ASIC
Australian Securities & Investments Commission

REPORT 582

Response to submissions on CP 296 Funds management

July 2018

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 296 *Funds management* (CP 296) and details our responses to those issues.

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.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy.

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A Overview/Consultation process

1 In Consultation Paper 296 *Funds management* (CP 296), we consulted on proposed guidance on key aspects of the corporate collective investment vehicle (CCIV) regime and the Asia Region Funds Passport regime in a suite of draft new and updated regulatory guides.

> Note 1: When the CCIV regime is implemented, it will provide an optional alternative to the managed investments regime under Ch 5C of the *Corporations Act 2001* (Corporations Act).
>
> Note 2: The Asia Region Funds Passport provides a multilateral framework to facilitate the cross-border marketing of passport funds across participating economies in the Asia region.

2 The proposed suite of regulatory guides comprised six new and updated guides covering managed investment schemes, CCIVs, passport funds and certain other Australian financial services (AFS) licensees involved in funds management. The suite comprised:

(a) draft new Regulatory Guide 000 *Funds management: Establishing and registering a fund* (draft new regulatory guide on establishing and registering a fund);

(b) draft updated Regulatory Guide 134 *Funds management: Constitutions* (draft updated RG 134);

(c) draft updated Regulatory Guide 132 *Funds management: Compliance and oversight* (draft updated RG 132);

(d) draft updated Regulatory Guide 133 *Funds management and custodial services: Holding assets* (draft updated RG 133);

(e) draft updated Regulatory Guide 136 *Funds management: Discretionary powers* (draft updated RG 136); and

(f) draft new Regulatory Guide 000 *Foreign passport funds* (draft new regulatory guide on foreign passport funds).

3 This report highlights the key issues that arose out of the submissions received on CP 296 on our proposed new and updated guidance in relation to managed investment schemes, managed discretionary account (MDA) providers, investor-directed portfolio service (IDPS) operators, licensed custody providers, corporate directors, and passport fund operators. The report also sets out our responses to those issues.

4 The CCIV regime and the Asia Region Funds Passport regime were originally intended to be introduced into Parliament at the same time. However, the Corporations Amendment (Asia Region Funds Passport) Act 2018 (Asia Region Funds Passport Act) was passed on 28 June 2018. The Treasury Laws Amendment (Collective Investment Vehicle) Bill 2018 (CCIV Bill) is yet to be introduced into Parliament.

5 We consider there is a need for us to publish guidance for industry on how we will administer the Asia Region Funds Passport Act, rather than delay it until the CCIV Bill has been passed. This guidance will help:

(a) Australian passport fund operators and their advisers understand how we will assess applications for registration as a passport fund; and

(b) foreign passport fund operators and their advisers understand the notification process and their ongoing obligations.

6 We have released new and updated guidance for responsible entities, operators of wholesale unregistered managed investment schemes (wholesale schemes) that hold an AFS licence, MDA providers, IDPS operators, licensed custody providers and passport fund operators in:

(a) Regulatory Guide 131 *Funds management: Establishing and registering a fund* (RG 131);

(b) Regulatory Guide 134 *Funds management: Constitutions* (RG 134);

(c) Regulatory Guide 132 *Funds management: Compliance and oversight* (RG 132);

(d) Regulatory Guide 133 *Funds management and custodial services: Holding assets* (RG 133);

(e) Regulatory Guide 136 *Funds management: Discretionary powers* (RG 136);

(f) Regulatory Guide 137 *Constitution requirements for schemes registered before 1 October 2013* (RG 137); and

(g) Regulatory Guide 138 *Foreign passport funds* (RG 138).

Note: We have also amended Information Sheet 32 *Foreign companies* (INFO 32) to be consistent with RG 138.

7 This guidance will be updated to include CCIVs and re-released after the CCIV Bill is passed.

8 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 296. We have limited this report to the key issues.

9 We received nine non-confidential responses to CP 296 from a range of stakeholders, including industry bodies, law firms, professional services firms and responsible entities. We also received one informal confidential submission. We are grateful to respondents for taking the time to send us their comments.

10 For a list of the non-confidential respondents to CP 296, see the appendix. Copies of these submissions are currently on the ASIC website under CP 296.

Responses to consultation

Draft new regulatory guide on establishing and registering a fund

11 We received seven submissions on our proposed draft new guidance on establishing and registering a fund. The main issues raised were:

(a) the channels for lodging applications with ASIC;

(b) the asset kinds proposed for registered managed investment schemes (registered schemes), CCIVs and sub-funds;

(c) for ASIC to ensure that the process to register a scheme, CCIV or Australian passport fund was as efficient and consistent as possible; and

(d) the appointment of the depositary at the time of making the application.

12 See Section B for a summary of the feedback received and our response to the feedback.

Draft updated RG 134 on constitutions

13 There were five submissions on our proposed guidance in draft updated RG 134. The main issues raised were:

(a) clarity about the application of the guidance to wholesale CCIVs;

(b) whether the section on the redemption of shares in a CCIV restated the draft CCIV Bill and did not provide any extra guidance;

(c) support for moving the appendix to RG 134 into a new separate regulatory guide; and

(d) whether the proposal in draft updated RG 134.120 that any rights to members of a sub-fund or class be set out in the constitution goes beyond the proposed legislative requirement to ‘make adequate provision’.

14 See Section C for a summary of the feedback received and our response to the feedback.

Draft updated RG 132 on compliance and oversight

15 There were nine submissions on our proposed guidance in draft updated RG 132. The issues raised covered compliance management systems, compliance plans, compliance plan audits, and the responsibilities of depositaries.

Compliance management systems

16 The main issues raised were:

(a) the alignment between compliance and risk management—in particular, the interaction between our proposed guidance in draft updated RG 132 and our existing guidance in Regulatory Guide 259 *Risk management systems of responsible entities* (RG 259); and

(b) the application of our proposed guidance to wholesale scheme operators that hold an AFS licence in relation to the operation of the scheme, in addition to its application to responsible entities of registered schemes.

Compliance plans

17 The main issues raised were:

(a) the appropriate compliance controls for specific asset kinds and investment strategies; and

(b) the transitional arrangements for existing registered schemes.

Compliance plan audits

18 The main issues raised were:

(a) our expectations around currency of the compliance plan at all times;

(b) whether the audit opinion should be as at the end of the financial year or if the opinion must also include other matters that the auditor becomes aware of after the end of the financial year;

(c) consistency between our proposed guidance in draft updated RG 132 and relevant auditing standards published by the Auditing and Assurance Standards Board (AUASB); and

(d) whether the compliance plan auditor's remit should extend to assessing non-compliance with the Corporations Act and the constitution.

Depositaries

19 The main issues raised were:

(a) the scope of the depositary's oversight responsibilities;

(b) whether the depositary is responsible for verifying the corporate director's compliance with the law and constitution;

(c) reliance by the depositary on third party reports where the corporate director has outsourced services; and

(d) our guidance on the matters that we considered should be included in the contract between the depositary and corporate director.

