

3 June 2024

Ms Kate Metz
Senior Executive Leader, Regulatory Reform and Implementation
Australian Securities and Investments Commission
GPO Box 9827
Sydney NSW 2000

By email: RG236.Feedback@asic.gov.au

Dear Ms Metz

Consultation Paper 378 *Safeguard mechanism reforms: Updates to RG 236 (CP 378)*

1. This submission is made by the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) and relates to CP 378, which the Australian Securities and Investments Commission (**ASIC**) released for consultation on 6 May 2024. A draft updated Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?* (**Draft RG 236**) was issued with CP 378.
2. The Committee has carefully reviewed CP 378 and Draft RG 236, and its feedback and comments on Draft RG 236 are set out below.

Submissions

3. The Committee agrees that it is an appropriate time for ASIC to update its regulatory guidance with respect to licensing requirements for participation in carbon markets, noting recent legislative changes relating to Australian carbon credit units (**ACCUs**) due to the introduction of the safeguard mechanism.

Overall approach

4. The Committee notes that Draft RG 236 is quite lengthy and some of the content is a reiteration of content in other regulatory guides about licensing and disclosure requirements in general. The Committee also notes that there is a significant amount of internal repetition within Draft RG 236 itself.
5. The Committee invites ASIC to revisit Draft RG 236 and consider:
 - (a) cross-referring to other regulatory guides which contain more general guidance about licensing and disclosure requirements, and focusing purely on the licensing requirements that are relevant only to activities involving carbon market products which are financial products and inter-related financial products; and
 - (b) restructuring the content to reduce unnecessary repetition with a view to making it more clear, concise and effective.

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Specific comments

6. In the **Annexure**, the Committee has provided a table containing some specific comments on content within RG 236 which the Committee believes has room for improvement.
7. Broadly, the Committee's comments cover:
 - (a) ensuring that there is adequate discussion of the licensing and disclosure requirements applicable to a corporate collective investment vehicle (**CCIV**) that has a sub-fund with ACCUs in its portfolio;
 - (b) inaccuracy in describing the operation of certain laws; and
 - (c) minor typographical and grammatical errors.
8. Regarding (b) and (c), there are some departures from the current regulatory guide wording which are unexplained and would, if adopted, cause the content to be less accurate. The Committee finds this somewhat disconcerting.

Conclusion and further contact

9. The Committee would be pleased to discuss any aspect of this submission with ASIC.
10. Please contact co-chair of the [REDACTED] ([REDACTED]) if you would like to do so.

Yours sincerely

[REDACTED]

Dr Pamela Hanrahan
Chair
Business Law Section

Annexure—Specific comments on Draft RG 236

Draft RG 236 content	Comments of the Committee
References to corporate collective investment vehicles (CCIVs)	
<p>RG 236.22, Figure 1</p> <p>“A responsible entity of a registered managed investment scheme is required to hold an AFS licence regardless of whether they provide financial services as part of a financial services business: see s601FA.”</p>	<p>(1) The corresponding obligation of the corporate director of a CCIV to hold an AFSL should be mentioned here.</p> <p>(2) The word “other” should be inserted after “provide”.</p>
<p>RG 236.22, Table 1, Step 3</p> <p>“Note: A responsible entity of a registered managed investment scheme is required to hold an AFS licence whether they provide financial services as part of a financial services business: see s601FA.”</p>	<p>The comments made above apply equally to this paragraph.</p>
<p>RG 236.26, Table 3</p>	<p>In the left-hand column “Managed investment schemes” should read “Managed investment schemes and CCIVs”</p>
<p>RG 236.54 to RG 236.60</p>	<p>Commentary on the corresponding requirements which apply to a corporate director of a CCIV with a sub-fund that includes ACCUs in its portfolio should be included in this section of the document.</p>
<p>RG 236.122</p> <p>“Additionally, if such units are held as part of the scheme property of a registered managed investment scheme, the responsible entity will need to comply with the relevant requirements of the Corporations Act...”</p>	<p>This should be reworded as follows (<u>adding underlined words</u>) to cover the corresponding CCIV requirements:</p> <p>““Additionally, if such units are held as part of the scheme property of a registered managed investment scheme <u>or a sub-fund of a CCIV</u>, the responsible entity <u>or the corporate director, as applicable</u>, will need to comply with the relevant requirements of the Corporations Act...”</p>

