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Australian Securities and Investments Commission
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Enhanced beneficial ownership disclosure

Thank you for the opportunity to provide feedback on ASIC's proposed implementation of new legislative provisions on enhanced beneficial ownership disclosure.

The Financial Services Council (FSC) is a peak body which sets mandatory Standards and develops policy for more than 130 member companies in financial services, one of Australia's largest industry sectors. Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses. The financial services industry is responsible for investing more than $4 trillion on behalf of over 16.9 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is one of the largest pools of managed funds in the world.

In our previous submissions, the FSC has detailed the need to ensure that implementation is not overly burdensome on fund managers and superannuation funds. These institutions are already highly regulated and are not the primary target of the legislated measures, which aim to improve transparency over corporate holdings and highlight potential tax and regulatory risks.

As a principle, compliance with the framework for beneficial ownership disclosure should be reasonable and proportionate to the goals of the policy to enhance transparency while promoting competition and market efficiency. It should ensure that these goals are achieved without unreasonable adverse impacts on other policy principles such as efficiency, equity and minimising unintended harmful effects. Elements of the proposed approach are inappropriate in circumstances involving trust structures, and place a significant administrative burden on issuers that is harmful to market efficiency while providing negligible transparency benefits in return.

It is also important to note that the legislation is primarily aimed at corporate structures and does not contemplate the context of trusts. Considering the widespread use of trusts as an investment structure in the financial services sector, the impacts are likely to be significant for Australian beneficiaries who are investors in managed investment trusts and members of superannuation funds. Our feedback is aimed towards ensuring that the current implementation approach is appropriately directed and does not have unintended negative consequences for the overwhelmingly small-scale beneficiaries of the significant pool of assets held through trust structures.

General comments on proposed approach

As noted above, the legislation is generally targeted at corporate forms and does not contemplate circumstances of trust structure, including where a company could be the trustee for many trusts holding both equities and derivatives separately as a fiduciary for many disparate beneficiaries.

Trust structures are utilised for multiple reasons or purposes, without an intent to exercise control or influence over individual companies. The framework does not distinguish between circumstances where a company asserts these types of rights and others, such as where an asset manager holds equities and derivative

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instruments in their capacity as a fiduciary for underlying investors through trust structures such as superannuation funds or managed investment schemes.

The requirements of a fiduciary relationship are for a trustee to treat each trust as a separate entity and only use its assets in the best interest of that trust's beneficiaries. The purposes for which these assets are managed will differ for each trust and the interests of each trust (and the trustee itself) may not align. This gives a misleading impression if combined as an aggregate, as there is no common purpose across the disparate entities, nor intention to exert influence or control over underlying securities.

As we understand a separate stream of reforms with specific application to trusts continues to be developed by Treasury, it is important to minimise the risk of unintended consequences as a result of this corporations-focused legislative package by implementing appropriate ongoing treatment or exclusions to avoid unintended negative consequences. Clarification is therefore required so that the arrangements apply to common trustees, custodians or Responsible Entities (REs) managing multiple superannuation funds or managed investment schemes only at the constituent trust level and do not require aggregation of interests across multiple structures.

It is also important to consider the practicalities of compliance, recognising in particular that there is no set format for information to be provided to funds from custodians, which generally hold the book of record for fund holdings. Obligations must be able to take into account the varying reporting methods and valuation policies applied by custodians at varying points in the process. Asset managers should not be required to conduct significant manual processing to identify and transform the data that has been provided to them, particularly considering the short period of time available to provide information where reporting is required. The cost of developing and implementing such a system or process of manual calculation would be substantial, and would more than likely be passed on to individual investors through higher management fees.

An overriding calculation methodology should not be required to be applied, and funds should be able to rely on the data made available from custodians using their valuation methodology without any need for any onerous and costly additional process to transform this data for reporting.

Recommendation 1: Noting the measures focus on corporate disclosures, ensure that implementation of the legislation does not result in unintended consequences for trust structures. In particular, it should be clarified that a trustee in its fiduciary capacity should not be required to inappropriately aggregate disclosures across multiple entities.

Recommendation 2: Trustees should not have to apply a separate methodology to process information received from custodians using their valuation methodology.

