Baker & McKenzie
ABN 32 266 778 912

Level 19
181 William Street
Me bourne VIC 3000
Australia

G.P.O. Box 2119
Me bourne VIC 3001
Australia

Tel: +61 3 9617 4200
Fax: +61 3 9614 2103
DX: 334 MELBOURNE VICTORIA
www.bakermckenzie.com

20 August 2019

Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investment Commission
GPO Box 9827
Brisbane QLD 4001

By email
policy.submission@asic.gov.au

Dear Alan

Submission on ASIC Consultation Paper 315: Foreign Financial Services Providers: Further Consultation (CP 315)

Baker McKenzie appreciates the opportunity to comment on the proposals of the Australian Securities & Investment Commission (**ASIC**) in CP 315. We have previously submitted a comment to ASIC in relation to ASIC Consultation Paper 301: Foreign Financial Service Providers (**CP 301**), dated 3 August 2018, the comments provided in relation to CP 301, where relevant, apply in relation to CP 315.

We regularly advise foreign financial service providers (**FFSPs**) on Australian licensing and regulatory issues associated with providing financial services in Australia and act for Australian investors engaging with FFSPs.

The views expressed in this submission are ours alone, and do not necessarily reflect the views of our clients.

1. Summary

1.1 We note that we do not support the repeal of the limited connection relief. In our view, it provides a valuable facility for allowing overseas FFSPs, that are not carrying on a business in Australia, to market their services to Australian clients. This allows Australian clients to have access to the best financial services providers in the world and investment for the betterment of Australians.

1.2 In noting this, we recognise that ASIC has attempted to reach a position with its "funds management relief" which will allow for the provision of some financial services to Australian clients, in addition to merely marketing. We agree with the premise of the relief, being that the funds management relief "allows a diversified range of investment managers and investment products be made available to professional investors in Australia, which will ultimately benefit investors in Australia investing through these institutions" (CP 315 at [33]). However, we have a number of concerns with the exact terms of the relief, outlined in our response below.

Baker McKenzie.

2. Sophisticated institutional investors

2.1 In our response to CP 301, we proposed that ASIC implement an explicit distinction between wholesale clients (such as high net-worth individuals) and large, sophisticated institutional investors (such as superannuation funds and government-managed funds). We note that ASIC has gone some way to achieving this in allowing "professional investors" only to rely on ASIC's relief, but our view remains that a second class of investor could be created for whom blanket relief would be provided.

2.2 For sophisticated institutional investors that do not rely on ASIC's consumer protection function, it is difficult to see what value regulating the providers of financial services to them would have, where those providers do not carry on financial services in Australia but for section 911D of the Corporations Act.

2.3 As previously noted, large, sophisticated investors have the capacity to undertake comprehensive due diligence relating to potential investment managers and partners and have the ability to absorb losses in the event that they do arise. Furthermore, such investors have the capacity to protect themselves when investing offshore by negotiating appropriate terms in investment management agreements and fund documentation to protect their own interests, and are also not reliant on ASIC's regulation of those providing financial services to them. Finally, such investors have the financial capacity to commence legal or regulatory action themselves, and do not rely on ASIC in the same manner that individual investors may. Therefore, for this class of investor, there is no benefit in the FFSP entering an irrevocable deed with ASIC (for example) under which they submit to the jurisdiction of Australian courts.

3. Foreign AFS licensees

3.1 We appreciate ASIC providing guidance regarding the regulation of foreign AFS licensees and the draft *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument*. However we note that the guidance and the Instrument will only form part of the regulatory framework for FFSPs. In particular, we note that the draft RG 176.38 and RG 176.39 indicate that ASIC Pro Form 209 *Australian financial services licence conditions* (**PF 209**) will not be updated in relation to foreign AFS licensees.

3.2 We request ASIC reconsider this as PF 209, in its current formulation, would impose a number of the conditions from which ASIC indicates it will be providing relief. If the intention is for PF 209 to apply differently to foreign AFS licensees then that intention should be expressed and particular provisions identified.

3.3 Section C of the draft regulatory guide does not adequately detail how the prior experience of the AFS licensee operating within the terms of previous relief is to be treated or when ASIC may refuse the licence application of a foreign AFS licensee, other than in general term. To truly streamline this process we would like to see increased guidance on what ASIC will require in order to grant a foreign AFS licence.