Draft RG 236 content	Comments of the Committee
<p data-bbox="277 268 439 296">RG 236.155</p> <p data-bbox="277 336 1122 603">“Emissions units (whether specifically financial products or not) may be associated with another financial product in various ways (e.g. a derivative or as the scheme property of a managed investment scheme). In this case, the other financial product (e.g. meaning the derivative or the interest in a managed investment scheme) will be regulated, rather than the underlying emissions unit that the derivative relates to or that is scheme property of the managed investment schemes.”</p>	<p data-bbox="1173 268 2011 331">This paragraph should also mention that emissions units may be held within the portfolio of a sub-fund of a CCIV.</p> <p data-bbox="1173 371 1906 435">Also, the last word of this paragraph should be “scheme” (singular) not “schemes” (plural).</p>
<p data-bbox="277 643 439 671">RG 236.210</p> <p data-bbox="277 711 1144 839">“PDS requirements still apply where the regulated emissions unit is the underlying asset, but the financial product being offered, issued or sold is something else, such as a derivatives over emissions units or interests in a managed investment scheme.”</p>	<p data-bbox="1173 643 2018 738">This paragraph should also cover the application of the PDS requirements to a sub-fund of a CCIV which holds emission units in its portfolio.</p> <p data-bbox="1173 778 1771 807">Also “a derivatives” should read “a derivative”.</p>

Draft RG 236 content	Comments of the Committee
Inaccurate description of the operation of the law	
<p>RG 236.63</p> <p>“A custodial or depository service will not be provided where the provider of the service has no more than 20 clients in aggregate for all custodial or depository services it provides: see reg 7.1.40(1)(c) of the Corporations Regulations.”</p> <p>RG 236.167</p> <p>“However, a custodial or depository service will not be provided where:</p> <p style="padding-left: 40px;">(a) the provider of the service has no more than 20 clients in aggregate for all custodial or depository services it provides (see 7.1.40(1)(c) of the Corporations Regulations)..”</p>	<p>The paragraphs quoted are inaccurate.</p> <p>The correct position is stated in Table 4, paragraph RG 236.125 and in the corresponding parts of the current regulatory guide.</p> <p>ASIC should not misstate the law and should make it clear that the “no more than 20 clients in aggregate” includes clients of the provider of the service and its associates.</p>
<p>RG 236.72</p> <p>“A person may fall within the definition of a ‘wholesale client’ if, among other things:</p> <p>...</p> <p style="padding-left: 40px;">(b) they have net assets of at least \$2.5 million;</p> <p style="padding-left: 40px;">(c) they have had a gross income for each of the past two financial years of at least \$250,000;”</p>	<p>This is an over-simplified description of how the law works.</p> <p>A person will only be a wholesale client under these limbs if they have a certificate from a qualified accountant attesting to their net assets or gross income (as applicable) which is not more than two years old.</p> <p>The wording in the current regulatory guide is more accurate.</p>

Draft RG 236 content	Comments of the Committee
Other	
<p>RG 236.54 to RG 236.60</p>	<p>This section should identify what AFS licence authorisation a responsible entity would need to hold to lawfully operate a registered scheme which includes assets which are ACCUs.</p> <p>For example, if a responsible entity is authorised to operate registered schemes which hold “financial assets” under its AFS licence, does this allow it to operate a scheme which holds ACCUs, or is a more specific authorisation required for ACCUs?</p>
<p>RG 236.95</p> <p>“In some cases, a person or company from outside Australia may be required to hold an AFS licence to carry on a financial services business in Australia: see RG 121. However, if the only activity you undertake is to hold EIEUs registered in a foreign registry, you are unlikely to require an AFS licence.”</p>	<p>In the second sentence, it is not entirely clear whether “you” is referring to a foreign entity or an entity in Australia.</p>
<p>RG 236.154</p> <p>“Example 6: Marking market when selling regulated emissions units”</p> <p>RG 236.157</p> <p>“Similar factors apply to derivatives as to other financial products when determining whether a person is providing financial product advice, dealing or marking a market, in derivatives.”</p>	<p>The current regulatory guide uses the correct terminology—“making a market”, not “marking market” / “marking a market”.</p>