20 See Section D for a summary of the feedback received and our response to the feedback.

Draft updated RG 133 on holding assets

21 There were five submissions on our proposed guidance in draft updated RG 133. The main issues raised were:

(a) ensuring that there was no overlap between the guidance in RG 132 and RG 133 on the arrangements that are required in relation to the holding of CCIV assets between a corporate director and a depositary;

(b) clarity about the content of custody agreements between an asset holder and another asset holder engaged by them;

(c) relief for depositaries from the requirement to ensure that assets are held on trust when the assets are held outside Australia where trust law is not recognised; and

(d) clarity about the minimum standards that apply when the custody function is outsourced to a licensed custody provider.

22 See Section E for a summary of the feedback received and our response to the feedback.

Draft updated RG 136 on discretionary powers

23 There were four submissions on our proposed guidance in draft updated RG 136. The main issues raised were of a minor and technical nature. They included:

(a) support for the approach in our guidance, which included the factors we may take into account in deciding relief applications in relation to the funds management industry and common forms of relief we have granted;

(b) the removal of our guidance on controlled sub-trusts; and

(c) making legislative instruments for each of the common forms of relief.

Note: We have not included a section in this report on the submissions we received on draft updated RG 136 due to the minor and technical nature of the issues raised. The issue of the removal of our guidance on controlled sub-trusts was also raised by respondents in relation to RG 133. See Section E for a summary of the feedback received and our response to the feedback.

Draft new regulatory guide on foreign passport funds

24 There were three submissions on our proposed draft new guidance on foreign passport funds. The main issues raised were:

(a) comments about the legislative settings that applied to the Asia Region Funds Passport, registration as a foreign company and the inability to use a shorter Product Disclosure Statement (PDS);

(b) the complexity of the notification process, including a suggestion that the same ASIC officer should handle both the application to register as a foreign company and the notice of intention;

(c) what ASIC would rely on if a foreign regulator failed to provide an opinion on a foreign passport fund's compliance with home economy laws as required; and

(d) public disclosure of rejected or withdrawn notices of intention.

25 See Section F for a summary of the feedback received and our response to the feedback.

B Establishing and registering a fund

Key points

In CP 296, we proposed to:

- make minor changes to our existing guidance on how we apply the requirements in deciding whether to register a managed investment scheme; and
- give new guidance on how we apply the requirements in deciding whether to register a CCIV, process a notification of a sub-fund of a CCIV, and register an Australian passport fund.

We proposed to adopt more granular asset kinds for registered schemes and CCIVs and sub-funds of CCIVs (sub-funds).

This section summarises the feedback we received in response to our draft new regulatory guide on establishing and registering a fund, which has now been released as RG 131, and explains the changes we made to our proposals resulting from the consultation process.

Background

26 In CP 296, we proposed to publish a new regulatory guide on establishing and registering a fund. We also proposed to provide guidance for operators of managed investment schemes, CCIVs and Australian passport funds and their advisers on how we apply the requirements in deciding whether to register a managed investment scheme, CCIV or Australian passport fund. We also proposed guidance for corporate directors and their advisers on notifying us of the establishment of a sub-fund of a CCIV.

27 We included proposed updated guidance on how we would apply the requirements in deciding whether to register a managed investment scheme, which was contained in RG 134.

Registering managed investment schemes and CCIVs

Method of submitting the application

28 In our draft new regulatory guide, we proposed that an application to register a managed investment scheme could be submitted to ASIC in hard copy format or online and that an application to register a CCIV would need to be made online.

29 We received one submission on this proposal, which indicated there was insufficient clarity in the rationale provided for a non-standardised set of channels for lodgement of registration documents. When hard copy or online is acceptable for a managed investment scheme, the respondent suggested both should be available for a CCIV.

ASIC's response

After the CCIV Bill is passed, we will amend our guidance in RG 131 to reflect the legal methods of submitting to ASIC an application to register a CCIV.

We have launched a new ASIC Regulatory Portal—an online platform designed to improve how we deliver services to our regulated population and how entities transact and interact with us.

Applying for registration as a managed investment scheme, CCIV or an Australian passport fund will be types of transactions available on the portal.

Because the law does not prescribe that ASIC can set a method of lodgement, corporate directors will be able to apply to register a CCIV using a paper form. However, if they wish to do this, they will need to send a request or call ASIC and explain why they are unable to apply using the portal. Given all AFS licensees have obligations to have adequate technological resources, we would only provide a hard copy form in exceptional circumstances.

Asset kind classification

30 In CP 296, we proposed that we would ask those making applications to register a managed investment scheme to select the asset kind of the scheme from a more granular list of asset kinds. The asset kinds were based on the classification system used by Morningstar. However, we did not propose to alter the current asset kinds that could be selected when applying for an AFS licence to operate the registered scheme. Instead, we proposed that each new asset kind would map to the broader selections available for the purposes of applying for an AFS licence. We also proposed to adopt this more granular list of asset kinds for CCIVs and sub-funds. These proposals were to assist us in obtaining data about the funds management industry.

31 We received four submissions on this proposal, the majority of which were supportive of the more granular asset types proposed. One respondent suggested the inclusion of additional asset kinds for credit/loans, cryptocurrency and multi-occupancy property investment. Two respondents remarked on the implications for AFS licences. They referred to the need to align the asset kind with those in an AFS licence and the possibility for changes to be required to an AFS licence.

32 The fourth respondent recognised the reasoning behind our desire for more granular asset types, but did not support the asset kinds proposed in CP 296. They encouraged us to adopt a multi-levelled classification system that better reflected industry classification standards. They said that a single level classification meant the asset kinds identified did not, in some cases, reflect individual categories. This resulted in registered schemes and sub-funds being categorised by more than one of the proposed asset kinds.

33 This respondent also identified that the classification system used by Morningstar did not apply to all registered schemes and would only apply after the registered scheme or sub-fund had built up a sufficient track record. They suggested that the use of existing classifications under the Global Industry Classification System (GICS) and the information required for APIR Systems Limited (APIR) might be a better approach.

ASIC's response

We will amend our asset kind classifications in RG 131 for registered schemes when responsible entities can use the ASIC Regulatory Portal to submit applications to register a scheme. After the CCIV Bill is passed, we will also amend our asset kind classifications for sub-funds. We will not require CCIVs to select an asset kind because all assets and liabilities will be held at the sub-fund level.

Before finalising our asset kind classifications, we showed our revised classifications to a targeted group of stakeholders to ensure that they were aligned with how registered schemes are currently classified. We did this not only to minimise confusion and costs for the funds management industry, but also to allow us to build our data-sharing capabilities.

We revised our asset kind classifications so the initial stage is identification and selection of the dominant asset kind into which investment will be made.