Basket or index derivatives

We disagree with the approach taken towards basket or index derivatives in proposals B4 and B8 of the consultation paper. As currently proposed, the approach would result in extremely onerous administrative and procedural requirements to calculate the weight of individual securities underlying a basket or index derivative, due to the requirement to look through to the basket or index to determine exposure to individual constituent elements. Tracked indices are often supplied by third parties and our members do not have an established process to perform these calculations. The cost of developing and implementing such a system or process of manual calculation would be substantial, and may need to be passed on to individual investors through higher management fees. These implementation costs far outweigh the benefits of disclosing interests.

This additional burden would not be reasonable in the circumstances, particularly considering the primary purpose for holding these derivatives is to facilitate overall exposure to a particular benchmark as opposed to individual securities, and for transactional efficiency in minimising risk at low cost by providing hedging that protects beneficiaries from performance impacts due to large cashflows or index rebalancing. These positions are also often only held for a short period of time. No direct exercise of control over the interest by underlying beneficiaries is intended or available through this holding, as the fund is a passive intermediary.

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Considering these dual purposes, the proposed treatment will provide no benefit to transparency over the exercise of control or influence within individual securities, while potentially limiting accessibility for investors to gain low-cost diversified exposure across an index based on a declared investment strategy.

In order to avoid these negative outcomes, we recommend that the exemption be broadened to extend to derivatives following a publicly available index. This could apply when the derivative is entered into for the purpose of tracking, rebalancing or risk-managing exposure to the disclosed benchmark. Alternatively, it would be valuable for ASIC to provide guidance on the circumstances under which individual applications for relief from the provisions would be available.

On the drafting of the existing exemptions, paragraphs 11(3) and 15(3) of the draft instrument should be amended so that if either limb is satisfied, the number of securities in which the person has a deemed economic interest or offsetting short position is zero. Further, consistent with the intent for the measure to determine a person's deemed economic interest within the basket or index, as opposed to their total position, the language of the draft instrument in 11(3)(a) and 15(3)(a) should be updated to indicate the number is based on the basket or index only.

Additionally, we recommend that the 20 per cent threshold at paragraphs 11(3)(b) and 15(3)(b) of the draft instrument be increased to 50 per cent. This would ensure that cash settled equity derivatives over dominant components of an index (such as the major four banks) do not cause the exemption to not apply by virtue of their relative size and importance in the market.

It would also be helpful for ASIC to expressly confirm that where a deemed economic interest is determined to be zero, there is no requirement to include transactions relating to the derivative in the transaction list of a substantial holding notice for the issuer. This is due to the fact that these would not appear to be transactions resulting in a disclosable movement for the purposes of s 671BB(1).

Recommendation 3: Extend the proposed exemption to include derivative transactions entered into for the purpose of tracking, rebalancing or risk-managing exposure to a disclosed benchmark or index.

Recommendation 4: The draft instrument should be modified to:
- Make clear the intent is for the relevant measure of a person's deemed economic interest is to be within the basket or index; and
- Increase the threshold for weighting of securities in a basket or index to 50 per cent.

Recommendation 5: Provide express clarification that deemed economic interests with a zero value do not need to be included in the list of transactions for an issuer substantial holding filing.

Assessment timing

There is significant uncertainty in the proposed approach as to the time at which the proportion of securities in a basket or index would have to be assessed against the threshold. This timing is essential information as equity prices are continually changing and there are also likely to be constituent changes in a basket or index to which the derivative relates while it is being held. As a result, it should be clarified whether the threshold is to be applied at the time of acquisition, or if there is an expectation of monitoring on an ongoing basis.

If the expectation were to be for assessment to occur on a rolling basis, this would be extremely difficult to determine due to the constantly moving prices and values of shares within the nominated basket or index. The fluctuations would also have no material impact for potential control or influence over the underlying constituent securities, given the changes are occurring without any input from the holder of the derivative.

As noted above, our members do not have an established system or process that is capable of tracking a provider's deemed economic interest based on the weight of the security in the basket or index, or to calculate where it may represent a share of over a certain percentage. Such a system would be costly to develop and onerous to administer, while also potentially resulting in worse outcomes for investors through higher

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administration costs and reduced efficiency.

Recommendation 6: Clarify that the relevant time for calculating the proportion of securities in a basket or index is at the time of acquisition of the derivative (and not on an ongoing basis for derivatives already held).

Exemption where no influence on listed entities

We are supportive of the exemption considered in proposals B11 and B12 to provide an exemption in circumstances where derivatives do not give the licensee any capacity to determine, influence or attempt to influence the affairs of the listed entity.

