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By Email

Dear Madam

Consultation Paper 280 - Proposed repeal of [CO 07/74]

1 Introduction

Allens welcomes the opportunity to provide comments on ASIC's proposed remaking or repeal of ASIC Class Order [CO 07/74] (**CO 07/74**) and the issues raised in Consultation Paper 280 *ASIC class order on wholesale equity schemes: Licensing relief for trustees* (**CP 280**) more generally. While Allens does not rely on CO 07/74, we have advised on the licensing and regulatory issues associated with providing trustee services in Australia generally and the operation and availability of the relief provided by CO 07/74 in particular.

2 Summary

In summary, we think CO 07/74 provides a useful regulatory purpose and should be remade and continued in a new legislative instrument that reflects current drafting practice, without significant changes.

3 Policy background to CO 07/74

(a) Paragraph 7 of CP 280 notes that:

A 'wholesale equity scheme' is essentially an unregistered managed investment scheme that primarily invests in securities of unlisted companies and whose members are all wholesale clients. For tax reasons, wholesale equity schemes are usually structured by the manager using a multiple unit trust structure with separate corporate trustees that are related bodies corporate of the manager.

(b) Paragraph 9 of CP 280 states that:

[CO 07/74] provides relief to trustees of wholesale equity schemes from the requirement to obtain an AFS licence in the circumstances specified in the class order. This relief has been provided to remove impediments in the venture capital industry by removing unnecessary regulatory burdens.

(c) In our experience, single collective investment schemes can comprise a number of trusts and other entities (as opposed to a single fund vehicle). In particular and for various reasons, managers often establish wholesale equity schemes as special purpose vehicles to hold one or more investments. We agree that such wholesale equity schemes are usually structured by the manager using a multiple unit trust structure with separate corporate trustees that are

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related bodies corporate of the manager, and we submit that CO 07/74 has operated and continues to operate effectively to allow managers to structure their funds and investment arrangements in that way without the regulatory burden of the trustees requiring an Australian financial services licence to provide dealing and custodial or depository services, and without the cost burden of appointing a third-party, licensed trustee.

4 Scope and practical use of CO 07/74

- (a) As CP 280 notes, absent the availability of the relief provided under CO 07/74, Part 7.6 of the Corporations Act 2001 (Cth) (the **Corporations Act**) is likely to require a trustee of a wholesale equity scheme to hold an Australian financial services licence (**AFSL**) to provide 'wholesale equity financial services' by:
 - (i) dealing in investment products that form part of the trust property of the wholesale equity scheme; and
 - (ii) providing a custodial or depository service in relation to the investment products of the scheme.
- (b) For a trustee to rely on CO 07/74, the relevant wholesale equity scheme must effectively be operated by the manager, which:
 - (i) is a related body corporate of the trustee;
 - (ii) holds an appropriate AFSL; and
 - (iii) takes responsibility for the operation of the scheme.
- (c) The relief provided by CO 07/74 is limited in scope in terms of the:
 - (i) financial services to which it applies;
 - (ii) schemes to which it applies, in terms of both the investors (wholesale only) and the underlying assets; and
 - (iii) requirement that a trustee seeking to rely on the relief must have a related body corporate which holds an AFSL authorising it to provide the wholesale equity financial services and which accepts responsibility for the financial services provided by the trustee in respect of the relevant wholesale equity scheme.

5 Policy

5.1 Impact of repeal

- (a) In our view, the repeal of CO 07/74 could adversely affect the ability of Australian managers who hold an AFSL to make use of wholesale equity schemes within their fund or investment structures.
- (b) As AISC notes at paragraph 8 of its Regulatory Guide 192 *Licensing: Wholesale equity venture capital schemes (RG 192)*, although Chapter 7 of the Corporations Act accommodates a limited form of group licensing, it is unlikely that the trustee of a wholesale equity scheme would be able to rely on its related body corporate's AFSL in relation to the provision of financial services in respect of those schemes. We also consider there to be a risk that the provision of custodial or depository services to beneficiaries of a trust is a service which is fundamentally personal to the trustee, in which case it may not be a service which a trustee can provide on behalf or as the representative of another entity.

- (c) In our view, if CO 07/74 is repealed, managers seeking to use wholesale equity schemes will be faced with two options:
- (i) the added cost and administrative burden of appointing appropriately-licensed third-party trustees; or
 - (ii) ensuring that each related body corporate trustee of a wholesale equity scheme holds an appropriate AFSL (which ASIC has noted at paragraph 7 of RG 192 would impose a disproportionate cost burden on schemes),
- with the added cost in each case likely to be borne by the third-party investors.

5.2 Policy balance

We submit that, in policy terms, CO 07/74 strikes an appropriate balance between, on the one hand, ensuring that financial services are provided only by or under the supervision of persons with appropriate AFSLs and, on the other, facilitating the use of wholesale equity schemes by managers for the benefit of their investors without subjecting the parties to undue cost and regulatory burden. In particular:

- (a) the relief is limited to the provision of wholesale equity financial services (as defined in CO 07/74), which it would not be possible for an unlicensed trustee to provide other than in reliance on the relief afforded by CO 07/74;
- (b) reliance on CO 07/74 requires a trustee to have a related body corporate with an AFSL authorising it to provide wholesale equity financial services with certain conditions, including that:
 - (i) the licensee must, as far as possible, comply with the Corporations Act as if the trustee were providing the services as the licensee's authorised representative; and
 - (ii) the licensee must have in place a deed poll for the benefit of and indemnifying the scheme members in relation to liability arising as a result of the trustee providing the services,

and in our view these conditions protect scheme members by ensuring that the regulatory and liability consequences that apply are equivalent to those which would apply if the services were instead provided by a licensee; and

- (c) the relief only applies to schemes which have only wholesale clients as investors, who are well placed to look after their own interests. In this regard, we observe that, generally, wholesale clients who contemplate the acquisition of interests in wholesale equity schemes or an investment in collective investment schemes are advised by financial, legal and asset-specific experts, as required.