The approach sits across five levels:

- Level 1 requires the identification and selection of the dominant asset kind (into which investment will be made) from cash/cash equivalent, fixed income, equities and alternatives.
- Level 2 seeks more granularity around the dominant sub-asset kind. The majority of the equity sub-asset kinds are aligned with those provided by APIR. APIR provides the industry standard identification regime in Australia for collective investment schemes, including managed funds, superannuation products and separately managed accounts.
- Level 3 requires the identification of a dominant geographical focus, towards investing domestically, internationally or globally.

- Level 4 requires the identification of a dominant sectoral focus for the equity and alternative asset kinds. We have aligned these sectors at the highest level with those in the joint Standard and Poor's/Morgan Stanley Capital International (MSCI) product, the GICS. GICS is used by the MSCI indexes, which include domestic and international stocks, as well as by a large portion of the professional investment management community. We consider this to be an appropriate, widely recognised framework aimed at standardising industry definitions.
- Level 5 then applies a number of additional factors that should be selected, where relevant, from a multi-select option.

As we noted in CP 296, the selections made for each asset kind will map to the broader selections available for the purposes of applying for an AFS licence. As the feedback we received supported this approach, we have retained it. However, we have updated the mapping to reflect the new asset kind classifications.

We consider this approach will enhance our regulatory oversight capabilities across the asset management sector.

We have also updated our guidance in RG 132 to take into account these new asset kind classifications.

Registering an Australian passport fund

Time to register

34 In CP 296, we did not propose a time within which we would register an Australian passport fund. This is because there is no time set out in the legislation in which we must register an Australian passport fund.

35 We received two submissions on the lack of a timeframe in which we would register an Australian passport fund. One respondent said that to ensure competitive neutrality the time to register an Australian passport fund should be aligned to the 21-day registration period for the lodging of a notice of intention by a foreign passport fund operator. The other respondent suggested the inclusion of an indicative timeframe.

ASIC's response

We have not amended our guidance in RG 131 to set out a time in which we will register an Australian passport fund.

We note that registration as an Australian passport fund requires us to be of the opinion that:

- the Australian passport fund operator has met the eligible entity tests; and

- the registered scheme has been, is being, or is likely to be, operated in compliance with the Corporations Act, including the Australian Passport Rules and the *Australian Securities and Investments Commission Act 2001* (ASIC Act).

The time taken for a decision to be made is likely to be affected by the nature, scale and complexity of the Australian passport fund operator and the fund, and the quality of the information provided in support of an application.

We also note that a foreign passport fund will become a notified foreign passport fund unless there are circumstances that exist in which we can reject the notice of intention. These circumstances are:

- we are of the opinion that the foreign passport fund has been, is being, or is likely to be, operated in non-compliance with the Corporations Act and the ASIC Act;
- we are of the opinion that it is not in the public interest for the foreign passport fund operator to offer interests in Australia;
- an exemption or modification of the home Passport Rules has been given and ASIC does not consent to it; or
- the name of the foreign passport fund is not available in Australia.

We are not required to form an opinion about whether a foreign passport fund operator has met the eligible entity tests. While we are required to be of the opinion that the operator is likely to comply with the Corporations Act and the ASIC Act, this is practically a much narrower test.

Given the differences in the tests, we do not consider the assessments we must undertake are comparable. However, we are committed to deciding applications to register an Australian passport fund quickly and efficiently.

We are currently testing the length of time to decide an application to register an Australian passport fund as part of the Asia Region Funds Passport pilot. The pilot will test passport regulator processes, tax treatment and barriers to offering interests in the Australian passport fund in host economies. We will use the findings of the pilot to improve our efficiency in deciding applications for registration as an Australian passport fund.

The appointment of a depositary

36 In CP 296, we proposed that when an application to register a retail CCIV is lodged with ASIC, it must include details of the appointment of a depositary that meets the requirements of originally drafted s1163 of the Corporations Act.

37 We proposed that a depositary should be appointed before any marketing of the CCIV to investors. If a depositary had not been appointed at the time of lodgement of the application, we said our expectation would be for the corporate director's planning to be sufficiently advanced to have commenced the process of appointing a depositary.

38 We received two submissions on this proposal. One respondent indicated they did not agree with the tests set out in the draft legislation relating to the requirement for independence between the depositary and the corporate director.

39 The other respondent disagreed that the appointment of a depositary must be carried out before marketing. They suggested that as pre-marketing to institutional investors was commonplace before the launch of a CCIV to retail clients, we should remove or qualify the proposal.

ASIC's response

As the requirement for the appointment of a depositary that meets draft s1234C and 1234D of the Corporations Act is a legislative requirement, we will retain this guidance after the CCIV Bill is passed.

We note that draft s1231B of the Corporations Act also requires that, if the CCIV is to have a depositary, the application must set out the name and address of the entity that consents in writing to be the depositary. As this is a legislative requirement we will reflect this in our guidance.

C Constitutions

Key points

In CP 296, we proposed to:

- make minor changes to our existing guidance on the requirements for constitutions of registered schemes in s601GA and 601GB of the Corporations Act;
- give new guidance on the requirements for constitutions of retail CCIVs; and
- give new guidance on the requirements for constitutions of Australian passport funds.

We also proposed to include in draft updated RG 134 the guidance from Information Sheet 220 *Managed investment schemes: Common registration issues* (INFO 220).

We proposed 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.

This section summarises the feedback we received in response to CP 296 and draft updated RG 134 and explains the changes we have made to our proposals resulting from the consultation process.

Background

40 RG 134 provides guidance for the content of a scheme's constitution to meet the requirements of the Corporations Act. In CP 296, we proposed to update our guidance for registered schemes, and give new guidance on the requirements that apply to the constitutions of retail CCIVs and Australian passport funds.

41 In CP 296, we proposed to move our guidance on how we apply the requirements in deciding whether to register a scheme from the appendix of RG 134 to a new regulatory guide.

Contents of constitutions

Application to wholesale CCIVs

42 In CP 296, we noted that our guidance in draft updated RG 134, in particular Section G, applied to wholesale CCIVs.

43 We received two submissions which queried which sections of the guidance in draft updated RG 134 applied to wholesale CCIVs, and suggested that this be clarified.

ASIC's response

Draft s1232B of the Corporations Act requires that the constitution of a wholesale CCIV specify the requirements that must be complied with for the CCIV to adopt a constitution after registration, and modify or repeal its constitution. This is the only content requirement in the Corporations Act for the constitution of a wholesale CCIV.

After the CCIV Bill is passed, we will revise Table 1 of RG 134 to clarify which guidance on changing the constitution applies to wholesale CCIVs.

When we update our guidance for the CCIV regime, we will incorporate the note in Section A of draft updated RG 134. This note explains that although the constitution of a wholesale CCIV does not need to contain the content required for retail CCIVs under draft s1232G of the Corporations Act, if the corporate director is to have any powers these should be set out in the constitution.

