5 December 2016

Mr Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investments Commission
Level 5, 100 Market Street
SYDNEY NSW 2000

By email: alan.worsley@asic.gov.au

Dear Alan

ASIC Consultation Paper 268 – Licensing for foreign financial services providers with a limited connection to Australia

The Australian Financial Markets Association (AFMA) is a member-driven and policy-focused industry body that represents participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations.

This submission is made on behalf of our financial markets members, in conjunction with a number of our partner member law firms. In particular, AFMA endorses the information provided to ASIC by King & Wood Mallesons in relation to examples of situations where a foreign financial service provider (FFSP) may rely on ASIC Class Order 03/824 (CO 03/824). Our members have had the opportunity to review the KWM submission and support the positions set out in that submission. Accordingly, we have endeavoured not to replicate those issues in this submission.

Responses to the consultation questions are set out in the annexure accompanying this letter.

AFMA submits that:

- CO 03/824 should be retained as it continues to serve a useful and important regulatory purpose;
- the alternative exemptions suggested by ASIC, including the Corporations Regulations, are not a complete substitute for the relief available under CO 03/824;
- if ASIC is concerned that the scope of CO 03/824 is such that there is potential misuse, then rather than repealing the class order, it should be updated to reflect any changes that are considered necessary to clarify the intended purpose and scope of the relief;
- a notification obligation, either on a temporary basis or as an ongoing feature of the relief is problematic and burdensome; and

- the relief provided by CO 03/824 should more appropriately be reflected in the Corporations Act and Regulations, if it is ASIC's preference not to continue to provide relief by instrument.

In any event, AFMA members request that ASIC does not make a final determination about the class order in isolation, and should instead temporarily extend the class order in line with other FFSP-related relief and consider it in the context of the broader review of the FFSP regime.

The class continues to serve an important regulatory purpose

Consultation Paper 268.4 states that ASIC aims to ensure that only instruments that serve a regulatory purpose are maintained. CO 03/824 should not be repealed because it continues to serve a regulatory purpose.

In this respect, we refer to the examples set out in the KWM submission. These examples demonstrate the ongoing importance of this relief.

The offshore related entities of AFMA members rely on the relief where those entities provide services from outside of Australia, have no physical presence in Australia, execute relevant documentation outside Australia, and otherwise do not carry on a business in Australia. In many situations, no other exemption is available to the offshore entities where services are provided to a small number of wholesale clients in Australia on a limited basis.

CO 03/824 reduces burden and cost for financial service providers with limited activity in the wholesale market in Australia. The class order promotes certainty for offshore entities that have a limited connection with Australia and facilitates efficient operations in a globalised market environment. The class order also allows Australian companies, wholesale clients, sophisticated investors and superannuation funds to efficiently access global capital.

In the absence of CO 03/824:

- offshore entities providing services in limited scenarios to Australian wholesale clients may potentially breach Australian law. This is because of the unduly broad nature of section 911D of the Corporations Act and the narrowness of the available exceptions in the Corporations Regulations. Given the nature of the services do not lend themselves to obviously being caught by Australian licensing laws, these entities may be relying on the class order without being aware that the class order exists and could find themselves inadvertently in breach;

- many offshore entities may stop providing their services to Australian wholesale clients. Whilst AFMA members believe that a strong regulatory framework is important, Australian regulation should not be implemented in a way that produces unfair results and reduces Australia's attractiveness as a destination for global business.

Given the very limited nature of the services being provided, the fact that offshore entities relying on the relief do not carry on business in Australia, and that the Australian clients are wholesale, in our view it is appropriate and important to maintain the relief.

Corporations Act and Regulations do not replicate CO 03/824

Section 911A(2E) of the Corporations Act, as inserted by Regulation 7.6.02AG, is considerably narrower in scope than CO 03/824.

In particular, for the purposes of s911A(2E), the services:

- may only be provided to a professional investor; and
- the services and financial products are limited to derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units. In relation to the last three product types, while they may have had particular relevance at the time Regulation 7.6.02AG was made, they are of limited relevance now.

