

Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investment Commission
Level 5, 100 Market Street
Sydney NSW 2000
email: policy.submissions@asic.gov.au

Copy to: Brittney Haryanto
Strategic Policy Adviser
email: Brittney.Haryanto@asic.gov.au

Date: 30 July 2018

Dear Sir

Submission on ASIC Consultation Paper 301: Foreign financial service providers (CP 301)

We refer to our earlier submission on ASIC Consultation Paper 268: *Licensing relief for foreign financial services providers with a limited connection to Australia (CP 268)* and now wish to make a submission in relation to ASIC's proposals in CP 301. We have **enclosed** a copy of our CP 268 submission for your reference and request that ASIC take these submissions into account along with our further submissions below.

As mentioned in our previous submission, FEXCO Merchant Services ("**FEXCO MS**") has been providing from Ireland foreign currency services for payment card transactions ("**FX Services**") both to card acquiring institutions and direct to large airlines in Australia since 2004 without an Australian Financial Services (**AFS**) Licence by relying upon Class Order 03/824 and now Instrument 2017/182 ("**Instruments**").

We understand that ASIC proposes to repeal the Instruments on 30 September 2019 and require entities currently relying on the Instruments to apply for an ordinary AFS Licence or the proposed 'foreign' AFS Licence ("**Proposal**").

In summary, we submit that repealing the Instruments and implementing the Proposal would impose an unnecessary or excessive regulatory burden on business and would result in FEXCO MS having to apply for an ordinary AFS Licence because it would not be eligible to apply for a foreign AFS Licence and cannot rely on any other exemption to continue to provide the FX Services to

Australian wholesale clients. We therefore submit that ASIC should maintain the Instruments and, if ASIC considers necessary, introduce enhanced conditions to enable ASIC to have greater oversight over entities who rely upon the Instruments.

We have provided submissions on a number of the specific questions posed by ASIC in CP301 regarding the proposed repeal of the Instruments. We have not responded to the questions relating to the sufficient equivalence relief as we are not currently able to rely on it.

Response to D1Q1

We do not agree with ASIC'S proposal to repeal the limited connection relief for the reasons set out above and in our CP 268 submission.

Response to D1Q2

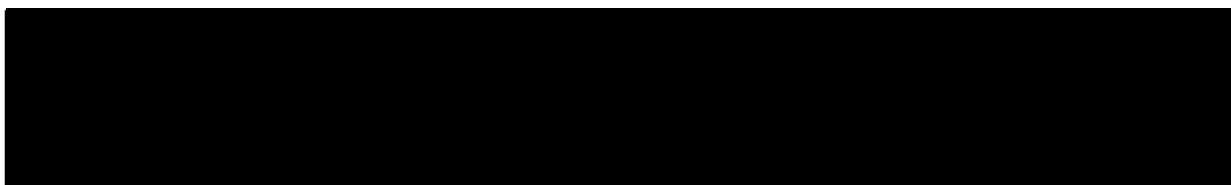
If ASIC were to repeal the limited connection relief, we estimate that:

- (a) FEXCO MS's projected costs to apply for an ordinary AFS Licence will be AUD 150,000;
- (b) FEXCO MS's projected costs to maintain an ordinary AFS Licence and compliance with the Corporations Act will be AUD 80,000 per annum;
- (c) The above projections do not take account of the costs of complying with the cash needs and capital requirements of a foreign currency dealer licensee. These requirements could be particularly costly and onerous if applicable to all business and in the event ASIC repeals the limited connection relief we submit that the requirements should only apply to Australian business.

Response to D1Q3 and D1Q4

We are not a 'wholesale fund operator' but we have provided some information below as to how the proposed repeal of the Instruments will impact our business and how we conduct our business in other jurisdictions.

Impact on Australian business



FEXCO MS has established a number of branches or subsidiary companies in some countries outside Ireland which provide marketing and client relationship services to FEXCO MS. FEXCO Proprietary Limited (ACN 141 167 660) is one such subsidiary and it is licensed to provide advice for foreign

exchange contracts to wholesale clients under AFS Licence no.: 402979. This is the only licence required and held by FEXCO MS or any of its subsidiaries.

