a substitute offer document is given because of relief under this guide, we will treat that document as if it were an exempt document under s766B. As a result, no AFS licence is needed for giving the document if it only contains general advice.

Licensing requirements for other financial services

- RG 178.60 If the FCIS operator wishes to provide any financial services not covered by an exemption or by the specific relief described above, the FCIS operator must have an AFS licence to offer its financial services in Australia. Examples of activities that will require a licence include:
- (a) the provision of financial product advice (other than general advice in an offer document provided in accordance with our relief relating to interests in the FCIS); and
 - (b) the issue of interests in the FCIS by the FCIS operator to investors other than under an intermediary authorisation under s911A(2)(b).

- RG 178.61 Although we recognise that FCIS operators will often be subject to another regulatory regime for such financial services, we consider that an AFS licence is required for providing such financial services in Australia.
- RG 178.62 An FCIS operator may be eligible for an exemption for other financial services it provides to wholesale clients, where the FCIS operator is regulated by an overseas regulatory authority that is recognised for that service by ASIC under RG 176.

Product disclosure relief

- RG 178.63 We can give exemptions from, or modify, the operation of Pt 7.9, which governs product disclosure to retail investors, and Ch 6D, which governs disclosure about corporate fundraising: see s1020F and 741. We offer broad relief from Pt 7.9 and Ch 6D if the FCIS operator prepares its offer document for retail investors under a sufficiently equivalent regulatory regime.

When will we give product disclosure relief?

- RG 178.64 We will give product disclosure relief if we are satisfied that the criteria in RG 178.14 are met. In particular, we will grant product disclosure relief if the regulatory regime governing the FCIS offer document achieves sufficiently equivalent outcomes for Australian retail investors as under Pt 7.9 or Ch 6D: see RG 178.68.

Note: If we consider that the disclosure regulatory regime in an FCIS operator's home jurisdiction is no longer sufficiently equivalent, we will generally revoke the FCIS operator's relief. We will endeavour to notify the FCIS operator before removing the benefit of relief on this basis.

What product disclosure relief will we give?

- RG 178.65 The product disclosure relief is from Pt 7.9 or Ch 6D and generally includes the PDS and prospectus requirements, and the requirement for ongoing product disclosure. However, to ensure that investors have practical access to the same legal rights and remedies as for an Australian managed investment scheme, we will not give relief from certain legislative provisions in Pt 7.9, and will apply them as if the relevant offer document were a PDS. These provisions of the Corporations Act are:
- (a) s1018A (advertising); and
 - (b) s1020E (ASIC's power to issue a stop order).

Note: Where we give relief from Ch 6D for a foreign investment company, we will include conditions to this effect.

- RG 178.66 We consider that the restrictions on advertising in s1018A will not affect advertising of FCIS products outside Australia, if the advertising does not target persons in Australia. We consider that an offer document or advertisement is targeting persons in Australia if it:
- (a) is published, distributed or made available in ways or locations that are calculated to draw it to the attention of persons in Australia;
 - (b) contains material that is specifically relevant to persons in Australia; or
 - (c) relates to an offer made in Australia by any other means, unless it relates to an advertisement in a foreign publication that has incidental circulation in Australia.

Note: See Regulatory Guide 141 *Offers of securities on the internet* (RG 141) for guidance on our approach to internet offers of financial products generally.

- RG 178.67 The provisions of our stop order power are preserved so that we can enforce Australian laws. However, the provisions in Pt 6D.3 and Div 7 of Pt 7.9 (dealing with matters such as civil remedies and criminal penalties) will not apply. This is because, if we give relief, it implies that the FCIS operator's overseas regulatory regime should provide an equivalent means of enforcement.

Regulatory outcomes for product disclosure relief

- RG 178.68 In assessing the FCIS operator's overseas regulatory regime for the purpose of giving relief from Pt 7.9 or Ch 6D, we consider that the overseas regulatory regime must:
- (a) promote confident and informed decision making by investors about the suitability of a financial product for them; and
 - (b) ensure that investors are given all the information they reasonably require to make a decision about whether to buy, sell or hold the relevant financial product.

Note: See Principle 10 of RG 54 for further details.

D How to apply for relief

Key points

There is no prescribed application form for applying for relief – however, we require certain information to be provided as minimum in assessing an application for relief.

The information required for us to assess an application is outlined in Appendix 2. Occasionally, we may need to ask for additional information.

To properly assess an application for relief, we need to understand how managed investments are regulated in the relevant overseas regulatory regime.

If an FCIS operator is already covered by an existing class order, it must notify ASIC that it is relying on that relief.

What you need to do

RG 178.69 The process for relief varies depending on the type of FCIS operator seeking relief. The different processes are set out in Table 2.

Table 2: How to apply for relief

Category	How to apply for relief
Where a class order applies: FCIS operators from jurisdictions listed in class orders previously issued under RG 178	<p>Certain overseas regulatory regimes have been assessed as meeting the criteria in RG 178.14. These regimes are identified in the following class orders: [CO 04/526] <i>Foreign collective investment schemes</i>, [CO 07/753] <i>Singaporean collective investment schemes</i>, and [CO 08/506] <i>Hong Kong collective investment schemes</i>.</p> <p>FCIS operators regulated by those overseas regulatory regimes and who are seeking to rely on class order relief must comply with the requirements in RG 178.73 and Section E of this guide.</p> <p>They should also refer to the types of relief available under the relevant class order, as a separate application for relief may be needed if the class order does not cover all the exemptions sought. For example, [CO 04/526] does not cover product disclosure relief.</p> <p>FCIS operators from New Zealand should refer to Ch 8 and RG 190 for details of the Trans-Tasman mutual recognition scheme.</p> <p>We will review the class order if there have been significant changes since our assessment that render a regime no longer sufficiently equivalent.</p>
FCIS operators from jurisdictions not previously assessed under RG 178 and where no class order applies	The applicant will have to make an application that complies with RG 178.75–RG 178.76.

