

From: [Greg Wong](#)
To: [policy.submissions](#)
Subject: Submission from Perpetual Corporate Trust - Consultation Paper 315: Foreign financial services providers: Further consultation
Date: Thursday, 8 August 2019 12:29:45 PM
Attachments: [image003.jpg](#)

Dear Mr Worsley

Perpetual Corporate Trust (PCT) would like to make a submission in relation to the proposals set out in CP 315. 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 in relation to the “funds management relief”; and
2. ASIC’s proposal in relation to the need to apply for a foreign AFS licence for a FFSP licensed or authorised by an overseas regulatory authority that regulates the FFSP under a sufficiently equivalent regime.

Paragraph references in this email refer to CP 315, unless otherwise stated.

Funds management relief

a. Clarification of relief

This relief is intended to apply where certain financial services are provided by the FFSP to a professional investor, or where the FFSP engages in portfolio management services to a limited class of professional investors. This is reflected in the definition of “funds management financial services” in the draft instrument. However, this concept is a bit muddled in the drafting in CP 315 and draft RG 176, where the two limbs of this relief are separated by the word “and” which suggests that the two limbs need to be satisfied simultaneously for the relief to apply. We suggest the drafting in CP 315 and RG 176 be amended accordingly.

b. Application of relief

Paragraph 37 suggests that it is the offshore fund itself that may need an AFS licence to provide financial services, and which the relief should be available to. However, in practice, the offshore fund itself is not providing any financial services in relation to the fund to Australian investors that require a AFS licence. The financial services is usually provided by the investment manager and distributors and it is these entities that will require a AFS licence or be relying on an exemption to hold an AFS licence. We suggest that the commentary in CP 315 be reviewed to remove references to the offshore fund to avoid confusion in the industry.

c. Conditions of relief

There are a number of uncertainties as to the conditions of the relief as currently proposed:

- The relief applies to “professional investor” for certain financial services classified as “funds management financial services”, but for other financial services classified as “portfolio management services”, the relief only applies to “eligible Australian users”, a limited category of professional investors . By differentiating different classes of users for the different limbs under this relief, it may be confusing to the FFSP looking to rely on this relief.
- “Funds management financial services” has been defined in the draft relief in terms of the different financial services set out in the Corporations Act (such as dealing, financial product advice and making a market). However, “portfolio

management services” is not specifically defined. Proposal B2 states that “portfolio management services” means the “management of assets”, while paragraph 41 states that the term is discussed in the proposed amendments in the Corporations Act (which unhelpfully is described in the Treasury Laws Amendment (Corporate Collective investment Vehicle) Bill 2019 Exposure Draft Explanatory Materials as a common usage in the funds management industry and are designed to capture entities that are the controlling mind and decision-makers in relation to an asset of the fund). It would be more helpful if “portfolio management services” is also defined in terms of the different financial services set out in the Corporations Act (such as dealing and financial product advice).

- The exclusion of custodial or depository service from the relief may be problem. Although paragraph 38 specifies that an exemption is available under regulation 7.6.01(1)(k) of the Corporations Regulations, that exemption is very limited, and would generally not be available for the FFSP to hold the assets on behalf of investors if there is no arrangement with a master custodian that holds a licence.
- The condition requiring the FFSP to have less than 10% of its annual aggregated consolidated gross revenue to be generated from the provision of funds management financial services in Australia may have practical issues which ASIC has yet to consider. The revenue cap may be easily breached in circumstances outside the control of the FFSP, such as when there is a large redemption from a non-Australian investor, unexpected influx of application monies from Australian investors, fluctuations in currency exchange or when market conditions change. There needs to a more permanent and predictable ceiling that is solely within the FFSP’s control, and not subject to changes due to market factors that the FFSP cannot influence. A number of alternatives may be considered such as:
 - either imposing a reasonable transition timing to allow the FFSP to adjust the revenue level back to the cap, or to calculate the cap over a period of time instead of being at an instantaneous point in time
 - increasing the 10% cap to a higher number such as 30% may be more practically appropriate for FFSPs to rely on this relief
 - changing the scope of the cap to be related to the number of investorsOtherwise, the cost of monitoring the cap level on a daily basis may be too onerous for the FFSP to rely on this relief.

An unintended consequence of the proposed cap level is that such a proposal favours diversified FFSPs over other types of FFSPs, since a FFSP offers a diversified suite of services across other markets will more easily keep their revenue below the 10% cap than a specialist asset manager.

Sufficiently equivalent relief

a. Application of relief

Clarification should be provided as to how ASIC will ensure that the FFSP applies for the right authorisations for their foreign AFS licence in line with the right authorisations for the sufficiently equivalent regime, as each regime has its own licence authorisations which the FFSP is able to rely upon.

b. Suitability of relief

Further consideration should be provided in relation to the suitability of this relief, especially in light of the fact that the FFSP is still required to apply for a AFS licence. Although Table 3 of draft RG 176 sets out the Corporations Act provisions that foreign AFS licensees are exempt from, there are still a number of AFS licence obligations that

the FFSP is subject to. This is confirmed through the application process where a number of core proofs is still required to be provided for a FFSP. Without any indication of difference in timing of processing such applications from the standard applications, and the fact that the FFSP is still subject to a number of AFS licence obligations, FFSP may find applying for a full AFS licence instead to be not that much extra work.

To make this relief more accessible for FFSPs, ASIC may consider requiring the FFSP to enter into a deed with ASIC to confirm it will comply with all ASIC and Corporations Act requirements in relation to complying with various laws and obligations and having adequate arrangements for management of conflicts or having adequate risk management systems. This will eliminate the need for the FFSP to provide a large number of proofs during the foreign AFS licence application process and make this relief more accessible for FFSPs.

Please let me know if you wish to discuss any of the above points in further detail.

Regards

Greg

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