Since FEXCO MS's dealing activities only relate to wholesale clients and only occur outside Australia, it does not carry on a financial services business in Australia and the group's activities have been deliberately structured to ensure that the only activities that do occur in Australia occur under the AFS Licence of FEXCO Proprietary Limited.

A requirement for FEXCO MS to now be licensed in Australia would impose significant cost and administrative burdens on our business. In particular, the financial requirements for holding an AFS Licence would impose a significant capital burden given the requirement to meet cash needs requirements based on global expenses. This would put into doubt the commerciality of FEXCO MS's business model for the provision of FX Services from Ireland to Australian wholesale clients and, if FEXCO MS were to cease operating in the Australian jurisdiction, would in turn reduce competition and product availability in Australia. Contracts for the provision of the FX Services generally have a term of 3 to 5 years and we believe it would not be straightforward for clients to switch to a competing provider given there would be relatively significant software, system and integration development costs to the client for transitioning to the new provider.

FEXCO MS's global operations and regulatory position in other jurisdictions

FEXCO MS's business model is based on providing generic services to clients globally using a workforce and systems located in Ireland. This means that FEXCO MS itself has no presence in other countries, other than to engage in the marketing and client relationship functions performed by branches and subsidiaries as mentioned above. This model has allowed FEXCO MS to develop and provide cost effective services with minimal engagement and costs in jurisdictions outside of Ireland.



FEXCO MS provides its FX Services from Ireland but is not required to be licensed in Ireland because the FX Services do not fall within any of the regulated activities requiring a licence. That is, the FX Services are not:

- (a) a money transmission service or bureau de change business under the Central Bank Act 1997;
- (b) an investment business service under the Investment Intermediaries Act 1995; or
- (c) a payment service under the *European Union (Payment Services) Regulations 2018*.

However, FEXCO MS is recognized as a 'financial institution' or 'designated person' for the purpose of Irish legislation and is therefore:

- (a) subject to the anti-money laundering requirements set down in the *Criminal Justice (Money Laundering and Terrorist Financing), Act 2010* (Ireland) ("**CJA 2010**") as amended by Part 2 of the *Criminal Justice Act 2013* (Ireland);
- (d) subject to the Data Protection requirements set out in the EU General Data Protection Regulation (Regulation (EU) 2016/679) which came into force on the 25th May 2018, replacing the existing data protection framework under the EU Data Protection Directive; and
- (e) certified under both the Payment Card Industry Data Security Standards and the International Standard on Assurance Engagements (ISAE) 3402 issued by the International Auditing and Assurance Standards Board.

Based on current external legal advice from local counsel in each jurisdiction, FEXCO MS is not required under the local laws of the 29 countries in which its clients are located to obtain any licences in those countries either because the FX Services can be provided in those countries without a licence or because FEXCO MS provides its FX Services from Ireland and all its operations are performed in Ireland. For example:

- (a) in the United Kingdom, FEXCO MS is not required to obtain a licence to provide the FX Services to card acquiring institutions and merchants in the UK because FEXCO MS is not operating in the UK and the place of "supply" of FX Services is Ireland. Even if FEXCO MS was operating the FX Services from the UK it would not be required to obtain a licence because it would not:
 - (i) be carrying on a regulated activity as specified in the *Financial Services and Markets Act 2000 (Regulated Activities) Order 2001*;
 - (ii) be providing payment services under the *Payment Services Regulations 2017*;
 - (iii) be considered to be issuing e-money under the Electronic Money Directive 2009 (as implemented in the UK by the *Electronic Money Regulations 2011*); or
 - (iv) fall within the scope of the MiFID II Directive (2014/65/EU);
- (b) in Japan, FEXCO MS is not required to obtain a licence because FEXCO MS is not deemed to be carrying on a business in Japan;

- (c) in Germany, FEXCO MS is not required to obtain a licence because FEXCO MS is not providing a service for a fee but is conducting proprietary trading on own account and paying the acquiring bank for the foreign exchange amounts it receives from the bank.