- RG 178.70 To apply for relief, lodge the application in writing by email to Applications@asic.gov.au. Make sure your application:
- (a) includes *all* the information in RG 178.75–RG 178.76;
 - (b) complies with Regulatory Guide 51 *Applications for relief* (RG 51); and
 - (c) includes the prescribed fee (see Information Sheet 30 *Fees for lodging documents* (INFO 30) on our website at www.asic.gov.au).

You can also contact ASIC on 1300 300 630 (or +61 3 5177 3988 if dialling from overseas) for further information and assistance if needed.

- RG 178.71 If you want to take advantage of existing class order relief, you must notify us:
- (a) as soon as practicable; and
 - (b) in writing, addressed to Applications@asic.gov.au.

Note: The usual application fees do not apply.

- RG 178.72 By relying on existing class order relief, you are agreeing to comply with all of the conditions attached to that class order.

What information will we require?

Where a class order applies

- RG 178.73 To rely on a class order that provides relief from registration, licensing or product disclosure, an FCIS operator must give ASIC certain documents, including:
- (a) evidence of the FCIS operator's authorisation (e.g. written confirmation from the overseas regulatory authority that the scheme is authorised to operate in that jurisdiction);

Note: We may be willing to rely on a publicly available register maintained by the overseas regulatory authority in lieu of written confirmation.
 - (b) a deed of the FCIS operator, for the benefit of, and enforceable by, ASIC, the other persons referred to in s659B(1), and any investor in the FCIS who is resident in Australia, that provides that:
 - (i) the deed is irrevocable, except with the prior written consent of ASIC (only to be given in exceptional circumstances);
 - (ii) the FCIS operator submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC (including under s50 of the *Australian Securities and Investments Commission Act 2001*) or any investor in the FCIS who is resident in Australia and, in relation to proceedings relating to a financial services law, by any person referred to in s659B(1);

- (iii) the FCIS operator agrees to comply with any order of an Australian court on any matter concerning the provision of the financial services; and
 - (iv) the FCIS operator agrees that, on written request of either its overseas regulatory authority or ASIC, it will give written consent and take all other practicable steps to enable its overseas regulatory authority to disclose to ASIC, and ASIC to disclose to the overseas regulatory authority, any information or document that they have concerning the FCIS operator;
- (c) written consents to the disclosure by the FCIS operator's overseas regulatory authority to ASIC, and ASIC to the overseas regulatory authority, of any information or document they have concerning the FCIS operator (the consents must be in such form (if any) as ASIC specifies in writing);
 - (d) the most recent financial statements of any FCIS proposed to be operated in Australia, any audit report, and any subsequent public disclosures by that FCIS about its financial position or compliance with the overseas regulatory regime or disclosure regulatory regime;
 - (e) a copy of the most recent offer document relating to the FCIS;
 - (f) a copy of the constitution or other governing rules of the FCIS;
 - (g) a description of how the FCIS operator will plan for, monitor and assess its compliance with the conditions of any relief and any Australian laws to which it will be subject;
 - (h) a description of the FCIS operator's intended financial services activities in Australia; and
 - (i) information about the interests in the FCIS that the FCIS operator intends to issue in Australia and how it plans to seek members in Australia.

RG 178.74 We may exclude the relief from applying to an FCIS operator if we consider that the objectives of this policy are not satisfied at any time, whether on the basis of the information provided under RG 178.73, because information that we request is not provided, or otherwise. The relief will automatically lapse if there is a material non-compliance with any condition and the operator is or should be aware of the non-compliance, unless we notify the operator that the relief continues (on conditions or otherwise).

Where no class order applies

RG 178.75 To apply for individual registration, licensing or product disclosure relief, a person seeking relief should check whether there are any effective cooperation arrangements between ASIC and their overseas regulatory authority. In general, if such an arrangement exists, the applicant should

provide documentation demonstrating that, because of regulation in their home jurisdiction, they are entitled to the relief under this guide: see Table 5 in Appendix 2. Where product disclosure relief is sought, applicants should also address the matters in Table 6 in Appendix 2.

RG 178.76 At the time of application, the applicant should also provide ASIC with all the information that would be required if a class order had been made relating to the FCIS operator's overseas regulatory regime: see RG 178.73.

Note: See Information Sheet 93 *Practical guidance for operators of foreign collective investment schemes seeking to offer in Australia* (INFO 93) for additional guidance.

Notifying your overseas regulatory authority

RG 178.77 We will ask the applicant for consent to allow us to notify their overseas regulatory authority of any information we have, including the fact of their application or reliance on a class order. In notifying the FCIS operator's relevant overseas regulatory authority, we may for example:

- (a) inform them about the content of the application; and
- (b) ask them questions about the applicant.

Additional information

RG 178.78 All information and documents provided in an application or under a class order must be in English. If they are not in English, a certified translation must be provided if required by ASIC. We may ask for an independent expert's verification of information provided about the overseas regulatory regime, to be provided at the applicant's cost.

Verification

RG 178.79 We will require an officer of the applicant, with the capacity to bind the applicant to:

- (a) declare that they have taken reasonable steps to ensure that, to the best of their knowledge, the information supplied in and with the application is complete and accurate; and
- (b) acknowledge that we may take action to verify that the statements and certifications made in the application are not false or misleading.

Processing your application

RG 178.80 The time it will take us to decide whether to grant relief will depend on the complexity of the application and the difficulty of assessing the equivalence of the overseas regulatory regime to the Australian regime.

RG 178.81 For an application for relief by an FCIS operator or an industry association, we will aim to process applications within 16 weeks of receiving all the information and documents required.

RG 178.82 It may take us longer to deal with an application if:

- (a) the application is particularly complex;
- (b) we negotiate cooperation arrangements with the relevant overseas regulatory authority;
- (c) we experience delays in obtaining the information we require from the applicant, the overseas regulatory authority or the independent overseas expert; or
- (d) we are waiting for a response to a request for further information.

