

Submission to ASIC

Consultation paper 200 – Managed Discretionary Accounts - Update to RG 179

Proposal	
<p>B2</p> <p>For the purposes of this relief, we propose to explicitly define 'family' as 'the spouse and/or children (as defined in s995-1 of the Income Tax Assessment Act 1997) of an AFS licensee or its representatives'.</p>	
ASIC question	Our response
<p>B2 Q1</p> <p>Do you agree with our definition of 'family'? If you think 'family' should be defined using an alternative definition, please supply that definition and outline why it is preferred.</p>	<p>The definition of family should go up as well as down. Family should include parents and parents of spouse and parents of children's spouse.</p>
Proposal	
<p>B4</p> <p>We propose to revoke the regulated platforms no-action letter and modify our guidance to specify that:</p> <p>(a) where AFS licensees or their representatives give instructions at their discretion to regulated platform providers, including instructions to switch between investment options, these arrangements will be regulated as MDAs; and</p> <p>(b) AFS licensees that wish to undertake this activity will need to obtain the relevant AFS licence authorisations.</p>	
ASIC question	Our response
<p>B4 Q1</p> <p>Do you agree with our proposal to require AFS licensees offering MDAs through a regulated platform to obtain the relevant AFS licence authorisations? If not, please explain why you think this licensing relief should continue, given the similarity between MDAs operated through regulated platforms and other MDAs.</p>	<p>Yes. Does an adviser need to be licensed to advise on MDA or is being licensed to provide advice on managed investment schemes sufficient. Most MDA advisers do not have specific MDA advice authorisation.</p>

B4 Q2	
Proposal	
B6	
<p>We propose that, where all of an MDA operator’s MDA investments are contained on a regulated platform, the MDA operator must comply with the same operation, disclosure and conduct requirements that apply to other MDA operators, except for the following:</p> <p>(a) the MDA operator does not have to issue transactional reports for clients if the transactions have been, or will be, reported to the client or MDA operator by the regulated platform operator, as long as the MDA operator ensures that:</p> <p>(i) the reports generated by the regulated platform are passed on to clients if they are sent via an address of the MDA operator; and</p> <p>(ii) as soon as reasonably practicable following the reports being provided by the regulated platform operator, the MDA operator reviews the transaction details in the report and reports any exceptions or anomalies to clients; and</p> <p>(b) the MDA operator does not need to provide its MDA clients with an annual statement from a registered company auditor providing their opinion whether transactional reports have, or have not, been materially misstated.</p>	
ASIC question	Our response
<p>B6 Q1</p> <p>Do you agree with our proposal to exempt MDA operators from issuing transactional reports and an audit opinion on those reports to clients when all investments of the MDA are held through a regulated platform and the regulated platform provider reports transactions to clients? If not, why not?</p>	<p>Yes.</p>
<p>B6 Q2</p> <p>Do you agree with our proposal that AFS licensees offering MDAs through a regulated platform must comply with our MDA guidance and relief in all other respects? If not, please identify any further modifications or concessions that you think are warranted, and explain why.</p>	<p>If the MDA Operator operates only through regulated platforms – we consider a lower level of NTA should be required.</p>
Proposal	
B7	
<p>For the purposes of proposals B4–B6, we propose to define a ‘regulated platform’ as ‘an IDPS, IDPS-like scheme or superannuation entity’.</p>	

ASIC question	Our response
<p>B7 Q1</p> <p>Do you agree with our proposal to explicitly define 'regulated platform' in this way? If not, please suggest an alternative definition.</p>	<p>This should also include all registered managed investment schemes.</p>
<p>Proposal</p>	
<p>C1</p> <p>We propose that MDA operators should be subject to updated financial requirements that are similar to the financial requirements that have applied to responsible entities of managed investment schemes since 1 November 2012 and that we have proposed to apply to platform operators, as outlined in Regulatory Guide 166 Licensing: Financial requirements (RG 166) (revised version forthcoming). We also propose to apply to MDA operators the same financial requirements as proposed to apply to responsible entities having regard to scheme property holding arrangements. In particular, we propose that MDA operators should meet:</p> <ul style="list-style-type: none"> (a) the standard solvency and positive net assets requirement that applies to all AFS licensees; (b) a tailored cash needs requirement similar to the requirement that applies to responsible entities; (c) a tailored audit requirement similar to the requirement that applies to responsible entities; and (d) a net tangible assets (NTA) requirement similar to that which is proposed to apply to responsible entities. 	
ASIC questions	Our response
<p>C1 Q1</p> <p>Do you agree with our proposal that MDA operators should be subject to similar financial requirements to those that apply to the responsible entities of managed investment schemes? If not, why not?</p>	<p>Yes. However where the MDA Operator uses an external custodian (either as the custodian or sub-custodian) the lower NTA requirements (that apply to responsible entities which outsource custody) should also apply.</p>
<p>C1 Q2</p> <p>Do you agree that this proposal is appropriate, given the level of risk carried by MDA operators? Why or why not?</p>	<p>Yes, but subject to the qualification above.</p>
<p>C1 Q4</p> <p>Are there any circumstances in which the proposed financial requirements should not apply? Please specify.</p>	<p>We consider a lower level of NTA should apply to MDA Operators who offer their services and conduct their services through regulated platforms.</p>