Guidance on redemption of shares in a CCIV

44 We proposed to update our guidance on withdrawal rights to cover redemption of shares in a CCIV.

45 One submission noted that Section G of draft updated RG 134 appeared to summarise the draft legislation, and did not provide guidance on the content of constitutions for retail CCIVs. The respondent queried whether the guidance in this section on registered scheme constitutions also applies to retail CCIVs. They said that it would be useful to provide guidance on the content of constitutions for retail CCIVs, rather than raise requisitions on CCIV constitutions after registration. However, they did not suggest any specific guidance on the topic of redemption of shares for retail CCIVs that they considered would be helpful.

ASIC's response

The constitution content requirements in the draft CCIV Bill for redemption of shares in a CCIV differ from those for withdrawal from a registered scheme. In particular, there is no requirement for the constitution of a retail CCIV that is similar to s601GA(4) of the Corporations Act. On that basis, we will provide separate guidance for the content requirements that apply to CCIVs, and the scope of this guidance will reflect the scope of the relevant requirements.

Appendix to RG 134

46 We proposed 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.

47 We received two submissions on this proposal. One respondent agreed with this proposal. The other respondent did not say whether they agreed or disagreed with this proposal but asked for confirmation that the proposal did not mean that constitutions for schemes registered before 1 October 2013 would need to be amended.

ASIC's response

We have removed the appendix from RG 134. This guidance can now be found in RG 137.

There has been no change to our position in relation to schemes registered before 1 October 2013.

Classes and sub-funds

48 We proposed to include guidance on the requirement that the constitution of a retail CCIV make adequate provision for the establishment of sub-funds and classes of shares referable to sub-funds.

49 We received two submissions on this proposal. One respondent did not agree that the constitution of a retail CCIV should set out any rights that apply to members of a sub-fund or class of shares referable to a sub-fund that differ from others. They said that this would go beyond the requirement in the draft legislation and that there were potential practical difficulties with this approach.

50 The other respondent queried whether it will be sufficient to provide that, while there is only one sub-fund, all shares will be taken to be referable to that sub-fund.

ASIC's response

Having regard to the current draft content requirements for sub-funds, we will clarify that the constitution may, but is not required to, set out any rights that apply to members of a sub-fund, or a class of shares referable to a sub-fund, that differ from those of other sub-funds, or classes of shares referable to sub-funds.

In our view, the constitution may provide that while there is only one sub-fund, all shares will be taken to be referable to that sub-fund, when it does so in a way that is consistent with draft s1231A of the Corporations Act.

D Compliance and oversight

Key points

In CP 296, we proposed to:

- give new guidance on the requirements for an effective and responsive compliance management system for operators of registered schemes, operators of wholesale schemes that hold an AFS licence, corporate directors, IDPS operators and MDA providers to meet their obligations in s912A of the Corporations Act;
- update and consolidate our existing guidance on the requirements for compliance plans for registered schemes in s601HA of the Corporations Act, and also apply this guidance to retail CCIVs; and
- give new guidance on oversight, including the compliance committee, compliance plan audits, the oversight function of the depositary (for CCIVs) and, for Australian passport fund operators, the role of the independent oversight entity and the annual implementation review.

We proposed that our existing regulatory guides on compliance plans for registered schemes would be superseded.

This section outlines the feedback we received on draft updated RG 132 and explains the changes we have made to our proposals resulting from the consultation process.

Background

51 In CP 296, we proposed new guidance in draft updated RG 132, alongside updated and consolidated guidance, on:

(a) how responsible entities (including those that are also Australian passport fund operators), wholesale scheme operators that hold an AFS licence, corporate directors, IDPS operators and 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) the oversight functions performed by compliance committees, compliance plan auditors, depositaries, implementation reviewers and independent oversight entities.

52 We proposed that our existing regulatory guides on compliance plans for registered schemes would be superseded. This included existing RG 132, Regulatory Guide 116 *Commentary on compliance plans: Agricultural industry schemes* (RG 116), Regulatory Guide 117 *Commentary on compliance plans: Financial asset schemes* (RG 117), Regulatory Guide 118

Commentary on compliance plans: Contributory mortgage schemes (RG 118), Regulatory Guide 119 *Commentary on compliance plans: Pooled mortgage schemes* (RG 119) and Regulatory Guide 120 *Commentary on compliance plans: Property schemes* (RG 120).

Compliance management systems

Alignment between compliance and risk management

53 In CP 296, we noted that the compliance and oversight obligations set out in draft updated RG 132 interact with other obligations under the Corporations Act. This included risk management obligations under RG 259. We proposed to provide limited guidance on the interaction between compliance and risk management. However, we noted that our guidance in draft updated RG 132 should be read in conjunction with other regulatory guides that address specific compliance issues.

54 We received five submissions on the interaction between compliance and risk management. These respondents were concerned about the interaction between draft updated RG 132 and RG 259. Of these respondents, four said that the interaction between compliance and risk management should be made clearer.

55 One respondent suggested that compliance should be more grounded as an element of the overall risk management systems, rather than requiring separate compliance management systems. This could involve the potential for increased costs for industry in running separate compliance management systems and risk management systems.

56 The respondent said that RG 132 should not include guidance on compliance management systems, but rather should revert to guidance specific to compliance plans (i.e. as in the previous RG 132). They believed that guidance as to minimum expectations for compliance management systems at the organisational level should be reflected in updates to ASIC's AFS licensing kit (Regulatory Guides 1–3 *AFS licensing kit* (RGs 1–3)). They said that if we considered that further elaboration was required with respect to compliance risk management, this should be addressed in an update and extension of licensee types subject to RG 259.

57 The respondent also questioned whether our proposed guidance would be able to achieve improvements in industry conduct. They thought that increased focus on compliance management systems would not of itself address the root cause, and we should focus on organisational culture to drive changes to conduct.

58 Another respondent suggested that some of the questions to think about when designing compliance controls for the compliance plan were business risks, rather than compliance risks. In their view, business risks should be dealt with within a risk management policy with guidance as to when a business risk may link into a compliance issue, rather than being included as compliance risks.

59 Another respondent noted that draft updated RG 132 provided guidance to enhance compliance management systems that should exist within a responsible entity's current compliance and risk management framework. They said that suggestions for improvements were welcomed given that RG 132 has not been updated since 1998.

ASIC's response

We acknowledge that compliance risk forms part of an entity's overall risk management systems. However, we have not incorporated our guidance on compliance management systems into RG 259. We consider that RG 132 is the appropriate place for guidance on an entity's broad compliance obligation under the Corporations Act, rather than incorporating compliance risk into our risk management guidance in RG 259.

We note that there are different Australian standards on risk management systems and compliance management systems. We are also aware that RG 259 has been recently implemented and we do not want to make significant changes to it unless necessary.

As a result of the feedback we received, we have amended RG 132 to reiterate that compliance and risk management are not mutually exclusive, but operate together. We have also made some changes to our guidance so that it better integrates with RG 259.

We have checked that our guidance on compliance management systems is consistent with Australian Standard AS ISO 19600:2015 *Compliance management systems—Guidelines*. On the basis of the feedback we received, we understand that the funds management industry generally already complies with AS ISO 19600:2015.

