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Email: policy.submissions@asic.gov.au

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

Norton Rose Fulbright Australia
ABN 32 720 868 049
Level 18, Grosvenor Place
225 George Street
SYDNEY NSW 2000
AUSTRALIA

Tel +61 2 9330 8000
Fax +61 2 9330 8111
GPO Box 3872, Sydney NSW 2001
DX 368 Sydney
nortonrosefulbright.com

Direct line

+61 2 9330 8772

+61 2 9330 8773

Email

[Redacted email address]

Dear Mr Worsley

Consultation Paper 315: Foreign financial services providers: Further consultation

- 1 We welcome the opportunity to comment on ASIC's proposals in ASIC Consultation Paper 315 – *Foreign financial services providers: Further consultation (CP 315)*. In this submission, we have commented in particular on ASIC's proposal to introduce new funds management relief.
- 2 Our Financial Services team regularly advises FFSPs on the licensing and regulatory requirements associated with providing financial services and financial products in Australia. This includes advising FFSPs in applying for sufficient equivalence relief and in relation to individual relief for FFSPs on similar terms.
- 3 We note that the comments provided in this submission do not necessarily reflect the views of our clients.

Introduction of foreign AFSL

- 4 The draft ASIC Regulatory Guide 176 'Foreign financial services providers' (**RG 176**) provides that a streamlined application process will apply for a foreign AFSL.
- 5 It would be useful for ASIC to indicate its target timeframes for reviewing and assessing a foreign Australian financial services licence (**AFSL**). This will assist FFSPs deciding to apply for a foreign AFSL to manage the timeframe required to lodge an application and obtain a foreign AFSL before the proposed end of the transition period for the sufficient equivalence regime on 31 March 2022.

Proposed new funds management relief

- 6 As a general comment, it is important that the funds management relief, including for provision of portfolio management services, is framed in a manner which is workable and likely to be taken up by FFSPs. If this is not the case, then investment choice and access to offshore investment management expertise for relevant Australian investors such as superannuation funds may be narrowed.

Application of relief

- 7 It appears from CP 315 that ASIC considers offshore funds may need relief in relation to dealing in interests or securities of the fund. It may be impractical for both an offshore fund and its investment manager to seek the funds management relief, in circumstances where the investment manager has done the active marketing for the fund.
- 8 There are alternative exemptions which may be available to offshore funds for:
- (1) the provision of general advice under reg 7.1 33H; and
 - (2) dealing in interests of the offshore fund (where it is a corporate fund) under the self-dealing exemption under section 766C(4) of the *Corporations Act 2001* (Cth) (**Act**) in circumstances where the offer of interests in the fund is not made to the public (although we note no corresponding exemption applies for non-corporate funds in these circumstances).
- 9 We would suggest ASIC considers making offshore funds exempt without needing to apply for relief in circumstances where the active marketing in the fund has been done by a third party such as a manager or distributor which has the benefit of the relief. We note the dealing exemptions referred to in paragraph 8(1) above may not always be available and would not be available in the case of a non-corporate fund.
- 10 In addition, we note the scope of financial product advice that would be able to be provided under the proposed relief would be limited, as the proposed relief does not permit advice in relation to the underlying investments of the offshore fund. We suggest this is broadened so that the relief extends to the investments of the fund.

Offshore funds

- 11 It is proposed that the provision of funds management financial services to professional investors is permitted only in relation to offshore funds. It is not uncommon for FFSPs relying on sufficient equivalence relief to establish Australian domiciled funds and be appointed as investment manager by a responsible entity. This includes where the domestic vehicle is established as a feeder fund into an offshore fund. The proposed relief would not include the marketing of the domestic vehicle to professional investors. We therefore suggest that the relief is extended to Australian domiciled funds.

Aggregated revenue cap on the scale of activities

- 12 The aggregated revenue cap is potentially problematic and it may be unduly burdensome to monitor the threshold as currently proposed.
- 13 In particular we note that:
- (1) at CP 315.47, ASIC refers to a FFSP measuring compliance “at the time it proposes to provide the funds management financial service”. This is not practical in the case of the provision of portfolio management services, where services may be provided on an ongoing basis, for example, where daily trading is involved;
 - (2) if offshore funds are included in the proposed funds management relief, and the revenue cap is measured by capital raised (as opposed to fees earned by a manager), then there will be circumstances where the cap may be breached outside of the control of the fund, such as redemptions from the fund by offshore investors; and
 - (3) the earning of performance fees may also result in breach of the cap in circumstances related to performance of the portfolio rather than an expansion of the FFSP’s clients in Australia or new funds under management from clients in Australia.
- 14 In relation alternatives as outlined in ASIC’s query B3Q4, we suggest that ASIC considers a cap on the number of clients, or alternatively consider the funds under management attributable to Australian investors. Alternatively, ASIC could consider adopting a methodology that provides relief

to FFSPs only where one of the following are satisfied: not generating more than a given percentage of its aggregated consolidated gross revenue from the provision of the funds management financial service, or provides services to no more than a given number of clients in Australia, or has no more than a given amount of funds under management attributable to Australian investors. However, even these options may not resolve the measurement and monitoring issues.

