

JOHNSON WINTER & SLATTERY

Partner: Austin Bell +61 2 8247 9620
Email: [REDACTED]
Associate: Geoffrey Li +61 2 8247 9670
Email: [REDACTED]
DocID: 75804599.1

8 August 2019

Mr Alan Worsley
Senior Specialist
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
BRISBANE QLD 4001

BY EMAIL policy.submissions@asic.gov.au

Dear Mr Worsley

CP 315 submissions

We have taken the opportunity to contribute to the FSC's submissions on CP 315. Except to the extent set out below, we agree with, and support, the FSC's submissions and do not propose to address those issues separately in this submission.

For convenience, terms defined in CP 315 have the same meaning in this letter.

Our further submissions are focused on three main issues:

- B1Q1 – categories of permitted clients for the proposed 'funds management financial services' (FMFS) relief;
- B4Q4 – requirement for FFSPs relying on the FMFS relief to be regulated by a regulatory authority that is a signatory to the IOSCO MMOU; and
- Foreign AFS licensees - audit requirements set out in section 989B of the Corporations Act.

1 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 submit that 'professional investors' (a sub-set of wholesale clients) is unnecessarily narrow. In our view, FFSPs that rely on the FMFS relief (both limbs of the definition of FMFS set out in the current draft legislative instrument) should be able to provide financial services to all wholesale clients in Australia.

The rationale set out in CP 315 acknowledges that "the current limited connection relief was granted to ensure that an FFSP transacting with wholesale clients in Australia would not require an AFS licence when there is a limited connection between the FFSP and Australia."

Level 25, 20 Bond Street
SYDNEY NSW 2000
T +61 2 8274 9555 | F +61 2 8274 9500
www.jws.com.au

Liability limited by a scheme approved under Professional Standards Legislation

It is unclear why the proposed scope of the relief has now changed from 'wholesale clients in Australia' to 'professional investors' (and in the case of portfolio management services, to a subset of professional investors). This is inconsistent with the scope of almost all other AFS licensing relief issued by ASIC. It is also inconsistent with Recommendation 7.3 of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services* – that regulation should be kept as simple as possible and exceptions and carve-outs reduced.

One example of inconsistency is a wholesale client that is seeking to invest more than AUD\$500,000 into a foreign fund, but does not control more than AUD\$10 million. This person would not qualify as a 'professional investor' but would otherwise be able to participate in effectively any other product offering to non-retail clients in Australia (including products that may be higher risk or otherwise are not subject to the same level of regulation as other financial products or services).

Another example is that a 'sophisticated investor' within the meaning of section 761GA of the *Corporations Act 2001* (a category of investors that Australian financial services law has otherwise acknowledged is able to make decisions about products that may be higher risk and are unavailable to retail clients) will be unable to engage the services of an FFSP relying on the proposed FMFS relief. It is unclear why certain sub-sets of wholesale clients have been excluded from the scope of the proposed relief.

In the context of 'portfolio management services' (ie the second limb of the definition of FMFS set out in the current draft legislative instrument), it is, in our view, overly complex and without any corresponding material regulatory benefit to add another sub-set of clients in the regulatory framework that are exempt from certain regulatory requirements. It is unclear why the broader category of wholesale client could not have been used, instead of introducing the new concept of an 'eligible Australian user', and if wholesale clients is too broad, why portfolio management services should not be able to be offered to all professional investors, not just a subset of them.

We submit that extending the FMFS relief uniformly to FFSP's providing services to wholesale clients would, as noted above, be consistent with Recommendation 7.3 of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services*. It would also have the salutary effect of giving investors, that Australian law otherwise acknowledges are able to make financial decisions about products that may be higher risk or otherwise are not subject to the same level of regulation as other financial products or services, the ability to engage FFSPs that rely on the FMFS relief. We submit further that, rather than reducing the number and categories of Australian investors that may obtain financial services from FFSPs relying on the FMFS relief, it would be preferable for the FMFS relief to apply where financial services are provided to all wholesale clients, but only be available to those FFSPs that are from a jurisdiction where the regulatory authority is a signatory to the IOSCO MMOU. We expand on our reasons for this submission further below.

2 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.

The IOSCO MMOU (**MOU**) sets an international benchmark for the cross-border cooperation of financial services regulators. The terms of the MOU prescribe various categories of information and assistance that signatory regulators may request and agree to provide. The

IOSCO Enhanced MMOU (**EMOU**) prescribes further powers and categories of information and assistance that signatory regulators may request and agree to provide.

