



Group Regulatory Affairs
The Westpac Group
(02) 8253 3445

19th July 2013

Mr Gerald Yip
Senior Lawyer
Investment Managers & Superannuation
Australian Securities & Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

Per email: gerald.yip@asic.gov.au

Dear Mr Yip

ASIC CONSULTATION PAPER 208

ASX MANAGED FUNDS SERVICE: RELIEF FROM THE APPLICATION FORM REQUIREMENT

BT Financial Group (BTFG), a part of The Westpac Group, is pleased to provide its comments on ASIC's *Consultation Paper 208 ASX Managed Funds Service (AMFS): Relief from the application form requirement* (CP 208).

We are always supportive of proposals which look to refine and improve the application of regulatory requirements in order to provide greater efficiency, reduce costs and generally create a better outcome for the end investor. However, we do have concerns with the selective exemption that ASIC proposes to apply in respect of the disclosure requirements under section 1016A(2) of the Corporations Act 2001 (Act).

In our view, ASIC's policy objective would be better served with a permanent relief from section 1016A(2) to all industry participants, including Product Issuers and Investor Directed Portfolio Services (IDPSs).

Applying a narrow exemption to only one industry participant would detract from a level playing field and restrict the benefits of the relief to a class of investor that chooses to purchase an unlisted managed investment scheme through the AMFS.

Additionally, we have the following concerns about the proposals as they are currently drafted;

- the controls proposed by the ASX do not take into account scenarios where the ASX has not kept its register up to date, or there has been some form of error leading to an out of date PDS being provided. In such a scenario, there is a question of who should bear liability. What contractual mechanisms will be put into effect between the ASX and the responsible entity (RE), to apportion liability for negligence or recklessness in uploading and maintaining the database of PDSs? If so, what would be the basis of these contractual mechanisms?;
- similarly, there is the possibility of additional compliance burdens on the RE when issuing interests, in order to implement processes to comply with this control and to ensure that it will not be exposed under section 1016F of the Act, for the actions of the AMFS Broker and ASX. It would be

problematic for REs to be subject to the default position under section 1016E and 1016F of the Act, which will attach liability to the issuer of the PDS; and

- we note that the ASX is liaising with AUSTRAC about whether any existing AML/CTF Rule would exempt an entity issuing via the AMFS from the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act). It is critical to ensure that the AMFS run by the ASX adheres to the spirit and objectives of the AML/CTF Act.

We have detailed our views in Appendix A (enclosed). BTFG also supports the views set out in the submission by the Financial Services Council.

If you have any questions in relation to this submission, please contact me

Yours sincerely

JOSH MOYES

Head of Product & Distribution Regulatory Affairs
The Westpac Group
For BT Financial Group

Appendix A

1. Background

ASX Limited is intending to implement a Managed Fund Service. This facility allows a retail investor (investor) to electronically apply for or redeem financial products in unlisted managed investment schemes that have been admitted to the service through an authorised distribution service (AMFS broker). AMFS has similarities to those services offered by IDPS operators. In respect of AMFS, investors will be able to apply for, or request redemption of, products through an ASX trading platform and participant (that may also be a settlement participant).

We understand the ASX will maintain an up to date library of all the PDSs of the admitted schemes, to ensure that the obligation to provide an investor with a copy of the PDS prior to being issued an interest is satisfied. However, ASIC proposes to change the policy objective of section 1016A(2) requiring an investor to apply for financial products using an application form that was included in or accompanied the Product Disclosure Statement (PDS). This relief is proposed to only apply to a RE of a registered scheme for applications made through the AMFS.

The claimed benefits of AMFS for REs and investors are enhanced product distributions through the existing relationships between AFS licensees and their clients. There are also claimed operational efficiencies resulting from electronic application straight through processing.

2. Considerations

2.1 Disclosure Requirements

In relation to the disclosure exemption specifically, section 1016A(2) of the Act imposes a requirement on REs to only issue an interest in a managed investment scheme to an investor if the issue or sale is made pursuant to an 'eligible application'¹. Under Class Order 02/260, REs are exempted from the requirement in section 1016A(2) subject to conditions. Class Order 02/260 provides that an issuer or seller can issue or sell a financial product in response to an application form issued and partially completed by an AFS licensee, provided that the AFS licensee had reasonable grounds to believe that the licensee form was distributed with a PDS that contained all of the required information for the product.