E Complying with the conditions of relief

Key points

Standard conditions of relief apply to registration, licensing and product disclosure relief for FCIS operators operating in Australia. These conditions fall into two categories: standard regulatory conditions and standard investor protection conditions.

We may also impose further conditions on product disclosure relief and/or tailored conditions of relief in particular circumstances.

Standard regulatory conditions

RG 178.83 We will apply the following regulatory conditions to any relief granted:

- (a) relief will continue only while the relevant conduct of the FCIS operator is authorised under its overseas regulatory regime;

Note: For our interpretation of 'authorised', see RG 178.84–RG 178.85.

- (b) the FCIS operator must notify us as soon as practicable and in any event within 15 business days from the date it knew or should reasonably have known of the following notifiable matters:
 - (i) any significant change to the authorisation granted by the relevant overseas regulatory authority relating to the operation of the FCIS, including any exemptions or other relief granted to the FCIS operator; and
 - (ii) the details of each significant investigation, disciplinary or enforcement action against the FCIS operator in an overseas jurisdiction;

Note: For a discussion of what we mean by 'significant' investigation, enforcement or disciplinary action, see RG 178.86–RG 178.87.

- (c) the FCIS operator must register as a foreign company under Div 2 of Pt 5B.2 (and appoint a local agent under s601CF);

Note: If the FCIS operator is not registrable as a foreign company under Div 2 of Pt 5B.2, we will need to impose tailored conditions to ensure that Australian investors are adequately protected.

- (d) the FCIS operator must submit to the non-exclusive jurisdiction of the Australian courts in regard to any matter concerning the FCIS;
- (e) the FCIS operator must comply with any direction of an Australian court;
- (f) the FCIS operator must give written consent and take all other practicable steps to enable its overseas regulatory authority to disclose to ASIC, and ASIC to disclose to its overseas regulatory authority, any information or document they have that relates to the FCIS operator; and

- (g) the FCIS operator must promptly give ASIC each annual financial statement of each FCIS operated under the exemption when the financial statement is published, together with any associated audit and other reports.

What do we mean by ‘authorised’?

RG 178.84 We consider an FCIS operator to be authorised to operate an FCIS if it:

- (a) may lawfully operate the FCIS in its home jurisdiction because of any licence, approval, authorisation or registration by its overseas regulatory authority; and

Note: The FCIS operator must be positively authorised to operate an FCIS and not be merely permitted to operate an FCIS because it is exempt under its overseas regulatory regime from requiring an AFS licence or other regulatory permission to operate the FCIS.

- (b) is subject to continuing regulatory oversight of how it operates the FCIS by its overseas regulatory authority.

RG 178.85 If an FCIS’s authorisation to operate as a collective investment scheme in the home jurisdiction is lost or removed, relief will no longer apply.

What do we mean by ‘significant’ investigation, enforcement or disciplinary action?

RG 178.86 A condition of our relief is the requirement to notify us of any significant investigation, enforcement or disciplinary actions against the FCIS operator in any overseas jurisdiction that are relevant to the financial services the FCIS operator provides.

RG 178.87 In determining whether an investigation, enforcement or disciplinary action is significant, FCIS operators should consider whether the investigation, enforcement or disciplinary action is serious enough that it may affect our assessment that the FCIS operator should continue to rely on relief from regulatory requirements under this guide. An investigation, enforcement or disciplinary action may be serious even if it relates to relatively minor breaches of the overseas regulatory regime, as those breaches may indicate inadequate compliance arrangements due to their number or frequency. Those unsure of whether an investigation, enforcement or disciplinary action is significant are encouraged to notify us of it.

Note: An investigation, enforcement or disciplinary action in an overseas jurisdiction does not have to be completed before it must be notified to us. It becomes notifiable when the FCIS operator knows, or should reasonably have known, of its existence.

What if the overseas regulatory regime ceases to be sufficiently equivalent?

RG 178.88 If we no longer consider that an FCIS operator's overseas regulatory regime is sufficiently equivalent to the Australian regime, we will generally revoke the FCIS operator's relief. We will endeavour to notify the FCIS operator before removing the benefit of relief on this basis.

Note: We do not anticipate that significant changes relevant to managed investment schemes that FCIS operators offer or intend to offer in Australia are likely to occur frequently.

RG 178.89 The types of changes that may result in an overseas regulatory regime ceasing to be sufficiently equivalent include changes to:

- (a) the regulatory structure in the overseas regulatory regime;
- (b) the supervisory arrangements for FCIS operators operating under the overseas regulatory authority;
- (c) the obligations or requirements imposed on FCIS operators in the overseas regulatory regime, particularly obligations or requirements relating to:
 - (i) honesty and fairness;
 - (ii) competence;
 - (iii) financial resources; and
 - (iv) risk assessment; and
- (d) the overseas regulatory authority's supervision or legislative responsibility for activities of the FCIS operator in Australia.

Note: This is not an exhaustive list. Relevant considerations will always depend on the applicable facts and circumstances.

Assistance to ASIC

RG 178.90 Another condition of relief is that the FCIS operator must comply with a written notice from ASIC directing it to lodge with ASIC a written statement containing specified information about any financial services provided by the FCIS operator.

Standard investor protection conditions

RG 178.91 We will impose the following investor protection conditions on relief:

- (a) the FCIS operator must maintain in Australia, at a place disclosed to investors resident in Australia, a register of investors resident in Australia and their contact details;
- (b) the FCIS operator must not:
 - (i) principally target investors resident in Australia in offering interests in its managed investment scheme, or, for a foreign investment company, its securities; or

- (ii) source more than 30% of the value of investments in the scheme or company from investors resident in Australia;

Note: See RG 178.92–RG 178.93 for further details.

