



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 296

Funds management

October 2017

About this paper

This consultation paper seeks feedback on our proposed guidance in relation to managed investment schemes, corporate collective investment vehicles (CCIVs) and passport funds.

This paper attaches the following draft guides:

- draft Regulatory Guide 000 *Funds management: Establishing and registering a fund*;
- draft updated Regulatory Guide 134 *Funds management: Constitutions*;
- draft updated Regulatory Guide 132 *Funds management: Compliance and oversight*;
- draft updated Regulatory Guide 133 *Funds management and custodial services: Holding assets*;
- draft updated Regulatory Guide 136 *Funds management: Discretionary powers*; and
- draft Regulatory Guide 000 *Foreign passport funds*.

Note: This paper is based on the exposure drafts of the Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2017 and Corporations Amendment (Asia Region Funds Passport) Bill 2017, released 25 August 2017.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 26 October 2017 and is based on draft legislation and regulations as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy in relation to funds management. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section H, 'Regulatory and financial impact'.

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 8 December 2017 to:

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What will happen next?

Stage 1	26 October 2017	ASIC consultation paper released
Stage 2	8 December 2017	Comments due on the consultation paper Drafting of regulatory guides
Stage 3	After legislation passes	Regulatory guides released

A Background to the proposals

Key points

The proposed new legislative regime for corporate collective investment vehicles (CCIVs) is designed as an optional alternative to the existing managed investments regime in Ch 5C of the *Corporations Act 2001* (Corporations Act).

The Asia Region Funds Passport will provide a multilaterally agreed framework to facilitate the cross-border marketing of passport funds across participating economies in the Asia region. It is proposed to be applied in Australia by new legislative provisions.

We propose to provide guidance about key aspects of the CCIV and Asia Region Funds Passport regimes in a suite of substantive regulatory guides. These will be supplemented by less substantive amendments to other regulatory guides—our proposals in relation to the less substantive amendments will be released later.

We have taken this opportunity to also update and reorganise our existing substantive regulatory guides that apply to managed investment schemes.

Corporate collective investment vehicles

- 1 The corporate collective investment vehicle (CCIV) regime will be implemented in Australia through the Treasury Laws Amendment (Collective Investment Vehicle) Bill 2017 and a further Bill enacting consequential amendments to other legislation, including the Corporations Act.
- 2 The CCIV regime will be an optional alternative to the existing managed investments regime in Ch 5C of the Corporations Act.
- 3 A company may only be registered as a CCIV if:
 - (a) the company is a company limited by shares; and
 - (b) the proposed director of the company is a public company that holds an Australian financial services (AFS) licence authorising it to operate a CCIV: see draft s1137.
- 4 The CCIV regime originated in the Australian Financial Centre Forum's report [*Australia as a financial centre: Building on our strengths*](#) (the Johnson Report), released in November 2009. The Johnson Report recommended a package of reforms to make it easier for Australian fund managers to attract overseas investors into funds run and administered out of Australia. The wider objective of the Australian Financial Centre Forum was

to recommend reforms that would better position Australia as a leading financial services centre.

- 5 The CCIV regime is intended to:
- (a) enhance the international competitiveness of the Australian funds industry by enabling funds to offer investment products using vehicles commonly used overseas;
 - (b) expand the range of funds offered in Australia; and
 - (c) maximise the effectiveness of Government initiatives aimed at improving access to overseas markets, including the Asia Region Funds Passport.
- 6 The CCIV regime has been designed taking into account:
- (a) recognised features of international collective investment vehicles, such as Undertakings for Collective Investment in Transferable Securities (UCITS), to maximise its marketability internationally, especially to the Asia region;
 - (b) the [Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport](#) (Memorandum of Cooperation), including the Passport Rules at Annex 3, to ensure consistency; and
 - (c) the existing regulatory framework for managed investment schemes to reduce regulatory arbitrage and compliance costs.
- 7 We have also developed our proposed guidance for CCIVs taking these legislative design principles into account.

Asia Region Funds Passport

- 8 The Asia Region Funds Passport will be implemented in Australia through:
- (a) the Corporations Amendment (Asia Region Funds Passport) Bill 2017;
 - (b) a legislative instrument enacting the Passport Rules in Annex 3 to the Memorandum of Cooperation; and
 - (c) consequential amendments to other legislation, including the Corporations Act—a further Bill enacting these consequential amendments will follow.
- 9 The Asia Region Funds Passport will provide a multilaterally agreed framework to facilitate the cross-border marketing of passport funds across participating economies in the Asia region. It is intended to support the development of an Asia-wide funds management industry through improved market access and regulatory harmonisation. This regime also originated in the Johnson Report.

- 10 The key objectives for the Asia Region Funds Passport include to:
- (a) ensure investors receive the benefits of increased competition, for example, lower fees and greater fund choice;
 - (b) provide a high degree of investor protection—that is, to promote informed and confident investors by ensuring high standards for the operation and offer of passport funds;
 - (c) strengthen the capacity and competitiveness of the region’s funds management industry;
 - (d) deepen the region’s financial markets by improving liquidity and access to finance; and
 - (e) ensure economies can continue to maintain financial system stability and efficiency. Keeping capital flows within the Asia region could help to strengthen the region’s resilience to external shocks and volatility.

Proposed update and consolidation of our guidance

- 11 To help corporate directors, passport fund operators, depositaries, oversight entities and their advisers understand their obligations under the CCIV and Asia Region Funds Passport regimes, we propose to provide guidance about key aspects of the regimes in a suite of substantive regulatory guides. We intend to supplement these with a range of less substantive amendments to other regulatory guides, to reflect the consequential amendments that will be made to the Corporations Act to accommodate the new regimes—our proposals in relation to the less substantive amendments will be released later.
- 12 We also propose to update and reorganise a large part of our guidance in relation to managed investment schemes into six new and consolidated regulatory guides covering managed investment schemes, CCIVs, passport funds and certain other AFS licensees involved in funds management. Our guidance will cover the following topics:
- (a) establishing and registering a managed investment scheme, CCIV or Australian passport fund, and notifying us about the establishment of a new sub-fund of a CCIV: see Section B of this paper;
 - (b) constitutions for investment funds and Australian passport funds: see Section C of this paper;
 - (c) compliance management systems, compliance plans and oversight: see Section D of this paper;
 - (d) asset holding: see Section E of this paper;
 - (e) how we may exercise our exemption or modification powers in relation to managed investment schemes, CCIVs and Australian passport funds,

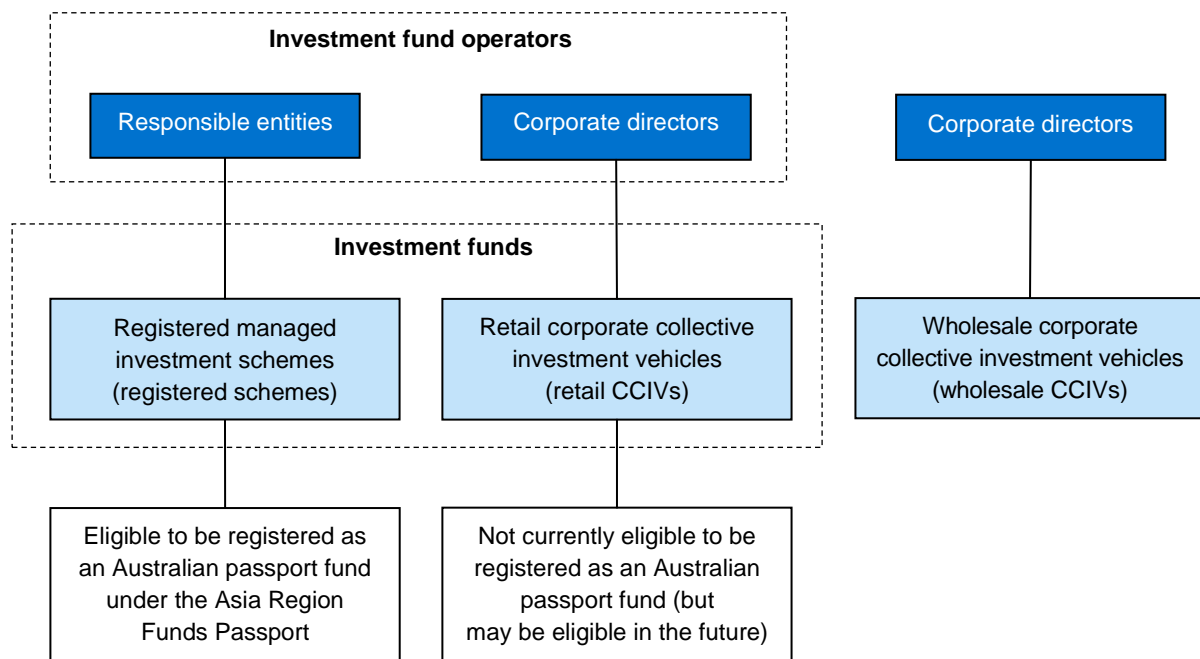
and common forms of relief we may grant: see Section F of this paper;
and

- (f) notifying us of an intention to offer interests in a foreign passport fund to Australian investors: see Section G of this paper.

Note: The draft new and updated regulatory guides and information sheet are available on our website at www.asic.gov.au/cp under CP 296.

- 13 We have taken this opportunity to update and reorganise our existing substantive regulatory guides relating to managed investment schemes. In reorganising our guidance, we have aimed to:
- (a) reduce the need to consult multiple regulatory guides to find our substantive policy on matters in relation to funds management;
 - (b) update our policy so that it reflects our current views and practices in relation to managed investment schemes; and
 - (c) improve the efficiency of the legislation by addressing issues we have identified over time in the administration of the relevant provisions.
- 14 The existing regulatory guides that we have reviewed and which, to the extent relevant, form part of the draft new and updated regulatory guides are listed in the appendix.
- 15 In our draft new and updated guides, as illustrated in Figure 1:
- (a) ‘investment fund’ refers to registered management investment schemes (registered schemes) and retail CCIVs;
 - (b) ‘investment fund operator’ refers to responsible entities of registered schemes and corporate directors of retail CCIVs; and
 - (c) ‘Australian passport fund’ refers to a registered scheme that is also registered as a passport fund under the Asia Region Funds Passport.

Note: Under the draft legislation, only registered schemes are eligible to be Australian passport funds. If the legislation is changed to also allow retail CCIVs to be Australian passport funds, we will amend our guidance accordingly.

Figure 1: Overview of investment funds and Australian passport funds

Note: Investment funds, investment fund operators and Australian passport funds are described in paragraph 15 (accessible version).

