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Confidential Communication

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**Australian Custodial Services Association response on ASIC consultation paper 296
Funds Management**

Dear Michelle

The Australian Custodial Services Association (**ACSA**) is the peak industry body representing members of Australia's custodial and investment administration sector. Collectively, the members of ACSA hold securities and investments in excess of AU\$3 trillion in value in custody and under administration. Members of ACSA include NAB Asset Servicing, JP Morgan, HSBC, State Street, RBC Investor Services, BNP Paribas Securities Services, Citi and Northern Trust.

This submission is intended to provide the Australian Securities and Investments Commission (**ASIC**) with the collective views of ACSA members on the issues raised by ASIC consultation paper 296 *Funds management (Consultation Paper)* and relevant draft updated regulatory guides which were released with the Consultation Paper.

The Consultation Paper relates to guidance about key aspects of the CCIV and Asia Region Funds Passport Regime which are to be administered by ASIC. The legislation through which the CCIV and ARSP Regimes are to be created under Australian law was released for consultation in August/September 2017 and comprised:

- An exposure draft of the Treasury Laws Amendment (Collective Investment Vehicle) Bill 2017 (**CCIV Bill**) together with a draft explanatory memorandum; and
- An exposure draft of the Corporations Amendment (Asia Region Funds Passport) Bill 2017 (**ARFP Bill**) with a draft legislative instrument enacting the Passport Rules in annex 3 to the Memorandum of Co-operation, together with a draft explanatory memorandum.

Many ACSA members operate depositary businesses in other jurisdictions and ACSA members would ordinarily expect that the role of depositary would most naturally sit with this particular group of licensed custodians. ACSA notes that at a high level, it has responded positively to the depositary proposals as it considers that the purpose of the CCIV developments is to create an

investment vehicle that is internationally competitive and ACSA would like to work co-operatively with the Government and ASIC to establish a suitable regime. However it is also important to ACSA that the depositary proposals be practical and workable, and this approach was reflected in ACSA's submission to Treasury on the draft CCIV Bill (and is reflected in the comments in this submission).

ACSA members consider that those parts of the Consultation Paper and draft regulatory guides that address the role of the depositary and the functions of custodians are most relevant to their activities, so this submission responds to the issues raised by those parts only. Please see the Annexures to this letter for the detail.

We note that there are also to be amendments made to other regulatory guides, to reflect the consequential amendments that will be made in the Corporations Act 2001 (Cth) (**Corporations Act**) to accommodate the two new regimes. ACSA looks forward to participating in any consultation regarding those additional regulatory guides when they are made available,

ACSA's submission is based on its review of the draft CCIV Bill and ARFP Bill. ASIC has flagged that its proposed guidance may change to reflect the final form of the legislation. Again, ACSA looks forward to participating in further consultation on any revisions to the regulatory guides once they are released.

EXECUTIVE SUMMARY

While the draft guidance largely reflects the terms of the draft CCIV Bill and draft ARFP Bill.

There are a number of matters in the draft CCIV Bill with which ACSA members do not agree and which have been the subject of the earlier ACSA submission and further discussions with Treasury.

One of those issues is the matter of independence between the depositary and the corporate director. This is referred to in a few places in draft regulatory guide 000 *Funds management: Establishing and registering a fund*. For example, at paragraph 66, the guide specifies that in an application for registration of a retail CCIV, among other things, the application must include the details of the appointment of a depositary that meets the requirements of draft s1163 of the Corporations Act and is independent of the corporate director: draft s1163C and 1163D of the Corporations Act. ACSA had submitted to Treasury that structural segregation of the depositary function is preferred to cross-ownership and directorship tests which were set out in the draft CCIV Bill. At this stage, ACSA simply notes that this will be the subject of consideration when the revised legislation is released and will impact on the contents of the guidance.

ACSA members have included in this submission specific comments on particular positions taken by ASIC in the draft guidance. Some of these are matters of some importance – ACSA refers specifically to the provisions of the guidance which purport to require compliance by the depositary with the PDS for scheme, and the overlap in the depositary and custody agreement content requirements as matters which are to be addressed.