- (c) the FCIS operator must have adequate internal complaints resolution procedures and be a member of either an Australian EDR scheme or an acceptable foreign EDR scheme;

Note: An acceptable foreign EDR scheme is an EDR scheme that meets the criteria in RG 178.94. If the FCIS operator is a member of an acceptable foreign EDR scheme, we will give relief from s1017G.

- (d) the FCIS operator must show prominently in any disclosure document or PDS given to any Australian *retail* investors:
 - (i) that the FCIS and its operator are regulated by the laws of a foreign jurisdiction, and that those laws differ from Australian laws;
 - (ii) that the rights and remedies available to Australian investors who acquire interests in the FCIS may differ from those of Australian investors acquiring interests in Australian managed investment schemes;
 - (iii) a brief description of the rights and remedies available to Australian investors under the overseas regulatory regime and how these rights and remedies can be accessed;
 - (iv) the nature of any special risks associated with cross-border investing, such as risks arising from foreign taxation requirements, foreign currency or time differences; and
 - (v) the nature and consequences of significant differences in the regulatory regime;

Note: If an FCIS operator obtains specific relief from the product disclosure requirements, additional disclosures are required under the specific conditions for that relief: see RG 178.95(d).

- (e) the FCIS operator must provide written disclosure containing prominent statements to the effect of paragraph (d)(i) to all *wholesale* investors in the scheme resident in Australia before they become a member; and
- (f) the FCIS operator must make available on request, to investors resident in Australia, any publicly available information about the FCIS that has been produced by, or on behalf of, the FCIS operator that relates to the FCIS, which is not otherwise available in Australia—the information must be provided in English and at no greater charge than applies in the home jurisdiction.

Targeting Australian investors

RG 178.92 Our relief is restricted to FCISs that are not principally targeted at investors resident in Australia. This is because it would be unreasonably burdensome for these schemes to operate in accordance with the Australian regulatory regime.

RG 178.93 We recognise that an operator may occasionally create a class of interests in a scheme to be marketed to investors in Australia. This will not necessarily mean that the FCIS operator's schemes are principally targeting Australian investors.

Internal and external dispute resolution

RG 178.94 In order to protect Australian retail investors, we require FCIS operators to have adequate IDR and EDR systems to serve the needs of Australian retail investors. FCIS operators can satisfy the EDR requirement in either of the following two ways. They can either:

- (a) join an ASIC-approved Australian EDR scheme; or
- (b) be a member of an acceptable foreign EDR scheme that, from the point of view of Australian investors, offers equivalent access and redress to an ASIC-approved Australian EDR scheme (equivalent foreign EDR scheme). In particular, we consider that an equivalent foreign EDR scheme must:
 - (i) be easily accessible to investors from Australia (e.g. offers internet access or call centre availability during Australian business hours);
 - (ii) be able to communicate with investors in English;
 - (iii) be no more costly to access than an ASIC-approved Australian EDR scheme; and
 - (iv) have jurisdiction (e.g. in terms of eligible complaints and monetary claims limits) and powers that are comparable with the appropriate ASIC-approved Australian EDR scheme (see Regulatory Guide 165 *Licensing: Internal and external dispute resolution* (RG 165)).

Note: If the FCIS operator joins an Australian EDR scheme, we will not give relief from s1017G (internal and external dispute resolution), and will apply that section as if the relevant offer document were a PDS. If the FCIS operator is a member of an acceptable foreign EDR scheme, we will give relief from s1017G.

Further conditions for product disclosure relief

RG 178.95 Relief from Pt 7.9 (financial product disclosure and other provisions relating to the issue, sale and purchase of financial products) and Ch 6D (fundraising) of the Corporations Act will be subject to the standard conditions in RG 178.83–RG 178.94, and to the following further conditions:

- (a) the FCIS operator must give an offer document in circumstances where it would have an obligation to give a PDS under s1012B and 1012C or a disclosure document under s706, 707 and 708;
- (b) the FCIS operator must:
 - (i) notify ASIC that the offer document is in use as soon as practicable, and in any event within five business days after a copy of the offer document is first given under paragraph (a);

- (ii) keep a copy of the offer document for seven years after it is first given under paragraph (a); and
- (iii) make a copy of the offer document available to ASIC if we ask for it within that seven-year period;
- (c) the FCIS operator must ensure that the offer document complies with the requirements of the FCIS operator's product disclosure overseas regulatory regime; and
- (d) the FCIS operator must ensure that the offer document prominently discloses:
 - (i) information about the FCIS operator's IDR system, covering complaints by investors and how that system may be accessed;
 - (ii) information about the EDR scheme that the FCIS operator has joined, and how that scheme may be accessed;
 - (iii) general information about any significant Australian taxation implications of interests of the kind offered; and
 - (iv) information about whether a cooling-off regime applies for acquisitions of interests in the FCIS (and whether the regime is provided for by law or otherwise).

Note: In addition to these disclosures, the offer document must also prominently display the disclosures required under our standard conditions of relief: see RG 178.91(d).

Tailored conditions of relief

RG 178.96 We may impose tailored conditions of relief in particular circumstances. For example:

- (a) we may impose tailored conditions that are appropriate to a type of scheme; or
- (b) if an overseas regulatory regime falls marginally short of certain Australian requirements, we may still grant relief but impose tailored conditions on the FCIS operator.

RG 178.97 However, we will not attempt to impose, by a broad set of conditions, a regime of regulation to supplement any significant limitations in an overseas regulatory regime.

Summary of our relief for an FCIS operator

RG 178.98 Table 3 summarises the relief available and applicable conditions for FCIS operators wishing to operate a scheme in Australia.