- 16 Our proposed guidance is based on the Treasury Laws Amendment (Collective Investment Vehicle) Bill 2017 and Corporations Amendment (Asia Region Funds Passport) Bill 2017. Our proposed guidance may change to reflect the final form of this legislation. We have chosen to release these substantive draft regulatory guides without waiting for the legislation to be finalised to give the funds management industry maximum time to engage with our proposals. However, we do not propose to release our final guidance until after these Bills, and Bills for the consequential amendments to be made to the Corporations Act, are passed by Parliament. We will consider whether any transitional arrangements are required closer to the final release.

Note: In this consultation paper and the attached draft regulatory guides, references to draft s1137–1166C are to the draft Treasury Laws Amendment (Collective Investment Vehicle) Bill 2017 and references to draft s1210–1217B are to the draft Corporations Amendment (Asia Region Funds Passport) Bill 2017.

- 17 Our proposed guidance in draft updated RG 136 reflects the current version of [Regulatory Guide 51 Applications for relief \(RG 51\)](#). RG 51 is currently being reviewed and updated, and will be released for consultation soon. Our final guidance in RG 136 may change to reflect updates to RG 51.
- 18 This consultation paper asks questions about specific aspects of the proposed guidance. We are also interested in any comments you may have on the other guidance we are proposing. Any final guidance that we give will take into account your comments.

B Establishing and registering a fund

Key points

We propose to make minor changes to our existing guidance about how we apply the requirements in deciding whether to register a managed investment scheme (see Proposal B1).

We propose to give new guidance about how we apply the requirements in deciding whether to:

- register a CCIV (see Proposal B3);
- process a notification of a sub-fund of a CCIV (see Proposal B3); and
- register an Australian passport fund (see Proposal B5).

We also propose to adopt more granular asset kinds for registered schemes and CCIVs and sub-funds of CCIVs (see Proposals B2 and B4).

Background

- 19 Draft Regulatory Guide 000 *Funds management: Establishing and registering a fund* is a new regulatory guide that provides guidance for operators of managed investment schemes, CCIVs and Australian passport funds and their advisers about how we apply the requirements in deciding whether to register a managed investment scheme, CCIV or Australian passport fund. It also provides guidance for corporate directors and their advisers about notifying us of the establishment of a sub-fund of a CCIV.
- 20 Draft Regulatory Guide 000 *Funds management: Establishing and registering a fund* includes updated guidance about how we apply the requirements in deciding whether to register a managed investment scheme, which was originally contained in [Regulatory Guide 134](#) *Managed investments: Constitutions* (RG 134).

Registering a managed investment scheme

Proposal

B1 Our proposed guidance on registering a managed investment scheme is set out in Section B of draft Regulatory Guide 000 *Funds management: Establishing and registering a fund* (Attachment 1 to this consultation paper). We propose to make minor changes to our existing policy to clarify our guidance about:

- (a) when a responsible entity can lodge an application;
- (b) acceptance of the application for lodgement; and
- (c) who can sign a directors' statement.

Your feedback

- B1Q1 Do you agree with our proposed guidance? If not, why not?
- B1Q2 Do you have any comments on our proposed guidance?
- B1Q3 Is there any further guidance we should give? Please give details.
- B1Q4 Are there any practical problems associated with our guidance? Please give details.

Proposal

- B2** We propose to require applicants to select more granular asset kinds (listed in Table 1 below) when applying to register the managed investment scheme. Where it is possible, we also propose to require existing responsible entities to reclassify an existing asset kind when they first lodge a notification.

Your feedback

- B2Q1 Do you agree with the asset kinds we have proposed? If not, why not?
- B2Q2 Is any further guidance required on the asset kinds we have proposed?
- B2Q3 Are there any other asset kinds that should be included? Please give details.

Table 1: Asset kinds for registered schemes

Asset kind	AFS licence authorisation asset kind
Derivatives	Derivatives
Financial assets	Financial assets
Foreign exchange	Financial assets
Managed funds—bonds—Australian	Financial assets
Managed funds—bonds—offshore	Financial assets
Managed funds—cash	Financial assets
Managed funds—equities—Australian	Financial assets
Managed funds—equities—offshore	Financial assets
Managed funds—equities—special	Financial assets
Managed funds—multi-sector	Financial assets
Managed funds—yield	Financial assets
Unlisted property investment scheme—property securities	Financial assets

Asset kind	AFS licence authorisation asset kind
Film scheme	Film scheme
Fractional investment property platform	Financial assets
IDPS-like scheme	IDPS-like scheme
Marketplace lending	Financial assets/contributory mortgage
Time-sharing scheme	Time-sharing schemes
Exchange traded fund—listed	Financial assets
Exchange traded fund—AQUA market traded	Financial assets
A-REIT stand alone	Direct real property
A-REIT stapled	Direct real property/Financial assets
Agribusiness scheme—aquaculture	Primary production
Agribusiness scheme—forestry	Primary production
Agribusiness scheme—horticulture	Primary production
Agribusiness scheme—land	Primary production
Agribusiness scheme—livestock	Primary production
Listed investment trust	Financial assets
Environmental—infrastructure	Direct real property
Horse breeding scheme	Primary production
Horse racing scheme	Primary production
Listed infrastructure project	Financial assets
Unlisted infrastructure project	Direct real property/Financial assets
Unlisted property investment scheme—development	Direct real property/Financial assets
Unlisted property investment scheme—direct real property	Direct real property
Unlisted property investment scheme—retirement	Direct real property
Contributory mortgage scheme	Mortgages
Pooled mortgage scheme	Mortgages
Serviced strata scheme	Direct real property
Hedge fund	Financial assets

Asset kind	AFS licence authorisation asset kind
Managed funds—alternatives	Financial assets
Other	Other specialised scheme

Rationale

- 21 Section 601EB(1) of the Corporations Act provides that we must register a managed investment scheme within 14 days of lodgement of the application, unless it appears to us that:
- the application does not comply with s601EA of the Corporations Act;
 - the proposed responsible entity does not meet the requirements of s601FA of the Corporations Act;
 - the constitution does not meet the requirements of s601GA and 601GB of the Corporations Act;
 - the compliance plan does not meet the requirements of s601HA of the Corporations Act;
 - the copy of the compliance plan that has been lodged has not been signed by all directors as required in s601HC of the Corporations Act; or
 - arrangements are not in place for audit of compliance with the compliance plan that satisfy the requirements of s601HG of the Corporations Act.
- 22 We have reorganised our guidance about registration, which was previously contained in RG 134, into this draft new regulatory guide. RG 134 will be updated and limited to guidance about the content of constitutions (see Section C of this consultation paper).
- 23 We have made minor changes to the guidance about registration (moved from RG 134 to draft Regulatory Guide 000 *Funds management: Establishing and registering a fund*) to:
- update references to legislative instruments; and
 - clarify when a responsible entity can lodge an application, who should sign a directors' statement and when we will accept an application for lodgement—as these issues regularly arise when assessing an application.
- 24 Our guidance in relation to registration of managed investment schemes will be supplemented by information about the application process on the ASIC website.

- 25 To allow us to better obtain data about the funds management industry, we propose to adopt more granular asset kinds for managed investment schemes (listed in Table 1). We will ask all applicants to categorise the asset kind of the managed investment scheme when submitting an application or notification. There will be many more asset kinds than can currently be selected for managed investment schemes. However, we do not propose to alter the current asset kinds that can be selected when applying for an Australian financial services (AFS) licence to operate the registered scheme, because each new asset kind will map to the broader selections available for the purposes of applying for an AFS licence.

Registering a CCIV and notifying of a sub-fund

Proposal

- B3** Our proposed guidance on registering a CCIV and notifying us of a sub-fund of a CCIV is set out in Section C of draft Regulatory Guide 000 *Funds management: Establishing and registering a fund* (Attachment 1 to this consultation paper). We propose to set out guidance about:
- (a) for registering a CCIV:
 - (i) when a corporate director can lodge an application;
 - (ii) appointment of the depositary;
 - (iii) acceptance of the application for lodgement;
 - (iv) assessment of the application, constitution and compliance plan;
 - (v) deciding whether to register the CCIV; and
 - (vi) where the application is withdrawn; and
 - (b) for notifying us of the establishment of a sub-fund of a CCIV:
 - (i) acceptance of the notification for lodgement; and
 - (ii) processing the notification.

Your feedback

- B3Q1 Do you agree with our proposed guidance? If not, why not?
- B3Q2 Do you have any comments on our proposed guidance?
- B3Q3 Is there any further guidance we should give? Please give details.
- B3Q4 Are there any practical problems associated with our guidance? Please give details.
- B3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- B3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Proposal

B4 We also propose to adopt the more granular asset kinds listed in Table 1 above for CCIVs and sub-funds of CCIVs.

Your feedback

- B4Q1 Do you agree with the asset kinds we have proposed? If not, why not?
- B4Q2 Is any further guidance required on the asset kinds we have proposed?
- B4Q3 Are there any other asset kinds that should be included? Please give details.

Rationale

- 26 To register a CCIV a person must lodge an application with ASIC.
- 27 Draft s1137 of the Corporations Act provides that we may register the CCIV where:
- (a) the company is a company limited by shares; and
 - (b) the proposed director of the company is a public company that holds an AFS licence authorising it to operate a CCIV.
- 28 There are differences between what we are required to assess in order to register a managed investment scheme and register a CCIV. Because of this, we have included new guidance about applying for the registration of CCIVs, including:
- (a) submitting an application to register a CCIV where we are considering whether to grant an AFS licence to operate the CCIV;
 - (b) providing us with the details of the depositary to be appointed;
 - (c) when an application will not be able to be submitted;
 - (d) what we may consider in assessing whether to register the CCIV;
 - (e) when we may ask for further information about the answers given in the application; and
 - (f) what happens when an application is withdrawn.
- 29 We have also included new guidance about the notification process for sub-funds, to assist corporate directors and their advisers to understand:
- (a) when an application will not be able to be submitted; and
 - (b) when we may ask for further information about the answers given in the application.

- 30 Our guidance in relation to CCIVs and sub-funds of CCIVs will be supplemented by information about the application process on the ASIC website.

Registering an Australian passport fund

Proposal

- B5** Our proposed guidance about registering a registered scheme as an Australian passport fund is set out in Section D of draft Regulatory Guide 000 *Funds management: Establishing and registering a fund* (Attachment 1 to this consultation paper). We propose to set out guidance about:
- the interaction between applications to register a managed investment scheme and an Australian passport fund;
 - assessing an application to register as an Australian passport fund;
 - assessing whether the operator meets the eligibility requirements;
 - forming an opinion about the likelihood of compliance with the Corporations Act and *Australian Securities and Investments Commission Act 2001* (ASIC Act);
 - assessing the Product Disclosure Statement (PDS); and
 - updating our register of passport funds.

Your feedback

- B5Q1 Do you agree with our proposed guidance? If not, why not?
- B5Q2 Do you have any comments on our proposed guidance?
- B5Q3 Is there any further guidance we should give? Please give details.
- B5Q4 Are there any practical problems associated with our guidance? Please give details.
- B5Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- B5Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 31 Draft s1212 of the Corporations Act provides that to register an Australian passport fund a person must lodge an application with ASIC. The application must be in the approved form and must be accompanied by a copy of the PDS.