Other modifications in the Corporations Regulations, such as Regulation 7.6.01(1)(n) and (na), do not provide a substitute for CO 03/824.

Purpose and scope of the relief

Rather than repealing CO 03/824, the class order should be updated to reflect any changes that are considered necessary to clarify the intended purpose and scope of the relief. Our understanding is that the purpose of CO 03/824 is to permit offshore providers with no other connection to Australia to deal with wholesale Australian investors. If ASIC is concerned about potential mis-use of the class order, then those concerns should be addressed rather than repealing the relief for entities that use it in the manner for which it was intended.

It may be beneficial to have further clarity in the regulatory guidance about the scenarios in which ASIC envisages the class order applying. The current wording of the class order could be amended to give effect to ASIC's current policy, and to clarify the intended scope of the relief to allow limited activity.

Notification

AFMA members in most, if not all, cases are not the users of the relief provided in Class Order 03/824. Our members are licensed to provide financial services in, and are regulated in, Australia. However, many of our members have offshore related entities, and relationships with FFSPs who do avail themselves of the class order relief to provide financial services of a unique or limited nature to wholesale clients located in Australia.

Consequently, in the event that ASIC decides to implement a notification requirement in connection with the class order, it is not AFMA members who will be providing such notification. AFMA members may not be able to influence the decisions of offshore entities as to whether those entities will give any such notification.

The class order helps to manage the overly broad jurisdictional reach of section 911D. It also assists to address the uncertainty created by the provision. A notification obligation does not work in the context of the problem that the class order is seeking to address. In particular, entities that may not realise they need the relief would also not be aware that they are subject to a notification obligation. A notification obligation would also create an additional regulatory reporting burden for these entities, without a corresponding benefit for either the attractiveness of Australia as a destination for global business or for consumer protection. If an entity is in fact carrying on a financial services business in Australia, that entity should hold an AFSL.

Amendment of Corporations Regulations

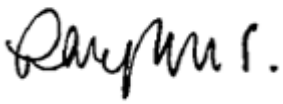
If ASIC prefers not to continue the relief by class order, it may be more appropriate to amend the Regulations to fully reflect the class order, albeit with any clarifications about purpose and scope that are considered necessary to align the use of the class order with its policy intent.

Class order should be temporarily extended

AFMA's preference is to retain the class order. However, we also understand ASIC's desire to ensure that the regulatory regime is fit for purpose. Accordingly, we recommend that ASIC should defer any decision about repealing the class order on or before April 2017, and consider it in conjunction with the other FFSP-related relief as part of the broader review of the FFSP regime. This would entail an extension of CO 03/824 similar to the extension granted under ASIC Corporations (Repeal and Transitional) Instrument 2016/396.

Please contact me on 02 9776 7997 or tlyons@afma.com.au if you have any queries about this submission.

Yours sincerely



Tracey Lyons
Head of Policy

AFMA response to ASIC Consultation Paper 268 – Licensing relief for FFSPs with a limited connection to Australia

Consultation Paper Question	AFMA comments
B1Q1 Are you an entity that relies on CO 03/824 and, if so, for what financial services? Please provide details.	AFMA members have noted their agreement with the scenarios described by King & Wood Mallesons in its separate submission. CO 03/824 is currently being relied upon and has been relied upon in the past by offshore related entities of AFMA members. Reliance on the class order has been primarily only where no other licensing exemption was considered to be available. The class order exemption is particularly effective for providers who do not carry on business in Australia in the conventional sense. In other words, it is applicable where services are provided from outside of Australia and the provider has no physical presence in Australia, executes relevant documentation (eg. contracts) from outside of Australia, and does not otherwise carry on business in Australia. Offshore financial products and services provided under the class order typically include: • cash equities (over foreign securities, generally where an entity located in the foreign jurisdiction must be used as the broker for the trade due to local regulations); • equity derivatives; • interests in managed investment schemes, including access to offshore funds for Australian wholesale clients; and • debt capital market activities;