Table 3: Summary of our relief and applicable conditions for an FCIS operator

Situation/activity	Summary of the law/our policy	Relevant relief power under the Corporations Act	Conditions of relief*
Registration relief			
An FCIS operator operates a managed investment scheme regulated by a jurisdiction that is sufficiently equivalent to the Australian regulatory regime and satisfies our other criteria in RG 178.14.	Relief granted from registration requirement.	s601QA	Standard conditions of relief apply: see RG 178.83–RG 178.94. Class order relief will generally apply if relief is subject to the standard conditions of relief only.
A New Zealand issuer wishes to offer securities or interests in a New Zealand regulated collective investment scheme.	Comply with entry and ongoing requirements under the trans-Tasman mutual recognition scheme: see RG 190 for further information.	Ch 8	See RG 190 for details of conditions applying to mutual recognition.
Licensing relief			
An FCIS operator deals in financial products that are scheme assets on behalf of Australian investors.	Relief from s601ED (the requirement to register a scheme) will also qualify an FCIS operator for relief from the AFS licensing requirement for this activity: see RG 178.48–RG 178.53.	s911A(2)(l)	Standard conditions of relief apply: see RG 178.83–RG 178.94. Class order relief will generally apply if relief is subject to the standard conditions of relief only.
An FCIS operator deals in derivatives or foreign exchange contracts.	Relief from s601ED (the requirement to register a scheme) will also qualify an FCIS operator for relief from the AFS licensing requirement for this activity: see RG 178.48–RG 178.53.	s911A(2)(l)	Standard conditions of relief apply: see RG 178.83–RG 178.94. Certain restrictions on exempted dealings apply: see RG 178.57–RG 178.58. Class order relief will generally apply if relief is subject to the standard conditions of relief only.

Situation/activity	Summary of the law/our policy	Relevant relief power under the Corporations Act	Conditions of relief*
An FCIS operator holds Australian investors' financial products on their behalf by providing a custodial or depository service.	Relief from s601ED (the requirement to register a scheme) will also qualify an FCIS operator for relief from the AFS licensing requirement for this activity: see RG 178.48–RG 178.53.	s911A(2)(l)	Standard conditions of relief apply: see RG 178.83–RG 178.94. Class order relief will generally apply if relief is subject to the standard conditions of relief only.
A New Zealand issuer wishes to offer securities or interests in a New Zealand regulated collective investment scheme.	Comply with entry and ongoing requirements under the trans-Tasman mutual recognition scheme: see RG 190 for further information.	Ch 8	See RG 190 for details of conditions applying to mutual recognition.
Product disclosure relief			
An FCIS operator wishes to make offers to Australian investors on the basis of its foreign-regulated offer document, and it: <ul style="list-style-type: none"> • is subject to a sufficiently equivalent disclosure regulatory regime; and • meets the other criteria in RG 178.14. 	If the overseas disclosure regulatory regime achieves sufficiently equivalent outcomes for Australian retail investors and the other criteria in RG 178.14 are met, there is relief from certain requirements governing the preparation and giving of a PDS or prospectus and ongoing disclosure to retail investors.	s1020F and 741	Standard conditions of relief apply: see RG 178.83–RG 178.94. Specific conditions for product disclosure relief apply: see RG 178.95. Class order relief will generally apply if relief is subject to these conditions of relief only.
A New Zealand issuer wishes to offer securities or interests in a New Zealand regulated collective investment scheme.	Comply with entry and ongoing requirements under the trans-Tasman mutual recognition scheme. A single disclosure document prepared under New Zealand law may be used: see RG 190 for further information.	Ch 8	See RG 190 for details of conditions applying to mutual recognition.

* In addition to the standard and specific conditions of relief listed, we may set tailored conditions for a particular FCIS operator or FCIS, if the circumstances warrant it.

Appendix 1: What is an FCIS?

RG 178.99 Table 4 sets out ASIC's interpretation of the Corporations Act as it applies to an FCIS—in particular:

- (a) What is an FCIS?
- (b) What is a managed investment scheme?
- (c) When must a managed investment scheme be registered?
- (d) What is the position of a 'corporate-based' FCIS?

An explanation follows Table 4.

Table 4: Our interpretation of the Corporations Act as it applies to an FCIS

Question	Our interpretation
What is an FCIS?	<p>We will consider a scheme to be an FCIS for the purpose of this policy if:</p> <ul style="list-style-type: none"> • it meets the definition of a managed investment scheme in s9; and • the operator is incorporated or is a foreign company that is formed in a foreign jurisdiction and is regulated in that jurisdiction for the operation of the scheme or company. <p>Note: The reference to a scheme covers all forms of collective investment schemes, regardless of how they are structured. For instance, a non-corporate-based mutual fund or undertaking for collective investments in transferable securities may be an FCIS.</p>
What is a managed investment scheme?	<p>A managed investment scheme is defined in the Corporations Act as having certain specific features. These are:</p> <ul style="list-style-type: none"> • people contribute monetary consideration to acquire interests in the scheme (such interests can be prospective or contingent and may be enforceable or not); • contributions are pooled or used in a common enterprise, for the benefit of members holding interests in the scheme; and • the members do not have day-to-day control over the scheme's operation. <p>Time-sharing schemes are also managed investment schemes under the Corporations Act. There are a number of exceptions to this definition: see s9.</p>
When must a managed investment scheme be registered?	<p>Generally, a managed investment scheme that has members as a result of offers in Australia must be registered under Ch 5C if it:</p> <ul style="list-style-type: none"> • has more than 20 members; • has been promoted by a person (or associate) in the business of promoting managed investment schemes; or • is related to any other schemes and the total number of members of the combined schemes exceeds 20. <p>Members in foreign jurisdictions count towards the total of 20 members. However, a scheme is not required to be registered if no issues have required a PDS under s601ED(2). An issue to a person outside Australia does not require a PDS.</p>
What is the position of a 'corporate-based' FCIS?	<p>The definition of managed investment scheme in s9 excludes bodies corporate (other than a body corporate that operates as a time-sharing scheme). Therefore, an FCIS based on a company structure (e.g. a foreign investment company) will not need to apply for relief from registration under Ch 5C. However, such an investment company will generally need an AFS licence to issue its securities (see s766C) and will require a prospectus under Ch 6D to offer its securities to investors in Australia. This policy provides for relief from Ch 6D in some circumstances.</p>

Explanation

RG 178.100 We regulate managed investment schemes (as collective investment schemes are known in Australia) under the Corporations Act.