CONTACT INFORMATION

If you have any questions in relation to this submission, please direct those questions to the head of the ACSA Regulatory Working Group, Stephen Coutts, Product Management and Regulatory Oversight Manager, J.P. Morgan Chase Bank N.A., (Tel: 02 9003 6169, stephen.coutts@jpmorgan.com).

Regards



David Knights
Executive Chair

Annexure A

Draft Regulatory Guide 132

ACSA comments in this submission on the proposed guidance set out in section C of draft updated RG132, insofar as that guidance relates to the oversight function performed by depositories of CCIVs. The guidance proposed for depositories of CCIVs performing an oversight role relates to them:

- (i) Establishing, implementing and reviewing procedures and processes in relation to acting on instructions;
- (ii) Performing their supervisory duty;
- (iii) Providing supervision where activities of the CCIV are outsourced.

ASIC poses the following questions in relation to that guides:

D3Q1 Do you agree with our proposed guidance? If not, why not?

At a high level, ACSA members have issues with the approach taken in various parts of the guidance in RG132 which relate to the obligations of depositories. The response to D3Q2 provides more detail regarding the specific issues that ACSA members have with this guidance.

D3Q2 Do you have any comments on our proposed guidance?

The following sets out ACSA's specific comments on individual paragraphs of the draft Regulatory Guide 132.

Oversight

- (a) At RG132.27, ASIC has included an accurate restatement of the contents of draft Section 1164B of the Corporations Act. ACSA notes that in its submission to Treasury, it has argued that there should be changes to this provision, particularly as currently drafted it suggests that the depository needs to conduct pre-transaction checks of transactions undertaken by the CCIV, rather than post-trade verification of compliance (consistent with the obligations of a depository to a Luxembourg SICAVs). ACSA notes that ASIC has stated its intention to update the guidance to reflect the ultimate form of the law.
- (b) However ACSA notes that the statement regarding the draft CCIV Bill set out in RG132.37 does not appear entirely accurate. Paragraph (b) refers to oversight of a CCIV being through the depository, which has a supervisory responsibility to ensure that the corporate director's activity in relation to transactions in shares in the CCIV, valuations and investments comply with the Corporations Act, the Constitution and the Product Disclosure Statement. ACSA recommends that it be changed to more closely represent what is ultimately contained in Section 1164B

of the legislation. It also notes that the Draft CCIV Bill does not contain any reference to compliance with the Product Disclosure Statement. In fact, there are no provisions in the Corporations Act which refer to compliance with the Product Disclosure Statement, as its primary purpose is to provide product disclosure to prospective investors in a financial product. It therefore contains representations in relation to the product but not obligations.

- (c) At RG132.129, ASIC refers to the obligation on the depositary of a CCIV to report to ASIC as soon as practicable after it becomes aware of a breach of the Corporations Act that relates to the CCIV and that has had, or is likely to have, a materially adverse effect on the interests of members. Again, this does not appear to be an accurate reflection of Section 1164E in the exposure draft CCIV Bill, which requires the depositary to lodge a written report with ASIC after becoming aware of, or reasonably suspecting, a breach as follows:
 - (b) *The breach or suspected breach:*
 - (i) *relates to the CCIV; and*
 - (ii) *arises in relation to the conduct by the corporate director of activities covered by sub-section 1164B(2); and*
 - (iii) *is, or would be in the opinion of the depositary, a serious breach of the Act.*
- (d) We also note that this paragraph (RG132.129) refers to the depositary having a compliance plan but note that there is no obligation on a depositary to have a compliance plan and it would not be typical. Rather, ACSA suggests that the reference here be to the depositary simply maintaining compliance controls to ensure that it meets its breach reporting obligation to ASIC.