6 Consultation process

- (d) We have, in part, made this submission because we are concerned that many of those potentially affected will not themselves write to ASIC. This is not due to lack of interest on their part but simply the fact that those relying upon CO 07/74 (or who have relied upon it in the past) may not become aware of CP 280.
- (e) Paragraph 23 of CP 280 suggests that ASIC will repeal CO 07/74 if responses received to the consultation confirm that the number of entities currently relying on and meeting the conditions of the relief are at such a low level that the relief is not warranted. Given that those relying upon CO 07/74 (or who have relied upon it in the past) may not become aware

of CP 280, we submit that ASIC should not repeal CO 07/74 based solely upon a small number of responses.

We have set out our responses to CP 280 in the annexed schedule. If you have any questions about our submission or would like to discuss any aspect of it, please contact us.

Yours sincerely

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Schedule 1 – Questions in CP 280**B1Q1. Do you consider that [CO 07/74] is currently operating effectively and efficiently? Please give reasons for your view.**

Yes.

The relief provided by CO 07/74 is of significant benefit to managers seeking to establish wholesale equity schemes as part of an overall fund or investment-holding structure, without necessitating the appointment of a third-party trustee or requiring the manager to incur the undue cost and regulatory burden of ensuring that each related body corporate which is appointed as trustee has an appropriate AFSL.

As discussed in detail at paragraph 5.2 of our cover letter, in our view CO 07/74 strikes an appropriate balance between, on the one hand, ensuring that financial services are provided only by or under the supervision of appropriately-licensed persons and, on the other, facilitating the use of wholesale equity schemes by managers for the benefit of their investors without subjecting the parties to undue cost and regulatory burden

B1Q2. Do you see any regulatory impacts or costs associated with amending the relief to align it with [CO 13/760], [CO 13/761] and [CO 13/1410]? Please provide reasons for your view and details of costs.

Allens does not rely upon CO 07/74 and is therefore not best placed to provide a response to this question. However, based on our experience advising clients:

- (a) on the basis that entities relying on the relief under CO 07/74 are often special purpose vehicles which would struggle to satisfy the net tangible assets requirements, we agree with ASIC's proposal that those requirements should not apply to persons seeking to rely upon the amended relief; and
- (b) CO 07/74 provides relief to unlicensed trustees on the basis that a licensed related body corporate treats the assets, liabilities, cash inflows and cash outflows of the trustee as though they were included in the assets, liabilities, cash inflows and cash outflows of the licensee. Given the requirements of [CO 13/760], [CO 13/761] and [CO 13/1410] already apply to the licensed related body corporate of any entity seeking to rely upon the amended relief, we query the need for those requirements to also apply to the unlicensed trustee.

B1Q3. Do you consider that the transitional provisions will provide sufficient time to meet the new financial and custody requirements? Please provide details about the steps that will need to be taken to meet these requirements and an estimate of the timeframe required to complete these steps.

Allens does not rely upon CO 07/74 and is therefore not best placed to respond to this question.

B1Q4. Do you see any regulatory impacts or costs associated with making any necessary changes to ASIC's systems to ensure our registers reflect the trustees and wholesale equity schemes relying on the relief and their compliance with the conditions of relief? Please provide reasons for your view and details of costs.

We do not have a view on this question, save for our comments on the proposed conditions of the amended relief, which appear elsewhere in this Schedule.

B2Q1. If you are an entity that relies on [CO 07/74], please provide details about:

(a) the wholesale equity schemes operated under [CO 07/74] (by name of manager and trustee (including ACN), and provide the name of the scheme, whether the scheme is currently operating and, for each scheme, the funds under management and the number of clients); and

(b) compliance with paragraph 5(c)(iii) of [CO 07/74] in relation to each wholesale equity scheme operated under [CO 07/74] (including, for the period commencing 30 June 2013 to 30 June 2016 inclusive, the dates of all lodgements for each scheme with ASIC and the entity that lodged the report(s) with ASIC).

As noted above, Allens does not rely upon CO 07/74.

B2Q2. Do you consider that a 12-month extension of relief will be sufficient to allow alternative arrangements to be made? Please provide details about the steps that will need to be taken to comply with the Corporations Act and an estimate of the timeframe required to complete these steps.

Allens does not rely upon CO 07/74. However, based on our experience advising clients, we anticipate that those currently relying on the relief would either need to appoint a third-party, licensed trustee in respect of each wholesale equity scheme or ensure that any existing related body corporate trustee obtains an appropriate AFSL. On that basis, we would expect a 12-month extension of relief to be sufficient to allow those relying upon CO 07/74 to make alternative arrangements.

B2Q3. What costs would you incur if we do not provide relief in the form of [CO 07/74] after 1 October 2018? Please provide details.

Allens does not rely upon CO 07/74. However, based on our experience advising clients, we expect that if ASIC does not provide relief in the form of CO 07/74 after 1 October 2018, unlicensed trustees currently relying on CO 07/74 may not have sufficient capital or experience to obtain an appropriate AFSL. Managers would therefore be required to appoint a third-party, licensed trustee at significant additional cost, with such cost likely to be borne by the investors.