Proposal	
C2	
<p>For the purposes of proposal C1, we propose to define 'client's portfolio assets' as 'financial products and other property that are the client's contributions or that are derived directly or indirectly from the client's contributions' (this is the same definition that is currently used in [CO 04/194]). We also propose to define 'average MDA operator revenue' as:</p>	
<ul style="list-style-type: none"> (a) in the first financial year in which the licensee is first authorised to operate an MDA, the licensee's reasonable forecast of its revenue from the date it was first authorised for the remainder of the first financial year pro-rated to a 12-month period; (b) in the next financial year after the first financial year in which the licensee was first authorised to operate an MDA, the average of the aggregate of the licensee's: <ul style="list-style-type: none"> (i) actual revenue for the second financial year to date, plus reasonable forecast of its revenue for the remainder of the second financial year; and (ii) revenue in the first financial year from the calculation date pro-rated to a 12-month period; (c) in its second financial year after the first financial year in which the licensee was first authorised to operate an MDA, the average of: <ul style="list-style-type: none"> (i) the aggregate of the licensee's revenue for the financial year to date and reasonable forecast of its revenue for the remainder of the financial year; (ii) the licensee's revenue for its previous financial year; and (iii) the revenue in the first financial year in which the licensee was first authorised to operate an MDA from the date of that authorisation pro-rated to a 12-month period; and (d) for all subsequent financial years, the average of: <ul style="list-style-type: none"> (i) the aggregate of the licensee's revenue for the current financial year to date and reasonable forecast of its revenue for the remainder of the current financial year; (ii) the licensee's revenue for the last preceding financial year; and (iii) the licensee's revenue for the second preceding financial year. 	
<p>In determining average MDA operator revenue, an MDA operator should include the revenue of persons performing the functions relating to an MDA for which the MDA operator is responsible (e.g. functions outsourced to other entities).</p>	
ASIC question	Our response
<p>C2 Q1</p> <p>Do you agree with our proposed definition of 'client's portfolio assets'? If you think that 'client's portfolio assets' should be defined using an alternative definition, please supply that definition and outline why it is preferred.</p>	<p>Yes – subject to our comments in C1 above.</p>

Proposal	
C3	
<p>We propose that external MDA custodians must meet the same requirements as those we propose to apply under CP 194 to providers of custodial or depository services that are not incidental providers. This includes the requirement to hold net tangible assets (NTA) of \$10 million, or 10% of average revenue, whichever is higher. In determining average revenue, an MDA operator should include the revenue of persons performing the functions relating to an MDA for which the MDA operator is responsible (e.g. functions outsourced to other entities).</p>	
ASIC question	Our response
C3 Q1	
<p>Do you agree with our proposal that external MDA custodians must meet the same requirements as those we proposed to apply under CP 194 to providers of custodial or depository services? If you disagree, please explain why.</p>	<p>Yes.</p>
Proposal	
C4	
<p>We propose that MDA operators responsible for holding client portfolio assets must meet the same requirements as those we proposed to apply under CP 194 to responsible entities that hold scheme property. This includes the requirement to hold NTA of \$10 million, or 10% of average revenue, whichever is higher, unless the MDA operator arranges for the client portfolio assets to be held by a person licensed to provide a custodial or depository service that is not an incidental provider or a body regulated by the Australian Prudential Regulation Authority (APRA).</p> <p>We propose to exclude MDA operators who are responsible for holding client portfolio assets from the definition of 'incidental custodial or depository services' as defined in CP 194. This means these MDA operators would not be able to fulfil their NTA obligations by meeting the reduced minimum NTA requirements for incidental providers of custodial and depository services. In determining average revenue, an MDA operator should include the revenue of persons performing the functions relating to an MDA for which the MDA operator is responsible (e.g. functions outsourced to other entities).</p>	
ASIC question	Our response
C4 Q1	
<p>Do you agree with our proposal that MDA operators responsible for holding client portfolio assets must meet the same requirements as those we proposed to apply under CP 194 to responsible entities that hold scheme property unless the MDA operator arranges for the client portfolio assets to be held by a person licensed to provide a custodial or depository</p>	<p>Yes, unless the MDA Operator engages either a direct custodian or sub-custodian. It should be noted in the registered scheme environment the custodian is engaged by the responsible entity and not the members. The custodian does not provide members of a registered scheme with an FSG and there is no direct contractual relationship. In our view the MDA operator should be entitled to appoint the custodian to hold the assets of the MDA with the MDA operator providing a form of sub-registry arrangement.</p>