We have clarified in RG 132 that an entity can choose to implement either:

- integrated compliance and risk management systems; or
- distinct compliance management systems and risk management systems.

We have chosen to provide guidance on compliance management systems in RG 132, rather than as part of RGs 1–3. This is because our guidance in RG 132 has been tailored for the specific characteristics of managed investment schemes,

operators of wholesale schemes that hold an AFS licence, corporate directors, IDPS operators and MDA providers.

Application to wholesale scheme operators

60 In CP 296, we proposed that our guidance in draft updated RG 132 on compliance management systems would apply to wholesale scheme operators that hold an AFS licence in relation to the operation of the scheme. This was in addition to responsible entities of registered schemes.

61 We received one submission in response to this proposal. The respondent said that this would seem to be a broadening of ASIC's regulatory oversight beyond the current rules, and potentially impose unnecessary compliance costs on wholesale funds.

ASIC's response

We note that the now superseded version of RG 132 published in 1998 was limited to guidance on how to prepare a compliance plan for a managed investment scheme. At that time, no obligations to comply with financial services laws existed under s912A of the Corporations Act.

RG 132 now provides further guidance on the broad compliance obligation under s912A of the Corporations Act for the funds management industry that are AFS licensees.

We have clarified which parts of RG 132 apply to which entities. For example, our guidance on compliance management systems in Section B of RG 132 applies to a wide range of entities, including wholesale scheme operators. This is because of the broad compliance obligation for AFS licensees under s912A of the Corporations Act. However, our guidance on compliance plans in Section C of RG 132 applies to responsible entities of registered schemes and, when the CCIV Bill is passed, will apply to corporate directors of retail CCIVs.

Compliance plans

Compliance controls for specific asset kinds and investment strategies

62 We proposed that for different types of registered schemes or sub-funds of retail CCIVs there would be different areas of focus for us in considering whether the compliance controls were adequate. We noted that these differences were largely driven by the nature, diversity and structure of assets invested in by the registered scheme or sub-fund and the investment strategy the responsible entity or corporate director employs.

63 We proposed to include a list of the typical areas of ASIC focus in relation to compliance controls for various kinds of registered schemes or sub-funds. These kinds were based on the asset kinds proposed for registration of a registered scheme or sub-fund.

64 We did not receive any submissions directly on the different areas of focus for us in considering whether the compliance controls were adequate. However, as noted above in relation to draft updated RG 131, some respondents raised concerns that the taxonomy proposed in CP 296 did not reference the actual assets into which investment is made, and was inconsistent and lacked comparability with existing industry asset classification standards.

ASIC's response

We have retained our approach of indicating in RG 132 areas of ASIC focus for various asset kinds and investment strategies. However, we have changed the asset kinds and investment strategies to align with the asset kinds that must be identified by a registered scheme or, after the CCIV Bill has passed, by a sub-fund when applying for registration.

Transitional arrangements

65 In CP 296, we did not propose any transitional arrangements for the application of our guidance in draft updated RG 132.

66 However, we received three submissions seeking clarification of our expectations around transition for existing registered schemes. These respondents requested clarification of our expectations on:

(a) whether responsible entities are expected to make changes to their existing compliance plans;

(b) when compliance plan auditors should begin applying our updated guidance;

(c) whether compliance plans that have previously been considered adequate can continue to be regarded as adequate; and

(d) whether our updated compliance plan guidance would apply to close-ended registered schemes and registered schemes that are in run-off.

ASIC's response

The legal requirements for the contents of a registered scheme's compliance plan and its audit have not changed. Our guidance in RG 132 sets out our view of these requirements. As such, we have not adopted a formal transition period. However, we do not expect to undertake any significant regulatory review of this area until the start of 2019–20 financial year.

We are taking this approach because many responsible entities or their advisers complete a comprehensive review of compliance plans at the end of their financial year, so any changes can be implemented for the next financial year. Allowing responsible entities to make changes to compliance plans as part of this normal cycle of compliance plan reviews will minimise the costs of meeting the guidance in RG 132.

We expect that responsible entities will regularly review their compliance plans at least annually. We also expect that any changes to the compliance plan should be made as part of that regular review cycle. Given that the adequacy of a compliance plan will depend on both the circumstances of the registered scheme and the environment in which it operates, we are unable to express a view about whether individual existing compliance plans will be adequate under s601HA of the Corporations Act. This is a matter that responsible entities should consider.

In preparing the audit report, we expect the compliance plan auditor will not simply assume that the compliance plan was necessarily compliant at any previous time. This includes assuming that the compliance plan met s601HA of the Corporations Act at the time the scheme was registered.

We expect a responsible entity to have implemented any changes to its compliance plan by the start of the registered scheme's 2019–20 financial year.

We expect the compliance plan auditor to give an audit opinion in accordance with our previous guidance for a registered scheme's 2018–19 financial year, and in accordance with revised RG 132 for a registered scheme's 2019–20 financial year.

For registered schemes that are being wound up, we agree these schemes need not amend their compliance plans in line with our new guidance. We will not take action if a registered scheme's compliance plan does not meet the guidance in RG 132 in the circumstances where it is being wound up.

However, for registered schemes that are operating, even if closed to new members, we expect the responsible entity to ensure that the compliance plan continues to meet the requirements of the Corporations Act having regard to our guidance in RG 132.

Compliance plan audits

Currency of the compliance plan and timing of the audit opinion

67 In CP 296, we said that in our view s601HG and originally drafted s1162A of the Corporations Act required the compliance plan auditor to consider whether the compliance plan complied with the Corporations Act in all

material respects during the relevant financial year. We gave an example that the auditor should consider whether, at any time during this period, the compliance plan failed in a material respect to contain adequate compliance controls to ensure that the plan was continuously reviewed and updated according to changing circumstances.

68 We also said that any significant contravention after the end of the financial year and up to the date of the audit report may indicate that the compliance plan did not comply at the date of signing the audit report. This was because the compliance controls contained in the compliance plan may not have been sufficient to prevent the breach. We proposed that if any such breach came to the attention of the auditor after year end, the auditor should re-evaluate whether the compliance plan continues to meet the requirements of the Corporations Act at the date of the report.

69 We received two submissions on this proposal. The respondents questioned our use of the phrase 'current at all times' in connection with the audit of the compliance plan by the auditor. They were concerned that this terminology could imply that the auditor is expected to check the compliance plan on a continuous basis. In their view, this would be unworkable and would be inconsistent with the requirements under the Auditing and Assurance Standards Board's Guidance Statement GS 013 *Special considerations in the audit of compliance plans of registered managed investment schemes*.

70 These respondents also considered that there was some ambiguity in our expectation about the timing of the audit opinion—in particular, whether the audit opinion should be as at the end of the financial year or if the opinion must also include other matters that the auditor becomes aware of after the end of the financial year. These respondents questioned whether the auditor's assessment of the adequacy of the compliance plan should be as at the end of the audit period or whether the assessment must be continuous throughout the period.