RG 178.101 Our role in regulating managed investment schemes includes:

- (a) licensing scheme operators (known as ‘responsible entities’);
- (b) registering schemes;
- (c) conducting surveillance activities;
- (d) taking enforcement action;
- (e) granting relief from the law;
- (f) issuing policy guidance for industry;
- (g) providing information to investors and assessing their complaints; and
- (h) providing a register for scheme documentation.

RG 178.102 We have issued a series of regulatory guides that set out how we administer the Corporations Act provisions governing the operation of managed investment schemes in Australia.

Note: These regulatory guides are published on the ‘Managed investments scheme’ page of our website at www.asic.gov.au.

RG 178.103 The Corporations Act provisions governing licensing of AFS providers are also relevant to financial services provided by managed investment schemes operating in Australia.

RG 178.104 Our powers in these matters include broad powers to make exemption and modification orders: see, for example, s601QA, 911A(2)(h), 911A(2)(l), 992B and 1020F.

Appendix 2: Questions about an FCIS operator's overseas regulatory regime

RG 178.105 This appendix sets out examples of questions about an applicant's overseas regulatory regime that an application for registration, licensing and product disclosure relief should generally address. Table 5 lists questions about an FCIS operator's overseas regulatory regime, while Table 6 focuses on questions about the disclosure regulatory regime. The questions cover:

- (a) licensing and registration requirements;
- (b) conduct and disclosure requirements;
- (c) extraterritorial operation of the overseas regulatory regime;
- (d) rights and remedies available to foreign investors under local laws; and
- (e) how the overseas regulatory regime is enforced.

RG 178.106 Generally, we anticipate that answers will be no longer than one to two paragraphs for each question. However, some questions will require more detailed answers than others. The answers must be supported by relevant extracts from the laws of the home jurisdiction.

Note 1: To facilitate our assessment of an overseas regulatory regime, we may require either an English translation of any relevant parts of the regulatory regime, or independent verification of the relevant details of the regulatory regime.

Note 2: Extracts may be provided by hyperlink.

Table 5: Questions about an FCIS operator's overseas regulatory regime

Subject area	Questions to address
Constitution and structure	<ol style="list-style-type: none"> 1 What are the requirements (if any) in your overseas regulatory regime for the legal form and structure of an FCIS? 2 Are there any requirements about the number of members of : <ul style="list-style-type: none"> • the operator's board; • the governing body; or • any person or group of persons responsible for monitoring compliance by the operator of the FCIS, <p>that need to be independent of the management of the operator? Are there any requirements about the independence of any person with a professional or business relationship with the operator, including its advisers, underwriter or custodian? If yes, what are the requirements and what are the special rights or duties (if any) of these independent members?</p> 3 Is the FCIS operator required to report to the overseas regulatory authority about material changes to its management, constitution or structure?

Subject area	Questions to address
Registration or licensing	<ol style="list-style-type: none"> 1 What form of licence or registration (if any) does an FCIS or FCIS operator require to operate in your jurisdiction? 2 What are the eligibility standards/criteria against which proposed operators of collective investment schemes in your jurisdiction are assessed? 3 Where are the relevant requirements or criteria set out? Which regulator(s) are responsible for ensuring compliance with the licensing or registration requirements? 4 To what extent are each of the following relevant to determining whether an operator is eligible to operate an FCIS in your jurisdiction: <ul style="list-style-type: none"> • honesty and integrity of the persons involved in management of the operator; • ability to carry out the functions and duties of a scheme operator (e.g. appropriate staff and resources); • financial capacity and insurance arrangements; • internal management procedures; and • capacity to carry out specific powers and duties of an operator? 5 Describe any other criteria that are considered by the overseas regulatory authority in assessing whether an operator is eligible to operate an FCIS in your jurisdiction. 6 In assessing the eligibility of an operator to operate an FCIS, to what extent are each of the following matters considered in the appointment of key officers or employees of the operator: <ul style="list-style-type: none"> • previous education and experience; • continuing education; and • a 'fit and proper person' requirement?
Supervision by overseas regulator	<ol style="list-style-type: none"> 1 What monitoring does the overseas regulatory authority or other persons undertake concerning the conduct of an FCIS operator during the life of a scheme, including compliance with licensing and registration requirements (e.g. inspections or external audits, monitoring by independent trustees, compliance committees or independent boards of directors)? 2 What are the powers of the overseas regulatory authority to investigate suspected breaches by FCIS operators? 3 What are the powers (statutory or otherwise) of the overseas regulatory authority to take action in the event of a breach or default by an FCIS operator or FCIS? 4 What sanctions may be imposed on FCIS operators, FCISs, or persons responsible for monitoring the FCIS (e.g. auditors or trustees), for any non-compliance with the overseas regulatory regime?
Agents and representatives	<ol style="list-style-type: none"> 1 To what extent are the agents or representatives of an FCIS operator required to comply with regulatory requirements applying to the operator? What exceptions are allowed? 2 Are the agents or representatives jointly liable with the operator for anything they are authorised to do on behalf of the FCIS operator? If not, how does the overseas regulatory authority ensure agents and representatives are conducting themselves in a proper manner and in accordance with the regulatory requirements?

