Wednesday, 8 May 2013

Ms Geraldine Lamont
Retail Investors Policy Officer, Financial Advisers
Australian Securities and Investments Commission

By email: mdareview@asic.gov.au

Dear Ms Lamont

ASIC Consultation Paper 200 – *Managed discretionary Accounts: Update to RG 179*

Thank you for the opportunity to provide a submission to ASIC Consultation Paper 200 *Managed discretionary accounts: Update to RG 179* (**CP 200**) and for the extension of time to provide our submission.

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, private and public trustees. The FSC has over 130 members who are responsible for investing $1.8 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

Please find our submission attached. We look forward to discussing the contents of our submission with you. I can be contacted on 02 9299 3022.

Yours sincerely

Stephen Judge
General Counsel

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FSC SUBMISSION – ASIC CONSULTATION PAPER 200 *Managed discretionary accounts: Update to RG 179*

EXECUTIVE SUMMARY

Below is a summary of some of the key points made in our submission in response to CP 200. However, our submission should be considered in full for these and all our other comments in response to CP 200.

1. We are concerned that the capital requirements for MDA operators may contribute to rationalisation in the industry and a reduction of providers able to or willing to provide MDA services:

   (a) (**No NTA on limited MDAs**): We consider that it does not appear appropriate to impose an NTA requirement on MDA operators *who only offer very limited MDA services (e.g. limited authority to operate – such as timing of investments, or limited power of attorney).*

   (b) (**Upper Cap on NTA on "Full" (or non-limited) MDA Operators**): Any NTA requirement should only apply to non-limited MDA operators (see (a) above). Where an MDA operator is a "full service" MDA operator (i.e. is not operating under a limited authority to operate or a limited power of attorney), then some NTA requirement should apply to the "full service" MDA operator but such NTA should be subject to an upper cap. (FSC has made similar submissions in relation to an upper cap on NTA for non-prudentially regulated entities, such as MDA operators, in other ASIC consultations, for example ASIC CP 140.)

2. ASIC proposes that the FSG and MDA contract must contain information about the fees and costs of the MDA *in a manner that is consistent with* Schedule 10 of the Corporations Regulations. We think that it is not appropriate to simply apply Schedule 10 to the MDA regime as Schedule 10 is not tailored to MDAs. Nor is it in our view sufficiently clear to mandate that MDA operators should instead apply a fee and cost regime which is "consistent with" Schedule 10, because it is unclear as to what is or is not "consistent" with Schedule 10 given the level of prescription in Schedule 10. We do not agree with ASIC's proposal.

3. The November 2004 ASIC no-action position (addressed to IFSA, as FSC then was) for MDAs should continue (and be incorporated in a Class Order). We do not support the removal of the no-action position for advisers using a platform that is already subject to a capital requirement. The MDA no-action position reflected in the November 2004

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letter should be preserved and formalised in a Class Order, with refinements to the no-action position suggested in this submission (e.g. see paragraph 20 of this submission for refinements to any Class Order preserving the no-action position) also being incorporated in a Class Order. Our view is that the MDA no-action position (which should be included in a Class Order) allows the efficient and cost effective delivery of advice and maintenance of up to date portfolios.

4. For advice licensees particularly (i.e. those which are not a product issuer), the proposed NTA may limit consumer choice given the costs of the NTA for such licensees. We also note that flexibility is required in relation to MDA policy to accommodate the various arrangements and business models in place.

5. In relation to ASIC's proposals in respect of MDA clients that become *non compos mentis* or of unsound mind, we do not agree with ASIC's proposal to apply ASIC's MDA proposals to trustee companies licensed to provide traditional trustee company services and who hold Enduring Powers of Attorney for MDA clients who subsequently lose capacity. If an MDA client loses capacity, then they by definition that client loses the ability to 'give' discretion or authority to a third party (including an MDA operator). Once an MDA operator is notified that a client has lost capacity, the authority and directions delegated to the MDA operator ceases, and instead what governs the relationship from the time the MDA client becomes of unsound mind, is the relevant enduring power of attorney, the common and statute law of trusts, and other provisions applicable to trustees and attorneys.