4. Questions posed in CP 315

4.1 We have set out our detailed responses to the questions in CP 315 in **Annexure A**, attached.

We would welcome any opportunity to discuss our submissions in greater detail.

Yours sincerely

Lewis Apostolou
Partner
+61 3 9617 4403
[redacted]

Leo Vellis
Partner
+61 2 8922 5745
[redacted]

Other contact:
Bryce Clarke
Senior Associate
+61 3 9617 4294
[redacted]

Baker McKenzie.

Appendix A
Responses to questions in CP 315

Section B: Funds management relief	
B1Q1	**Do you agree with our proposal to provide AFS licensing relief to permit FFSPs to provide funds management financial services to professional investors (subject to the cap in proposal B3 and the conditions in proposal B4)? If not, why not? Please be specific in your response.**
	We do agree with the proposal to provide AFS licensing relief to permit FFSPs to provide funds management financial services to professional investors rather than require FFSPs to obtain an AFS licence although note the terms of the relief proposed by ASIC could be refined, as detailed below.
B1Q2	**Do you agree with our proposal to not provide relief in relation to the provision of a custodial or depository service on the basis that it is covered by reg 7.6.01(1)(k)? If not, why? Please be specific in your response.**
	No, custodial or depository services should also be covered by the relief. Regulation 7.6.01(1)(k) does not cover the field in this respect. For instance if the operator of fund was an FFSP which was a "sub-custodian" under Regulation 7.6.01(k) and the regulation applied with regards to financial products held by it, the master custodian would be required to hold a beneficial interest in the assets of the fund to comply with the regulation. In addition, Regulation 7.6.01(k) requires the recipient of the service (i.e., the master custodian) to be a financial services licensee - not all institutional investors are required to hold a financial services licence.
B2Q1	**Do you agree with our proposed inclusion of 'portfolio management services' as a discrete type of funds management financial service that FFSPs can provide under the relief? If not, why not? Please be specific in your response.**
	While we agree with the inclusion of the concept of 'portfolio management services' as a discrete type of funds management financial service we have a number of comments on the proposed definition, please see our response to B2Q2 and in Appendix B.
B2Q2	**Do you agree with our proposed definition of 'portfolio management services'? If not, why not? Please be specific in your response.**
	We do not agree with the proposed definition of 'portfolio management services', in particular we note: (a) The words "located outside this jurisdiction" are imprecise. It is not clear how you determine the location of an asset that is not a physical asset. In addition, the words "located outside this jurisdiction" appear to mean that FFSPs could not manage any Australian assets (e.g., ASX equities or derivatives with Australian counterparties) from offshore. Whether this is the intention is not clear. Such an interpretation would be problematic where an FFSP is advising on a portfolio of assets that includes some assets "located" in Australia. (b) It is not clear whether the words "management of assets" cover the issue of products (e.g., derivatives) and the provision of financial product advice in respect of products held or to be held by the FFSP. The issuing of derivatives is conduct we would ordinarily expect a large proportion of portfolio managers to engage in.