	• the provision of general advice – for example, research provided to Australian wholesale clients in respect of offshore financial products; and • dealing, custody and arranging services. A case study helps to illustrate the benefit of CO 03/824 and the effect that revoking it may have. Superannuation funds in Australia will seek to access overseas offers of institutionally-focussed funds. Although styled as 'funds', these 'funds' are commonly structured as bodies corporate, and offers in respect of them will be offers of shares. An overseas fund manager, who is often not the same entity as the 'fund' but a related entity, will distribute the information memorandum (IM) into Australia. In many cases it could be arguable that the fund manager is carrying on a financial services business in Australia. However, the fund manager will need to rely on CO 03/824 to distribute the IM because no other exemption is available to the fund manager as: • the self-dealing exemption in Regulation 7.1.33H will not apply because the fund manager is not the issuer; • the general advice exemption in Regulation 7.1.33B will not be available because the advice will not be provided by an AFS licensee; • Regulation 7.6.01(1)(na) will in practically all cases will not be available because the fund manager will not have a relationship with an AFS licensee or an AFS licensee will not consider it appropriate to be party to an arrangement with the fund manager; and

	• section 911A(2E) will not apply because the financial products are securities, and not any of the financial products listed in that section. Given the above scenario, in the absence of CO 03/824, the fund manager may decide not to make offers to superannuation funds in Australia.
B1Q2 Do you consider that CO 03/824 is currently operating effectively and efficiently? Please give reasons for your view.	CO 03/824 provides an important exemption to facilitate limited dealings by offshore financial services providers with Australian wholesale clients. In many situations, no other exemption is available (eg. the relevant entity is not located in a jurisdiction subject to the country-specific FFSP class orders). Similarly, local regulatory requirements in other jurisdictions may restrict Australian clients from obtaining the relevant product or service from an alternative entity (holding an AFSL or FFSP class order relief) - for example, where local currency restrictions apply. The class order reduces burden and cost for financial service providers with limited activity in the wholesale market in Australia. The current regime creates certainty for offshore entities and facilitates efficient operation within globalised markets. The class order also allows Australian companies, individuals who are wholesale clients, sophisticated investors and superannuation funds to efficiently access global capital. This access may be severely restricted if the class order is repealed without an equivalent new exemption, or if a cumbersome, administratively burdensome regime is imposed in its place. As noted above, the class order is generally only relied upon where no other licensing exemptions have been assessed as available,

	and the proposed service is limited to a small number of clients in Australia. It might be of benefit to both ASIC and the industry however, if there was further clarity in the regulatory guidance about the type of scenarios that ASIC envisages as being covered by the class order, including guidance on the extent to which services can be provided whilst still being able to rely on CO 03/824. The current wording of the class order could be amended to give effect to ASIC's current policy, and to clarify the intended scope of the relief. Other relief in the Corporations Regulations and related instruments do not provide a complete substitute for CO 03/824, as the class order does not, for example: • require the FFSP to rely on an AFS licensee to arrange for the service or product to be provided (see Corporations Regulation 7.6.01(1)(n) and (na)); or • restrict activities in the way that Corporations Regulation 7.6.02AG does.
B1Q3 Do you rely on CO 03/824 to provide financial services in relation to financial products that are not referred to in s911A(2E)? If so, please provide details of these services and products.	Yes, entities rely on CO 03/824 to provide financial services in relation to financial products such as securities including cash equities and bonds, managed investment schemes and other banking products. See response to B1Q1 above. Restricting the exemption to the very limited list of financial products and client types in section 911A(2E) would significantly limit the ability of Australian clients to access these kinds of financial products listed or issued in foreign jurisdictions.