DETAIL – SOME GENERAL COMMENTS

6. A bona-fide non-custodial MDA operator, does not create or issue the underlying investment schemes invested in under the MDA, so is not responsible for the operation of the underlying investment schemes. The MDA operator is selecting from a range of assets and schemes and is simply arranging transactions across various investments such as already issued investment schemes that are operated by responsible entities, or assets listed on an exchange.

7. (**Non-limited MDA operator not providing custody**): For these reasons we believe the NTA requirements for non-limited MDA operators that do not provide custodial and depository services should be modified so that part (b) of ASIC's proposed NTA is altered to a maximum of $2 million, and part (c) of ASIC's proposed NTA be changed to 2.5% of average MDA operator revenue (up to a maximum of $2 million). That is, the NTA requirement (where it applies – and FSC submits its should not apply to limited MDA operators), should be (where the non-limited MDA operator does not provide custodial and depository services):

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> *"MDA operators that do not provide custodial and depository services must hold at all times minimum NTA of the greater of:*
>
> *(a) $150,000;*
>
> *(b) 0.5% of the average value of all of the client's portfolio assets of the MDAs you operate up to $2 million NTA; or*
>
> *(c) 2.5% of your average MDA operator revenue up to $2 million NTA."*

8. (**Non-limited MDA operator providing custody**): In relation to non-limited MDA operators that do provide custodial and depository services, we also consider that similarly there should be an upper cap on the amount of NTA, rather than uncapped as ASIC propose. We refer ASIC to FSC's submission dated 4 February 2013 to ASIC Consultation Paper 194 – *Financial requirements for custodial or depository service providers* in which we set out in more detail our view that there should be an upper cap on NTA for custodial and depository service providers (as a non-prudentially regulated entity).

9. Given the cost of capital and our view that operational risk does not continue to increase linearly with MDA revenue, there should be an upper fixed cap on the maximum amount of financial resources required by ***non-limited*** MDA operators. Only non-limited MDA operators should be subject to any NTA requirement and the NTA should be subject to a cap. (FSC's view that ASIC should not impose an uncapped NTA requirement is consistent with FSC's submission (of 8 December 2010) to ASIC Consultation Paper 140 in relation to the financial resource requirements for responsible entities and FSC's submission to ASIC Consultation Paper 194 (financial requirements for custodians)).

10. (**Limited MDA operator should not be subject to an NTA requirement**) As set out in paragraph 1(a) of this submission, we do not consider that limited MDA operators should be subject to any NTA requirement. That is, MDA operators who only offer very limited MDA services (e.g. limited authority to operate, or limited power of attorney) should not be subject to any NTA requirement.

Definition of MDA Service - inconsistency between the MDA class order and pooling of assets in regulated platforms

11. The definition of ***MDA service*** in paragraph 7.6(m) of CO 04/194 requires that, in order for the class order to apply, the service must ensure that the client's portfolio assets will "*not be pooled with property that is not the client's portfolio assets to enable an investment to be made or made on more favorable terms*". This requirement is also reflected in condition 1.22 of CO 04/194.

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12. However, regulated platforms typically do pool client investments for this purpose. For example, superannuation funds, IDPSs and IDPS-like schemes are typically pooled to give members access to investments they could not hold directly and/or to access those underlying investments on more favourable terms. This means that the prohibition on pooling in CO 04/194 may prevent an MDA being operated through a regulated platform. Further, the prohibition on pooling may restrict direct share trading where trades for multiple clients are combined and sent to the market at the one time.

13. Another inconsistency relates to the reporting and audit requirements as they relate to the holding, transacting and reporting on underlying assets. The requirements that apply to regulated platforms differ depending on the type of regulated platforms (i.e. whether the platform is a superannuation fund, IDPS or IDPS-like), but are in all cases different to the requirements imposed by CO 04/194.