The MOU currently has 124 signatories and the EMOU currently has 9 full signatories.¹ ASIC is only a partial signatory to the EMOU and has not agreed to provide the “whole set” of information and assistance to other signatories.

The MOU prescribes that signatory regulators may request, and agree to provide, information and assistance:

- to enable reconstruction of all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;
- that identify the beneficial owner and controller of an account;
- for transactions, including the amount purchased or sold, the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction;
- identifying persons who beneficially own or control companies; and
- taking or compelling a person’s statement or, where permissible, testimony under oath, regarding the potential offence.

The draft legislative instrument providing the FMFS relief requires FFSPs to consent to ASIC and the overseas regulator to share information about the FFSP. It also requires the FFSP to agree to take all practicable steps to enable and assist the FFSP’s home regulator and ASIC to share with each other information that relate to the FFSP.

We submit that the FMFS relief should be restricted to FFSPs that are regulated in their home jurisdiction by a regulatory authority that is a signatory to the MOU.

Given that a requirement of the FMFS relief is that ASIC and the FFSP’s home regulator will share information, restricting the relief to entities that are regulated by an entity that is a signatory to a convention that governs the sharing of information should facilitate ASIC being able to enforce the FMFS relief, if required. Moreover, given that there are 124 regulators from 119 countries that are signatory to the MOU, adding this additional requirement should not unduly restrict Australian investors’ choice of, or access to, global investment management capabilities. It would also provide a certain minimum standard, albeit arguably very low, to FFSPs that can rely on the FMFS relief,

3 **Audit requirements for foreign AFS licensees**

The draft legislative instrument, which permits certain FFSPs to obtain a foreign AFS license and be exempt from certain regulatory requirements, does not provide an exemption from the obligations imposed under section 989B of the *Corporations Act 2001*. We submit that it should.

Section 989B provides that:

- “(1) A financial services licensee must, in respect of each financial year, prepare a true and fair profit and loss statement and balance sheet in accordance with this Subdivision.
- (2) The licensee must lodge the statement and balance sheet with ASIC in accordance with this Subdivision.

¹ According to the IOSCO website: <https://www.iosco.org/about/?subSection=mmou&subSection1=signatories> and <https://www.iosco.org/about/?subSection=emmou&subSection1=signatories> [accessed 8 August 2019].

- (3) The licensee must, with the statement and balance sheet, lodge an auditor's report with ASIC containing the information and matters required by the regulations.”

The prescribed form for the lodgement required in paragraphs (2) and (3) above are referred to as FS70 and FS71, respectively.

The policy rationale for requiring a foreign AFS licensee to file this information with ASIC is not immediately obvious given the proposal that foreign AFS licensees be exempt from the financial resource requirements set out in section 912A(1)(d) of the Corporations Act. We submit that, if ASIC exempts an FFSP from the financial resource requirements on the basis that sufficiently equivalent financial resource requirements apply to the FFSP in its home jurisdiction, ASIC should also exempt the FFSP from the audit requirements.

Not exempting foreign AFS licensees from the ongoing audit requirements could result in FFSPs not applying for a foreign AFS licence. Any obligation for FFSPs to file financial statements with a regulator – even on the basis that they are commercial in confidence – could deter FFSPs from obtaining a foreign AFS licence, thereby reducing the choice of global investment management services to Australians. In our view, the potential burden of an FFSP having to comply with section 989B outweighs any regulatory benefit. ASIC has granted similar relief from the audit and reporting requirements under Chapter 2M of the *Corporations Act 2001*.

4 Description of non-cash payment products

There are two references to non-cash payment products in Schedule 1 of the draft legislative instrument applicable for foreign AFS licensees. Column 5 on page 17 refers to “a facility for making non-cash payment” and column 5 on page 20 refers to “a facility through which a person makes non-cash payments”. Is there intended to be a difference between these financial products? Presumably, they should both refer to the Australian term used for non-cash payment products, being the term that will be used on the online AFS licence application and that will subsequently appear on the foreign AFS licence.²

If you have any questions or require clarification on any of our submissions, please contact Austin Bell on 02 8247 9620.

Yours faithfully



² We also query why the order in which the financial products in the various tables in Schedule 1 are not listed in a consistent order across all tables across different jurisdictions.