31 July 2018

Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email: policy.submissions@asic.gov.au

CP 301 – FOREIGN FINANCIAL SERVICES PROVIDERS

Dear Alan

Thank you for the opportunity to comment on CP 301.

ASX does not agree with the proposal to repeal the sufficient equivalence relief and implement a modified licensing regime for foreign financial services providers (**FFSPs**) to apply for a modified form of Australian financial services licence (**AFSL**), or the proposal to repeal the limited connection relief. ASX strongly supports the continuation of this relief for the reasons set out in this response.

ASX understands that the proposals in CP 301, if implemented, would impact ASX and ASX 24, and the following categories of FFSPs which rely on, or may in the future wish to rely on, the sufficient equivalence or limited connection relief:

- ASX and ASX 24 full Participants with clients and non-participants with clients (including Participants' offshore related entities), which would otherwise be required to hold an AFSL under s911A(1) of the *Corporations Act 2001* (the **Act**); or
- ASX and ASX 24 Principal Trader Participants (those which trade only on their own behalf) and non-participants without clients which make markets in a financial product, and which would otherwise be required to hold an AFSL pursuant to s911A(1) and s766A(c) of the Act for their market making activity (but not for their proprietary dealing activity).

ASX would like to confirm its understanding that the proposals in CP 301 would not impact FFSPs that are ASX or ASX 24 Principal Trader Participants not engaging in market making activity (as such FFSPs are not required to hold an AFSL).

The proposals mentioned above would impact current and prospective Participants of ASX or ASX 24 with an offshore presence that rely on or may seek to rely on the sufficient equivalence or limited connection relief. ASX is concerned that issues arising from an increased regulatory and financial burden imposed on affected Participants or prospective Participants, or their related entities, may cause Participants to resign as Participants of ASX or ASX 24 or choose not to apply for Participant status. ASX considers that it is important to encourage Participants of ASX and ASX 24 to remain as Participants, as they are bound by the ASX Operating Rules and ASX 24 Operating Rules (respectively), and the Market Integrity Rules (**MIRs**), their activity is more transparent and subject to more direct oversight.

Also, as ASX has previously submitted, ASX considers that it is important to encourage entities to become market makers, particularly in new or existing illiquid wholesale markets, as designated liquidity providers with clear liquidity obligations are an important contributor to the liquidity and quality of the market. In addition, as entities bound by the MIRs and the ASX or ASX 24 Operating Rules, their activity is more transparent and trends can be monitored more effectively. Hence, caution should be exercised in imposing regulatory requirements which discourage market makers, unless there is a clear policy benefit of doing so.

ASX considers that the proposals have the potential to impact market maker activity in the ASX or ASX 24 markets by increasing the regulatory and financial burden to engage in that activity for FSSPs that currently rely on, or may in the future wish to rely on, the sufficient equivalence or limited connection relief (collectively referred to in this response as "Market Makers"), which is likely to have a significant impact on the attractiveness of providing those market making services.

Annexure A contains our comments in relation to some of the specific proposals and questions in the consultation paper.

If you have any queries on these matters please contact me on (02) 9227 0833 or [redacted].

Yours sincerely,

Catherine Sullivan
Senior Manager & Senior Legal Counsel
+61 (0)2 92270833
[redacted]

Annexure A

Comments on CP 301 – Foreign Financial Services Providers

Proposal		Feedback
C1	We propose to repeal the sufficient equivalence relief on 30 September 2019, as well as any individual relief issued on similar terms. Note: We are proposing a 12-month transitional period (until 30 September 2020): see Section E.	ASX does not agree with this proposal. ASX considers that this proposal has the potential to impact current and prospective market maker activity. A requirement to obtain an AFSL or a foreign AFSL (as referred to in the application) would result in an increased burden and cost to engage in market making activity for Market Makers which, coupled with the recent introduction of the new ASIC fee model which imposes cost recovery levies on market makers, is likely to have a significant impact on the attractiveness of continuing to provide those market making services. It would also be a disincentive for new Market Makers ASX seeks to attract to existing or new products. As ASX has previously submitted, ASX is seeing increasing interest from entities based in foreign jurisdictions in participating in the Australian market, including in some of those product markets where existing liquidity is relatively thin. There have been a number of occasions whereby foreign based liquidity providers have been interested in becoming Market Makers but have not proceeded due to the AFSL requirement. These potential Market Makers have indicated that the cost and time to obtain the AFSL outweighs the commercial benefit of participating in new markets. Recently a Principal Trader Participant of ASX 24 was not willing to proceed with its application to become a Market Maker