14. We see no reason in policy for preventing an MDA from being run on the basis that the custody, reporting and transactional functions will be provided through a regulated platform, and we see no reason why CO 04/194 cannot leave the requirements relating to custody, reporting and transactional functions to be governed by the requirements applicable to the regulated platform. Accordingly, we submit that CO 04/194 be amended to facilitate the operation of an MDA through a regulated platform by removing the inconsistencies (such as pooling restrictions currently applicable to MDAs) and anomalies (such as timing discretion when limited MDA services involve trading on behalf of clients), and by allowing the rules governing the regulated platform to determine how underlying assets are held, transacted and reported on.

RESPONSE TO SPECIFIC ASIC QUESTIONS IN SECTION B OF CP 200 *RESOLVING THE [IFSA/FSC] OUTSTANDING NO-ACTION POSITION*

ASIC Question B4Q1 ***Do you agree with our proposal to require AFS licensees offering MDAs through a regulated platform to obtain the relevant AFS licence authorisation? If not, please explain why you think this licensing relief should continue, given the similarity between MDAs operated through regulated platforms and other MDAs.***

15. We disagree with ASIC's proposal because:

    (a) A *dealing* or *arranging* licence authorisation coupled with a *personal advice* licence authorisation that covers the regulated platform (and underlying products if the regulated platform is an IDPS) for retail clients should be sufficient. This covers the advice and investment management functions of the Limited Power of Attorney, while the custody, reporting, administration and transactional functions are performed by the regulated platform and covered by the licence of its operator.

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(b) There does not appear to be any additional consumer protection offered by requiring a further licence authorisation.

(c) There is no demonstrated need in the market for additional protection in this regard (but there will be costs in ASIC requiring it).

(d) A further licensing requirement would impose unnecessary costs on both licensees and ASIC.

(e) Imposing additional costs by requiring further licence authorisations will reduce competition by putting further cost pressure on small independent licensees, exacerbating the cost pressure that ASIC's proposed NTA requirements will impose.

ASIC Question B5Q1 ***Will this transition period assist AFS licensees and their representatives who are currently relying on the no-action position to adjust to the proposed changes to our guidance and relief? Please explain if you think a shorter or longer transition period is needed and why.***

16. The length of transition period should depend on how much adjustment is needed pursuant to final release of the updated *Regulatory Guide 179 Managed discretionary account services* ("**RG 179**").

17. Industry may need a significant transition period if ASIC's final revised policy interacts with other financial services laws such as the FOFA reforms.

ASIC Question B6Q1 ***Do you agree with our proposals 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.***

18. Yes, we agree.

ASIC Question B6Q2 ***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.***

19. Given the increasing interest in planners offering the limited MDAs under limited power of attorney to their clients, we believe further modifications are required. Many advisers who offer limited MDAs under the limited power of attorney may be involved

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in a trading discretion which is merely confined to the time or price at which transactions could be effected.

20. Currently, RG 179.19 states: "*However, if the trading discretion given to the operator is confined merely to the time or price at which transactions could be effected, we do not consider that arrangement to be covered by our MDA policy*." The essence of this statement is currently not incorporated in the no-action letter and we request that ASIC incorporate the substance of this statement into a formal class order relief. Such incorporation will also ensure that the class order related to MDAs will be consistent with the class order related to IDPSs, where the latter provides relief for timing discretion.

21. Therefore, we propose that further clarification should be given with respect to RG 179.13 to exclude planners who assist their clients in carrying out a trade in securities by using a brokerage service as offering MDA services.

22. The definition of ***MDA service*** in paragraph 7.6(m) of CO 04/194 requires that, in order for the class order to apply, the service must ensure that the client's portfolio assets will "*not be pooled with property that is not the client's portfolio assets to enable an investment to be made or made on more favorable terms*". This requirement is also reflected in condition 1.22 of CO 04/194.

23. However, regulated platforms typically do pool client investments for this purpose. For example, superannuation funds, IDPSs and IDPS-like schemes are typically pooled to give members access to investments they could not hold directly and/or to access those underlying investments on more favourable terms. This means that the prohibition on pooling in CO 04/194 may prevent an MDA being operated through a regulated platform.

24. We see no reason in policy for preventing an MDA from being run on the basis that the custody, reporting and transactional functions will be provided through a regulated platform, and we see no reason why CO 04/194 cannot leave the requirements relating to custody, reporting and transactional functions to be governed by the requirements applicable to the regulated platform.