On a superficial level, the relief in ASIC Class Order 02/260 and the proposed form of the relief provided under Consultation Paper 208 appear consistent. They both seek to implement the same policy objective of ensuring that an investor is in fact given a PDS, to facilitate confident and informed investors². However, a key difference between the current Class Order and the proposed relief is the extent to which REs will be able to avail themselves of the benefits of issuing products electronically.

We note that the proposed relief will not require the investor to complete an application form. The application form has been replaced with electronic messages from the settlement participant that will flow through CHESS. The CHESS message will indicate whether the investor has downloaded the PDS from the AMFS broker's website or has otherwise been given the current PDS before making their application. The message will satisfy the RE that the investor has received a copy of the PDS. However, in contrast, the relief provided under Class Order 02/260 imposes further conditions in the Schedule to the Class Order. These conditions include that the issuer or seller must take all reasonable measures to ensure that the AFS licensee holder who is issuing the licensee form, provides the client with the PDS. One of the key risks identified under the proposed AMFS is that investors may not be provided with a PDS prior to making the application via the AMFS³.

The ASX has proposed that when confirming the issue of the product, the RE will advise the investor that a PDS exists and to contact the RE if they have not received one. In addition, if the RE becomes aware that the investor was not given a PDS before making an application, they will advise the ASX.

¹ An eligible application is one made using an application form that was included in or accompanied by a PDS and that was not defective at the time when the application was made – section 1016A.

² Pg 20, para S9 CP208

³ Pg 9, CP208

The proposed control does not take into account scenarios where the ASX has not kept its register up to date, or there has been some form of error leading to an out of date PDS being provided. In such a scenario, there is a question of who should bear liability. It would be problematic for REs to be subject to the default position under section 1016E and 1016F of the Act, which will attach liability to the issuer of the PDS.

2.2 Fund Manager Perspective

There are a number of unanswered questions as to how the proposed arrangement will be put into effect. One issue requiring further consideration from a fund manager perspective will be whether contractual mechanisms will be established between the ASX and the RE, to apportion liability for negligence or recklessness in uploading and maintaining the database of PDSs. If so, what would be the basis of these contractual mechanisms? Similarly, there is the possibility of additional compliance burdens on the RE when issuing interests, in order to implement processes to comply with this control and to ensure that it will not be exposed under section 1016F of the Act, for the actions of the AMFS Broker and ASX.

Under Schedule 1(c) of the Class Order 02/260 of the current relief, REs are required to take all reasonable measures to ensure that where a PDS or Supplementary PDS is provided electronically, it is received complete and unaltered. This presents the potential for a key distinction for the RE considering the options available to it to distribute its scheme via an IDPS versus the AMFS, as there is less of an obligation through the AMFS to take proactive steps. Under the control mechanism proposed by the ASX to alleviate the risk of investors not being provided with the PDS prior to making the application, the onus will be on the investor to contact the RE if they have not received a PDS⁴. This is problematic if the retail investor has received an incorrect or out of date PDS because of the ASX or the AMFS broker's negligence, as they are unlikely to know the PDS is the incorrect version and to contact the RE?

In contrast, the proposed relief provides that the RE will be allowed to issue products when it has reasonable grounds to believe that an investor has been given a PDS by an AMFS broker at or before the time the application was made. This is subject to a requirement that the AMFS broker has represented to the RE that the current PDS has been given to the client and the RE has no reason to doubt that the AMFS broker has done so. In addition, ASIC intends to impose a condition that the RE must send a notice to the retail investor to the effect that there is a PDS with information about the scheme and the date, and that if they have not received the PDS they should obtain a copy from the RE free of charge. The notice must be sent within five business days of the product being issued. Where a request is received from the RE that it believes may indicate that the retail investor was not provided with the current PDS and any supplementary PDS, it must inform the ASX in writing.

The proposed relief clearly shifts the responsibility on to the AMFS broker by allowing the RE to rely on the representation from the AMFS broker. In effect, the substance of the relief in the existing Class Order and as set out in the consultation paper is different: there is a positive obligation imposed on the RE versus the RE's obligation arising once they are put on notice of any irregularity from the investor.