		because of the AFSL requirement. Although it trades in a wholesale market, the Participant indicated that it was not comfortable that it fell within the scope of the exemption in s911A(2E) of the Act. In addition, in respect of the Australian Electricity Futures Market, which is a wholesale market, ASX is seeking interest from potential market makers and expects that some foreign entities that may wish to engage in market making activity in this market might not hold an AFSL. ASX notes that a key element in the National Energy Guarantee (NEG) relates to the reliability requirement. This requirement specifically mentions a Mandatory Liquidity Obligation that might be placed on some entities, in the absence of market making arrangements. ASX is concerned that potential Market Makers in the Australian Electricity Futures Market may choose not to proceed if they are unable to rely on the sufficient equivalence or limited connection relief. ASX also considers that this proposal has the potential to impact current Participants of ASX or ASX 24 with an offshore presence relying on the sufficient equivalence or limited connection relief, or prospective applicants for Participant status with an offshore presence that might seek to rely on the relief in the future. ASX has been informed by key ASX and ASX 24 Participants that a number of their overseas related entities rely on the sufficient equivalence relief. ASX understands that these Participants will be providing their own feedback on CP 301. ASX asks ASIC to weigh the regulatory benefit of the proposal against the regulatory detriment, particularly given that the affected entities have been identified as subject to a regulatory regime that is sufficiently

		equivalent to the regime in Australia (see below). *(a) Regulatory benefit* A requirement for foreign Market Makers or foreign ASX and ASX 24 full Participants with clients to obtain an AFSL does not, in ASX's view: • enhance ASIC's regulatory control over market making activity which is governed by the ASIC Market Integrity Rules (**MIRs**) and ASX Operating Rules or the ASX 24 Operating Rules (as applicable) (the **Operating Rules**) that bind Principal Traders. For non-participant market makers, ASX or ASX 24 contractual terms require compliance with the relevant Operating Rules which in turn require compliance with the ASIC MIRs; • enhance ASIC's regulatory control over full Participants of ASX or ASX 24 which are bound by the MIRs and the relevant Operating Rules. The current obligations under these Rules as against the legal implications of requiring an AFSL are summarised in ASX's previous submission to ASIC dated 5 April 2018. ASX considers that the MIRs and Operating Rules provide the appropriate level of visibility of market behaviour, and that this is not enhanced by additional AFSL status requirements where equivalence has been recognised under another recognised regime. CP 301 states that ASIC's inquiries suggest that its approach to AFS licensing relief for FFSPs may be broader than those of its peers in other major jurisdictions. We would like to have seen examples of the way in which ASIC's approach is broader than the licensing relief in the jurisdictions identified. Without having an understanding of the way in which the

		licensing relief in such jurisdictions differs it is difficult to assess the importance of such differences and whether they would place AFS licensees at a competitive disadvantage in the global marketplace; and • enhance the consumer protection function of the AFSL regime, in particular, the protection of retail investors (as FFSPs to which the proposals apply are limited to those that provide or may provide financial services to wholesale clients in Australia). The level of regulation appropriate to ensure adequate investor protection will vary depending on the level of sophistication of the relevant investor. ASX considers that the current level of regulation is sufficient to ensure adequate investor protection for wholesale clients in Australia, whose knowledge, experience and ability to look after their own interests distinguishes them from retail clients. In addition, in respect of Market Makers and foreign ASX and ASX 24 full Participants with clients, consumer protection objectives are sufficiently met through the existing regulatory controls outlined above, and the transparency of pricing provided by Market Makers to the market. *(b) Regulatory detriment* ASX considers that the consequences of requiring Market Makers to hold an AFSL or a foreign AFSL (as described in CP 301) (including additional administrative compliance obligations, financial reporting requirements, registration as a foreign company, and uncertain tax consequences), act as a significant deterrent to remaining or becoming a Market Maker. ASX considers that it is in the best interest of the market for Market Makers to be encouraged to be direct participants of the