32 We must register a registered scheme as an Australian passport fund if we are of the opinion that:

- (a) the responsible entity for the registered scheme is an eligible entity; and
- (b) the Corporations Act, including the Australian Passport Rules, and ASIC Act are likely to be complied with in relation to the scheme.

Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211(1) and 1211A of the Corporations Act. Under draft s1211(2), the Australian Passport Rules must be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

33 The process to register an Australian passport fund is quite different to the process that currently exists for registering a managed investment scheme. In our view, draft s1212 and the Australian Passport Rules envisage a registration process that is more aligned with the process we undertake to assess whether a person should be granted an AFS licence.

34 To assist responsible entities and their advisers in applying to register a registered scheme as an Australian passport fund and understanding what we may do when assessing the application, we have included new guidance about:

- (a) how we will assess an application to register a managed investment scheme and Australian passport fund when they are submitted at the same time;
- (b) our approach to relying on answers given as part of the application;
- (c) how we assess whether 'suitable processes' are in place for section 11(1) of the Australian Passport Rules and if there is a 'broadly similar' regulatory framework for section 11(3) of the Australian Passport Rules;
- (d) circumstances when the application will not be able to be submitted;
- (e) submission where one or more portfolio allocation limits is exceeded;
- (f) the eligibility requirements in the Australian Passport Rules and how we form an opinion about whether they are satisfied;
- (g) what we will consider in assessing whether compliance with the Corporations Act and ASIC Act is likely;
- (h) when we may ask for further information about the answers given in the application;
- (i) the timeframe for making a decision; and
- (j) what actions we may take in reviewing the PDS lodged with the application.

35 Our guidance will be supplemented by information about the application process on the ASIC website.

C Constitutions

Key points

We propose to make minor changes to our existing guidance about the requirements for constitutions of registered schemes in s601GA and 601GB, and give new guidance about how we will apply the requirements for constitutions of CCIVs and Australian passport funds (see Proposals C1 and C2).

We also propose to give new guidance about:

- changing the constitution (see Proposal C3);
- establishing sub-funds of CCIVs (see Proposal C4); and
- relief we grant in relation to classes of interests in a registered scheme (see Proposal C4).

Background

- 36 Draft updated Regulatory Guide 134 *Funds management: Constitutions* (draft updated RG 134) provides guidance for the content of a constitution to meet the requirements of the Corporations Act.
- 37 RG 134 originally contained guidance about how we apply the requirements in deciding whether to register a managed investment scheme. This content has been moved to draft Regulatory Guide 000 *Funds management: Establishing and registering a fund*: see Section B of this consultation paper.

Content of constitutions

Proposal

- c1 Our proposed guidance on the content requirements for constitutions is set out in draft updated RG 134 (Attachment 2 to this consultation paper). To reflect the new CCIV and Asia Region Funds Passport regimes, we propose to update our guidance on:
- (a) consideration to acquire interests or shares (see Section B of draft updated RG 134);
 - (b) powers and rights of an investment fund operator (see Section D of draft updated RG 134);
 - (c) complaints, disputes and remedies (see Section E of draft updated RG 134);
 - (d) withdrawal rights (see Section G of draft updated RG 134); and
 - (e) incorporation by reference (see Section J of draft updated RG 134).

Your feedback

- C1Q1 Should we exclude foreign members of an Australian passport fund in a host economy under the Asia Region Funds Passport from the relief we give under [Class Order \[CO 13/656\]](#) *Equality of treatment impacting on the acquisition of interests* from a responsible entity's duty in s601FC(1)(d) to treat members equally or fairly in relation to rights issues or distribution reinvestment plans?
- C1Q2 Do you agree with our proposed guidance? If not, why not?
- C1Q3 Do you have any comments on our proposed guidance?
- C1Q4 Is there any further guidance we should give? Please give details.
- C1Q5 Are there any practical problems associated with our guidance? Please give details.

Proposal

- c2 We propose to remove the appendix from RG 134 for managed investment schemes registered before 1 October 2013 and create a new regulatory guide containing the content from this appendix.

Your feedback

- C2Q1 Do you agree with our proposed approach? If not, why not?

Rationale

- 38 Under s601GA of the Corporations Act, the constitution of a registered scheme must make adequate provision for, or specify, certain prescribed matters, including:
- (a) the consideration to acquire and dispose of an interest in the scheme;
 - (b) the powers and rights of the responsible entity, including:
 - (i) for making investments, borrowing or dealing with scheme property; and
 - (ii) to be paid fees or be indemnified out of scheme property;
 - (c) the method for dealing with complaints about the scheme;
 - (d) any rights of members to withdraw from the scheme; and
 - (e) winding up the scheme.
- 39 Section 601GB requires that the constitution of a registered scheme must be a document that is legally enforceable between the members and the responsible entity of the scheme.
- 40 A CCIV must have a constitution: see draft s1137A of the Corporations Act.

- 41 Under draft s1155 of the Corporations Act, the constitution of a retail CCIV must make adequate provision for, or specify, certain prescribed matters, including:
- (a) the consideration to acquire a share in the CCIV;
 - (b) the powers and rights of the corporate director, including:
 - (i) for making investments, borrowing or dealing with assets of the CCIV; and
 - (ii) to be paid fees or be indemnified out of assets of a sub-fund of the CCIV; and
 - (c) the establishment of sub-funds.
- 42 Responsible entities have a duty to treat members who hold interests of the same class equally and members who hold interests of different classes fairly: see s601FC(1)(d) of the Corporations Act. We have given additional relief from s601FC(1)(d) under [CO 13/656] to allow a responsible entity to exclude foreign members (e.g. members with a registered address outside Australia or New Zealand) from participating in a rights issue or a distribution reinvestment plan. We grant this relief to exclude foreign members because there are often only small numbers of foreign members in a particular jurisdiction and/or legal or regulatory problems with offers to foreign members meeting that jurisdiction's requirements. This relief may not be appropriate for an Australian passport fund that offers interests to persons in a host economy as a notified foreign passport fund, as the number of foreign members is likely to be greater.
- 43 We have updated our guidance in draft RG 134 to:
- (a) include requirements for CCIVs and Australian passport funds;
 - (b) make minor changes to update our guidance to:
 - (i) update references to legislative instruments;
 - (ii) clarify certain aspects; and
 - (iii) include guidance published in [Information Sheet 220](#) *Managed investment schemes: Common registration issues* (INFO 220).
- 44 We will move our existing guidance in the appendix to RG 134 for registered schemes in existence prior to 1 October 2013 to a new regulatory guide.

Changing the constitution

Proposal

- c3 Our proposed guidance about changing the constitution of an investment fund is set out in Section F of draft updated RG 134 (Attachment 2 to this consultation paper).

Your feedback

- C3Q1 Do you agree with our proposed guidance? If not, why not?
- C3Q2 Do you have any comments on our proposed guidance?
- C3Q3 Is there any further guidance we should give? Please give details.
- C3Q4 Are there any practical problems associated with our guidance? Please give details.
- C3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- C3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 45 The constitution of an investment fund may be changed, or repealed and replaced, either:
- (a) by special resolution passed by members; or
 - (b) by the investment fund operator if the operator reasonably considers the change will not adversely affect members' rights: see s601GC and draft s1155A of the Corporations Act.
- 46 To provide greater transparency and clarity, we have included new guidance about:
- (a) what we do when we receive notification of an amendment to the constitution or a replacement constitution; and
 - (b) the relief we give to facilitate changing the constitution in specific situations that meet the requirements of [Class Order \[CO 09/552\]](#) *Changing scheme constitutions* or [ASIC Corporations \(Attribution Managed Investment Trusts\) Instrument 2016/489](#).

Classes and sub-funds**Proposal**

- c4 Our proposed guidance is set out in Section C of draft updated RG 134 (Attachment 2 to this consultation paper). We propose to set out guidance about:
- (a) establishing sub-funds of CCIVs; and
 - (b) protecting class rights in registered schemes.

Your feedback

- C4Q1 Do you agree with our proposed guidance? If not, why not?
- C4Q2 Do you have any comments on our proposed guidance?

- C4Q3 Is there any further guidance we should give? Please give details.
- C4Q4 Are there any practical problems associated with our guidance? Please give details.
- C4Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- C4Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 47 A CCIV must have at least one sub-fund at all times: see draft s1141A of the Corporations Act. Each share in a CCIV must be referable to only one sub-fund, although more than one class of shares may be referable to a single sub-fund: see draft s1141B of the Corporations Act.
- 48 The constitution of a retail CCIV must make adequate provision for the establishment of sub-funds and classes of shares referable to sub-funds: see draft s1155(1)(c) of the Corporations Act. We have included new guidance about the retail CCIV's constitution making 'adequate provision' for the establishment of sub-funds and classes of shares referable to sub-funds as required under draft s1155.
- 49 We have also included new guidance about the relief we give for registered schemes to facilitate the variation or cancellation of class rights under [ASIC Corporations \(Amendment and Repeal\) Instrument 2017/545](#).
- 50 Our guidance aims to help investment fund operators and their advisers understand the requirements that apply.

D Compliance and oversight

Key points

We propose to give new guidance about the requirements for an effective and responsive compliance management system for operators of registered schemes, wholesale unregistered managed investment schemes (wholesale schemes), CCIVs, investor directed portfolio services (IDPSs) or managed discretionary accounts (MDAs) to meet their obligations in s912A of the Corporations Act (see Proposal D1).

We propose to update and consolidate our existing guidance about the requirements for compliance plans for registered schemes in s601HA, and also apply this guidance to retail CCIVs (see Proposal D2).

We propose to give new guidance about oversight (see Proposal D3), including:

- the compliance committee;
- the compliance plan audit;
- for CCIVs, the oversight function of the depositary; and
- for Australian passport fund operators, the role of the independent oversight entity and the annual implementation review.

Our existing regulatory guides about compliance plans for registered schemes will be superseded.

Background

51 Draft updated Regulatory Guide 132 *Funds management: Compliance and oversight* (draft updated RG 132) provides new guidance, alongside updated and consolidated guidance, about:

- (a) how responsible entities (including those that are also Australian passport fund operators), wholesale scheme operators, corporate directors, IDPS operators or MDA providers can develop an effective and responsive compliance management system to comply with s912A of the Corporations Act;
- (b) the content of a compliance plan that meets the requirements of the Corporations Act; and
- (c) oversight functions performed by compliance committees, compliance plan auditors, depositaries, implementation reviewers and independent oversight entities.