	(c) The definition should allow the provision of 'portfolio management services' to investment companies, partnerships, stapled fund vehicles and family offices which meet the asset threshold. (d) The definition should also be expanded to include special purpose vehicles held by any of the investors who may be provided 'portfolio management services'. It is also not clear how the provision of services to joint ventures between eligible investors or unincorporated bodies are to be treated.
B2Q3	**Do you agree with our proposed definition of 'eligible Australian users' of portfolio management services? If not, why not? Please be specific in your response.**
	No. Please see our response immediately above in B2Q2. We note that one solution to address the gaps in the definition of 'eligible Australian users' identified in our response to B2Q2 may be to widen the scope to "professional investors" as defined in section 9 of the Corporations Act. We note this appears to have been considered by ASIC, but not adopted (Paragraph 43 of CP 315). While guessing, we imagine this is to prevent the misuse of the relief and ensure it is used by those investors who commonly use funds management services. We suggest that the same result could be achieved by imposing a net assets test in addition to the "professional investor" definition, which would relate to the net assets of the investor or their associates.
B3Q1	**Do you agree with our proposal to apply an aggregated revenue cap to ensure that the financial services provided by FFSPs under the funds management relief are provided on a limited basis? If not, why not?**
	No. There are a number of reasons as to why this is problematic, including the following: (a) Fund managers will often use multiple vehicles (e.g., special purpose entities to act as general partners) for "feeder funds" and separate accounts which will frequently all relate to one overall fund. While a particular foreign company acting as general partner for one feeder fund may derive all or most of its revenue from one investor (and thus exceed the cap), the particular fund or fund manager, overall, will not. We are happy to discuss typical fund structures with ASIC, in this regard. (b) This requirement will restrict the ability of investors to invest in start-up managers of funds in overseas jurisdictions. For example, start-up managers sometimes have a small number of large investors seed their initial funds. Often these start-up managers have worked with institutional investors while part of a more established fund manager allowing them to build relationships with Australian institutional clients. This requirement will mean that Australian investors cannot invest in such funds, in the absence of the fund having an AFSL. This would place Australian investors at a disadvantage when attempting to access highly-credentialed start-up managers and will only assist large established fund managers. In addition, in some investment classes (e.g., venture capital) the size of the funds tend to be smaller, meaning that a small number of Australian investors could potentially cause the manager to exceed the 10% limit. The issues addressed in paragraph (b) could be addressed in two primary ways: first, the limit of 10% could be increased; or, second, sophisticated institutional investors that are of sufficient size to protect their own interests (e.g., large superannuation funds and government funds / entities) could be exempt from the limit.
B3Q2	**What systems and processes will you need to implement to monitor your compliance with the aggregated revenue cap? Please be specific in your response.**
	Smaller start-up fund managers, may implement no systems or processes and simply not allow Australian investors to invest.

	Larger fund managers could rely on registers of ownership, noting that it is not clear how this would work where only one investor came through an investment vehicle.
B3Q3	**What are the costs associated with implementing the systems and processes to monitor compliance with the aggregated revenue cap? Please be specific in your response.**
	Pursuant to our response in B3Q2, it may be that smaller FFSPs incur no direct costs as a result of implementing the systems and processes to monitor compliance with the aggregated revenue cap. Rather, Australian investors would incur the opportunity cost of not being able to invest with such managers, which is unquantifiable. For larger FFSPs we imagine costs would relate to system maintenance and supervision, but are difficult to quantify. Legal advice would also need to be taken in relation to Australian investors and the various thresholds. Conservatively, we estimate that would cost A$50,000 for each fund relying on the relief but it is difficult to estimate. These costs will ultimately be borne by Australian investors.
B3Q4	**Are there any other caps that we should consider as an alternative (see Table 3 for other caps we have considered)? What are the costs associated with monitoring compliance with your alternative cap? Please be specific in your response.**
	In our view neither the "Number-of-clients cap" nor the "Service-specific cap" are appropriate. Our view is that sophisticated institutional investors (e.g., large superannuation funds and government funds / entities) should be exempt from the cap, or the cap substantially increased (for example to 50%).
B3Q5	**Is the proposed aggregated revenue cap able to be applied to all the types of financial services that you may provide to professional investors in Australia (e.g. providing financial product advice)? Please be specific in your response.**
	In the funds management space this would be really difficult and potentially unworkable. Typically a manager simply provides management services (i.e., performs multiple roles and provides multiple services). We are not aware of a manager breaking down services in the way that is contemplated i.e., providing advice; dealing in financial products. Further to this it is important to note these are Australian legal concepts and will not necessarily be recognised by an international fund management community.
B3Q6	**If you currently have the benefit of the limited connection relief and intend to reduce the size of your activities in Australia to have the benefit of the proposed funds management relief, how long would it take to do so? What are the costs associated with this? Please be specific in your response.**
	Not applicable.
B4Q1	**Do you agree with our proposal to impose these conditions on the funds management relief? If not, why not? Please be specific in your response.**
	Subject to our comments on the content informing these obligations, we agree with proposed conditions (d); (e) (f); (g); (h); and (i). We agree that ASIC should: (a) have an express information gathering power in relation to the relief;