For the same reasons that market making and client serving activities are not considered to be the focus of the enhanced beneficial ownership disclosure reforms, these exemptions should also be extended to cover AFS licensees that are investment managers and superannuation trustees acting as fiduciaries when dealing in derivatives for the benefit of members of a fund or scheme.

Due to their similar role as facilitators of investment by others seeking exposure to an index, the exemption should be explicitly extended to investment managers and investors fulfilling an investment mandate in line with an index, where there is no intention or capacity to control or influence underlying listed entities.

In particular, passive index funds provide an example of investment activities that should be exempt. As the passive fund does not aim to outperform the index, derivatives are predominantly utilised for hedging, economic exposure or investment efficiency, in order to meet the disclosed investment mandate by following the nominated benchmark.

The types of derivatives entered into by passive funds do not have, and are not reasonably capable of having, the effect of giving the licensee any capacity to determine, influence or attempt to influence the affairs of the listed entity. Many passive investors also have agreements in place that explicitly prohibit the exercise of ownership rights on cash-settled derivatives or settling transactions through physical delivery of shares. In such cases, there is no intention or ability to exercise swaps for shares or otherwise exert any form of influence.

Recommendation 7: Extend the proposed exemption to also include AFS licensees that are investment managers and superannuation trustees dealing in derivatives in a fiduciary capacity for the benefit of members of a fund or scheme.

Recommendation 8: Explicitly include in the exemption passive investment managers and investment managers facilitating an investor obtaining economic exposure to listed securities as part of fulfilling an investment mandate, where no intention or capacity to control or influence listed entities exists.

Avoiding excessive regulatory burden

We have concerns over the unreasonable compliance burden that would be placed on issuers as a result of prescribing a mandatory format for the Register of Relevant Interests (**RRI**). As currently drafted, there is potential for the proposed approach to place a substantial burden on issuers to receive and transform data to fit the requirements of the RRI, despite the fact that they have no control over the structure, quality or format of the information they receive in tracing notice responses.

If issuers were required to receive, interpret, transform and standardise these third party responses into a single prescribed format, the result would be a significant increase in compliance costs, higher reliance on specialised staff to perform these tasks manually, and introduce substantial compliance risks from the process. It would also introduce an element of risk from processing data into the required format where it is incomplete or it is not possible to capture important context from the raw data. The risk of such events would fall on the issuer rather than the third party, although they are only an intermediary in the process.

In order to avoid this considerable regulatory burden, any required standardisation would have to be implemented at the level of the third party providers of the original information. An existing interoperability framework is in place in the European Union, which presents an opportunity to leverage already existing systems used by global custodians and improve the efficiency of implementing any requirement for standardisation of data reporting in Australia.

Alternatively, ASIC could take an approach that improves the structure and usability of the existing disclosure model, without requiring issuers to incur the burden of detailed processing and standardising of these disparate information sources. This approach would allow tracing notice responses from third parties to be summarised as part of a structured index approach, retaining disclosures in the form in which they are received.

A small number of high-level standard data fields on disclosable securities could be indexed, providing a layer of accessibility to the raw data while enabling users to access the relevant disclosure information in its original form. This would ensure that all information required to be recorded is made accessible, while providing a more accurate method of presenting the data with a more appropriate and proportionate level of regulatory burden on issuers.

In any case, the approach should deem that best efforts to comply with the tracing notice requirements should be available as a safeguard against inappropriate compliance outcomes. It should be clearly expressed in guidance that where information has not been provided in tracing notices, there is no requirement for issuers to seek additional information beyond the response or make assumptions about ownership structures that are not expressly provided by third parties in order to comply with data fields required in the standard form.

Recommendation 9: Ensure there is no disproportionate regulatory burden for issuers receiving tracing notice responses that would require interpreting and transforming the information provided into standard data field inputs. Any standardisation requirement should apply to those providing the responses, or alternatively, the raw data source could be reported with a high-level summary to aid accessibility.

Recommendation 10: Clarify in guidance that where an issuer can demonstrate best efforts have been taken to meet the disclosure requirements, this will be deemed sufficient to ensure compliance. This recognises the role of issuers as intermediaries receiving responses from third parties.