Compliance management systems

Proposal

D1 Our proposed guidance about compliance management systems is set out in Section B of draft updated RG 132 (Attachment 3 to this consultation paper). We propose to set out guidance about the key features of an effective and responsive compliance management system for responsible entities, wholesale scheme operators, corporate directors, IDPS operators and MDA providers to meet their obligations in s912A.

Your feedback

D1Q1 Do you agree with our proposed guidance? If not, why not?

D1Q2 Do you have any comments on our proposed guidance?

D1Q3 Is there any further guidance we should give? Please give details.

D1Q4 Are there any practical problems associated with our guidance? Please give details.

D1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

D1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 52 An AFS licensee has obligations to:
- (a) do all things necessary to ensure its financial services are provided efficiently, honestly and fairly: see s912A(1)(a);
 - (b) comply with financial services laws: see s912A(1)(c); and
 - (c) comply with the conditions on its AFS licence: see s912A(1)(b).
- 53 An operator of a registered scheme, wholesale scheme, CCIV, IDPS or MDA must have measures in place for ensuring it complies with its obligations as an AFS licensee: see condition 4 of the standard licence conditions in [Pro Forma 209 Australian financial services licence conditions \(PF 209\)](#).
- 54 We consider an effective and responsive compliance management system that is planned, implemented, evaluated and improved can help a responsible entity, wholesale scheme operator, corporate director, IDPS operator or MDA provider operator meet its obligations in s912A.

- 55 We have included new guidance about the key features of an effective and responsive compliance management system, including:
- (a) an understanding of the context in which the managed investment scheme, CCIV, IDPS or MDA operates;
 - (b) clear articulation of the values, purpose and strategy of the responsible entity, wholesale scheme operator, corporate director, IDPS operator or MDA provider and how these are reflected its compliance management system;
 - (c) identification of compliance obligations, risks and objectives;
 - (d) clarity of roles and responsibilities of those people involved in the compliance management system;
 - (e) organisational support for the compliance management system;
 - (f) appropriate documentation and record keeping;
 - (g) monitoring and reporting of performance against the compliance management system; and
 - (h) procedures where non-compliance occurs and for continual improvement of the compliance management system.

Compliance plans

Proposal

D2 Our proposed guidance about compliance plans is set out in Section C of draft updated RG 132 (Attachment 3 to this consultation paper). We propose to set out guidance about how the investment fund operator can establish measures that will be adequate to meet s601HA. We propose to provide guidance about the identification of compliance risks and compliance controls at the group level and the level of the registered scheme or sub-fund of the retail CCIV. We also propose to give guidance about the additional compliance risks and compliance controls for an Australian passport fund.

Your feedback

- D2Q1 Do you agree with our proposed guidance? If not, why not?
- D2Q2 Do you have any comments on our proposed guidance?
- D2Q3 Do you agree with the types of risks identified for different types of investment funds? If not, why not?
- D2Q4 Are there further risks that should be identified for any of the different investment fund types? Please give details.
- D2Q5 Is there any further guidance we should give? Please give details.
- D2Q6 Are there any practical problems associated with our guidance? Please give details.

D2Q7 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

D2Q8 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 56 Each registered scheme and retail CCIV must have a compliance plan in place: see s601HA and draft s1161.
- 57 The compliance plan must set out adequate compliance controls that the investment fund operator is to apply in operating the registered scheme or retail CCIV to ensure compliance with the Corporations Act and the constitution: see s601HA and draft s1161A.
- 58 We have updated our guidance on compliance plans, which is currently contained in:
- (a) [Regulatory Guide 132](#) *Managed investments: Compliance plans* (RG 132);
 - (b) [Regulatory Guide 116](#) *Commentary on compliance plans: Agricultural industry schemes* (RG 116);
 - (c) [Regulatory Guide 117](#) *Commentary on compliance plans: Financial asset schemes* (RG 117);
 - (d) [Regulatory Guide 118](#) *Commentary on compliance plans: Contributory mortgage schemes* (RG 118);
 - (e) [Regulatory Guide 119](#) *Commentary on compliance plans: Pooled mortgage schemes* (RG 119); and
 - (f) [Regulatory Guide 120](#) *Commentary on compliance plans: Property schemes* (RG 120).
- 59 Draft updated Regulatory Guide 132 *Funds management: Compliance and oversight* will replace the existing guidance in RG 132, RG 116, RG 117, RG 118, RG 119 and RG 120.
- 60 Our guidance provides that in order to establish measures that will be adequate, the investment fund operator must ensure the compliance plan:
- (a) aligns the compliance controls in the compliance plan with the investment fund operator's values, objectives and strategy and the nature, scale and complexity of the particular investment fund and, for a retail CCIV, each sub-fund;
 - (b) demonstrates a clear nexus between the investment fund operator's compliance obligations and the compliance controls to address those

obligations, which reflect the actual procedures, processes and practices of the investment fund operator and the investment fund;

- (c) sets out the compliance controls with enough certainty to allow the investment fund operator, ASIC and the auditor of the compliance plan to assess whether the investment fund operator has complied with the compliance plan;
- (d) is written in a clear manner so that it is usable by its target audience;
- (e) provides for identified functional roles responsible for carrying out a particular compliance control and the monitoring of that compliance control;
- (f) provides for sufficient frequency and quantity of compliance controls, and their monitoring, to effectively manage the compliance risks;
- (g) provides for monitoring of compliance with the compliance procedures and describes the processes for monitoring compliance with the compliance controls with sufficient details and certainty to ensure whether they will be or have been complied with, and ensures any non-compliance is reported to the compliance committee, the board or ASIC as required; and
- (h) is maintained so that it is up to date at all times.

61 Our proposed guidance also provides that an effective and responsive compliance plan identifies compliance risks and compliance controls at the group level and the level of the registered scheme or sub-fund of the retail CCIV. Group level compliance risks are present irrespective of the nature and characteristics of the investment fund or sub-fund. Registered scheme or sub-fund level compliance risks are driven by the nature, diversity and structure of assets invested in by the registered scheme or sub-fund and the investment strategy employed by the investment fund operator. We have provided some guidance about the types of investment risks that we will focus on for different types of registered schemes or sub-funds.

62 We have included new guidance about what an Australian passport fund operator should consider in establishing compliance controls to address specific risks in relation to compliance with the Australian Passport Rules.

Oversight

Proposal

D3 Our proposed guidance about oversight of registered schemes, CCIVs and Australian passport funds is set out in Section D of draft updated RG 132 (Attachment 3 to this consultation paper). We propose to set out guidance about:

- (a) for compliance committees:
 - (i) the experience, qualifications and competence required by a compliance committee member to carry out their duties and functions;
 - (ii) the terms of appointment of compliance committee members, which should set out clear requirements; and
 - (iii) meeting regularly and keeping records;
- (b) for compliance plan auditors:
 - (i) the scope of the audit under s601HG;
 - (ii) testing of master compliance plans;
 - (iii) lodgement of consolidated or single compliance plans; and
 - (iv) the period covered by the audit opinion;

Note: We also include summary guidance about removing an auditor and reporting to ASIC, with cross-references to our existing guidance.
- (c) for depositaries of CCIVs performing an oversight role:
 - (i) establishing, implementing and reviewing procedures and processes in relation to acting on instructions;
 - (ii) performance of their supervisory duties; and
 - (iii) supervision where activities of the CCIV are outsourced; and
- (d) in relation to the oversight obligations for Australian passport funds:
 - (i) the role of the independent oversight entity; and
 - (ii) the annual implementation review.

Your feedback

- D3Q1 Do you agree with our proposed guidance? If not, why not?
- D3Q2 Do you have any comments on our proposed guidance?
- D3Q3 Is there any further guidance we should give? Please give details.
- D3Q4 Are there any practical problems associated with our guidance? Please give details.
- D3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- D3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

Compliance committees

- 63 Section 601JA of the Corporations Act requires that a responsible entity of a registered scheme must establish a compliance committee if less than half of

its directors are external directors. The compliance committee must have at least three members, the majority of whom must be external members: see s601JB of the Corporations Act.

- 64 We have provided new guidance about how compliance committees can perform their functions under s601JC of the Corporations Act to a high standard. Our guidance includes our expectations about:
- (a) the engagement of compliance committee members who have appropriate and relevant experience, qualifications and competence;
 - (b) maintaining competence as a compliance committee member;
 - (c) the types of matters that should be covered under the terms of appointment; and
 - (d) meetings of compliance committees.

Compliance plan auditors

- 65 The operator of an investment fund must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the investment fund's compliance plan: see s601HG(1) and draft s1162 of the Corporations Act.
- 66 The auditor must examine the compliance plan and carry out an audit of the investment fund operator's compliance with the compliance plan during the financial year. The auditor must also give the investment fund operator a report that states the auditor's opinion on whether:
- (a) the investment fund operator has complied with the investment fund's compliance plan during the financial year; and
 - (b) the plan continues to meet the requirements of the Corporations Act.

Note: See s601HG(3) and draft s1162A.

- 67 We have provided new guidance about what compliance plan auditors should address to meet their obligations under s601HG(3) and draft s1162A. We have also included references to other guidance about reporting breaches and replacement of the compliance plan auditor.

Depositaries

- 68 Draft s1163 requires that a retail CCIV must have a depositary. However, it is optional for a wholesale CCIV to have a depositary: see draft s1163A of the Corporations Act.
- 69 The depositary has a supervisory responsibility to take reasonable care to ensure that the corporate director's activities comply with the Corporations Act and the CCIV's constitution (see draft s1164B of the Corporations Act) in relation to:

- (a) issuing, redeeming and cancelling shares in the CCIV;
- (b) valuing shares in the CCIV;
- (c) allocating assets and liabilities of the CCIV to sub-funds of the CCIV;
and
- (d) allocating and distributing income of the CCIV.

70 To assist depositaries understand how we consider they should meet their oversight requirements, we have included guidance about:

- (a) how the depositary should assess the compliance risks relating to the matters for which the depositary has oversight and establish oversight controls that are appropriate to the CCIV and the assets in which it invests, which are then implemented and evaluated;
- (b) establishing procedures in relation to communication with the corporate director and escalation; and
- (c) overseeing functions that are outsourced.

Australian passport funds

71 In addition to the compliance plan audit requirements under the Corporations Act, a registered scheme that is also registered as an Australian passport fund is subject to an annual implementation review: see draft s15 of the Australian Passport Rules.

72 We have proposed new guidance for Australian passport fund operators and their advisers about the role of the independent oversight entity and the conduct of the annual implementation review.

E Holding assets

Key points

We propose to make minor and technical changes to our existing guidance about the requirements for asset holders and give new guidance about how we apply the requirements for asset holding for CCIVs and Australian passport funds (see Proposal E1).

