

31 March 2023

Investment Managers,
Australian Securities and Investments Commission
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Dear [REDACTED]

Deloitte response to ASIC Consultation Paper 367 Remaking ASIC class orders on financial requirements: [CO 13/760], [CO 13/761] and ASIC Instrument 2022/449

Deloitte Touche Tohmatsu (Deloitte) is pleased to respond to the consultation process of remaking ASIC class orders on financial requirements: [CO 13/760], [CO 13/761] and ASIC Instrument 2022/449 (collectively referred to as “the instruments”).

We support ASIC’s initiative to remake these instruments to ensure they remain relevant and effective. We would like to take this opportunity to provide the following recommendations:

Class Order 13/760

1. Net Tangible Assets (“NTA”) requirement if no registered schemes, IDPSs or retail CCIVs (“fund”) are being operated

Background

Paragraph 912AA(4)(a) requires a licensee that does not operate any registered schemes, investor directed portfolio services (“IDPSs”) or retail corporate collective investment vehicles (“CCIVs”) (collectively referred to as “funds”) to hold a minimum NTA of the greater of:

- (i) \$150,000
- (ii) 0.5% of the average value of fund assets up to \$5 million
- (iii) 10% of average revenue.

If the licensee does not currently operate a fund, the financial risk associated with managing money or assets on behalf of investors is not present. Hence, the NTA requirement in that circumstance is not warranted.

Recommendation

We recommend that subsection 912AA(4) be amended to clarify that the NTA requirement does not apply if the licensee does not operate any fund.

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2. Revenue for NTA calculation for fund operators

Background

Revenue is used as a basis to calculate the required NTA. The definition of revenue includes “*licensee’s revenue (within the meaning given by the accounting standards)*”. The licensee’s revenue often arises from activities and sources other than operating a fund. Such revenues do not represent the financial risk associated with managing money or assets on behalf of investors as a responsible entity (“RE”), IDPS operator or corporate director (collectively referred to as “fund operator”). Hence in our view, the revenue used to calculate the NTA requirement should not include non-fund revenue.

We also note that the description of the benchmark to be used has been changed from “RE and IDPS revenue” to “revenue” in the updated class order which may cause confusion in this regard.

Recommendation

We recommend that the original description of the revenue benchmark be retained (including CCIV) as “RE, IDPS and CCIV revenue”. We also recommend that the definition of this revenue be updated to exclude non-fund revenue so that it aligns with the financial risk associated with managing money or assets on behalf of investors.

3. Value of fund assets (gross vs net) for NTA calculation for fund operators

Background

The value of fund assets is used as a basis to calculate the required NTA. The value of fund assets is defined as the value of the assets of the retail CCIVs, the scheme property and the IDPS property. However, it does not clarify whether the value of such assets and property is to be taken on a gross assets basis or net of liabilities of those funds. To avoid confusion and gain consistency in the application of this law it will be helpful to clarify whether the fund’s gross or net assets should be used for the purpose of calculating NTA.

Recommendation

We recommend that the definition of the value of fund assets be updated to clarify whether value of fund assets should be used on a gross or net basis.

Class Order 13/761

4. Net Tangible Assets (“NTA”) requirement if no custodial or depository services are being provided

Background

Subsection 912AC(2) says “*net tangible assets that apply because it provides a custodial or depository service*”. It means that if the licensee is authorised to provide custodial or depository service but doesn’t actually provide that service, the NTA requirement does not apply.

Subsections 912AC(4) and (5) further exempt licensees from the NTA requirement if all assets are held by another complying custodian. However, it doesn’t clarify that the NTA requirement does not apply if no custodial or depository services are provided by the licensee.

Table 15 contained in Regulatory Guide 166 AFS licencing: Financial requirements ("RG166") states that an incidental provider does not need to meet the NTA requirement if all assets are held by another complying custodian. However, it does not factor the situation where no custodial or depository services are provided at all.

Recommendation

We recommend that subsection 912AC(4) and RG166 be updated to clarify that NTA requirement does not apply if the licensee does not provide any custodial or depository service.

5. Revenue for NTA calculation for custodial or depository services providers

Background

Revenue is used as a basis to calculate the NTA for custodial or depository service providers.

- a) There is an inconsistency in the description of revenue as per section 912AC and RG166 as below:
Per section 912AC(4) – "10% of average revenue"
Per RG166 Table 15 – "10% of average licensed custodial or depository service revenue"

Recommendation – We recommend that the description of revenue per section 912AC be updated as "10% of average licensed custodial or depository service revenue".

- b) Revenue to be used to calculate the required NTA is defined as "the licensee's revenue (within the meaning given by the accounting standards)". The licensee's revenue often arises from activities and sources other than providing custodial or depository services. Such revenues do not represent the operational risk associated with the provision of custodial or depository services.

Recommendation – We recommend that the revenue used to calculate the NTA requirement should not include non-custodial or depository services revenue.

- c) There is an inconsistency in the definition of revenue as per section 912AC and RG166. RG166.167 says
Note 3: The revenue of a licensee includes any revenue of an authorised representative of the licensee acting on the licensee's behalf.

Section 912AC does not make reference to the revenue of authorised representatives.

Recommendation – We recommend that Note 3 in RG166.167 be removed to bring the definition in line with section 912AC and avoid any confusion.

- d) We note that the definition of revenue in section 912AC has now been updated to include:

"(b) to the extent it is not the licensee's revenue (within the meaning of the accounting standards)—any amount paid or payable out of the scheme property of a registered scheme, IDPS property or assets of a retail CCIV for the performance of the obligations imposed on the licensee in connection with operating that registered scheme, IDPS or retail CCIV respectively; even if those obligations are performed by another entity."

In our view, this is relevant for fund operators who engage external service providers in connection with operating a fund but not for custodial and depository service providers.

Recommendation – We recommend that paragraph (b) stated above be removed from the definition of revenue for custodial and depository service providers.

6. Treatment of Deferred Tax Assets

Background

We note that there is some inconsistency between various ASIC instruments in the treatment of deferred tax assets when calculating NTA.

The definition of 'excluded assets' in ASIC Class Orders CO 13/760 and CO 13/761 state:

"Excluded assets mean, in relation to a financial services license:

(a) intangible assets (excluding, for the avoidance of doubt, a deferred tax asset) ..."

However, ASIC Corporations (Financial Requirements for Issuers of Retail OTC Derivatives) Instrument 2022/705 ("Instrument 2022/705") states:

"Excluded assets means in relation to a financial services licensee:

"(a) intangible assets (including, for the avoidance of doubt, a deferred tax asset)"

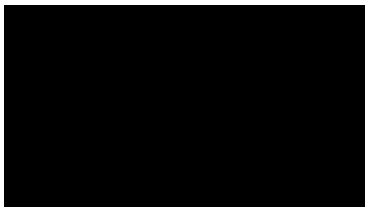
We agree with ASIC's position in CO 13/760 and CO 13/761 to exclude DTAs from intangible assets. However, we request that ASIC clarify the definition of excluded assets in Instrument 2022/705 to remove the confusion.

Recommendation – We recommend that the definition of Excluded Assets in Instrument 2022/705 be updated to exclude DTAs being considered as an intangible asset consistent with the other ASIC Class Orders.

We welcome the opportunity to discuss these matters further with you. If you have any questions, please do not hesitate to contact me at [REDACTED]

Thank you for considering our feedback.

Yours sincerely



Deloitte Touche Tohmatsu