Limiting privacy risks to small-scale investors

There are also concerns about the privacy implications for individuals and smaller-scale investors if the system is implemented in a way that exposes their personal information in a granular and widely accessible way. These risks have been identified in other contexts and precautions should also be taken to provide appropriate data and privacy security for information recorded in the RRI.

As the RRI format will be publicly accessible for a number of purposes, there are significant concerns about potential risks of personal information relating to small shareholders or retail investors being able to be extracted from the dataset and inappropriately reused. Consistent with an appropriate and proportional approach to register design, sensitive personal information should be excluded from public registries when the transparency benefit is marginal and privacy risks from its access and misuse are material to potentially impacted individuals.

Risks to personal privacy from widely accessible registers have also been recognised in other contexts. For example, ASIC also recently made changes to rectify similar privacy concerns with the treatment of sensitive personal information relating to company directors, by removing residential addresses from company extracts. Another means of protection is a statutory proper purpose regime, such as the provisions in place relating to accessing a company's register of members under section 173 of the Corporations Act.

Although no equivalent safeguard applies to access the RRI and a proper purpose test was not included in the legislative design, similar risks to privacy and misuse of information exist in this context. Most of these risks are present due to the implementation and design of how the RRI can be accessed, but can be mitigated to some extent through appropriate use of ASIC's discretionary powers.

ASIC should use its broad discretion to issue exemptions under sections 672DA and 672DB of the Corporations Act to apply a materiality threshold to the information reported to the RRI, which would not require reporting where there is no risk of exceeding the ownership threshold. An appropriate minimum threshold could be set to exclude holdings of less than 1 per cent of a listed entity.

Such an exemption would protect the privacy of shareholders who are not the target of the measures, such as individual retail investors, while not affecting the availability of information on larger investors. This would ensure that the framework is proportionate and appropriate considering the potential for unintended consequences, while remaining consistent with the policy intent of improved transparency around significant holdings and potential for control or influence over listed entities.

Recommendation 11: ASIC should use its discretionary powers to exclude interests where there is no risk of the interest exceeding the threshold from being reported on the RRI. An appropriate materiality threshold could be applied, such as on holdings of less than 1 per cent.

Substantial holding notices

Reduce required information

The requirement to give information about a disclosable movement be limited to the last transaction that resulted in the disclosable movement, rather than all historical transactions leading to a change in substantial holding. Requiring all historical transactions to be reported would be potentially burdensome and time-consuming, especially considering it would involve manual input of each individual transaction. This imposition would be particularly significant where fund managers incrementally adjust holdings to track an index.

In addition, providing an automated import feature would improve usability and reduce operational burden by allowing data for a large volume of transactions to be uploaded as a single source. Further efficiencies could be made by removing the requirement to complete the 'present relevant interests' in section 4 where the holder of the interest is the same as the substantial holder in section 1 of the form, consistent with practice in other jurisdictions.

Short lodgement timeframe

We agree with the concept of providing a single substantial holding notice form to meet disclosure obligations, streamlining existing processes that can require multiple separate forms. However, this must also be provided with sufficient time for data to be collated and checked before it is required to be reported.

Consideration should be given to granting more time to provide notice. A 48-hour submission deadline is not feasible for reporting while operating processes to ensure the appropriate quality and accuracy of disclosed information. Requiring lodgement on such short timeframes introduces significant risk of inaccuracy and non-compliance, while also potentially undermining the reputation and effectiveness of the register as an information source.

Recommendation 12: Consideration should be given to streamlining the substantial holding notice requirements by:

- Requiring only the last transaction that resulted in a disclosable movement to be reported;
- Providing an import feature for uploading transaction data;
- Not requiring 'present relevant interests' to be completed where the holder of the relevant interest is the same as the listed substantial holder; and
- Allowing a longer period of time for notifications to be provided.

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Insufficient implementation time period

Requiring industry to implement the proposed approach by December 2026 provides an insufficient lead-in period for compliant systems to be developed and deployed.

A period of at least 12 months from the point at which ASIC finalises and releases the instrument and related guidance is essential to effectively implement the framework. If ASIC is constrained by legislation and is unable to recommend an amendment to this effect, appropriate certainty could be provided by issuing an indication that a no action position would be taken and relief from related breach reporting requirements provided to give sufficient time for system changes to be made.

Recommendation 13: ASIC should provide industry with an implementation period of at least 12 months subsequent to final release of the legislative instrument.

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