In practice, there may be impediments to investors responding to the notice from a RE once the product has been issued. Investors may have existing relationships with their advisers and AMFS brokers and place all confidence in the adviser and broker, which will undermine the message from the RE requiring the investor to consider whether they received either correct PDS or any PDS. It should be noted that in this context, investors would have already received multiple documents including a Financial Services Guide, applicable adviser statement of advice, broker financial services guide and any applicable broker and ASX terms and conditions before being issued with the PDS. Given the recent focus on reforms to the financial planning industry, investors will and should be able to seek comfort from reliance on any personal advice relating to a product, such as in a statement of advice provided to them.

Industry experience further highlights that there is a consistent theme of investor disengagement where investors are called upon to undertake an action where they have already received advice. There may also be cost implications associated with additional compliance with this requirement to provide notice from the RE.

⁴ Pg 9, CP208

2.3 IDPS perspective

To provide investors with the greatest choices available in the market, any relief granted that will facilitate the acceptance of online applications should be mirrored in the existing Class Order 02/260. This promotes efficiency by ensuring existing financial services distribution networks remain competitive as alternative options. This is especially relevant in the online provision of financial services. Given this is where the market is heading, the proposed inconsistent application of legislative requirements as well as favourable treatment to certain market participants, places others at a disadvantage.

If ASIC is minded to provide this exemption to AMFS brokers on account of other controls being in place, it seems reasonable that this exemption be extended to Fund REs and IDPSs who also provide a PDS electronically, without need for an application form to be completed. In that case, the client agrees to having received the IDPS Guide by ticking a box (i.e. wet signature). Irrespective of the legal role of the ASX in AMFS and the structure of this service, compared to that of an IDPS, allowing this exemption for AMFS brokers gives the ASX a competitive advantage, by streamlining what is otherwise a complicated process for Fund REs and IDPSs.

We consider that similar relief could be provided to Fund REs and IDPSs while striking an adequate balance between the policy objectives of section 1016A(2) and efficiency. Under the current IDPS requirements, for example, the operator of an IDPS is required to ensure that any PDS for the investment has been given to the investor before they can acquire an interest in a fund. The effect of this requirement is to place obligations on both the Fund RE and IDPS operator. Permanent relief from section 1016A(2) to IDPS operators would be appropriate, given there are existing IDPS requirements reiterating this requirement.

2.4 Further Considerations

Investors who wish to access to investment choices beyond managed investment schemes will not have the convenience of foregoing an application form, if they purchase units through an IDPS. This presents a considerable inconvenience to investors in accessing a wide range of investment options and to REs in deciding how best to distribute their products. To ensure that investors with IDPS accounts are provided with the same benefits as those who use the new AMFS, we submit that REs be able to accept electronic applications, where their products are distributed through an IDPS.

The implementation of the AMFS also raises additional concerns surrounding how the AMFS brokers and the ASX will comply with the AML/CTF Act. We note that the ASX is liaising with AUSTRAC about whether any existing AML/CTF Rule would exempt an entity issuing via the AMFS from the AML/CTF Act. It should be noted that the costs associated with compliance with the AML/CTF Act are extensive and a specific exemption provided to the AMFS will contribute to a disparity in the costs of borne by financial services providers such as IDPS providers, which will reduce competition in the markets and lead to reduced investor choice. In addition, there is a lack of clarity surrounding how the AML/CTF rules will apply in this scenario, which is critical to ensure that the AMFS run by the ASX adheres to the spirit and objectives of the AML/CTF Act. It is critical to investor confidence that an institution such as the ASX adheres to the regulatory framework in a manner consistent with other financial services providers.

Conclusions

- We support ASIC's intended policy objective in CP208.
- In our view, ASIC's policy objective would be better served with a permanent relief from section 1016A(2) to all industry participants, including Product Issuers and IDPSs.
- Doing so would ensure a level playing field and not restrict the benefits of the relief to only a class of investor that chooses to purchase an unlisted managed investment scheme through the AMFS.
- In particular, there is arguably less risk associated with providing relief to IDPS providers given that there is overlap between the disclosure obligations of IDPS and Fund REs.
- We have concerns about how the AMFS would operate that requires further consideration.
- It is critical to ensure that the AMFS adheres to the spirit and objectives of the AML/CTF Act.