		market as market makers rather than indirect market users. This is on the basis that they are bound by the obligations of the MIRs and the Rules whereas indirect market users are not, and as entities bound by the MIRs and the Rules their activity is more transparent and trends can be monitored more effectively. To the extent that these traders bring additional activity to the market, all users benefit through the impact deeper and more liquid markets have on implicit transaction costs and overall market quality. Hence, caution should be exercised in imposing regulatory requirements which discourage Market Makers, unless there is a clear policy benefit of doing so. Similarly, imposing a requirement on ASX or ASX 24 Participants or their related entities to obtain an AFSL or a foreign AFSL is of concern in circumstances where this requirement has not previously been imposed because the regulatory regime overseen by the overseas regulatory authority in the entity's home jurisdiction has been identified as sufficiently equivalent to the Australian regulatory regime. ASX is concerned that the duplicated regulatory burden that would be imposed on affected current or prospective Participants or their related entities would cause the costs of maintaining Participant status to outweigh the benefits, and that as a result those Participants may elect to resign as Participants of ASX or ASX 24. ASX considers that it is important to encourage Participants of ASX and ASX 24 to remain as Participants, as they are bound by the relevant Operating Rules and the MIRs, their activity is more transparent and subject to more direct oversight. Given the factors set out above, ASIC is encouraged to weigh the net regulatory

		benefit of the proposal against the impact it will have on the quality of the market.
C1Q1	Do you agree with our proposal to repeal the sufficient equivalence relief and individual relief for FFSPs? If not, why not? Please be specific in your response.	See above.
D1	We propose to repeal the limited connection relief on 30 September 2019. Note: We are proposing a 12-month transitional period (until 30 September 2020): see Section E.	ASX does not agree that the limited connection relief should be repealed. The reasons for this include those outlined above in ASX's response to proposal C1. ASX considers that the regulatory benefit of repealing the limited connection relief is outweighed by the regulatory detriment of this proposal. In particular, the benefit of additional oversight of entities which may be taken to be carrying on a financial services business in Australia by the operation of s911D, even though those entities engage in limited activity in the wholesale market in Australia, is likely to be limited and outweighed by the regulatory detriment. ASX is concerned that repealing the limited connection relief is likely to discourage Market Makers from engaging in market making activity. For the reasons outlined above, ASX considers that it is in the best interests of the market for this activity to be encouraged. ASX also notes that part of the rationale for the proposal to repeal the limited connection relief is that there are certain exemptions from the requirement to hold an AFSL under s911A. However, those exemptions are more limited in their operation than the relief provided under Class Order [CO 03/824]. For example, the exemption in s911A(2E) applies only to a person providing a financial service to a professional investor, rather than a wholesale client (which is defined more broadly in the Act). It is not clear that Market Makers would be able rely on this exemption. ASX agrees with stakeholder feedback reflected in *Report 519: Response to*

		submissions on CP 268 Licensing relief for FFSPs with a limited connection to Australia that s911A(2E) is not a complete replacement for Class Order [CO 03/824]. As noted above, there have been a number of occasions whereby foreign based liquidity providers have been interested in becoming Market Makers but have not proceeded due to the AFSL requirement. Recently a Principal Trader Participant of ASX 24 was not willing to proceed with its application to become a Market Maker because of the AFSL requirement and indicated that it was not comfortable that it fell within the scope of s911A(2E) although it trades in a wholesale market. Further, ASX notes that submissions in response to CP 268 illustrated that, in practice, the limited connection relief was used by some FFSPs to provide financial services to wholesale clients in Australia as a precursor to an entity applying for and relying on the sufficient equivalence relief. In those circumstances, ASX is concerned that repealing the limited connection relief will inhibit the growth of participation in Australian wholesale financial markets, because the incentive for FFSPs to engage in this activity will be outweighed by the burden of obtaining an AFSL or foreign AFSL. Accordingly ASX is concerned that this proposal does not strike the appropriate balance between cross-border investment facilitation, market integrity and investor protection. In CP 301 ASIC recognises that in some jurisdictions conduct that will require a person to hold a licence or be authorised may not extend to the 'inducing' activities covered by s911D, and accordingly it would not be necessary in those jurisdictions for there to be analogous relief to the limited connection relief. We would like to have had more of an understanding of how many jurisdictions fall

		into this category. ASX asks ASIC to consider whether the limited connection relief may result in an increase in compliance costs for FFSPs in such jurisdictions currently relying on the relief to provide financial services in Australia, in comparison to compliance costs for AFS licensees for the financial services they provide in overseas markets, such that this proposal might not be an appropriate response to ASIC's concerns around a possible competitive disadvantage for AFS licensees in the global marketplace. ASX asks ASIC to consider what regulatory benefit ASIC gains from the imposition of the requirement to obtain an AFSL or foreign AFSL on FFSPs providing financial services to wholesale clients in the circumstances covered by the sufficient equivalence or limited connection relief and whether those benefits are already, or can be, achieved through other means.
D1Q1	Do you agree with our proposal to repeal the limited connection relief? If not, why not? Please be specific in your response.	See above.