Background

- 73 Draft updated Regulatory Guide 133 *Funds management and custodial services: Holding assets* (draft updated RG 133) is an update to our existing regulatory guide that sets out minimum standards for responsible entities, corporate directors, depositaries, licensed custody providers, MDA providers and IDPS operators in relation to holding assets to ensure they meet their obligations under their AFS licence.
- 74 This guide has been updated to accommodate the CCIV and Asia Region Funds Passport regimes, which both have requirements in relation to asset holding.

Holding assets

Proposal

E1 Our proposed guidance about holding assets is set out in draft updated RG 133 (Attachment 4 to this consultation paper). To reflect the new CCIV and Asia Region Funds Passport regimes, we propose to update our guidance on:

- (a) minimum standards and related requirements for asset holders;
- (b) requirements when engaging another asset holder;
- (c) compliance controls for licensed custody providers—excluding registered schemes, CCIVs, IDPSs and MDAs;

Note: Compliance measures for registered schemes, CCIVs, IDPSs and MDAs are set out in draft updated RG 132 (see Section D of this consultation paper).

- (d) protection of rights for land used in registered schemes; and
- (e) for registered schemes and CCIVs, relief from the obligation to separate assets.

Your feedback

E1Q1 Do you agree with our proposed guidance? If not, why not?

E1Q2 Do you have any comments on our proposed guidance?

- E1Q3 Is there any further guidance we should give? Please give details.
- E1Q4 Are there any practical problems associated with our guidance? Please give details.
- E1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.
- E1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 75 An Australian passport fund operator cannot hold the assets of the Australian passport fund, but must engage a separate asset holder.
- 76 Under draft s1163(1) a retail CCIV must have a depositary.
- Note: It is optional for a wholesale CCIV to have a depositary.
- 77 Draft s1164 provides that a depositary:
- (a) must hold the assets of a CCIV on trust for the CCIV, subject to any exemptions applied by ASIC; and
 - (b) may appoint an agent or otherwise engage a person to do anything that it is authorised to do in connection with the CCIV, except the supervisory responsibilities of the depositary.
- 78 We have updated our guidance in draft updated RG 133 to:
- (a) include asset holding requirements for CCIVs and Australian passport funds; and
 - (b) make minor changes to update our existing guidance to:
 - (i) update references to legislative instruments;
 - (ii) clarify certain aspects; and
 - (iii) remove transitional information.
- 79 We have moved our existing guidance in RG 133 about other compliance controls for registered schemes, CCIVs, IDPSs and MDAs into draft updated RG 132: see Section D of this consultation paper.

F Discretionary powers

Key points

We propose to update our existing guidance about the factors we may take into account in deciding whether to exercise our powers to grant relief in relation to a registered scheme, wholesale scheme, CCIV or Australian passport fund (see Proposal F1).

We propose to give new guidance about particular types of relief we commonly grant for registered schemes (see Proposal F2).

Background

- 80 Draft updated Regulatory Guide 136 *Funds management: Discretionary powers* (draft updated RG 136) explains our policy in exercising our exemption and modification powers to grant relief in relation to requirements under the Corporations Act (including the Australian Passport Rules) for managed investment schemes, CCIVs and Australian passport funds. It also explains some of the more common situations when we have given, and when we may be likely to give, relief.
- 81 Our guidance includes new guidance, alongside updated guidance that was previously included RG 136.

Our approach to individual relief

Proposal

- F1 Our proposed guidance about granting relief is set out in Section B of draft updated RG 136 (Attachment 5 to this consultation paper). We propose to set out guidance on:
- (a) our powers to give relief;
 - (b) the interaction between RG 51 and draft updated RG 136; and
 - (c) some of the factors we may take into account in applying the principles under RG 51 that we have identified from our experience in assessing applications for individual relief from the provisions in Ch 5C of the Corporations Act, and which we anticipate may also be relevant for assessing relief applications from provisions of draft Chs 7A and 8A and from the Australian Passport Rules.

Your feedback

- F1Q1 Should we remove this section and rely on the policy in RG 51 instead?

- F1Q2 Are there any other factors we should take into account when considering whether to grant relief? Please give details.
- F1Q3 Do you agree with our proposed guidance? If not, why not?
- F1Q4 Do you have any comments on our proposed guidance?
- F1Q5 Are there any practical problems associated with our guidance? Please give details.

Rationale

- 82 There are specific powers of exemption or modification that apply in relation to managed investment schemes, CCIVs and Australian passport funds, including s601QA, draft s1217 and draft s1217A.
- 83 Taking into account our experience with, and feedback about, our existing guidance in RG 136, we propose to provide:
- (a) an explanation about our exemption and modification powers for managed investment schemes, CCIVs and Australian passport funds; and
 - (b) greater clarity about how we apply our guidance in RG 51 in the context of assessing applications for individual relief from the provisions in Ch 5C, draft Ch 7A and draft Ch 8A.
- 84 This will provide more transparency about how we apply our guidance in considering whether to grant relief in relation to registered schemes, CCIVs and Australian passport funds.
- 85 We have removed existing guidance in RG 136 in relation to relief given by legislative instrument or class order. This will now be found on ASIC's website, which is easier to regularly update.

Common forms of individual relief

Proposal

- F2 Our proposed guidance about common forms of relief is set in Section C of draft updated RG 136 (Attachment 5 to this consultation paper). For managed investment schemes, we propose to set out guidance on:
- (a) when we have granted, and may grant, relief in relation to:
 - (i) when a compliance plan is required;
 - (ii) compliance plan audit;
 - (iii) extensions for establishing the compliance committee;
 - (iv) extensions of time to appoint a new or replacement compliance plan committee member;
 - (v) stapled securities arrangements;

- (vi) change of the responsible entity (where the change is to a related body corporate, there are a small number of members, or significant interests are held by non-voting platforms);
 - (vii) offers to foreign members in a restructure;
 - (viii) withdrawal (where members of a 'frozen fund' are suffering hardship, to enable 'rolling' withdrawal offers, or for illiquid marketplace lending schemes); and
 - (ix) voluntary deregistration; and
- (b) when we may make a determination that a number of managed investment schemes are closely related and each need to be registered.

Your feedback

- F2Q1 Are there any types of relief that are not included that should be? If so, why should they be included?
- F2Q2 Are there any types of relief that are included that should not be? If so, why should they be removed?
- F2Q3 Do you agree with our proposed guidance? If not, why not?
- F2Q4 Do you have any comments on our proposed guidance?
- F2Q5 Are there any practical problems associated with our guidance? Please give details.

Rationale

- 86 We do not have publicly available information about when we might grant relief, what factors we take into account and the conditions we might impose for particular common forms of relief we grant. In our view, by doing so we can better help operators of managed investment schemes, CCIVs and Australian passport funds and their advisers to prepare relief applications and respond to our questions about them. We consider that including particular commonly granted forms of relief in draft updated RG 136 will provide more transparency about how we will assess a relief application and make it easier for those preparing the application.
- 87 To determine which relief should be included, we conducted a search over the last few years to see how often we granted relief of a particular type.
- 88 We intend to update RG 136 when appropriate to include other forms of common relief we may grant in relation to managed investment schemes, CCIVs and Australian passport funds, as we believe this will assist responsible entities, corporate directors and Australian passport operators and their advisers in understanding emerging trends in common types of relief.
- 89 We do not propose to include novel forms of relief that we grant in draft updated RG 136 unless we observe a trend of similar relief applications.

G Foreign passport funds

Key points

We propose to give new guidance about:

- how we apply the requirements in deciding whether to approve the offer of interests in a foreign passport fund in Australia (see Proposal G1);
- the ongoing requirements that apply to a notified foreign passport fund in Australia (see Proposal G2); and
- our powers and responsibilities (see Proposal GG3).

Background

90 Draft Regulatory Guide 000 *Foreign passport funds* is a new regulatory guide that has been drafted for foreign passport fund operators and their advisers to assist them understand the requirements for entry into, or operating in, Australia as a host economy under the Asia Region Funds Passport. It explains our role as a host regulator under the Asia Region Funds Passport and our requirements in regulating notified foreign passport funds and their operators in Australia.

Approval to offer interests in Australia as a foreign passport fund

Proposal

G1 Our proposed guidance about notifications by foreign passport fund operators for entry into Australia is set out in Section B of draft Regulatory Guide 000 *Foreign passport funds* (Attachment 6 to this consultation paper). We propose to set out guidance on:

- (a) the eligibility requirements to apply for entry under the Corporations Act;
- (b) the notification process;
- (c) how ASIC will assess a notice of intention to offer interests; and
- (d) when interests in a notified foreign passport fund can commence being offered in Australia.

Your feedback

G1Q1 Do you agree with our proposed guidance? If not, why not?

G1Q2 Do you have any comments on our proposed guidance?

G1Q3 Is there any further guidance we should give? Please give details.

G1Q4 Are there any practical problems associated with our guidance? Please give details.

G1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

G1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

91 Draft s1213 of the Corporations Act provides that a person may lodge a notice of intention to offer interests in a foreign passport fund to persons in Australia if the person is a registered foreign company and is the operator of the fund, or a person who is acting on their behalf. The notice of intention must be in the prescribed form and include a copy of the PDS.

92 We may notify the foreign passport fund operator that the notification lacks information that is required: see draft s1213A of the Corporations Act.

93 Under draft s1213B of the Corporations Act, we may only reject the notification where:

- (a) we are of the opinion that the Corporations Act, ASIC Act or the law of the home economy (including the home economy Passport Rules) have not been, are not being, or are not likely to be, complied with in relation to the foreign passport fund;
- (b) we are of the opinion that it is not in Australia's public interest for the foreign passport operator to offer interests in the fund in Australia;
- (c) we have not consented to an exemption or modification made to the home economy Passport Rules for the foreign passport fund that affects the fund or entities connected with the fund; or
- (d) the name of the foreign passport fund in the notice of intention is unavailable in Australia for one of the reasons specified in draft s1213B(1)(d), and the foreign passport fund operator has not notified us and the home regulator of the fund in writing that it will adopt an available alternative name for the fund in Australia.

94 We have given new guidance about the following process and main requirements for a foreign passport fund to apply for and gain entry into Australia as a host economy under the notification process:

- (a) the requirements to be a registered foreign company and have an offer in the home economy; and
- (b) the notification process, including what an applicant will need to send to ASIC, being:
 - (i) a completed notice of intention;

- (ii) a copy of the PDS required to be prepared under the Corporations Act; and
- (iii) payment of the prescribed fee.
- (c) when a notice of intention will not be able to be submitted;
- (d) what we may consider in assessing whether to reject the notice of intention;
- (e) when we may ask for further information about the answers given in the application;
- (f) extension of the consideration period;
- (g) what happens when an application is withdrawn; and
- (h) what happens to the information sent to us.

95 Our guidance in relation to foreign passport funds applying for entry into Australia as a host economy will be supplemented by information about the notification process on the ASIC website.