B1Q4 If we repeal CO 03/824, do you think that one year is an appropriate transitional period to facilitate future compliance with the Corporations Act, including seeking any other relevant exemptions that may be necessary for you to continue providing financial services to Australian wholesale clients? Please give reasons for your view.	AFMA's preference is that the existing class order is re-made with appropriates updates and clarifications, and continues to operate substantively as is. The repeal, extension or any amendment to CO 03/824 should be considered with the broader FFSP relief regime as the transition period required may depend on any changes made to the other FFSP class orders available. If, following the review of the broader FFSP regime, it is determined that the class order is to be discontinued (which is not the preferred outcome), a 2 year transition period would be more appropriate given the: • time and cost to perform a global review of entities, services and products; • time and cost of potential licence or exemption requests; • time and cost to advise clients; and • time required to amend arrangements with clients where necessary. A 2 year transitional period will provide the opportunity to assess and determine whether any other relevant exemptions are available, whether it is viable to continue to offer the services into Australia, and to apply for any other relevant exemptions as may be necessary. The transition period will also allow implementation of an appropriate risk and compliance framework to manage the relevant regulatory obligations under any new relevant exemptions obtained. Alternatively, where the services are to be discontinued following an assessment of the viability of the business, a 2 year transition period

	would also greatly assist in an orderly transition and exit of clients to ensure detrimental effects are limited. If ASIC decides to repeal CO 03/824, the transitional arrangements should be co-ordinated with any changes made to the FFSP class orders, which ASIC has indicated will be subject to further consultation in 2017. Financial services providers will need certainty concerning alternate licensing/exemption arrangements prior to restructuring their business arrangements away from CO 03/824. If a foreign entity elects to use the other current FFSP relief in lieu of Class Order 03/824, only for that relief to also be removed or significantly amended, substantial costs could be incurred in re-organising business arrangements twice.
B1Q5 If we were to continue the relief in CO 03/824, what would be the costs associated with a requirement to notify ASIC when you are relying on CO 03/824? Please give reasons for your view.	As AFMA members are not generally the entities relying on the class order relief, as they are entities that are licensed and regulated in Australia, they would not be the relevant entities providing notification to ASIC. However, for offshore related entities, further information about the nature of the notification obligation, including the information to be reported and the level at which notification would be required in order to properly respond to this question. For example, would a notification be required for multiple financial services provided to a single client or would a single notification suffice? Apart from the identification of some users of the class order relief, it is not clear what ASIC expects to achieve through the notification requirement, given that the users are by definition not located in

	Australia, have no other connection to Australia and are not generally subject to Australian laws. Similarly, in circumstances where a financial product or service is provided on a one-off basis, the administrative burden of making a notification to ASIC would outweigh any benefit of ASIC receiving the notification. There is a risk that foreign funds and other providers will cease any operations in the Australian market and with Australian investors, rather than having to provide notification in circumstances where they have no other Australian regulatory obligations. If there is to be a notification requirement, there should be scope to notify within a reasonable period after the financial service or product is provided as CO 03/824 is currently relied upon in many instances where pre-notification to ASIC is not practical. AFMA appreciates ASIC's desire to better understand the use of and reliance on CO 03/824. However, it would be overly onerous to require individual notifications for each instance where the relief is relied upon. If there is to be a notification requirement, a better approach might be to notify ASIC where the exemption is to be or has been relied upon and the category of financial product or service to be provided. For example, an entity would notify ASIC that it intends to rely on CO 03/824 for 'dealing' activities.
B1Q6 If we were to temporarily extend the relief in CO 03/824 until the expiry of ASIC Corporations (Repeal and Transitional) Instrument 2016/396, what would be the costs associated with a requirement to notify ASIC when you are relying on CO 03/824 during the extension period? Please give reasons for your view.	There would be costs associated with the notification requirements as well as costs related to performing a review/audit of all businesses and the location of clients to whom services have been provided in a short period of time.

	As noted above, entities may consider ceasing operations in Australia in the event that the relief is repealed. Accordingly, any interim notification requirements during the transition period would be inconsistent with a cost/benefit analysis approach to regulation.