Relationship between the Depositary and the Corporate Director

- (a) RG132.137, contains a list of items which ASIC suggests should be included in the contract between the depositary and the corporate director. While ACSA notes that this list is drawn from Article 2 of Commission Delegated Regulation (EU) 2016/438 supplementing directive 2009/65/EC of the European Parliament and of the Council with regard to the obligations of depositaries (a copy of which is contained in **Annexure C**), ACSA submits that this list is overly long and complicated in light of existing requirements as to the content of custody contracts. Australia already has (set out within ASIC RG133: *Managed investments and custodial or depositary services holding assets*), one of the world's most detailed list of requirements for the contents of custody agreements.
- (b) ACSA members submit that there are a number of specific issues with RG 132.137, which we set out below:
 - (i) the last sentence in paragraph (b) of RG 132.137 should be removed. A constitution will not set out information about the assets or geographic regions in which the CCIV plans to invest. The PDS is a disclosure

document and does not operate as a governing document as to its terms of operation. As it merely represents the corporate director's summary of relevant information for prospective investor, there should be no requirement that the contracts between the depositary and the corporate director be required to be consistent with the PDS. Further, the depositary has no control over the information that is included in the PDS, it being solely the responsibility of the corporate director to determine what should be included and the corporate director can replace or amend the PDS from time to time. ACSA members are also conscious that there may be multiple PDS for the same CCIV.

- (ii) Similarly, ACSA submits that the reference to PDS is paragraph (b) can be deleted, as the PDS is not relevant to the performance by the depositary of its obligations, which must be set out in the contract with the corporate director.
- (iii) ACSA members submit that the terminology used in paragraph (h) of RG132.137 will in due course need to be reviewed having regard to the way in which the CCIV Bill is redrafted following the recent consultation. ACSA members note that the terminology of "sale" and "repurchase" is language used in Europe which does not necessarily translate to the Australian market.
- (iv) At paragraph (l) of RG132.137, there is a reference to information being provided on cash accounts opened in the name of the corporate director acting on behalf of the CCIV. To the extent that the depositary also provides services as an authorised deposit taking institution, ACSA members consider that the account would be opened in the name of the CCIV (with a delineation for the relevant sub-fund), not in the name of the corporate director. To the extent that the depositary only holds bank accounts on trust for its clients, any accounts will in fact be opened in the name of the depositary or of a sub-custodian. The depositary will keep records of what cash is maintained in accounts opened with third party ADIs in which the client's cash is held.

ACSA members point out that because of the detailed content requirements for custody agreements which continue to be contained within revised draft Regulatory Guide 133, there are now separate and over-lapping requirements for the contents of the depositary agreement. That is because under draft ASIC Regulatory Guide 133, the definition of asset holder will also capture a depositary. This is not an issue created by the European directive requirements, as there are not detailed content requirements for custody agreements as there are set out in ASIC's Regulatory Guide 133 (and the applicable class orders)¹.

ACSA members suggest that to enable existing custodians to adapt their existing custody agreements for depositary services, that the list of contents contained in ASIC RG 132.137 be reduced so that they only relate to the functions that are necessary having regard to the depositary's oversight function. Attached as **Annexure D** is a copy of the proposed content requirements extracted from ASIC RG132.137, marked with ACSA members suggested changes to limit the obligations contained to matters that relate the depositary's oversight function.

¹ ASIC Class Order [CO13/1409] and [CO13/1410].

Section D Oversight

Under ASIC's key points at the beginning of Section D, ASIC refers to the fact that for CCIVs, oversight is primarily through the depositary, which has a supervisory responsibility to ensure that the corporate director's activities in relation to transactions in shares in the CCIV, valuations and investments comply with the Corporations Act, the CCIV's Constitution and the PDS. As noted above, these key points will ultimately need to be updated to refer to the description of the depositary's functions as settled in the CCIV Bill, but as a placeholder, ACSA notes that the references to investments and the PDS is not consistent with the current draft of the Bill. Please note that draft section 1164B makes no reference to the depositary having supervisory responsibilities in relation to investments and the PDS is, as noted above, simply a disclosure document.