Ongoing requirements for notified foreign passport funds

Proposal

G2 Our proposed guidance about ongoing requirements for notified foreign passport funds is set out in Section C of draft Regulatory Guide 000 *Foreign passport funds* (Attachment 6 to this consultation paper). We propose our guidance will outline the following ongoing requirements under the Corporations Act, including the Australian Passport Rules, for notified foreign passport funds and their operators:

- (a) lodging financial statements, audit reports and implementation review reports;
- (b) notifying ASIC of certain change of events and reporting significant breaches to ASIC;
- (c) providing the required point of sale disclosure to Australian investors; and
- (d) maintaining appropriate internal and external dispute resolution arrangements.

Your feedback

G2Q1 Do you agree with our proposed guidance? If not, why not?

G2Q2 Do you have any comments on our proposed guidance?

G2Q3 Is there any further guidance we should give? Please give details.

G2Q4 Are there any practical problems associated with our guidance? Please give details.

G2Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

G2Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 96 Section 2 of Annex 1 to the Memorandum of Cooperation permits a host economy to impose certain laws and regulations on foreign passport funds.
- 97 To assist foreign passport fund operators and their advisers understand and meet the relevant obligations, we have provided guidance about the ongoing requirements that apply to a notified foreign passport fund in Australia, including:
- (a) how to prepare and lodge financial statements, audit reports and implementation review reports;
 - (b) how and when to notify us of certain change of events;
 - (c) how and when to report significant breaches to us and what constitutes a significant breach;
 - (d) the point of sale disclosure to Australian investors that is required;
 - (e) the types of documents and information that Australian investors can request.

ASIC's powers and responsibilities

Proposal

- G3 Our proposed guidance about ASIC's powers and responsibilities in relation to foreign passport funds is in Section D of draft Regulatory Guide 000 *Foreign passport funds* (Attachment 6 to this consultation paper). We propose to set out guidance on:
- (a) our powers to grant exemptions and modifications to the Australian Passport Rules and some other applicable laws that we administer;
 - (b) recognition of exemptions and modifications granted by other passport regulators;
 - (c) disclosure and use of confidential information;
 - (d) our powers to check compliance and conduct investigations of foreign passport funds and their operators;
 - (e) our powers to take administrative action against a foreign passport fund operator; and
 - (f) our powers to take civil action and/or criminal prosecution action against a foreign passport fund operator.

Your feedback

G3Q1 Do you agree with our proposed guidance? If not, why not?

G3Q2 Do you have any comments on our proposed guidance?

G3Q3 Is there any further guidance we should give? Please give details.

G3Q4 Are there any practical problems associated with our guidance? Please give details.

G3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

G3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

Rationale

- 98 We have a wide range of powers and responsibilities under the Corporations Act and ASIC Act.
- 99 We have discretionary powers to grant exemptions and modifications in relation to draft Ch 8A of the Corporations Act and the Australian Passport Rules: see draft s1217 and 1217A of the Corporations Act. We also have powers to grant exemptions and modifications from the AFS licensing, financial product disclosure and hawking provisions of the Corporations Act.
- 100 Under s127 of the ASIC Act, we must take reasonable measures to prevent unauthorised use and disclosure of information we receive in confidence in connection with our statutory functions, unless its use and disclosure is authorised.
- 101 A failure to comply with or breach of an obligation applying to a foreign passport fund operator under the Corporations Act may be an offence. A failure to comply with or breach of an obligation applying to a foreign passport operator under the Australian Passport Rules may also be an offence: see draft s1211C(2) of the Corporations Act.
- 102 Under draft s1215 of the Corporations Act, we can order a foreign passport fund operator to do one or more of the following:
- (a) cease offering, or not begin offering, interests in notified foreign passport funds in Australia;
 - (b) take some other specified action; or
 - (c) cease taking some other specified action.
- 103 We can issue an infringement notice for a breach of the Australian Passport Rules: see draft s1216 of the Corporations Act.

- 104 We can seek a wide range of civil enforcement remedies for breaches of the Australian Passport Rules, the Corporations Act and any other applicable Australian law as host economy laws and regulations.
- 105 Because foreign passport funds may be unfamiliar with them, we have provided new guidance about our powers and responsibilities, including:
- (a) how to apply for relief and the factors we may take into account in deciding whether to exercise our powers to grant exemptions and modifications to the Corporations Act, including the Australian Passport Rules;
 - (b) when and how we will recognise exemptions and modifications granted by other passport regulators;
 - (c) when we are permitted or required to disclose confidential information and how we can use confidential information;
 - (d) our powers to check compliance and conduct investigations of foreign passport funds and their operators;
 - (e) our powers to take administrative action against a foreign passport fund operator, including making a stop order, issuing an infringement notice and accepting an enforceable undertaking; and
 - (f) our powers take civil action and/or criminal prosecution action against a foreign passport fund operator.

H Regulatory and financial impact

106 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) meeting the Government objectives of the CCIV and Asia Region Funds Passport regimes;
- (b) promoting confidence in the CCIV and Asia Region Funds Passport CCIV regimes through implementing protections for investors; and
- (c) improving transparency about our views and actions we may take.

107 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

108 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

109 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Appendix: Cross-references to existing guidance

110 Table 2–Table 7 set out cross-references to those parts of our existing guidance that are incorporated into the various sections of our draft new and consolidated regulatory guides.

Note: Table 7 sets out the draft sections of an entirely new guidance on foreign passport funds.

Table 2: Establishing and registering a fund—cross-references to existing guidance

Draft guide	Existing guidance
B Registering a managed investment scheme	
Applying to register a scheme	RG 134 in Section A
The responsible entity	RG 134 in Section A
Contents of the application	RG 134 in Section A
Assessment by ASIC	RG 134 in Sections A, B, G
C Registering a CCIV	
Applying to register a CCIV	N/A
Fund structure	N/A
The corporate director	N/A
The depositary	N/A
Contents of the application form	N/A
Assessment by ASIC	N/A
Notifying ASIC of new sub-funds	N/A
D Registering as an Australian passport fund	
Applying to register as an Australian passport fund	N/A
Contents of the application	N/A
Assessment by ASIC	N/A
Entry on the register of passport funds	N/A

Table 3: Constitutions—cross-references to existing guidance

Draft updated RG 134	Existing guidance
B Consideration to acquire interests and shares	
What is 'adequate provision'?	RG 134 in Section B
What relief is available?	RG 134 in Section B
Calculating the consideration	RG 134 in Section B
Procedures for exercising a discretion	RG 134 in Section B
C Sub-funds of retail CCIVs and class rights in registered schemes	
Establishing sub-funds of CCIVs	N/A
Protecting class rights in a scheme	RG 136 in Section A
D Powers and rights of an investment fund operator	
Powers to deal with property and assets and raise money	RG 134 in Section C
Fees and indemnities	RG 134 in Section C
E Complaints, disputes and remedies in registered schemes and Australian passport funds	
Requirements for registered schemes	RG 134 in Section D
Requirements for Australian passport funds	N/A
F Changing the constitution of an investment fund	
Requirements for investment funds	N/A
Relief available for registered schemes	N/A
G Withdrawal from registered schemes and CCIVs	
Withdrawal from a registered scheme	RG 134 in Section E
Redemption of shares in a CCIV	N/A
H Winding up a registered scheme	
Procedures for winding up	RG 134 in Section F
Independent audit	RG 134 in Section F
Postponement of winding up	RG 134 in Section F

Draft updated RG 134	Existing guidance
I Legal enforceability of a registered scheme's constitution	
Enforceability between members and the responsible entity	RG 134 in Section G
Severance clauses	RG 134 in Section G
Impact on s601GA content	RG 134 in Section G
J Incorporation by reference in investment fund constitutions	
Making adequate provision for and specifying matters	RG 134 in Section H
Relief to incorporate by reference listing rules of a financial market	RG 134 in Section H

Table 4: Compliance and oversight—cross-references to existing guidance

Draft updated RG 132	Existing guidance
B Compliance management systems	
What is a compliance management system?	RG 104 in Section C
Key features of a compliance management system	N/A
C Compliance plans	
Establishing adequate compliance controls in the compliance plan	RG 116 , RG 117 , RG 118 , RG 119 , RG 120 , RG 132
Group compliance risks and controls	RG 116 , RG 117 , RG 118 , RG 119 , RG 120
Registered scheme or sub-fund level compliance risks and controls	RG 116 , RG 117 , RG 118 , RG 119 , RG 120 , RG 133 in Section D
Additional compliance risks and controls for Australian passport funds	N/A
D Oversight	
Compliance committee	N/A
Compliance plan audit	N/A
Oversight of Australian passport funds	N/A
Depositaries of CCIVs	N/A

Table 5: Holding assets—cross-references to existing guidance

Draft updated RG 133	Existing guidance
B Minimum standards and related requirements for asset holders	
Specific obligations for registered schemes and CCIVs	N/A
Obligations applying to all AFS licensees who are asset holders	N/A
Obligations applying to all AFS licensees who engage asset holders	N/A
Organisational structure	RG 133 in Section B
Staffing capabilities	RG 133 in Section B
Capacity and resources	RG 133 in Section B
Holding assets on trust	RG 133 in Section B
Keeping compliance records	RG 133 in Section B
Making client inquiries	RG 133 in Section B
C Requirements when engaging another asset holder	
Specific obligations for registered schemes and CCIVs	N/A
Obligations applying to all AFS licensees who engage asset holders	N/A
Ensuring the asset holder meets the minimum standards	RG 133 in Section C
Requirements for the content of custody agreements	RG 133 in Section C
Disclosure to retail clients of relationship with asset holder	RG 133 in Section C
Transfer of assets when asset holder is changed	RG 133 in Section C
D Compliance controls for licensed custody providers	
Compliance controls must cover risks to client assets	RG 133 in Section D
Compliance controls may vary	RG 133 in Section D
E Protection of rights for land used in registered schemes	
Protecting members' rights	RG 133 in Section E
Registration of protective interests	RG 133 in Section E

Draft updated RG 133	Existing guidance
F Relief from the obligation to separate assets	
Specific obligations for registered schemes and CCIVs	N/A
Obligations for other AFS licensees who are asset holders	N/A
Relief for omnibus accounts	RG 133 in Section F
Relief does not extend to non-financial assets	RG 133 in Section F

Table 6: Discretionary powers—cross-references to existing guidance

Draft updated RG 136	Existing guidance
B Our approach to individual relief	
Our powers to grant relief	RG 136 in Section A
Our general approach to relief under RG 51	RG 136 in Section A
Our approach to relief for managed investment schemes, CCIVs and Australian passport funds	N/A
Statutory preconditions for Australian passport funds	N/A
C Common forms of individual relief	
Compliance plan audits and compliance committees	RG 136 , Section C
Stapled securities	N/A
Change of responsible entity	N/A
Offers to foreign members in a restructure	N/A
Withdrawal arrangements	N/A
Deregistration of a registered scheme	N/A
Closely related schemes: s601ED determination	RG 136 , Section D