Subject area	Questions to address
Members' rights	<ol style="list-style-type: none"> 1 What safeguards (if any) apply to address the risk that sufficient liquidity may not be available to meet withdrawal commitments? 2 What requirements (if any) govern entry and exit fees (i.e. fees when purchasing or disposing of interests in the FCIS)? Must they be disclosed in the offer document? 3 If and when changes to investors' rights are to occur without their prior approval, what are the requirements (if any) before they take effect?
Valuation and pricing	<ol style="list-style-type: none"> 1 What requirements (if any) apply to the valuation of FCIS assets and the pricing (for entry and exit) of interests in an FCIS? 2 Who is responsible for valuation and pricing, and how often must this be done? To what extent do auditors check these matters? 3 What are the requirements (if any) for pricing controls (e.g. reconciliations and audits) to identify any errors, omissions or misplacement of assets?
Internal management	<ol style="list-style-type: none"> 1 What measures (if any) exist to restrict conduct that involves a conflict of interest between the FCIS and its operator (and its associates) for: <ul style="list-style-type: none"> • principal transactions between the FCIS and the operator or its associates; • transactions in which the FCIS and operator or its associates jointly participate; • receipt of monetary and non-monetary benefits by the operator or its associates; • lending and borrowing to or from the operator or its associates; • purchase of securities or other investment products from the operator or its associates; • use of the operator or its associates as brokers; • employees of the operator or its associates transacting on their own accounts; and • other related party transactions? 2 What are the requirements (if any) to disclose FCIS transactions with the operator or its associates (e.g. to the overseas regulatory authority or members of the scheme)? 3 What are the requirements (if any) for the separation of FCIS assets from the assets of the operator or its associates (if the operator is not the FCIS) and other schemes? Who is responsible for ensuring compliance with these requirements? 4 What are the requirements (if any) for safekeeping or custody of FCIS assets (e.g. appointment of an independent custodian)? What measures (if any) are taken to protect FCIS assets from loss? 5 What are the eligibility requirements (if any) for the entity holding FCIS assets (e.g. competence, service agreements and financial capacity)?

Subject area	Questions to address
Books and records	<ol style="list-style-type: none"> 1 What are the requirements (if any) for keeping books and records on transactions involving FCIS assets and transactions involving interests (units or shares) in the FCIS itself? 2 What are the requirements (if any) for maintaining a register of holders of interests (units or shares) in the FCIS? 3 What are the (internal or external) audit requirements (if any) for the financial position and financial performance of the FCIS? 4 What are the requirements (if any) for auditors to report to the overseas regulatory authority if they have reasonable grounds to suspect a contravention has occurred? 5 What are the requirements (if any) to ensure the competence and independence of auditors of the FCIS? 6 What are the requirements (if any) for the accounts of an FCIS that are provided to the overseas regulatory authority or investors to be prepared in accordance with relevant accounting standards? Which accounting standards apply?
Reporting requirements	<ol style="list-style-type: none"> 1 What are the requirements (if any) for a report to be published on the FCIS's activities on a periodic basis? Who does the report have to be given to (e.g. the overseas regulatory authority or investors)? 2 What are the requirements (if any) for the timing of reports referred to in question 1 (e.g. within a set period after the end of an accounting period)?
Extraterritorial operation	<ol style="list-style-type: none"> 1 To what extent do the overseas regulatory requirements governing the operator of an FCIS apply to its conduct overseas (e.g. in Australia)? 2 To what extent can the overseas regulatory authority investigate and (if necessary) take action for a breach of the regulatory requirements where the relevant incident occurs overseas (e.g. in Australia)?
Rights and remedies available to Australian investors	<ol style="list-style-type: none"> 1 What internal and/or external dispute resolution arrangements will Australian investors in the FCIS have access to? 2 How will this access be provided (e.g. direct contact with FCIS operator, through a local agent, through an EDR scheme)? 3 Are the rights and remedies available to Australian investors different from those available to investors from the FCIS's home jurisdiction, and, if so, how?

Table 6: Questions about an FCIS operator's disclosure regulatory regime

Subject area	Questions to address
Constitution and structure	<ol style="list-style-type: none"> 1 What are the requirements (if any) to disclose the legal form and structure of the FCIS to investors?
Supervision by overseas regulator	<ol style="list-style-type: none"> 1 What monitoring does the overseas regulatory authority or other persons undertake in relation to disclosure by an FCIS operator? 2 What are the powers of the overseas regulatory authority to investigate suspected breaches by FCIS operators? 3 What are the powers of the overseas regulatory authority to take action (statutory or otherwise) in the event of a breach or default by an FCIS operator? 4 Does the overseas regulatory authority have the power to stop or suspend the offering of interests in an FCIS if the disclosure document is non-compliant? 5 What sanctions may be imposed on FCIS operators, FCIS, or persons responsible for ongoing monitoring of the FCIS (e.g. auditors or trustees), for any non-compliance with the disclosure regulatory regime?
Members' rights	<ol style="list-style-type: none"> 1 What are the requirements (if any) that the rights of the investors in an FCIS must be clearly disclosed? 2 Are there any cooling-off rights in any circumstance?
Offer documents	<ol style="list-style-type: none"> 1 When an offer of interests in an FCIS is made, is there a requirement that an offer document (e.g. prospectus) be given to a prospective investor? For which clients or in what circumstances does it apply? 2 What are the requirements (if any) for the FCIS offer document to include all material information that investors would reasonably require and expect for them to make an informed investment decision? 3 What are the requirements (if any) for the format and clarity of the FCIS offer document? 4 If any other documents (e.g. brochures or advertising material) are permitted in marketing the FCIS, what requirements apply to these other documents? 5 What are the requirements (if any) that the FCIS offer document be kept up-to-date? 6 What powers and sanctions are available (if any) where an offer document is inaccurate, misleading or false, or does not satisfy the disclosure requirements?
Reporting requirements	<ol style="list-style-type: none"> 1 What are the requirements (if any) for confirmation of investments or a periodic report on the member's holdings in an FCIS to be published? Who does the confirmation or report have to be given to (e.g. the overseas regulatory authority or investors)? 2 What are the requirements (if any) for the timing of confirmations or reports referred to in question 1 (e.g. within a set period after the end of an accounting period)? 3 What are the requirements (if any) for continuous disclosure to investors of significant events (e.g. restructuring, suspension of dealings, termination of the FCIS, changes of fees)?