RG132.209 and following then contains ASIC's specific guidance in relation to the depositary functions. Ultimately, once the legislation for the establishment of CCIVs is settled, there will need to be an alignment between the legislation and what is set out in the guidance. For now, ACSA makes the following submissions in relation to the draft:

- (a) At paragraph RG132.210, there is reference to the depositary having a supervisory responsibility to ensure that the corporate directors' activities comply with the Corporations Act, the Constitution and any PDS. In fact, the requirement in draft section 1164B paragraph 1 is that the depositary takes such care to ensure compliance with the CCIV's Constitution and the provisions of the Act. The PDS does not contain obligations and is not referred to in draft section 1164B.
- (b) At RG 132.211, there is a reference to the depositary having a duty to safeguard the assets of the CCIV. One of the comments made as part of ACSA's submission on the draft legislation (in relation to section 1164) is that there needs to be equivalent carve-outs created in relation to the holding of assets as existing under the regime for the provision of custodial or depositary services (as described in ASIC Class Orders [CO 13/1409], [CO 13/1410] and Regulatory Guide 133). The CCIV Rules are intended to specify that there will be assets that are of a class determined which will not be held in trust. ACSA members have in mind that this will equate to the definition of "special custody assets" in ASIC Class Order [CO 13/760]. Further, as recognised in the custody class orders, there are circumstances in which assets cannot be held on trust. This is recognised in legislative provisions made by ASIC Class Orders [CO 13/1409 and CO 13/1410] being section 601FCAA(1)(a)(i) and (ii) and section 912AA(3). In particular this is important as custodians hold cash deposits as banker and not as a trustee, a position which legally excludes the holding of that cash on deposit. These exceptions need to be reflected in the CCIV Rules and ultimately in the draft Regulatory Guides.
- (c) At paragraph RG132.212, there is again a reference to the depositary holding the assets of the CCIV on trust, and as pointed out above, this is not workable and ACSA members look for this to be addressed either in the draft CCIV Bill or the CCIV Rules. There is also a reference in this paragraph to compliance with the PDS which will need to be deleted for the reasons given above.
- (d) At RG132.213, the guidance provided by ASIC is an accurate reflection of the draft CCIV Bill, but ACSA has submitted to Treasury that any compliance checks

undertaken by a depositary should be done on a post-transaction basis and this will ultimately affect what is included here by way of guidance for depositaries.

- (e) At RG132.214, ACSA members agree that it is appropriate that a depositary should prior to accepting its appointment, assess the risks to it relating to the matters for which it has oversight. This assessment would not be limited to compliance risks. However, the depositary oversight procedures will not be tailored to each individual CCIV but will be formulated having regard to processes adopted by the depositary for CCIVs with similar assets and risk levels. There also will not be an update of procedures done annually but rather, procedures will be subject to review and update on an as needed basis. It follows that the sentence beginning "on the basis of that assessment" should be deleted.
- (f) At RG132.215, there is reference to the depositary testing and verifying procedures of the corporate director. It is not clear to ACSA members what this would require. In relation to particular matters for which ACSA members have oversight responsibility, namely, the following activities:
 - (i) issuing, redeeming and cancelling shares in the CCIV;
 - (ii) valuing shares in the CCIV;
 - (iii) allocating assets and liabilities of the CCIV to sub-funds in the CCIV;
 - (iv) allocating and distributing income of the CCIV,the depositary will in relation to those matters undertake post-trade checks to ensure that the relevant activities have been undertaken by the corporate director (or its agent). A depositary is not an auditor and would not be able to conduct an audit style review of processes. It follows that ACSA members consider that RG132.215 should be deleted.
- (g) At RG132.216, as noted above, there is reference to the depositary's obligation to report to ASIC but this does not accurately reflect the wording in draft section 1164E of the Corporations Act. Draft section 1164E refers to the fact that the breach or suspected breach which may be reportable must relate to the CCIV, arise in relation to the conduct of the corporate director of activities covered by sub-section 1164B (2) and is or would be in the opinion of the depositary a serious breach of the Act. ACSA members submit this should be updated.
- (h) At RG132.217, ASIC provides guidance to the corporate director about providing information to the depositary which it requires to perform its functions. ACSA members consider this to be essential to the performance by the depositary of its functions.
- (i) At RG132.218, there is a reference to the corporate director being required to ensure all instructions related to the "assets and operations of the CCIV" are sent to the depositary, so the depositary can perform its own verification or reconciliation procedure. ACSA members recommend this be deleted. The primary supervisory duties of the depositary do not extend to the "assets and operations of the CCIV".