service? If you disagree, please explain why.	
Proposal	
D1 We propose to refine our conditions relating to the MDA contract, investment program and financial advice to make it clear that: (a) the investment program that forms part of the MDA contract must contain an investment strategy; (b) the invest strategy must contain sufficient detail to permit an opinion to formed on the suitability of the investment program for a particular client; (c) the investment program forms part of the MDA contract; (d) the MDA operator or an external MDA adviser must provide personal advice about the MDA contract, including the investment program, on an annual basis. This personal advice must meet the conduct and disclosure obligations under Pt 7.7 and Pt 7.7A of the Corporations Act that apply to personal advice (including the obligation for the AFS licensee or its authorised representative to prepare and provide a Statement of Advice (SOA) or record of advice, and the obligation for the advice provider to act in the best interests of the client, provide appropriate advice, warn the client where advice is based on inaccurate or incomplete information, and prioritise the interests of the client), and must contain advice about whether the MDA contract for that client, including the investment program, continues to be suitable in light of the client’s personal objectives, needs and relevant personal circumstances.	
ASIC question	Our response
D1 Q1 Do you agree with our proposal to introduce an explicit requirement for the investment program to contain an investment strategy? If not, why not?	What happens to investors who hold an MDA but after investing cease to have an adviser. How do these investors maintain an MDA investment without an adviser. There should be an opportunity for investors to select model portfolios that have general investment guidelines in the same way as super fund members can select, portfolios that are balanced, conservative, aggressive and the like.
D1 Q2 Do you agree with our proposed clarification that personal advice about the MDA must state that the MDA contract including the investment program is appropriate to the client’s financial situation, needs and objectives? If not, please explain why.	No. See comments above.
D3 Q3 Are there any other aspects of our investment program, MDA contract or SOA requirements that	See comments above about model portfolios. Investors in registered managed investment schemes can invest without an adviser – why cannot the same apply to managed discretionary

need clarification or refinement? If so, please provide details.	accounts?
Proposal	
D2 We propose to clarify that the FSG and MDA contract must contain information about the fees and costs of the MDA in a manner that is consistent with Sch 10 of the Corporations Regulations.	
ASIC question	Our response
D2 Q1 Do you agree with this proposal? If not, why not?	Yes. MDA is a service not a product.
D2 Q2 Do you think that this proposal will assist investors to more easily compare different MDAs, or an MDA and an alternative investment?	Yes.
D2 Q3 Do you think that this proposal will assist investors to make better, more informed decisions about whether to invest in an MDA? Please explain your views.	The schedule 10 fee disclosure needs to be revisited to make it clearer.
Proposal	
D3 We propose to require the FSG for the MDA to provide a description of the operation of outsourcing arrangements that apply to the MDA, where relevant. This description should cover: (a) the entities involved and the functions they perform; and (b) how outsourced arrangements will be monitored.	
ASIC question	Our response
D3 Q1 Do you agree with this proposal? Please explain your response.	Yes

Proposal	
<p>D4</p> <p>We propose to require both the FSG and the MDA contract to contain information about how the client may terminate the MDA contract including:</p> <p>(a) how the instruction to terminate must be communicated;</p> <p>(b) how long it will take for the termination to take effect; and</p> <p>(c) how the MDA assets will be disposed of, or transferred to the client, if those assets are not held directly by the client.</p>	
ASIC question	Our response
<p>D4 Q1</p> <p>Do you agree with this proposal to require explicit upfront disclosure of how the client may terminate the MDA contract, and the processes for ceasing the MDA arrangement? Please provide details.</p>	<p>Yes</p>
<p>D4 Q2</p> <p>Will this proposal assist retail clients to better understand the operation of their MDA contract, how they can terminate that contract and the impact of any termination? If not please explain why.</p>	<p>Yes. However client should be able to maintain the MDA without an ongoing investment program – where the client chooses to not engage an adviser.</p>
<p>D4 Q3</p>	
Proposal	
<p>D5</p> <p>We propose to require that the length of time required by an MDA operator for the termination to take effect must be no longer than is reasonably necessary.</p>	
ASIC question	Our response
<p>D5 Q1</p> <p>Do you agree with our proposal to require that the length of time required by an MDA operator for the termination to take effect must be no longer than is reasonably necessary? If not, please explain why.</p>	<p>Yes.</p>