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CP 315 – FOREIGN FINANCIAL SERVICES PROVIDERS – FURTHER CONSULTATION

Dear Alan

Thank you for the opportunity to comment on CP 315.

ASX set out its position in support of the continuation of the existing relief and the expected impact on the ASX and ASX 24 markets if the relief was removed in its earlier submission in response to CP 301. ASX reiterates this view and urges ASIC to provide clarity on the position of foreign market makers, to encourage market making which provides benefits to all market users. As ASIC's proposed relief now relates to a limited group of market users who are not directly involved as participants of the ASX markets, ASX will not provide responses to questions B to C.

ASX responds to question D1Q1 as follows:

D1Q1 Do you think we have provided adequate guidance to about our proposed regulatory framework for FFSPs will apply? If not, why not? Please be specific in your response.

In its submission on CP 301, ASX stated its concern regarding the position of ASX, ASX 24 Principal Trading Participants (those which trade only on their own behalf) and non-participants without clients which make markets in a financial product. Under s911A(1) and s766A(c) of the Act these participants would be required to hold an AFSL for their market making activity (but not for their proprietary dealing activity), but for the matters set out below.

CP 315 states at paragraphs 79 and 80 in relation to limited connection relief:

- 79 There are a number of other exemptions in the Corporations Act and Corporations Regulations that are available to FFSPs when they provide other types of financial services to non-retail clients in Australia (most relevantly, reg 7.6.02AG, which was made in 2005 after we had provided the limited connection relief).
- 80 Regulation 7.6.02AG modifies s911A of the Corporations Act by inserting s911A(2A)–(2E). These subsections provide exemptions from the need for FFSPs to obtain an AFS licence in relation to the provision of certain financial services, subject to various conditions. Note: See the Explanatory Statement of Select Legislative Instrument 2005 No. 324 for further information on s911A(2A)–(2E).

In addition, the proposed Draft Updated Regulatory Guide 176 refers to the available exemptions under Regulation 7.6.02AG in numerous places but does not specify what these are in relation to market making.

ASX receives numerous enquiries from potential foreign based market makers about their AFSL licensing requirements. ASX's view is that Regulation 7.6.02AG, which inserts s911A(2E) into the Corporations Act, provides relief for foreign based market makers who are contracted as market makers by ASX. ASX and foreign based market makers have previously requested that ASIC confirm that s911A(2E) permits foreign market makers to be engaged by ASX to make markets without the requirement to obtain an AFSL, and now a Foreign FSL.

Given the frequency of these questions, ASIC should confirm in Regulatory Guide 176 that s911A(2E) provides an exemption for foreign based market makers. ASX remains concerned that the lack of clarity impacts current and prospective Participants of ASX or ASX 24 with an offshore presence that currently rely on or may seek to rely on the sufficient equivalence or limited connection relief.

It is important to encourage entities to become market makers, particularly in new or existing illiquid wholesale markets, as designated liquidity providers with clear price making obligations are an important contributor to the liquidity, price transparency 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. Caution should be exercised in imposing additional regulatory requirements which discourage market makers, unless there is a clear policy benefit of doing so.

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. Enhancing the attractiveness of Australian markets to new and experienced foreign firms will help deepen local markets and provide positive benefits to users of these products.

There have been a number of occasions when foreign based liquidity providers have been interested in becoming Market Makers but have not proceeded due to the lack of clarity of 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. We urge ASIC to address this issue by providing the clarity requested above.

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

[REDACTED]

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Catherine Sullivan', written in a cursive style.

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