	(b) be able to take enforcement action in relation to the actions undertaken in Australia by those relying on the relief, noting that we are of the view that it already has this power; (c) be able to exclude providers from relying on the relief where it has concerns that the provider is not fit to provide services to Australian clients, or where a provider is using the relief in a manner which is contrary to its policy intentions; and (d) require the FFSP retaining adequate proof of compliance with whatever metric ASIC decides upon. However, we do not agree: (a) that a local agent needs to be appointed. In our view that creates an undue regulatory burden upon funds management providers, especially where they may only have one Australian investor and are not carrying on any business in Australia; and (b) with the FFSP submitting to the non-exclusive jurisdiction of Australian courts, especially where the FFSP provides financial services solely to sophisticated institutional investors. It is difficult to imagine why a large Australian superannuation fund, for instance, would want to rely on ASIC's intervention where it is involved in a dispute with an overseas FFSP. The relief also requires that the FFSP must not be registered as a foreign company, and that the FFSP only be carrying on a financial services business because of the operation of section 911D of the Corporations Act. In our experience, it is difficult to apply the carrying on business test when FFSPs are visiting Australia in order to engage with their clients (even where there no other connection to Australia, such as an office). In some cases, FFSPs will register as foreign companies as a matter of prudence in those circumstances. To that end, given the other limited connection conditions proposed, we believe that FFSPs merely visiting Australia in order to engage with their clients should not preclude them from relying on relief in the absence of any other indicia of carrying on business in Australia. In addition, we note the following in relation to the definition of "offshore fund": (a) as it is not clear in all cases whether a partnership is a managed investment scheme, we would recommend that ASIC include specific reference to partnerships in the definition; (b) in some cases, an FFSP may create a separate account for an investor. Accordingly, the definition of managed investment scheme may not be broad enough to capture such arrangements. To that end, we would recommend that ASIC include specific reference to separate accounts and other similar arrangements or make it clear that a managed investment scheme may be constituted by the manager / general partner and a single investor; (c) the requirement that 50% by value of the assets of the scheme or foreign company that are not cash or cash equivalents are located outside the jurisdiction creates the following issues: (i) it does not provide enough flexibility for a scheme / foreign company that may invest in Australian assets in the early stages of its investment period before it is fully invested (at which time the Australian assets comprise less than 50% of the total assets); (ii) a fund that is invested in Australian assets for Australian wholesale clients (e.g., an equities fund), but is managed completely offshore, will need to appoint an AFSL holder (or a representative) to manage the fund; (d) it is not clear why the tax-related conditions have been included given the limited connection requirements of the relief and it is our view that including such a requirement adds another layer of complexity given that it imports tax concepts. If the intention is to exclude funds that are trusts that have an Australian trustee or their central management and control in Australia that should be specifically set out in the relief (but our comment above about the application of the carrying on business test also applies to the application of the central

	management and control test, and also note our more general comment below about Australian professional investors who may prefer Australian structures be used for their investments). Also, the terms "resident trust for CGT purposes" and "resident unit trust" include circumstances where Australian residents hold more than 50% of the beneficial interests in the income or property of the trust - this could be problematic where an offshore manager has established a trust dedicated to Australian clients or a trust for individual Australian clients; (e) the requirement that the fund is established outside Australia and is not operated in Australia precludes an FFSP establishing Australian structures for their Australian professional investors who may prefer such structures for various reasons. Accordingly, ASIC should consider allowing Australian structures established to facilitate their investments managed by FFSPs.
B4Q2	**Are there any other conditions that you think we should impose on FFSPs? Please be specific in your response.**
	No.
B4Q3	**Are there any conditions that you think we should not impose on FFSPs? Please be specific in your response.**
	See response to B4Q1 above.
B4Q4	**Should the provider of the funds management financial services be subject to an additional condition that it be regulated by a regulatory authority that is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU) or the IOSCO Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO Enhanced MMOU)? How would this additional condition affect the provision of funds management financial services to professional investors in Australia? Please be specific in your response.**
	No, we do not agree. Our view is that this may inadvertently limit the flexibility of funds. It is also not clear how this would work in the case of "feeder funds" where one fund had several feeder funds, one of which may be located in a jurisdiction where the regulatory authority is not a signatory to the relevant IOSCO agreements.
B4Q5	**What are the costs associated with complying with these conditions? Please be specific in your response.**
	Tentatively we would suggest each fund manager seeking to rely on the relief would occur approximately A$10,000 - A$20,000 in costs in complying with the conditions. We would expect these costs would include the costs of receiving legal advice regarding the relief and the conditions of the relief and employing a local agent, for which an annual fee is typically charged.
B4Q6	**Do you agree with our proposal to use our powers to require an FFSP to provide information about the services the FFSP provides to professional investors in Australia, as well as its compliance with the proposed aggregated revenue cap? Please be specific in your response.**
	Yes. In our view this would be useful from ASIC's perspective in understanding the services provided by FFSPs and how those services are provided.
B4Q7	**If you disagree with the proposal to use our powers, would you prefer that we impose the requirement to provide an annual declaration about the activities the FFSP conducts in Australia as an explicit condition on the relief? Please be specific in your response.**