Rather, the supervisory responsibilities relate to the specific matters referred to in section 1164A and section 1164B.

- (j) ACSA members have similar concerns with RG132,219. The outsourcing must relate specifically to the matters referred to relevantly in section 1164B (2). As noted above, ACSA members have made submissions to Treasury that any checks in relation to the activities listed in that section need to be conducted on a post-transaction basis. ACSA members agree, however, that where the corporate director has outsourced services and information must be provided by the outsourced service provider, the corporate director must be obliged to ensure that the outsourced service provider makes the relevant information and evidence available to the depositary. The depositary will not be in a position to require the outsourced service provider to provide that information or evidence, as it will have not contract with that person.

D3Q3 Is there any further guidance we should give? Please give details.

ACSA members do not consider that the scope of the guidance provided by ASIC needs to be broader than that currently proposed.

D3Q4 Are there any practical problems associated with our guidance? Please give details.

The practical problems with the proposed guidance are addressed in the detailed comments in D3Q2. ACSA members consider that practical problems associated with the guidance include:

- (a) Requirements to comply with the PDS which is a disclosure document, not a constitutional document;
- (b) Obligations on a depositary to conduct a review of the corporate directors processes or to undertake compliance checks on a pre-trade basis;
- (c) Obligations which are expressed to be broader than those specified in the law, for example, references to the depositary having obligations to check the corporate directors compliance activities in relation to investments and operations;
- (d) Requirements to include specific matters in depositary contracts which overlap and conflict with the content requirements for custody agreements which are set out in ASIC Class Orders [CO 13/1409] and [CO 13/1410].
- (e) The regulatory guidance provided by ASIC is based on the draft legislation prepared by Treasury. On the basis of the current draft legislation for CCIVs, custodians face a number of challenges that are likely to prevent them from offering depositary services in Australia. These challenges are detailed further in the ACSA submission to Treasury dated 22 September 2017 (**Annexure E**). If there are further material changes to the draft legislation proposed by Treasury, then it is likely that a number of aspects of the regulatory guidance provided by ASIC may also be subject to change and will require further review and consultation with industry.

D3Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

It is difficult for ACSA members to respond to this question as there is no depositary function in Australia so the costs of implementing the draft CCIV Bill and addressing the guidance cannot properly be separated.

The cost will be affected by the extent to which the depositary role is consistent with global operating models that many global custodians already have in place. If the role in Australia is consistent with the service provided in other locations, eg Europe it will be easier and more cost effective to replicate existing processes and controls here.

D3Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

ACSA members consider that the guidance is likely to be useful, especially in setting expectations around the standards of conduct required of corporate directors and depositaries, which in turn should have an impact on consumer expectations. ACSA members encourage ASIC, in the next round of consultation on these documents, which follows the release of a revised draft Bill, to consider including statements which describe the benefits and limits of the depositary role, and encourage corporate directors to include those statements in their offer documents. The depositary will not be a watchdog over all of the corporate director's activities, nor is it an auditor. Its functions will be limited to those identified in the legislation and will largely address operational issues which arise from the operation of the CCIV. Ultimately the decisions made as to the investments made by the CCIV and the manner in which the CCIV is to be operated, are matters for the corporate director, not the depositary.

Annexure B

Draft Regulatory Guide 133

ACSA members are also interested in the proposed guidance about holding assets as set out in draft updated RG133 (attachment 4 to the Consultation Paper).

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

At a high level, ACSA members agree with changes to the proposed guidance in draft updated RG 133 as a number of the changes relate to extending the asset holding requirement to corporate directors and depositaries of CCIVs, which are currently applicable to responsible entities and custodians.

E1Q2 Do you have any comments on our proposed guidance?

Custody agreement

ACSA is supportive of the guidance on custody agreement contents and the application of those requirements to CCIV depositaries, thereby allowing for consistency in agreements with parties who have both registered scheme and CCIV property.

ACSA recommends that should any change be made to RG 132 in relation to a depository's oversight functions, any additional requirements to the extent they need to be captured in a depository agreement, should not be imposed on custodians.