Consequences for failing to comply with the aggregated revenue cap

- 15 If the cap is breached, it would not necessarily be prudent or in the interests of Australian investors to terminate the services provided by the FFSP. Instead, we propose that ASIC consider a transitional period, whereby the FFSP notifies ASIC within a specified timeframe of their breach and is given time to remediate the breach. We suggest that immaterial or one-off breaches should not result in a loss of benefit of the relief.

Custodial or depository services

- 16 ASIC is not proposing to provide relief in relation to the provision of a custodial or depository service for the interests of the scheme or body on the basis it is covered by reg 7.6.01(1)(k). ASIC states in CP 315 that it considers in most cases professional investors can engage an AFS licensee as custodian, who can then hold the interests or securities through a foreign sub-custodian in reliance on reg 7.6.01(1)(k) if required.
- 17 It is not clear from CP 315 what circumstances are envisaged here. Professional investors in Australia would usually hold the interests in offshore funds in accordance with their usual custody arrangements. However, we suggest ASIC considers extending the relief to provision of custodial or depository services, in circumstances where a non-corporate offshore fund may be seen as providing a custodial or depository service by holding the assets of the fund.

Portfolio Management Services

- 18 Defining 'portfolio management service' in the proposed legislative instrument as a financial service 'that is the management of assets located outside of Australia' is in our view unclear. We suggest it is linked to specific forms of financial services as defined in Chapter 7, namely, dealing and advisory services.
- 19 It is proposed that portfolio management services are limited to the management of assets located outside Australia. ASIC has not provided a rationale for this limitation. An example of a practical issue with such a limitation is that offshore managers managing a global equities portfolio would need to exclude Australian equities from the portfolio, which is not likely to be practical or in the interests of Australian investors.
- 20 The proposed relief limits the provision of portfolio management services to certain eligible Australian users, limited to:
- (1) an Australian trustee of certain superannuation funds with net assets of at least A\$10 million;
 - (2) a person in Australia that operates a managed investment scheme with net assets of at least A\$10 million;
 - (3) a life company operated in Australia; and
 - (4) an exempt public authority.
- 21 This may significantly restrict (or eliminate) sub-investment management delegations from investment managers based in Australia to FFSPs, as only the 'eligible Australian user' may appoint a FFSP under the proposed relief. We suggest that the concept of 'eligible Australian user' is extended to capture investment managers providing investment management services to the entities currently noted in the proposed definition, to cater for a 'manager of managers' investment strategy.

22 We also note that the term 'eligible Australian user' issued in draft RG 176 but not in the proposed relief instrument. We suggest the same terminology is used in the instrument and RG 176.

Reverse solicitation relief

23 With respect to ASIC's proposal C1 in CP 315, we note that there are currently regulations that allow for a limited form of reverse solicitation to occur, although it is not particularly useful for offshore fund managers. We note the following:

- (1) the exemption available in section 911AD(2D) of the Act, as inserted by reg 7.6.02(AG), is limited in its utility as it only applies to product issuers. Typically, the offshore fund manager or a distributor in its group (rather the fund which is the product issuer) would deal directly with an Australian investor, including with respect to marketing activities;
- (2) the exemption in section 911(2A) of the Act, as inserted by reg 7.6.02(AG), only applies where there is no inducement. However, the provision of the inducement could be said to induce the client not only in relation to that service, but also in relation to additional future services; and
- (3) the exemption in section 911A(2C), as inserted by reg 7.6.02(AG), which applies to the provision of services to the holder of an AFSL, does not apply to an AFSL holder acting as a trustee or responsible entity or on behalf of someone else.

24 These are referred to in the Appendix in ASIC Regulatory Guide 121: Doing financial services business. We consider it would be useful for ASIC to recognise and provide further guidance on these exemptions, given ASIC's statements in CP 315 that it does not propose to provide reverse solicitation relief.

Other issues

RG 176

25 We consider it would be useful for ASIC to provide guidance in RG 176 that the term 'foreign company', as used in the draft funds management relief instrument, is not limited to companies, given FFSPs are often formed as partnerships.

Public database

26 We would suggest a publically available ASIC database that provides a list of entities that are relying on the proposed funds management relief is put in place.

ASIC Information Sheet 157

27 In due course, it would be useful for ASIC to update information sheet 'Foreign financial service providers – practical guidance' (INFO 157), to cover transitional issues and to include information about the application process for the proposed new funds management relief.

We would happy to elaborate on any of our comments if that would be of assistance.

Matthew Farnsworth

Email: [REDACTED]
Tel. +61 2 9330 8772

Jon Ireland

Email: [REDACTED]
Tel. +61 2 9330 8773