ASIC's response

We note that the Corporations Act requires the auditor's report to include an opinion on whether the compliance plan continues to meet the requirements of the Corporations Act: see s601HG and draft s1241J of the Corporations Act.

While the auditor's report as to the responsible entity or corporate director's compliance with the compliance plan covers the relevant financial year, the compliance plan's continued adequacy to meet the requirements of the Corporations Act is an ongoing requirement. We consider the compliance plan auditor's assessment of adequacy must reflect the compliance plan auditor's opinion at the time the auditor provides the report.

We have amended RG 132 to clarify that this does not imply that the audit must be continuous during the relevant financial year or

that the audit must be continued to cover matters after the end of the financial year.

However, any significant contravention identified after the end of the financial year and up to the date of the audit report may indicate that the compliance plan did not meet the requirements at the end of the financial year. This is because the compliance controls in the compliance plan during the financial year may not have been adequate to prevent the breach.

We consider that if such a breach comes to the attention of the auditor after the year end, the auditor should re-evaluate if they are of the opinion that the compliance plan continued to meet the requirements of the Corporations Act at the end of the financial year.

Consistency with AUASB standards

71 In CP 296, we noted that although the Corporations Act does not provide further standards for the performance of a compliance plan audit, we expected auditors to follow general auditing principles. Standards and guidance for auditors are provided by the AUASB, including:

(a) Standard on Assurance Engagements ASAE 3100 *Compliance engagements*; and

(b) GS 013.

72 We received one submission raising concerns about consistency between our proposed guidance in draft updated RG 132 and relevant auditing standards published by the AUASB. The respondent identified some areas where GS 013 and ASAE 3100 were inconsistent with our proposed guidance. This included:

(a) the use of the terminology ‘compliance controls’ in draft updated RG 132, rather than ‘compliance measures’ or ‘compliance activity’, is not reflective of GS 013 or ASAE 3100; and

(b) whether our proposed guidance in draft updated RG 132 required a compliance plan audit to be continuous, which would be inconsistent with the AUASB’s guidance in GS 013.

ASIC’s response

We acknowledge that the Corporations Act does not provide detailed standards for the performance of a compliance plan audit. We note that, at the time the AUASB standards were originally published, we provided only limited guidance on discrete issues relating to compliance plans.

Our intention with the revised guidance in RG 132 is to set out our expectations for the subject matter of compliance plan audits. We expect auditors to follow general auditing principles to the extent they are relevant and consistent.

Taking into account the feedback we received, we engaged with staff at the AUASB about our proposed guidance. The AUASB indicated a process to review and, if necessary, update its standards and guidance statements that apply to compliance plan audits in light of the revisions to RG 132.

Despite being currently inconsistent with GS 013, we have retained the terminology of 'compliance controls' to match AS ISO 19600:2015. We note AS ISO 19600:2015 was released some years after GS 013 was released.

Extent of the compliance plan auditor's role

73 In draft updated RG 132, we said that the compliance plan auditor's report is not required to address the responsible entity or corporate director's compliance with the Corporations Act or the constitution. However, we also said that it will be essential in assessing the adequacy of the compliance plan to determine whether there are systemic issues of non-compliance with the law or the constitution that are not addressed by the compliance plan.

74 We received one submission on this proposal. This respondent questioned whether the auditor's remit should extend to assessing non-compliance with the law and the constitution. They believed that assessing non-compliance *with* the law is too broad and outside the compliance plan auditor's remit. They said that the auditor's role is better described as considering systemic non-compliance in designing procedures and forming a view on the compliance plan.

ASIC's response

We have amended RG 132 to clarify that the compliance plan auditor is not required to directly address instances where the responsible entity or, when the CCIV Bill is passed, the corporate director has failed to comply with the Corporations Act or the constitution.

However, we expect that in determining whether there are systemic or significant issues of non-compliance with the law or the constitution it will be essential in assessing whether the compliance controls and monitoring processes contained in the compliance plan are adequate to prevent future non-compliance.

Depositaries

Scope of depositary's oversight responsibilities

75 Originally drafted s1164B of the Corporations Act provided that 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 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.

76 To assist depositaries understand how we considered they should meet their oversight requirements, we proposed in CP 296 to provide guidance in draft updated RG 132 on:

(a) establishing procedures in relation to communication with the corporate director and escalation, such as appropriate procedures to verify that the instructions from the corporate director are lawful and comply with the CCIV's constitution;

(b) 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; and

(c) overseeing functions that are outsourced.

77 We received four responses on the scope of the depositary's oversight responsibilities set out in our proposed guidance.

78 Two respondents said our proposed guidance established an oversight role for the depositary that was too broad. They said that the depositary's role is not one of oversight of all matters in which the corporate director is involved, but only those specified in the law.

79 One respondent was concerned that our guidance implied that the depositary would have rights to access information or conduct onsite visits and inspections in situations where there is no nexus between the role being undertaken by the service provider and the depositary's statutory obligations.

80 Another respondent was concerned that our proposed guidance implied that the depositary's role was similar to that of an auditor. They pointed to examples in our proposed guidance on the depositary's responsibility to 'test and verify' the corporate director's procedures.

81 We note that many of the issues raised concerned the functions and powers of the depositary as set out in the legislation. For example, one respondent suggested that:

(a) the depositary of a retail CCIV should merely be the custodian of assets rather than having an oversight role;

(b) the corporate director should have the right to remove the depositary itself if it considers it to be in the interests of members; and

(c) the depositary should be entitled to act on the instructions of the corporate director, not required to only trade if the trade is lawful and in accordance with the CCIV's constitution.

ASIC's response

After the CCIV Bill has passed, we will clarify our language to make it clearer that the supervisory responsibilities of the depositary are only those matters set out in draft s1234L of the Corporations Act. We do not intend for RG 132 to expand our expectations about the responsibilities of the depositary beyond those set out in the law.

At this stage, we intend to provide some high-level guidance on the depositary's responsibilities. As the CCIV regime matures, we may include extra guidance in RG 132 on the responsibilities of the depositary if we consider it is necessary or helpful.

Responsibility for verifying corporate director's compliance with the law and constitution

82 Originally drafted s1164B of the Corporations Act did not specify whether the depositary's supervisory responsibility requires it to verify the corporate director's compliance with the Corporations Act and the CCIV's constitution on a post or pre-transaction basis.

83 At the time CP 296 was published, we understood that the CCIV regime would allow for post-transaction verification. Therefore, in performing its oversight duties, we proposed a depositary should test and verify the procedures that were the responsibility of the corporate director or its delegate. We also proposed that this testing and verification could occur after the fact, rather than at each point the corporate director performs the activity. We further proposed that the depositary should ensure that an appropriate testing, verification and reconciliation procedure is implemented and frequently reviewed.