Subject area	Questions to address
Extraterritorial operation	<ol style="list-style-type: none"><li data-bbox="507 309 1369 365">1 To what extent does the disclosure regulatory regime that governs an FCIS operator apply to its conduct overseas (e.g. in Australia)?<li data-bbox="507 387 1369 472">2 To what extent can the overseas regulatory authority investigate and (if necessary) take action for a breach of the disclosure regulatory regime where the relevant incident occurred overseas (e.g. in Australia)?

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
associate	Has the meaning given in s10–17 of the Corporations Act
Ch 8 (for example)	A chapter of the Corporations Act (in this example, numbered 8)
CIS	A collective investment scheme
[CO 98/55] (for example)	An ASIC class order (in this example, numbered 98/55)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
disclosure regulatory regime	The rules that apply to pre-issue and ongoing disclosure, and cooling-off periods for interests in a managed investment scheme or securities in a foreign investment company, including any applicable legislation, instruments made under that legislation and any relevant policies or other documents (however described) issued by the overseas regulatory authority applying to disclosure about the scheme
EDR	External dispute resolution
equivalence test	The criteria set out in RG 178.18 by which we will assess the equivalence of an FCIS operator's overseas regulatory regime to the Australian regulatory regime
FCIS or foreign collective investment scheme	A foreign collective investment scheme as described in Appendix 1 of this guide
FCIS operator	The person who operates the FCIS or, for an FCIS that is a corporation, the corporation
financial services law	Has the meaning given in s761A of the Corporations Act
foreign investment company	A body corporate incorporated outside Australia that carries on a financial services business in Australia by issuing its securities

Term	Meaning in this document
home jurisdiction	The jurisdiction from which the FCIS operator is primarily authorised and positively regulated for the operation of its scheme
IDR	Internal dispute resolution
IOSCO	International Organization of Securities Commissions
IOSCO Collective Investment Scheme (CIS) Principles	The Principles for the Regulation of Collective Investment Schemes, originally adopted by IOSCO in October 1994, as amended from time to time
IOSCO MMOU	The IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information
IOSCO Objectives and Principles of Securities Regulation	The Objectives and Principles of Securities Regulation, originally adopted by IOSCO in September 1998, as amended from time to time
IOSCO Principles Regarding Cross-Border Supervisory Cooperation	The Principles Regarding Cross-Border Supervisory Cooperation, originally adopted by IOSCO in May 2010, as amended from time to time
MOU	Memorandum of Understanding
overseas regulatory authority <i>or</i> relevant regulatory authority	The regulatory authority of the FCIS operator in its home jurisdiction
overseas regulatory regime <i>or</i> relevant regulatory regime	The regulatory regime supervised and administered by the overseas regulatory authority
PDS	Product Disclosure Statement
PDS requirements	The requirements set out in Div 2 of Pt 7.9 of the Corporations Act and related regulations
principles for cross-border financial regulation	The principles set out in RG 54
Product Disclosure Statement (PDS)	A document that must be given to a retail investor with the offer or issue of a financial product in accordance with the PDS requirements
Pt 7.2 (for example)	A part of the Corporations Act (in this example, numbered 7.2)
reg 7.6.01 (for example)	A regulation of the Corporations Regulations (in this example, numbered 7.6.01)
registered scheme	A registered managed investment scheme as defined in s9 of the Corporations Act

Term	Meaning in this document
regulatory regime	A scheme's regulatory regime or a disclosure regulatory regime
responsible entity	The company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of a registered scheme Note: This definition is contained in s9 of the Corporations Act.
retail investor	A retail client as defined in s761G of the Corporations Act
RG 54 (for example)	An ASIC regulatory guide (in this example, numbered 54)
s601ED (for example)	A section of the Corporations Act (in this example, numbered 601ED), unless otherwise specified
scheme's regulatory regime	The rules that apply to the operation of a scheme, including any applicable legislation, instruments made under that legislation and any relevant policies or other documents (however described) issued by the overseas regulatory authority applying to the operation of the scheme
wholesale investor	A wholesale client as defined in s761G of the Corporations Act

Related information

Headnotes

collective investment schemes, FCIS, foreign collective investment schemes, managed investment schemes, unregistered schemes

Class orders

[CO 02/263] *Foreign interests in a managed investment scheme traded on an approved foreign exchange: 20 or fewer offers in Australia in 12 months*

[CO 04/526] *Foreign collective investment schemes*

[CO 07/753] *Singaporean collective investment schemes*

[CO 08/506] *Hong Kong collective investment schemes*

Regulatory guides

RG 54 *Principles for cross-border financial regulation*

RG 121 *Doing financial services business in Australia*

RG 141 *Offers of securities on the internet*

RG 165 *Licensing: Internal and external dispute resolution*

RG 167 *Licensing: Discretionary powers*

RG 168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)*

RG 169 *Disclosure: Discretionary powers*

RG 175 *Licensing: Financial product advisers—Conduct and disclosure*

RG 176 *Licensing: Discretionary powers—Wholesale foreign financial services providers*

RG 190 *Offering securities in New Zealand and Australia under mutual recognition*

Legislation

Corporations Act, Pts 5B.2, 6D.3 and 7.9, Divs 5 and 7, Chs 2C, 2M, 5C, 6D, 7 and 8, s9, 601CF, 601ED, 601QA, 659B, 706, 707, 708, 741, 766A, 766B, 766C, 911A, 911D, 912A, 992B, 1012B, 1012C, 1017D, 1017G, 1018A, 1020E and 1020F

Corporations Regulations, regs 7.6.01(l)(o) and 7.6.01(l)(m)

Consultation papers and reports

CP 98 *Cross-border recognition: Facilitating access to overseas markets and financial services*

REP 134 *Enhancing capital flows into and out of Australia*

Information sheets

INFO 30 *Fees for lodging documents*

INFO 93 *Practical guidance for operators of foreign collective investment schemes*