25. Accordingly, we submit that CO 04/194 be amended by removing the pooling restriction in the definition of MDA service and in condition 1.22.

ASIC Question B7Q1 ***Do you agree with our proposal to explicitly define 'regulated platform' in this way? If not, please suggest an alternative definition.***

26. We propose that, if ASIC's final position is to opt for an explicit definition of the term "regulated platform", the proposed definition should read: "an IDPS, IDPS-like scheme, superannuation entity, superannuation wraps, master trusts and trading facilities

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through market participants that allow clients to acquire or dispose interests in, or relate to, IDPS, IDPS-like schemes, or superannuation products".

27. In addition, if ASIC decides to include "superannuation entity" in the definition of regulated platform, we seek further clarifications on the term "superannuation entity" and whether it includes SMSFs.

28. We also would like to seek clarification from ASIC as to whether administrative platforms such as platforms facilitating share trading are considered as a "regulated platform" given they are often used in MDA services. This kind of administrative platform will also fit into the proposed definition for "regulated platform" set out above.

29. FSC would welcome the opportunity to arrange FSC members to comment on any ASIC drafting of any definition of "regulated platform".

RESPONSE TO SPECIFIC ASIC QUESTIONS IN SECTION C OF CP 200 *UPDATING FINANCIAL REQUIREMENTS FOR MDA OPERATORS*

ASIC Question C1Q1 ***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?***

30. The following comments are based on the assumption that financial requirements only apply to MDA operators that are AFS licensees. If ASIC intends to impose financial requirements to MDA operators that are authorised representatives, then we propose further consultation is required on this point.

31. Currently, licensees are subject to the financial requirements provided by subsection 912A(1)(d) of the *Corporations Act 2001* (Cth) and ASIC's Regulatory Guide 166: *Licensing: Financial requirements* ("**RG 166**"), as well as to any other licence conditions imposed on licensees. We believe that it is sufficient that licensees comply with these requirements for the purpose of ensuring MDA operators meet the relevant financial requirements.

32. In addition to the financial requirements, all licensees and authorised representatives are required to have the adequate Professional Indemnity ("**PI**") insurance to cover the MDA service they provide.

33. In our view, MDAs are a retail investment mandate, and should not be treated as a financial product requiring product disclosure statements or compliance with financial requirements applicable to product issuers such as responsible entities. Where

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custody is provided by the MDA operator, the operator is already subject to additional financial requirements under their licence condition. Also, where external custody and depository services are used, the clients' assets and benefits rest with these custodians as opposed to MDA operators.

ASIC Question C1Q3 ***Are there any practical problems with the implementation of this proposal? If so, please give details.***

34. The requirement for the licensee to determine the cumulative average MDA operator revenue of all authorised representatives operating an MDA service can be practically difficult and costly.

35. As we have previously outlined in this submission, we believe the current financial requirements under law, RG 166 and licence conditions, as well as PI insurance is sufficient in ensuring MDA operators are adequately resourced financially.

ASIC Question C1Q4 ***Are there any circumstances in which the proposed financial requirements should not apply? Please specify.***

36. The proposed financial requirements should not apply to an MDA operator where the MDA operator does not hold any legal or beneficial ownership of the MDA assets under the MDA arrangement (for example, Limited Powers of Attorney).

37. As set out elsewhere in this submission, we do not consider that limited MDA operators should be subject to any NTA requirement. That is, MDA operators who only offer very limited MDA services (e.g. limited authority to operate, or limited power of attorney) should not be subject to any NTA requirement.

RESPONSE TO SPECIFIC ASIC QUESTIONS IN SECTION D OF CP 200 *IMPROVING DISCLOSURE FOR MDA INVESTORS*

ASIC Question D1Q1 ***Do you agree with our proposal to introduce an explicit requirement for the investment program to contain an investment strategy? If not, why not?***

38. Yes, we agree.

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ASIC Question D1Q2 ***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.***

39. Yes, we agree.

40. However, we believe that where clients have declined or did not respond to the offer of the annual review, MDA services should be allowed to continue. Currently, the requirement is that MDA services must cease if the client refuses to participate in an annual advice process.