84 We also proposed that, at the time of its appointment, a depositary should assess the compliance risks relating to the matters for which the depositary has oversight associated with the nature, scale and complexity of the CCIV's investment policy and strategy, and with the operations of the corporate director. On the basis of that assessment, we proposed the depositary should establish oversight procedures that are appropriate to the CCIV and the assets in which it invests, and that are then implemented and applied.

85 We received two submissions on this proposal. One respondent suggested that any pre-trade validation requirements to be undertaken by the depositary

should be restricted to ensuring that there are appropriate systems and processes in place so that only instructions that conform to the agreed form of a proper instruction can be accepted for processing.

86 Another respondent said that the depositary's pre-appointment assessment of risks should have regard to processes adopted by the depositary for CCIVs with similar asset and risk levels, rather than a tailored assessment for an individual CCIV.

ASIC's response

We note that the CCIV legislation that was exposed in August 2017 did not set out when compliance checks would be undertaken by the depositary. We also note that the latest exposed draft of the CCIV legislation now provides that the depositary must verify the matters set out in s1234L of the Corporations Act. This means compliance checks are to be undertaken on a post-transaction basis. As this is the approach we adopted in CP 296, we will retain our guidance.

After considering the feedback we received on the depositary's pre-appointment checks, we do not intend to amend our guidance to address this feedback. We do not consider it would be sufficient for a depositary to satisfy its requirement for assessment of compliance risks through a representative assessment of similar CCIVs. We consider that the depositary must still satisfy itself that its oversight procedures are appropriate for the specific CCIV to meet its responsibilities. However, we consider it would be appropriate for the depositary to have reference to the processes that are in place for CCIVs with similar asset and risk levels in similar circumstances.

Oversight of outsourced services

87 In CP 296, we proposed that when the corporate director has outsourced services, it would not be sufficient for the depositary to simply rely on a report prepared by the auditor of the service provider. We expect the depositary will obtain sufficient and appropriate evidence on which to base its supervision of the corporate director and the outsourced service provider.

88 We received one submission on the role of the depositary when the corporate director has outsourced services. This respondent was concerned that our proposed guidance would require a depositary to obtain its own evidence rather than rely on third party reports and audits of the outsourced services. They were concerned that this appears to extend the depositary's supervisory duties too far.

ASIC's response

The latest exposed draft of the CCIV legislation provides that the depositary must not delegate its supervisory functions under s1234L.

We remain of the view that the depositary must verify itself that the corporate director's activities for which it has supervisory responsibility comply with the Corporations Act and the CCIV's constitution.

A depositary should ensure that it is able to obtain sufficient and appropriate evidence on which to base its supervision of the corporate director and outsourced service providers to meet its responsibilities. We consider that third party reports and audits of outsourced services can be used by the depositary, but there should not be an over reliance on them by the depositary.

Contract between depositary and corporate director

89 To ensure that the relationship between the depositary and the corporate director has the necessary degree of independence, we proposed to provide guidance on the matters that we considered should be included in the contract between the depositary and the corporate director.

90 We received one submission on this proposal. This respondent believed that our proposed guidance was overly long and complicated. This was particularly in light of existing arrangements in the industry with respect to the content of custody contracts.

ASIC's response

After the CCIV Bill is passed, we will retain guidance on the contents of the contract between the depositary and the corporate director. We note that the role of depositary is new in Australia. While there are some similarities with aspects of custodial contracts, the depositary has a broader role than a custodian. We will ensure that our guidance in RG 132 is consistent with our guidance in RG 133.

E Holding assets

Key points

In CP 296, we proposed to make minor and technical changes to our existing guidance for asset holders and give new guidance on how we apply the requirements for asset holding for CCIVs and Australian passport funds.

This section outlines the feedback we received in response to CP 296 on draft updated RG 133 and explains the changes we have made to our proposals resulting from the consultation process.

Background

91 In CP 296, we proposed updated and new guidance in draft updated RG 133. We proposed to set 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.

Holding assets

Custody agreements

92 We proposed to give guidance on the content requirements of custody agreements when a depositary engages a custody provider, or a corporate director of a wholesale CCIV engages a custody provider that is not a depositary.

93 We received one submission that our proposed guidance overlapped with our guidance on the arrangements between a corporate director and a depositary in draft updated RG 132. The respondent considered that any additional requirements imposed on a depositary under an arrangement between a corporate director and a depositary in relation to the asset holding function of the depositary should not be extended to custody providers under a custody agreement.

ASIC's response

We intend to remove the discussion about requirements of the arrangements between a corporate director and a depositary in relation to the asset holding function of the depositary from RG 132. After the CCIV Bill is passed, we will incorporate this

discussion in RG 133. We consider that our guidance on the arrangements between a corporate director and a depositary in relation to the asset holding function of the depositary better sits in RG 133.

We will distinguish the arrangements between a corporate director and a depositary from the general custody agreements that may exist between an asset holder and another asset holder engaged by the former.

We will provide guidance that we do not expect the requirements of the arrangements between a corporate director and a depositary in relation to asset holding forms any part of a general custody agreement between an asset holder and another asset holder engaged by the former.

We will also provide guidance that we do not expect the content requirements of a custody agreement under Section C of RG 133 forms any part of the arrangements between a corporate director and a depositary.

Holding assets on trust

94 We proposed that, for wholesale CCIVs, the corporate director may hold the assets of the CCIV, appoint a depositary or engage a licensed custody provider. We also provided guidance in draft updated RG 133 on the limited exception to the requirement to hold assets on trust provided under Class Order [CO 13/1409] *Holding assets: Standards for responsible entities* and Class Order [CO 13/1410] *Holding assets: Standards for providers of custodial services*.

95 We received three submissions on our proposals. Two respondents suggested that our proposed guidance on the corporate director of a wholesale CCIV holding assets did not reflect the draft CCIV Bill. We also received one submission that said the exception to hold assets on trust that applies in relation to assets held by a custody provider outside Australia under [CO 13/1409] and [CO 13/1410] should be extended to depositaries.

ASIC's response

After the CCIV Bill is passed, we will ensure our guidance in RG 133 is consistent with it.

Taking into account the feedback, we will extend the exception to hold assets on trust that applies in relation to assets held by a custody provider outside Australia to depositaries.

We will also extend the exception to corporate directors in cases where they elect to engage a custody provider outside Australia.

Minimum standards where custody function is outsourced to licensed custody provider

96 In CP 296, we proposed that responsible entities, MDA providers and IDPS operators that engage a licensed custody provider to hold assets would not need to meet the requirements on organisational structure, as set out in Section B of draft updated RG 133, when they engage an asset holder that does meet the requirements.

97 We proposed that licensed custody providers need to meet the organisational structure requirements as set out in Section B even when they have engaged a sub-custodian that meets the requirements.

98 We received feedback from one respondent that our proposed guidance was unclear about the application of standards and requirements in relation to organisational structure in situations when a licensed custody provider has appointed a sub-custodian. They perceived that, when a licensed custody provider has appointed a sub-custodian, the licensed custody provider must, itself, continue to meet the organisational standards and requirements, and that the appointed sub-custodian must also meet the requirements.

