

From: Greg Wong
To: policy.submissions
Subject: Submission from Perpetual Corporate Trust - ASIC Consultation Paper 301: Foreign Financial Services Providers
Date: Tuesday, 31 July 2018 4:45:41 PM
Attachments:

Dear Mr Worsley

Perpetual Corporate Trust (PCT) would like to make a submission in relation to the proposals set out in CP 301. PCT acts as a third party trustee or responsible entity for a number of managed investment schemes, some of which have investment managers who are foreign financial services providers (FFSPs) currently relying on the “sufficient equivalence relief”.

PCT submits its observations and concerns with:

1. ASIC’s proposal to repeal the sufficient equivalence relief and replace it with the requirement for FFSPs to apply for a foreign AFS licence (AFSL); and
2. ASIC’s reasoning as to why the current relief is not appropriate.

Requirement for FFSPs to apply for an AFSL

ASIC has stated in CP 301 the proposed modified AFS licensing regime for sufficient equivalence FFSPs, to allow them to apply and maintain a modified form of AFS licence, being a foreign AFS licence.

We submit a number of concerns that we have with the introduction of the requirement for this modified form of AFS licence:

1. Applying for a foreign AFS licence is a burdensome process for a FFSP, both from a cost perspective and from an obligations perspective. This is due to the following:
 - a. It is proposed that similar core and additional support proof documents are required for a foreign AFSL application as that required for an ordinary AFSL (see para C9). Since there may be differences in the way the FFSP operates in the foreign jurisdiction, it will be an onerous process for them to provide these proof documents, as it will require them to dedicate time and resources to update their existing processes and policies to satisfy our requirements. This may result in them incurring significant costs in retaining external advisers to assist in the application, and may also require them to incur costs by hiring a responsible manager to support their foreign AFSL. Furthermore, there is a fee for service when applying for a AFSL, and with the recent increase in application fee for an AFSL due to the implementation of the Industry Funding Model, the initial cost to applying for licence has substantially increased. We estimate that the initial costs for a FFSP to make an application would be at least \$50,000 to \$75,000, when we take into account the resources required to draft support proof documents for the application.
 - b. Maintaining a foreign AFSL is an ongoing burden for the FFSP. They will need to maintain adequate compliance records and systems in place to satisfy the requirements of being a AFSL holder. They will need to pay additional ongoing costs such as the ASIC levy imposed on AFSL holders, costs for retaining responsible managers to support their AFSL and fees to external advisers for training and updates in order for them to maintain their AFSL. These ongoing costs may become significant over time as the regulatory landscape changes which requires more dedicated resources from the FFSP to maintain their AFSL.
2. Although a number of obligations in the law is proposed not to be applicable to the FFSP under a foreign AFSL (see Appendix 1), there are a number of obligations that are still applicable to the FFSP under a foreign AFSL (see Appendix 2), some of which may impose unnecessary burden on the FFSP. We note the following observations:

- a. A number of conduct type obligations, such as the requirement to have arrangements for conflicts of interest or have adequate risk management systems, may just be a variant on the FFSP's obligations in their home jurisdictions. However, there may be some differences between our requirements and their home jurisdiction requirements which may require the FFSP to dedicate resources to address those differences. Given that a foreign AFSL is applicable only to sufficient equivalence FFSPs, ASIC should have assessed the adequacies of these conduct type obligations in those jurisdiction to suit our requirements before classifying a jurisdiction being of sufficient equivalence, without requiring the FFSP to look into the differences in requirements and updating their policies and systems, which may be costly and time consuming for the FFSP.
 - b. A number of our obligations that are proposed to be applicable to the FFSP under a foreign AFSL, such as various restrictions or notification requirements, may easily be addressed through imposing additional conditions on the existing sufficient equivalence relief, instead of introducing a whole new AFSL system, which brings with it additional burden on the FFSP, as outlined in paragraph 1 above.
3. The onerous burden in applying for a foreign AFSL and the ongoing burden of maintaining a foreign AFSL for FFSPs, as outlined in paragraphs 1 and 2 above, along with other existing regulatory requirements such as the operational due diligence reporting requirements, imposes a significant barrier to entry into the Australian market for FFSPs, which is at odds with the existing initiatives of opening up the Australian markets to foreign investments under the Asia Region Funds Passport. We note that under the Asia Region Funds Passport's Memorandum of Co-operation, there is provision for "sufficiently equivalent" regulated foreign investment managers to satisfy the "track record" test. Requiring FFSPs in Australia to be licensed potentially puts Australia at a competitive disadvantage compared to other participating jurisdictions who take advantage of these provisions. The net effect may be that FFSPs bypass Australia as the domicile for passport funds in favour of other participating jurisdictions, undermining the policy intent of promoting the development of Australia as a regional financial services hub.
4. The barriers to entry into the Australian market for FFSPs, as a result of onerous burden in applying for a foreign AFSL and the ongoing burden of maintaining a foreign AFSL for FFSPs, as outlined in paragraphs 1 and 2 above, may also result in only established FFSPs with sufficient resources or track record that wishes to persevere in the Australian market to enter into our market, which may deprive us of foreign innovative start-ups from entering into the Australian market, depriving our market of innovative ideas which is at odds with ASIC's policy intent of promoting Australia as a regional innovation hub. Furthermore, given the limitation in terms of investment opportunities in Australia, creating barriers for FFSPs to enter into the Australian market will result in a reduction of choices and opportunities for Australian investors to access global investment capabilities and opportunities.
5. Requiring FFSPs to apply for an AFSL may have tax related unintended consequences, as FFSPs with an AFSL may be seen as having a "permanent establishment" in Australia, resulting in an unfavourable tax treatment for the FFSPs, further causing barriers to entry for FFSPs into the Australian market. If ASIC does not consult with the ATO on this issue, the FFSP will need to consider how the AFSL interacts with the Investment Manager Regime, further increasing their external advisory costs, and potentially deterring them from entering into the Australian market.
6. Given the number of initiatives that ASIC is involved with in terms of AFS licensing