ASIC Question D1Q3 ***Are there any other aspects of our investment program, MDA contract or SOA requirements that need clarification or refinement? If so, please provide details.***

41. We support ASIC's proposal to allow advice to be given in an RoA as an alternative to an SoA.

ASIC Question D2Q1 ***Do you agree with the fee disclosure proposal? If not, why not?***

42. We agree that fee disclosure is necessary. However, we believe the relevant fee disclosure should be able to be provided in a separate document which clearly sets out all relevant fees and disclosures, so clients can view the total costs for the advice and product in one document. There are or will be multiple different fee disclosure regimes, including:

- FSG
- SoA
- PDS
- AFDS
- Opt-in
- CO 04/194
- Contract
- Fiduciary duties.

43. It seems unnecessary to require compliance with all of these. For example, the SoA sets out the investment contract so the client already knows what the fee is for. The fee disclosure regime applicable to MDAs should be rationalised to reduce duplication and redundancy.

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ASIC Question D3Q1 ***Do you agree with the proposal on outsourcing arrangements? Please explain your response.***

44. No, we do not agree with ASIC's proposal. If the operator takes responsibility for its outsource providers, these descriptions should be irrelevant and will be confusing for investors, potentially implying direct rights against service providers.

ASIC Question D4Q1 ***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.***

45. We agree that explicit upfront disclosure relating to the termination of the MDA contract should be mandated. However, we believe it is only appropriate for such disclosure to take place in the MDA contract, as opposed to the FSG. In the FSG, there should only be a brief reference about termination, but not in detail. This is because the termination regarding the MDA contract is complex, and the FSG is not the appropriate place to provide such details. For example, how the assets will be treated is dependent on the client's situation and what is appropriate for the client at the time of termination.

46. We agree that explicit upfront disclosure of how the client may terminate the MDA contract, and the processes for ceasing the MDA arrangement should be mandated. We believe the relevant disclosure should occur in the MDA contract under a clear termination clause, and only a brief reference to termination should be required in the FSG.

ASIC Question D5Q1 ***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.***

47. The term "no longer than is reasonably necessary" is unclear. Under the best interest duty, it is expected that all licensees and authorised representatives would not be acting in a way that is inconsistent with the term "no longer than is reasonably necessary".

ASIC Question D6Q1 ***Do you agree with our proposal to require MDA operators to formulate a policy outlining the steps they will take if a client opts out of receiving ongoing advice? If not please provide details.***

48. This matter should be disclosed in the MDA contract.

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ASIC Question D6Q2 ***Do you agree with our proposal to require disclosure of the policy in the FSG? If not, please explain why.***

49. No, disclosure of the policy should not be required to appear in the FSG. The FSG should disclose that the MDA contract may be terminated by the client and that details of how to terminate and the consequences of termination will be set out in the MDA contract.

RESPONSE TO SPECIFIC ASIC QUESTIONS IN SECTION E OF CP 200 *OTHER MODIFICATIONS TO OUR GUIDANCE AND RELIEF*

Investing in arrangements where recourse is not limited

ASIC Question E2Q1 ***Do you agree with our proposed definition of 'non-limited recourse product or arrangement'***

50. The proposed definition is too restrictive. The restriction should not be included as the client is protected by the requirement for annual personal advice and the investment parameters. If a restriction is to be applied, it should only apply to those products where losses are open-ended or not subject to a quantifiable maximum. Otherwise the restriction may exclude many investments (such as for example, warrants and partly paid shares).

MDA clients that become non compos mentis or of unsound mind

ASIC Question E3Q1 ***Do you agree with our proposal to formally incorporate the above relief for trustee companies who are licensed to provide traditional trustee company services and who hold EPAs for MDA clients who subsequently lose capacity? If not please explain why***

51. No, we do not agree. Once a client loses capacity they no longer meet one of the basic criteria of an MDA. We refer ASIC to paragraph 2(a) of ASIC CP 200 which states: "*The client gives the MDA operator the authority to make and implement investment decisions on their behalf.*"

52. If an MDA client loses capacity then they by definition lose the ability to 'give' discretion or authority to a third party (including an MDA operator).