	Not applicable, although we note our view is that this would impose unnecessary compliance burdens on FFSPs.
B5Q1	**Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?**
	No, we do not think this timing is sufficient. The transition period should be at least 12 months and possibly two years, in accordance with the transition period for the foreign AFS licensing regime.
Section C: Repeal of the limited connection relief	
C1Q1	**Are there any significant reasons why ASIC should provide an AFS licensing exemption based on reverse solicitation, given our proposed funds management relief in Section B and the licensing exemptions available in reg 7.602AG? Please be specific in your response.**
	No, in our view reverse solicitation would be difficult to regulate, hard to understand for industry participants and give ASIC no insight into the financial services industry.
C1Q2	**If you are an FFSP that may not be able to rely on the proposed new funds management relief or existing statutory licensing exemptions, please outline the specific financial services you wish to provide on a reverse solicitation basis? Please be specific in your response.**
	Not applicable.
C1Q3	**How significant is the volume of those specific financial services provided to Australian clients to your overall business? Please be specific in your response and include quantitative information.**
	Not applicable.
C1Q4	**If a strong case for reverse solicitation relief, as set out in the appendix to this paper, was established, do you agree with our approach to defining reverse solicitation and how it will operate with s911D, as set out in paragraphs 104 and 107–109 respectively? If not, why not? Please be specific in your response.**
	In the event that a strong case for reverse solicitation was established we would agree with it being defined as set out in the paper.
C1Q5	**If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, we consider conditions should apply to the FFSP providing financial services on a reverse solicitation basis. Do you agree with the conditions we set out in paragraph 105? If not, why not?**
	Yes, the conditions are sensible in the event that a strong case for reverse solicitation is established.
C1Q6	**What are the costs associated with complying with the conditions set out in paragraph 105, including maintaining adequate records of proof of reverse solicitation and communications with the investor?**
	Our view is costs would be minimal. We note that the requirement to keep records may impose compliance obligations but we would expect most FFSPs to keep

C1Q7	**If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, are there any mechanisms that could be implemented by the FFSP or the professional investor in Australia to assist in monitoring the conduct of FFSPs to ensure that the engagement was on a reverse solicitation basis? If not, why not? Please be specific in your response.**
	It is difficult to see any mechanisms ASIC could use in this respect. A notification requirement would not necessarily work as, in the case of reverse solicitation, it may be that the FFSP has not considered Australian law and regulatory requirements prior to the approach.
Section D: Changes to our guidance in RG 176	
D1Q1	**Do you think we have provided adequate guidance to FFSPs about how our proposed regulatory framework for FFSPs will apply? If not, why not? Please be specific in your response.**
	No. While the guidance for FFSPs and the proposed regulatory framework is outlined at a high level, it is not particularly clear. We note in particular that some provisions of the Corporations Act from which a foreign AFS licensee is granted relief may be reapplied in PF 209 and it is not clear how PF 209 is to interact with this relief. In noting this, our view is that, provided the regulatory framework reflects those provisions from which relief has been granted under the draft instrument there is an identifiable framework within which the relief will apply. The level to which ASIC's licensing team will take into consideration a FFSPs reliance on the previous relief is not clear. It is also not clear when ASIC may refuse the AFS licence application of an entity that previously relied upon the sufficient equivalence relief.