Table 7: Foreign passport funds—cross-references to existing guidance

Draft guide	Existing guidance
B Entry requirements	N/A
C Ongoing requirements	N/A
D ASIC's powers and responsibilities	N/A

Key terms

Term	Meaning in this document
AFS licence	<p>An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services</p> <p>Note: This is a definition contained in s761A.</p>
AFS licensee	<p>A person who holds an AFS licence under s913B of the Corporations Act</p> <p>Note: This is a definition contained in s761A.</p>
APFRN	<p>Australian Passport Fund Registration Number—the number assigned to an Australian passport fund under draft s@1212A(2)(a) of the Corporations Act</p>
Asia Region Funds Passport	<p>An agreement between economies in the Asia region that allows passport funds established and regulated in one participating economy to offer interests to investors in another participating economy</p>
ASIC	<p>Australian Investments and Securities Commission</p>
ASIC Act	<p><i>Australian Investments and Securities Commission Act 2001</i></p>
asset holder	<p>A person who holds scheme property of a registered scheme, assets or property of a sub-fund of a CCIV, client assets of an IDPS, client portfolio assets of an MDA service, or financial products or a beneficial interest in financial products held under a custodial service</p>
assets of a sub-fund of a CCIV	<p>The assets of a sub-fund of a CCIV at a particular time are the assets of the CCIV (including money, assets and investments), to the extent the assets:</p> <ul style="list-style-type: none"> • are allocated by the corporate director to the sub-fund in accordance with draft s1142E of the Corporations Act; or • are to be assets of the sub-fund under a restructure, arrangement or court order (but does not include assets that, in accordance with a restructure, arrangement or court order, are no longer to be assets of the sub-fund) <p>Note: This is a definition contained in draft s1142D</p>
Australian passport fund	<p>A registered scheme that is also registered as a passport fund under draft Pt 8A.3 of the Corporations Act</p>
CCIV	<p>A corporate collective investment vehicle—a company that is registered as a corporate collective investment vehicle under the Corporations Act</p> <p>Note: This is a definition contained in s9 of the Corporations Act.</p>

Term	Meaning in this document
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
[CO 13/656] (for example)	An ASIC class order (in this example numbered 13/656) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
corporate director	The company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV Note: This is a definition contained in draft s9 of the Corporations Act.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
depository	The company named in ASIC's record of the CCIV's registration as the depository or temporary depository of the CCIV Note: This is a definition contained in draft s9 of the Corporations Act.
foreign passport fund	A passport fund with a home economy other than Australia
home economy	The participating economy in which a passport fund is first registered, approved or authorised as a regulated collective investment scheme
home regulator	The passport regulator in a passport fund's home economy
host economy	A participating economy that is not a passport fund's home economy and either: <ul style="list-style-type: none"> • permits the fund to offer interests in the fund in that economy under the Asia Region Funds Passport; or • has accepted an application from the fund to offer interests in the fund in that economy under the Asia Region Funds Passport (but not to register the fund as a passport fund in that economy)
host regulator	The passport regulator in a passport fund's host economy
IDPS	An investor directed portfolio service as defined in Class Order [CO 13/763] <i>Investor directed portfolio services</i> or any instrument that amends or replaces that class order
IDPS-like scheme	An investor directed portfolio services-like scheme as defined in Class Order [CO 13/762] <i>Investor directed portfolio services</i> , provided through a registered managed investment scheme, or any instrument that amends or replaces that class order
investment fund	A registered scheme or retail CCIV

Term	Meaning in this document
investment fund operator	A responsible entity of a registered scheme or corporate director of a retail CCIV
licensed custody provider	A person who holds an AFS licence authorising the licensee to provide a custodial service
managed investment scheme	Has the meaning given in s9 of the Corporations Act
MDA	A managed discretionary account
member	A member of a registered scheme or a shareholder of a CCIV
Memorandum of Cooperation	The Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport
participating economy	An economy that is a participant under the Memorandum of Cooperation (while it is in effect) and has: <ul style="list-style-type: none"> • advised the Asia Region Funds Passport Joint Committee that they have implemented the Asia Region Funds Passport; and • not withdrawn from the Memorandum of Cooperation
passport fund	A regulated collective investment scheme, or sub-fund of a regulated collective investment scheme, registered as a passport fund in a participating economy
passport fund operator	An entity that operates a passport fund
passport regulator	The entity that regulates passport funds in a participating economy
Passport Rules	The requirements in Annex 3 to the Memorandum of Cooperation, as incorporated into the domestic law of a participating economy <p>Note: The Australian Passport Rules will be made by the relevant Minister as a legislative instrument under draft s1211 and 1211A of the Corporations Act.</p>
PDS	A Product Disclosure Statement—a document that must be given to a retail client for the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act <p>Note: See s761A for the exact definition.</p>
register of passport funds	A register of all current and deregistered passport funds in a home economy, maintained by the home regulator
registered scheme	A managed investment scheme that is registered under s601EB of the Corporations Act
regulated collective investment scheme	A regulated collective investment scheme as defined by the Passport Rules for a participating economy

Term	Meaning in this document
reg 7.6.04 (for example)	A regulation of the Corporations Regulations 2001 (in this example numbered 7.6.04)
responsible entity	A responsible entity of a registered scheme as defined in s9 of the Corporations Act
retail CCIV	<p>A CCIV promoted by a person, or an associate of a person, who was, when the CCIV was promoted, in the business of promoting CCIVs to persons who are, or would be, retail clients or a CCIV that has at least one member that acquired one or more shares in the CCIV:</p> <ul style="list-style-type: none"> • as a retail client; or • under a custodial arrangement and a PDS had to be provided to the member before the acquisition <p>Note: See draft s1154A of the Corporations Act.</p>
retail client	A client as defined in s761G of the Corporations Act and Div 2 of Pt 7.1 of the Corporations Regulations
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s9 (for example)	A section of the Corporations Act (in this example numbered 9), unless otherwise specified
scheme property	<p>Means:</p> <ul style="list-style-type: none"> (a) contributions of money or money's worth to the scheme; (b) money that forms part of the scheme property under provisions of the Corporations Act or the ASIC Act; (c) money borrowed or raised by the responsible entity for the purposes of the scheme; (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraphs (a), (b) or (c); and (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraphs (a), (b), (c) or (d) <p>Note: This is a definition contained in s9 of the Corporations Act.</p>
sub-fund	<p>A part of a CCIV that:</p> <ul style="list-style-type: none"> • is established as a sub-fund in the records of the CCIV by assigning a unique name to the sub-fund and identifying one or more classes of shares in the CCIV that are to be referable to the sub-fund; and • either relates to the entire business of the CCIV (in the case where there is one sub-fund) or relates solely to a particular part of the business of the CCIV (in the case where there are two or more sub-funds)
UCITS	Undertakings for Collective Investment in Transferable Securities

Term	Meaning in this document
wholesale CCIV	A CCIV that is not a retail CCIV
wholesale scheme operator	An operator of a managed investment scheme that is unregistered because of s601ED(2) of the Corporations Act, who holds an AFS licence in relation to the operation of the scheme

List of proposals and questions

Proposal	Your feedback
<p>B1 Our proposed guidance on registering a managed investment scheme is set out in Section B of draft Regulatory Guide 000 Funds management: Establishing and registering a fund (Attachment 1 to this consultation paper). We propose to make minor changes to our existing policy to clarify our guidance about:</p> <ul style="list-style-type: none"> (a) when a responsible entity can lodge an application; (b) acceptance of the application for lodgement; and (c) who can sign a directors' statement. 	<p>B1Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>B1Q2 Do you have any comments on our proposed guidance?</p> <p>B1Q3 Is there any further guidance we should give? Please give details.</p> <p>B1Q4 Are there any practical problems associated with our guidance? Please give details.</p>
<p>B2 We propose to require applicants to select more granular asset kinds (listed in Table 1 below) when applying to register the managed investment scheme. Where it is possible, we also propose to require existing responsible entities to reclassify an existing asset kind when they first lodge a notification.</p>	<p>B2Q1 Do you agree with the asset kinds we have proposed? If not, why not?</p> <p>B2Q2 Is any further guidance required on the asset kinds we have proposed?</p> <p>B2Q3 Are there any other asset kinds that should be included? Please give details.</p>

Proposal	Your feedback
<p>B3 Our proposed guidance on registering a CCIV and notifying us of a sub-fund of a CCIV is set out in Section C of draft Regulatory Guide 000 Funds management: Establishing and registering a fund (Attachment 1 to this consultation paper). We propose to set out guidance about:</p> <p>(a) for registering a CCIV:</p> <ul style="list-style-type: none"> (i) when a corporate director can lodge an application; (ii) appointment of the depositary; (iii) acceptance of the application for lodgement; (iv) assessment of the application, constitution and compliance plan; (v) deciding whether to register the CCIV; and (vi) where the application is withdrawn; and <p>(b) for notifying us of the establishment of a sub-fund of a CCIV:</p> <ul style="list-style-type: none"> (i) acceptance of the notification for lodgement; and (ii) processing the notification. 	<p>B3Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>B3Q2 Do you have any comments on our proposed guidance?</p> <p>B3Q3 Is there any further guidance we should give? Please give details.</p> <p>B3Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>B3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>B3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>B4 We also propose to adopt the more granular asset kinds listed in Table 1 above for CCIVs and sub-funds of CCIVs.</p>	<p>B4Q1 Do you agree with the asset kinds we have proposed? If not, why not?</p> <p>B4Q2 Is any further guidance required on the asset kinds we have proposed?</p> <p>B4Q3 Are there any other asset kinds that should be included? Please give details.</p>