Breach reporting

In relation to suspicious matter reporting, RG 133.111 provides that a custody agreement must ensure that the asset holder will report to ASIC within 10 business days if it becomes aware or reasonably suspects the corporate director or depositary has breached its obligations to report its own breaches as required by s912D(1B) or its obligations to report breaches in relation to the CCIV. ACSA notes that this does not entirely reflect the wording in draft section 1164E.

Draft section 1164E has an additional requirement, that the breach or suspected breach, "is or would be in the opinion of the depositary a serious breach of the Act". ACSA members submit that the proposed draft RG 133 be updated to reflect draft section 1164E entirely.

Depositary to hold CCIV assets on trust

Under the proposed draft RG 133, in the case of a retail CCIV, where a depositary is appointed, the depositary must hold the assets of the CCIV on trust for the CCIV (draft section 1164(1)).

Although ACSA members are supportive of this proposal, ACSA suggests that the exception to hold assets on trust which currently applies to custodial property held outside of Australia under ASIC Class Orders [CO 13/1409] and [CO 13/1410] be extended to depositaries. Among other reasons outlined in Annexure B, this exception is necessary to reflect the fact that trusts are not recognised in certain jurisdictions.

ACSA members are supportive of the proposal in the draft RG 133 that depositaries of CCIVs can register real property in the name of the asset holder without breaching the requirements to hold the assets separately in draft section 1142B(1).

E1Q3 Is there any further guidance we should give? Please give details.

ACSA members have not identified any further guidance to be provided by ASIC on this issue.

E1Q4 Are there any practical problems associated with our guidance? Please give details.

ACSA members recommend that securities lending not be included as a service that forms part of custodial service.

As such, a transfer of securities from a lender (eg responsible entity or corporate directors) to another party (a borrower) is not a transaction where the securities transferred or the beneficial interest in the securities transferred is held by a custodian – in practice, however, a custodian only holds the collateral in respect of the transferred securities on behalf of the registered scheme or a CCIV. It follows from this that a collateral in respect of the securities transferred under a securities lending programme is not a "custodial property" as defined in section 912AAC(16) of ASIC Class Order [CO 13/1410] (meaning a financial product or a beneficial interest in a financial product that is held in providing a custodial or depository service).

On this basis, securities lending should not be included as a service that forms part of custodial service as it does not fall within the definition of "custodial or depository service" as defined in section 766E of Corporations Act. ACSA members consider that securities lending, is more appropriately captured within the definition of "dealing" in section 766C of Corporations Act.

E1Q5 Please give details of any additional costs associated with the implementation of our guidance. If possible, please quantify these costs.

It is difficult for ACSA members to respond to this question as there is no depositary function in Australia so the costs of implementing the draft CCIV Bill and addressing the guidance cannot properly be separated.

The cost will be affected by the extent to which the responsibilities of a depositary regarding the safekeeping of assets, which are in essence the same as those of an existing custodian, are to differ under the new regime. It will be much more efficient if the custodial responsibilities of depositaries are the same as those of existing custodians of registered managed investment schemes.

E1Q6 Are there any benefits you consider will result from our guidance? If possible, please quantify these benefits.

ACSA members have not identified any particular benefits which will result from this guidance.

Annexure C

Article 2

Contract for the appointment of a depositary

1. The contract evidencing the appointment of the depositary in accordance with Article 22(2) of Directive 2009/65/EC shall be drawn up between, on the one hand, the depositary and, on the other hand, the investment company or the management company for each of the common funds that the management company manages.
2. The contract shall include at least the following elements:
 - (a) a description of the services to be provided by the depositary and the procedures to be adopted by the depositary for each type of assets in which the UCITS may invest and which are entrusted to the depositary;
 - (b) a description of the way in which the safekeeping and oversight functions are to be performed depending on the types of assets and the geographical regions in which the UCITS plans to invest, including in respect to the safekeeping duties, country lists and procedures for adding or withdrawing countries from the lists. This shall be consistent with the information provided in the UCITS rules, instruments of incorporation and offering documents regarding the assets in which the UCITS may invest;
 - (c) the period of validity and the conditions for amendment and termination of the contract, including the situations which could lead to the termination of the contract and details regarding the termination procedure and the procedures by which the depositary send all relevant information to its successor;
 - (d) the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. Those obligations shall not impair the ability of competent authorities to have access to the relevant documents and information;
 - (e) the means and procedures by which the depositary transmits to the management company or the investment company all relevant information that it needs in order to perform its duties, including the exercise of any rights attached to assets, and to allow the management company or the investment company to have a timely and accurate overview of the accounts of the UCITS;
 - (f) the means and procedures by which the management company or the investment company transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its duties, including the procedures ensuring that the depositary will receive information from other parties appointed by the management company or the investment company;