53. Once an MDA operator is notified that a client has lost capacity, the authority and directions delegated to the MDA operator ceases. That is, it would be impossible for an MDA operator to advise that an MDA remains appropriate as the client does not

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have the capacity to make any decision about whether the MDA is appropriate for them.

54. The MDA operator must then seek out an alternative decision maker. This could be a decision maker:

(a) previously appointed by the client via an Enduring Power of Attorney (**EPA**) e.g. a family member;

(b) who is a professional trustee (operating under a Traditional Trustee Service licence) previously appointed by the client via an EPA;

(c) or should the client not have a valid EPA, an alternate decision maker must be appointed by a court/tribunal/administration body

The alternate decision maker as prescribed in the EPA (or relevant order) now has the legal right to make financial decisions on behalf of the client as though they are the client.

55. **Example 1**

Mary Jones has an MDA service at XYZ Financial. Mary loses capacity but had previously appointed her son Peter Jones as an EPA. XYZ Financial now deals with Peter Jones who will make all investment decisions. Peter can direct XYZ financial to continue existing arrangements, close the account and open a different account elsewhere. Peter has decided he wishes to be more hands on with the investments and directs XYZ Financial to close the account and remit the proceeds to another account.

If the client had appointed a professional trustee, the professional trustee has the exact same powers available to any other attorney under an EPA, including the ability to open/close accounts. If the professional trustee decides to discontinue the MDA service it may do so at any time under its legal powers. Once the professional trustee has exited the MDA then any obligations relating to the MDA provisions also fall away. E.g. Activities such as SOA, reporting and providing documentation are superfluous as the MDA has been discontinued.

ASIC Question E3Q2 ***Do you think our proposal to give MDA operators who are licensed to provide traditional trustee company services alternative options for the delivery of MDA documentation is appropriate in these circumstances? If not, please explain why***

56. No. Please see our response above to ASIC Question E3Q1. Further it would be nonsensical in our opinion to send disclosure documentation to parties who have no legal right to make a decision relating to the documents in question.

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ASIC Question E3Q3 ***Are there any alternative options that should be made available to MDA operators who are licensed to provide traditional trustee company services? If so, please outline what other options should be available and why?***

57. Existing alternatives are already available. It is important to note that once the Enduring Power of Attorney is invoked, the attorney is subject to trustee regulatory obligations in the respect of its duties including to invest. Upon notification of the client's loss of capacity, the attorney must review the needs and circumstances of the principal to select an appropriate investment vehicle. Investment decisions must be made in accordance with the relevant trust legislation in each state (i.e. the Prudent Person Principle). A trustee must therefore balance the need to preserve capital ("the risk") with the need to make the funds productive for the benefit of the principal ("the return").

58. When a trustee corporation acts as an attorney under an EPA for a *non compos mentis* client, it does so in a fiduciary capacity and is subject to various significant duties under common or statute law that are more exacting than those imposed on non-trustees in the current MDA environment. Examples of those trustee duties include:

(a) always acting in the best interests of the client;

(b) not take advantage of information that it becomes aware of or opportunities that arise, by virtue of its role as attorney;

(c) not directly confer benefits on itself or to a third party unless expressly authorised to do so by the power of attorney;

(d) hold the clients property separately from its own funds.

ASIC Question E3Q4 ***Are there any other alternative requirements or modifications that should be imposed on MDA operators who are licensed to provide traditional trustee company services when a client loses legal capacity because they are of unsound mind? If so, please outline what other requirements or modifications should apply and why?***

59. No. Please see our previous responses above to ASIC Questions E3Q1, E3Q2 and E3Q3 (in paragraphs 51 to 58 of this submission).

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ASIC Question E3Q5 ***Aside from MDA operators who are licensed to provide traditional trustee company services, do other MDA operators ever act under enduring powers of attorney for some or all of their MDA clients and how common is this? Please provide details***

60. We do not have information relating to this question but we query how such a service could be provided without the appropriate licence. E.g. provide traditional trustee company services: to retail and wholesale clients.