regimes, such as devising a AFS licence for corporate collective investment vehicles, and implementing the fintech licensing exemption under its regulatory sandbox framework, we query whether ASIC has the sufficient resources to implement in a timely manner the foreign AFS licensing regime. We note that currently, ASIC's turnaround time for a new AFSL application is around 9 months, so there are concerns as to how long a FFSP will need to wait before it is issued a foreign AFSL and whether they are able to provide financial services in Australia during the application review period.

ASIC's issues with existing FFSP relief

ASIC has stated in CP 301 various issues it has with the existing FFSP relief, and as a result, ASIC is proposing for FFSPs to apply for a foreign AFSL.

Given the concerns we have raised above in relation to the foreign AFSL regime, we submit that the issues that ASIC has identified in CP 301 can be addressed with via alternative means, without the need to overhaul the existing system and requiring FFSPs to apply for a foreign AFS licence.

We set out below our observations in relation to the issues ASIC has raised in relation to the existing FFSP relief:

1. ASIC has identified a few incidents of non-compliance with the sufficient equivalent relief by FFSPs as a reason for changing the existing system (see para 41). However, requiring FFSPs to hold a foreign AFSL may have no effect in reducing the incidents of non-compliance. This is evidenced by the vast number of actions ASIC has taken against AFSL holders in the past for non-compliance with their AFSL obligations, including large financial services institutions such as Macquarie Bank and CBA.
2. ASIC has identified supervisory and enforcement concerns with the activities of FFSPs as there are challenges in practice that limit each foreign regulator's ability to monitor and supervise the conduct of FFSPs in Australia, and ASIC's supervision and investigations outside Australia may be restricted without assistance from the relevant foreign regulator (see paras 38-40, 43-56). In our view, more local regulation is not necessarily the best solution to address such concerns, since regulators will need to establish appropriate protocols for sharing information in an increasingly global regulatory environment. An alternative to requiring FFSPs to apply for a foreign AFSL is to keep the existing FFSP relief, and for ASIC to improve its relationship to the foreign regulators in sufficient equivalent jurisdictions, so ASIC is aware of any filings or issues in the foreign jurisdiction. Another alternative is to also keep the existing FFSP relief but limit the number of sufficient equivalent jurisdictions to only include those jurisdictions which is willing to monitor and supervise the conduct of FFSPs in Australia and allow ASIC to monitor and supervision the conduct of FFSPs. Given the increased interaction between ASIC and foreign regulators as a result of initiatives such as Asia Region Funds Passport, and the trend towards global regulatory approach as a result of FATCA and CRS, the past restrictions in the monitoring and supervision arrangements for FFSPs between Australian regulators and foreign regulators identified by ASIC may be less of an issue going forward.

In conclusion, PCT is of the view that the introduction of foreign AFSL regime is too onerous and burdensome for FFSPs, and the better approach is to make adjustments to the existing FFSP relief to satisfy some of the concerns that ASIC has.

Please let us know if you wish to discuss further.

Regards

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