Proposal	Your feedback
<p>B5 Our proposed guidance about registering a registered scheme as an Australian passport fund is set out in Section D of draft Regulatory Guide 000 Funds management: Establishing and registering a fund (Attachment 1 to this consultation paper). We propose to set out guidance about:</p> <ul style="list-style-type: none"> (a) the interaction between applications to register a managed investment scheme and an Australian passport fund; (b) assessing an application to register as an Australian passport fund; (c) assessing whether the operator meets the eligibility requirements; (d) forming an opinion about the likelihood of compliance with the Corporations Act and Australian Securities and Investments Commission Act 2001 (ASIC Act); (e) assessing the Product Disclosure Statement (PDS); and (f) updating our register of passport funds. 	<p>B5Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>B5Q2 Do you have any comments on our proposed guidance?</p> <p>B5Q3 Is there any further guidance we should give? Please give details.</p> <p>B5Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>B5Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>B5Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>C1 Our proposed guidance on the content requirements for constitutions is set out in draft updated RG 134 (Attachment 2 to this consultation paper). To reflect the new CCIV and Asia Region Funds Passport regimes, we propose to update our guidance on:</p> <ul style="list-style-type: none"> (a) consideration to acquire interests or shares (see Section B of draft updated RG 134); (b) powers and rights of an investment fund operator (see Section D of draft updated RG 134); (c) complaints, disputes and remedies (see Section E of draft updated RG 134); (d) withdrawal rights (see Section G of draft updated RG 134); and (e) incorporation by reference (see Section J of draft updated RG 134). 	<p>C1Q1 Should we exclude foreign members of an Australian passport fund in a host economy under the Asia Region Funds Passport from the relief we give under Class Order [CO 13/656] <i>Equality of treatment impacting on the acquisition of interests</i> from a responsible entity's duty in s601FC(1)(d) to treat members equally or fairly in relation to rights issues or distribution reinvestment plans?</p> <p>C1Q2 Do you agree with our proposed guidance? If not, why not?</p> <p>C1Q3 Do you have any comments on our proposed guidance?</p> <p>C1Q4 Is there any further guidance we should give? Please give details.</p> <p>C1Q5 Are there any practical problems associated with our guidance? Please give details.</p>
<p>C2 We propose to remove the appendix from RG 134 for managed investment schemes registered before 1 October 2013 and create a new regulatory guide containing the content from this appendix.</p>	<p>C2Q1 Do you agree with our proposed approach? If not, why not?</p>

Proposal	Your feedback
<p>C3 Our proposed guidance about changing the constitution of an investment fund is set out in Section F of draft updated RG 134 (Attachment 2 to this consultation paper).</p>	<p>C3Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>C3Q2 Do you have any comments on our proposed guidance?</p> <p>C3Q3 Is there any further guidance we should give? Please give details.</p> <p>C3Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>C3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>C3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>C4 Our proposed guidance is set out in Section C of draft updated RG 134 (Attachment 2 to this consultation paper). We propose to set out guidance about:</p> <p>(a) establishing sub-funds of CCIVs; and</p> <p>(b) protecting class rights in registered schemes.</p>	<p>C4Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>C4Q2 Do you have any comments on our proposed guidance?</p> <p>C4Q3 Is there any further guidance we should give? Please give details.</p> <p>C4Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>C4Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>C4Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>D1 Our proposed guidance about compliance management systems is set out in Section B of draft updated R G 132 (Attachment 3 to this consultation paper). We propose to set out guidance about the key features of an effective and responsive compliance management system for responsible entities, wholesale scheme operators, corporate directors, IDPS operators and MDA providers to meet their obligations in s912A.</p>	<p>D1Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>D1Q2 Do you have any comments on our proposed guidance?</p> <p>D1Q3 Is there any further guidance we should give? Please give details.</p> <p>D1Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>D1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>D1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>D2 Our proposed guidance about compliance plans is set out in Section C of draft updated RG 132 (Attachment 3 to this consultation paper). We propose to set out guidance about how the investment fund operator can establish measures that will be adequate to meet s601HA. We propose to provide guidance about the identification of compliance risks and compliance controls at the group level and the level of the registered scheme or sub-fund of the retail CCIV. We also propose to give guidance about the additional compliance risks and compliance controls for an Australian passport fund.</p>	<p>D2Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>D2Q2 Do you have any comments on our proposed guidance?</p> <p>D2Q3 Do you agree with the types of risks identified for different types of investment funds? If not, why not?</p> <p>D2Q4 Are there further risks that should be identified for any of the different investment fund types? Please give details.</p> <p>D2Q5 Is there any further guidance we should give? Please give details.</p> <p>D2Q6 Are there any practical problems associated with our guidance? Please give details.</p> <p>D2Q7 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>D2Q8 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>D3 Our proposed guidance about oversight of registered schemes, CCIVs and Australian passport funds is set out in Section D of draft updated RG 132 (Attachment 3 to this consultation paper). We propose to set out guidance about:</p> <p>(a) for compliance committees:</p> <ul style="list-style-type: none"> (i) the experience, qualifications and competence required by a compliance committee member to carry out their duties and functions; (ii) the terms of appointment of compliance committee members, which should set out clear requirements; and (iii) meeting regularly and keeping records; <p>(b) for compliance plan auditors:</p> <ul style="list-style-type: none"> (i) the scope of the audit under s601HG; (ii) testing of master compliance plans; (iii) lodgement of consolidated or single compliance plans; and (iv) the period covered by the audit opinion; <p>Note: We also include summary guidance about removing an auditor and reporting to ASIC, with cross-references to our existing guidance.</p> <p>(c) for depositaries of CCIVs performing an oversight role:</p> <ul style="list-style-type: none"> (i) establishing, implementing and reviewing procedures and processes in relation to acting on instructions; (ii) performance of their supervisory duties; and (iii) supervision where activities of the CCIV are outsourced; and <p>(d) in relation to the oversight obligations for Australian passport funds:</p> <ul style="list-style-type: none"> (i) the role of the independent oversight entity; and (ii) the annual implementation review. 	<p>D3Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>D3Q2 Do you have any comments on our proposed guidance?</p> <p>D3Q3 Is there any further guidance we should give? Please give details.</p> <p>D3Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>D3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>D3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>E1 Our proposed guidance about holding assets is set out in draft updated RG 133 (Attachment 4 to this consultation paper). To reflect the new CCIV and Asia Region Funds Passport regimes, we propose to update our guidance on:</p> <ul style="list-style-type: none"> (a) minimum standards and related requirements for asset holders; (b) requirements when engaging another asset holder; (c) compliance controls for licensed custody providers—excluding registered schemes, CCIVs, IDPSs and MDAs; <small>Note: Compliance measures for registered schemes, CCIVs, IDPSs and MDAs are set out in draft updated RG 132 (see Section D of this consultation paper).</small> (d) protection of rights for land used in registered schemes; and (e) for registered schemes and CCIVs, relief from the obligation to separate assets. 	<p>E1Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>E1Q2 Do you have any comments on our proposed guidance?</p> <p>E1Q3 Is there any further guidance we should give? Please give details.</p> <p>E1Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>E1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>E1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>F1 Our proposed guidance about granting relief is set out in Section B of draft updated RG 136 (Attachment 5 to this consultation paper). We propose to set out guidance on:</p> <ul style="list-style-type: none"> (a) our powers to give relief; (b) the interaction between RG 51 and draft updated RG 136; and (c) some of the factors we may take into account in applying the principles under RG 51 that we have identified from our experience in assessing applications for individual relief from the provisions in Ch 5C of the Corporations Act, and which we anticipate may also be relevant for assessing relief applications from provisions of draft Chs 7A and 8A and from the Australian Passport Rules. 	<p>F1Q1 Should we remove this section and rely on the policy in RG 51 instead?</p> <p>F1Q2 Are there any other factors we should take into account when considering whether to grant relief? Please give details.</p> <p>F1Q3 Do you agree with our proposed guidance? If not, why not?</p> <p>F1Q4 Do you have any comments on our proposed guidance?</p> <p>F1Q5 Are there any practical problems associated with our guidance? Please give details.</p>

Proposal	Your feedback
<p>F2 Our proposed guidance about common forms of relief is set in Section C of draft updated RG 136 (Attachment 5 to this consultation paper). For managed investment schemes, we propose to set out guidance on:</p> <p>(a) when we have granted, and may grant, relief in relation to:</p> <ul style="list-style-type: none"> (i) when a compliance plan is required; (ii) compliance plan audit; (iii) extensions for establishing the compliance committee; (iv) extensions of time to appoint a new or replacement compliance plan committee member; (v) stapled securities arrangements; (vi) change of the responsible entity (where the change is to a related body corporate, there are a small number of members, or significant interests are held by non-voting platforms); (vii) offers to foreign members in a restructure; (viii) withdrawal (where members of a 'frozen fund' are suffering hardship, to enable 'rolling' withdrawal offers, or for illiquid marketplace lending schemes); and (ix) voluntary deregistration; and <p>(b) when we may make a determination that a number of managed investment schemes are closely related and each need to be registered.</p>	<p>F2Q1 Are there any types of relief that are not included that should be? If so, why should they be included?</p> <p>F2Q2 Are there any types of relief that are included that should not be? If so, why should they be removed?</p> <p>F2Q3 Do you agree with our proposed guidance? If not, why not?</p> <p>F2Q4 Do you have any comments on our proposed guidance?</p> <p>F2Q5 Are there any practical problems associated with our guidance? Please give details.</p>

Proposal	Your feedback
<p>G1 Our proposed guidance about notifications by foreign passport fund operators for entry into Australia is set out in Section B of draft Regulatory Guide 000 Foreign passport funds (Attachment 6 to this consultation paper). We propose to set out guidance on:</p> <ul style="list-style-type: none"> (a) the eligibility requirements to apply for entry under the Corporations Act; (b) the notification process; (c) how ASIC will assess a notice of intention to offer interests; and (d) when interests in a notified foreign passport fund can commence being offered in Australia. 	<p>G1Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>G1Q2 Do you have any comments on our proposed guidance?</p> <p>G1Q3 Is there any further guidance we should give? Please give details.</p> <p>G1Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>G1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>G1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>
<p>G2 Our proposed guidance about ongoing requirements for notified foreign passport funds is set out in Section C of draft Regulatory Guide 000 Foreign passport funds (Attachment 6 to this consultation paper). We propose our guidance will outline the following ongoing requirements under the Corporations Act, including the Australian Passport Rules, for notified foreign passport funds and their operators:</p> <ul style="list-style-type: none"> (a) lodging financial statements, audit reports and implementation review reports; (b) notifying ASIC of certain change of events and reporting significant breaches to ASIC; (c) providing the required point of sale disclosure to Australian investors; and (d) maintaining appropriate internal and external dispute resolution arrangements. 	<p>G2Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>G2Q2 Do you have any comments on our proposed guidance?</p> <p>G2Q3 Is there any further guidance we should give? Please give details.</p> <p>G2Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>G2Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>G2Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>G3 Our proposed guidance about ASIC's powers and responsibilities in relation to foreign passport funds is in Section D of draft Regulatory Guide 000 Foreign passport funds (Attachment 6 to this consultation paper). We propose to set out guidance on:</p> <ul style="list-style-type: none"> (a) our powers to grant exemptions and modifications to the Australian Passport Rules and some other applicable laws that we administer; (b) recognition of exemptions and modifications granted by other passport regulators; (c) disclosure and use of confidential information; (d) our powers to check compliance and conduct investigations of foreign passport funds and their operators; (e) our powers to take administrative action against a foreign passport fund operator; and (f) our powers to take civil action and/or criminal prosecution action against a foreign passport fund operator. 	<p>G3Q1 Do you agree with our proposed guidance? If not, why not?</p> <p>G3Q2 Do you have any comments on our proposed guidance?</p> <p>G3Q3 Is there any further guidance we should give? Please give details.</p> <p>G3Q4 Are there any practical problems associated with our guidance? Please give details.</p> <p>G3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.</p> <p>G3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.</p>