- (g) the procedures to be followed when an amendment to the UCITS rules, instruments of incorporation or offering documents is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment;
- (h) all necessary information that needs to be exchanged between the investment company or the management company, or a third party acting on behalf of the UCITS on the one hand, and the depositary, on the other hand, related to the sale, subscription, redemption, issue, cancellation and re-purchase of units of the UCITS;
- (i) all necessary information that needs to be exchanged between the investment company or the management company, or a third party acting on behalf of the UCITS and the depositary related to the performance of the depositary's duties;
- (j) where parties to the contract envisage appointing third parties to carry out parts of their respective duties, a commitment to provide, on a regular basis, details of any third party appointed and, upon request, information on the criteria used to select the third party and the steps envisaged to monitor the activities carried out by the selected third party;
- (k) information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism;
- (l) information on all cash accounts opened in the name of the investment company or of the management company acting on behalf of the UCITS and the procedures ensuring that the depositary will be informed when any new account is opened;
- (m) details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the management company or the investment company by the depositary when it launches such a procedure;
- (n) a commitment by the depositary to notify that the segregation of assets is no longer sufficient to ensure protection from insolvency of a third party, to whom safekeeping has been delegated in accordance with Article 22a of Directive 2009/65/EC in a specific jurisdiction;
- (o) the procedures ensuring that the depositary, in respect of its duties, has the ability to enquire into the conduct of the management company or the investment company and to assess the quality of information received, including by way of having access to the books of the management company or the investment company and by way of on-site visits;
- (p) the procedures ensuring that the management company or the investment company are enabled to review the performance of the depositary in respect of the depositary's duties.

The details of the means and procedures set out in points (a) to (p) shall be described in the contract appointing the depositary and any subsequent amendment to the contract.

3. The parties may agree to transmit all or part of the information that flows between them electronically provided that proper recording of such information is ensured.
4. Unless otherwise provided by national law, there shall be no obligation to enter into a specific written contract for each common fund.

The management company and the depositary may enter into a single contract agreement listing the common funds managed by that management company to which the contract applies.

5. The contract evidencing the appointment of the depositary and any subsequent agreement shall indicate the law applicable to the contract.

Annexure D

Extract from ASIC regulatory guidance: Depositary contract guidance

As noted at RG 132.57, the depositary has an important compliance role by providing oversight of the actions of the CCIV and the corporate director. The contract between the depositary and the corporate director should include at least:

- (a) a description of the oversight functions to be performed by the depositary;
- (b) a description of the way in which the oversight functions are to be performed;
- (c) the means and procedure by which the corporate director transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its functions including the procedures ensuring that the depositary will receive information from other parties appointed by the corporate director;
- (d) the procedures to be followed when an amendment to the CCIV's constitution is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment;
- (e) all necessary information that needs to be exchanged between the corporate director or a third party acting on behalf of the CCIV and the depositary [related to the sale, subscription redemption, issue, cancellation and re-purchase of shares of the CCIV];
- (f) all [necessary information] that needs to be exchanged between the corporate director or a third party acting on behalf of the CCIV and the depositary related to the performance of the depositary's oversight functions;
- (g) details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the corporate director by the depositary when it launches such a procedure;
- (h) the procedures ensuring that the depositary, in respect of its oversight functions, has the ability to inquire into the conduct of the corporate director and to assess the quality of information received, including by way of having access to the books of the corporate director and onsite visits; and
- (i) the procedures ensuring that the corporate director is enabled to review the performance of the depositary in respect of the depositary's oversight functions.

Annexure E

Copy of ACSA submission to Treasury dated 22 September 2017