99 The respondent considered that this was contrary to the policy applicable to responsible entities that outsource the custody function under s601FCAA(2) as inserted by [CO 13/1409].

ASIC's response

We have clarified that the organisational structure requirements do not apply when all the financial products or beneficial interests in financial products in which the asset holder has an interest are held by another person that it appoints. The asset holder will have to ensure that it has appropriate controls to appoint and monitor delegates and that its arrangements for managing conflicts arising in respect of this function are adequate. The asset holder will have an obligation to ensure sub-custodians comply with the organisational structure requirements (except for assets outside Australia where this is not reasonably practicable).

We will amend [CO 13/1410]. We consider that if the licensed custody provider ensures that the assets are held by an entity that meets the standards and requirements, it should not be necessary for the licensed custody provider to continue to meet the relevant standards and requirements. This will be in line with our policy applicable to responsible entities that appoint a custody provider.

Controlled sub-trusts

100 We provided guidance on controlled sub-trusts in the version of RG 136 reissued on 11 September 2000. However, we removed this guidance in draft

updated RG 136 because it was not relevant to the exercise of our discretionary powers.

101 We received two submissions that our proposed guidance in draft updated RG 136 no longer recognised structures where the responsible entity of a registered scheme (or the licensed trustee of an unregistered scheme) holds assets indirectly through one or more wholly-owned and controlled sub-trusts. These respondents requested that the former guidance be retained.

ASIC's response

We originally removed the guidance on controlled sub-trusts in draft updated RG 136 because it no longer suited the content of that guide. However, in view of the feedback we received, we have now included the relevant guidance in RG 133: see RG 133.13.

As our guidance on controlled sub-trusts has not changed, we consider it necessary to continue to provide guidance on the standards and requirements applicable to a sub-trustee as custodian of the property of the registered scheme that controls the sub-trust. For unregistered schemes, we consider that the trustee of the head trust would need to ensure that the sub-trustee complies with the standards and requirements in RG 133.

F Foreign passport funds

Key points

We proposed that a draft new regulatory guide on foreign passport funds would explain our role as a host regulator under the Asia Region Funds Passport and the requirements for notified foreign passport funds and their operators under the Corporations Act.

This section summarises the feedback we received in response to our proposed guidance and explains the changes we have made to our proposals resulting from the consultation process.

Background

102 In CP 296, we proposed to publish a new regulatory guide on foreign passport funds to assist foreign passport fund operators and their advisers understand:

(a) how we apply the requirements in deciding whether to approve the offer of interests in a foreign passport fund in Australia;

(b) the ongoing requirements that apply to a notified foreign passport fund in Australia; and

(c) our powers and responsibilities.

Approval to offer interests in Australia as a foreign passport fund

Complexity of application requirements

103 We proposed that a foreign passport fund operator wanting to offer interests in the fund in Australia would need to:

(a) lodge an application to register as a foreign company, meeting the foreign company registration requirements;

(b) have an offer of interests in the home economy; and

(c) lodge a notice of intention comprising a completed notice of intention, a copy of the PDS required to be prepared under the Corporations Act and payment of the prescribed fee.

104 We received one submission on the complexity of the requirements for submitting a notice of intention in Australia. That respondent expressed concern that the information to be provided as part of the notification process was too detailed and could limit the attractiveness of Australia as a market. In particular, they considered that:

(a) the foreign passport fund operator should not be required to register as a foreign company in Australia;

(b) a full length PDS should not need to be provided; and

(c) the extent of the content of the notice of intention about the foreign passport fund operator's ability to comply with Australian law should not be required.

105 The respondent also suggested that, if registration as a foreign company was required, the same officer within ASIC should handle both the application to register as a foreign company and the notice of intention.

ASIC's response

We note that s1213 of the Corporations Act requires the foreign passport fund operator to register as a foreign company. Because of this, we have not made any change to our guidance, which has now been released in RG 138.

Taking into account the feedback we received, we have not changed the notice of intention. This is because we consider the information sought in the notice of intention is necessary for performing our functions as a passport regulator or forming an opinion about whether compliance with the Corporations Act or ASIC Act is likely. However, we are currently testing the notice of intention design as part of the Asia Region Funds Passport pilot. We will use the findings of the pilot to improve the design of the notice of intention for a foreign passport fund.

We have not changed our internal processes to facilitate the same action officer handling the application to register as a foreign company and the notice of intention given the anticipated volumes of foreign passport funds.

However, we have decided to amend the form to register as a foreign company to better identify those seeking registration that are foreign passport fund operators. We have also included information on applying for registration as a foreign company in RG 138 and in updated Information Sheet 32 *Foreign companies* (INFO 32).

Grounds to reject an application

106 We did not propose any guidance on what we would do when a home regulator fails to provide an opinion, or does not provide an opinion in 'reasonable time', on an entity's compliance with the home economy law under s1213B(2) of the Corporations Act.

107 We received one submission that asked for guidance on the factors we would rely on to assess a foreign passport fund's compliance with its home economy laws if a home regulator's opinion is not received or is not received in a 'reasonable time' as required.

ASIC's response

We have decided not to change our guidance to include information on what we would do if we do not receive an opinion from the home regulator or receive it in a reasonable time. Given the obligations about sharing of information and cooperation in the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport (Memorandum of Cooperation), we consider that this situation would be unlikely to arise.

We have obligations under administrative law to make decisions within a reasonable time. If we do not receive an opinion from a home regulator at all, or in a reasonable time, we must still meet our administrative law obligations.

Withdrawn or rejected applications

108 We proposed to make available for public inspection all notices of intention lodged with ASIC, irrespective of whether the notice is withdrawn by the operator or rejected by ASIC.

109 We received one submission that expressed concern that withdrawn or rejected notices of intention would be a matter of public record. The respondent feared this could be a disincentive to foreign passport funds submitting a notice of intention.

ASIC's response

We have not changed our guidance because, under section 7 of Annex 2 to the Memorandum of Cooperation, participating economies have committed to publishing information in Part A of a notice of intention on ASIC's registers. Section 1274 of the Corporations Act also permits inspection of any document lodged with ASIC on payment of the prescribed fee unless an exemption applies.

Under s1213(4) of the Corporations Act, ASIC may, by legislative instrument, determine the parts of a notice of intention to be made available for inspection or copying. This is designed to ensure we can protect personal information or information that is confidential from being publicly accessed. We do not intend to give the public the ability to search and obtain confidential information contained on the notice of intention.

Appendix: List of non-confidential respondents

- Allens Linklaters
- Australian Custodial Services Association (ACSA)
- Ernst & Young
- Financial Services Council (FSC)
- Herbert Smith Freehills
- Norton Rose Fulbright
- Perpetual Corporate Trust
- Property Council of Australia
- Property Funds Association (PFA)