Furthermore, there are no proposals that FEXCO MS is aware of which would require FEXCO MS to obtain a licence, registration or other authorisation in any of the jurisdictions in which FEXCO MS has clients. This demonstrates that the Proposal is out of step with international regulatory developments and would impose a significant regulatory hurdle to businesses wishing to offer FX services to wholesale clients in Australia, which is likely to reduce competition for those services and therefore increase costs for Australian businesses and reduce the competitiveness of the Australian economy with negative consequences for Australian consumers.

As FEXCO MS does not require a licence in any other jurisdiction, FEXCO MS is unable to apply for relief under the current 'sufficient equivalence relief' and will not be eligible to apply for a foreign AFS License as contemplated by CP 301.

Response to D1Q5

We support the introduction of enhanced conditions if ASIC believes they are required to better facilitate supervision of entities such as FEXCO MS that rely on the Instruments.

We believe that requiring relying entities to have a local agent should be sufficient to allow ASIC to enforce Australian requirements.

We submit that monitoring could be done by requiring relying entities to notify ASIC of reliance on the limited connection relief before relying on it and when they no longer have any intention of relying on it in the future. We support the proposal that this should be done through an online form. However, we submit that it should be a simple process and that a general high level description of the planned activities should be sufficient. ASIC can request further more detailed information if required. There should not be any need to provide a copy of the entity's constitution or articles of association or an executed agreement with an Australian local agent. We submit that this is an unnecessary burden of questionable value to ASIC. If ASIC has a specific need for these documents, it can require the entity to provide it. We also believe it would be appropriate to require entities relying on the relief to notify ASIC of any material change to services provided to Australian clients under the relief – being a material change to the information previously provided to ASIC.

We support ASIC having an express information gathering power.

Response to D1Q6:

We consider that the exemptions currently available for conduct for which a foreign company does not need to hold an AFS licence (as noted in Table 1 in CP 301) are not applicable to all of FEXCO MS' current or future activities. In particular:

- the exemption in s911A(2A) is not applicable because FEXCO MS engages in conduct which is likely to induce Australian clients to use its FX Services;
- the exemption in s911A(2B) is not applicable to FEXCO MS' Australian clients;
- the exemption in s911A(2C) is not applicable because not all of its Australian clients hold an AFS Licence;
- the exemption in s911A(2D) does not permit FEXCO MS to solicit clients in Australia; and
- although FEXCO MS's FX Activities relate to foreign exchange contracts and the exemption in s911A(2E) of the Corporations Act may apply to much of those activities, the exemption is limited to professional investors only. FEXCO MS submits that this limitation is not appropriate and businesses which operate outside Australia should not require an AFS Licence if their activities are confined to the wholesale market.

FEXCO MS does not expect to be able to rely on another exemption to continue to provide the FX Services to Australian clients if the Instruments are repealed and strongly advocates for the continuation of CO 03/824 or Instrument 2017/182 beyond 30 September 2020.

Response to E3Q1:

If both the sufficient equivalence relief and individual relief are repealed, we would expect there to be a significant influx of licence applications to ASIC (for both ordinary and foreign AFS licences). Further, we note ASIC's service charter was amended recently so that applying for and varying an AFS licence is 150 days from receipt of a complete application (with a target of 70%) and decide 90% of applications within 240 days. This suggests the 12 month transition period is not realistic and we believe a 24 month period would be more appropriate.

It is also important for the transition period continue to apply to any organisation that has been relying on the Instrument provided it lodges a licence application before the end of the transition period, i.e. the transition period should continue until the entity's AFS licence application is granted or refused. This will also reduce the pressure on ASIC to have to complete the processing of all licence applications by the end of the transition period and reduce the risk for entities relying on the relief currently.

We are very concerned about the impact of the Proposals on FEXCO MS' ability to continue to service Australian clients and we would be very happy to discuss our concerns with ASIC representatives directly. Please contact David Millbourn on +447977470669 or by email at [REDACTED] if you would like to arrange such a discussion.

Yours faithfully

Denis Cleary
Managing Director
for and on behalf of
FEXCO Merchant Services Unlimited Company

PP *David Millbourn*
General Counsel