ASIC Question E3Q6 ***Should the proposed reporting arrangements also apply to MDA operators who are not licensed to provide traditional trustee company services, provided that they are also acting under an enduring power of attorney? If so, please outline who this should apply to and why. If not, please outline why not.***

61. Please see our responses above to ASIC Question E3Q1 (in paragraphs 51 to 55 of this submission) and ASIC Question E3Q5 (in paragraph 60 of this submission).

ASIC Question E3Q7 ***Will implementing this proposal impose additional costs for these MDA operators? Please give details of any initial and/or ongoing costs that would result.***

62. See our response above to ASIC Question E3Q1 (in paragraphs 51 to 55 of this submission).

63. Yes additional costs will be imposed because, providing a service that has specific requirements under two different licence/regulatory conditions or regimes (i.e. Traditional Trustee Company Services and MDA) would create duplication and would also create a process of provision of disclosure documents that are unnecessary.

ASIC Question E3Q8 ***Should ASIC address any other issues in our terms of relief in relation to MDA clients that lose legal capacity due to unsoundness of mind? Particular issues include: when ASIC should address relief for arrangements that have effect only on loss of capacity; when it is appropriate to provide information to the next of kin or guardians; nomination of alternative recipients in advance of incapacity; the obligations that should apply if a client resumes legal capacity; and whether the same provisions should apply to MDAs involving trusts rather than powers of attorney. Please outline why or why not these issues should be addressed.***

64. No. See our response above to ASIC Question E3Q1 (in paragraphs 51 to 55 of this submission). Also, in the event that ASIC propose any guidance as to the operation of a Traditional Trustee Company Service, consultation on this should occur outside of and separately from this MDA consultation.

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65. We submit that ASIC's MDA guidance is not the appropriate place to detail issues pertaining to loss of capacity. There is and should not be any difference between MDAs and any other financial product/service, so far as the issues of loss of capacity are concerned.

66. **Example 2**

(*See Example 1 at paragraph 55 of this submission for the facts which also apply to this Example 2*)

Mary Jones also has a managed fund at XYZ Financial. Mary loses capacity but had previously appointed her son Peter Jones as an EPA. XYZ Financial now deals with Peter Jones who will make all investment decisions. Peter has decided he wishes to keep the investment, provides a copy of the EPA to XYZ Financial and directs XYZ Financial as desired.

Other Comments in relation to ASIC's Proposals in Section E3 MDA clients that become non compos mentis or of unsound mind

67. Paragraph 78 of ASIC CP 200 states that ASIC's Proposals in section E3 "*does not cover situations where a client has already lost their mental capacity before they commence investing in an MDA*." We make the observation which we think is critical, that It is not clear under what legal basis a person who does not have capacity could ever enter an MDA. The only person who could elect to do so would be an alternative decision maker.

RESPONSE TO SPECIFIC ASIC QUESTIONS IN SECTION F OF CP 200 *UPDATED REGULATORY GUIDANCE*

ASIC Question F1Q2 ***Are there any other topics which relate to the scope and application of our MDA relief and guidance where revised guidance is needed? Please provide details.***

68. We would like to seek further clarification on the different types of MDA arrangements involving multiple parties. For example, an MDA arrangement may include a planner and an investment specialist who provide ongoing management of the investment programs. The investment specialist may, or may not, rely on external administrators or custodians.

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ASIC Question F5Q1 ***Do you agree with our proposals to provide MDA-specific regulatory guidance on the requirement to give annual fee disclosure statements? If not please explain why.***

69. Yes, we agree.

ASIC Question F6Q1 ***Do you agree with our proposals to provide MDA-specific regulatory guidance on the interaction of the opt-in requirement and the conditions of relief in [CO 04/194]? If not, please explain why.***

70. Yes, the guidance could take the form of amending the existing class order, or in a regulatory guide. In particular, we would like to seek clarifications on situations where the client opts-in to receive ongoing advice, but not the MDA service.

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