Law Council
OF AUSTRALIA

Business Law Section

9 August 2019

Alan Worsley
Senior Specialist, Strategic Policy
Australian Securities and Investments Commission
Level 5, 100 Market Street
Sydney NSW 2000

By email: policy.submissions@asic.gov.au

Dear Mr Worlsey

ASIC Consultation Paper 315 Foreign financial service providers: Further consultation

We refer to ASIC Consultation Paper 315 Foreign financial service providers: Further consultation (**CP 315**).

The Financial Services Committee and Corporations Committee of the Business Law Section of the Law Council welcome the opportunity to provide a submission in relation to CP 315 and appreciates the opportunity to be involved in the consultation process.

1. Summary of our position

(a) We reiterate the following views we previously expressed in our response to ASIC Consultation Paper 301 *Foreign financial service providers* (**CP 301***)*, provided approximately 12 months ago:

(i) we support ASIC's overarching regulatory objective to ensure that the regulation of foreign financial service providers (**FFSPs**) providing financial services to wholesale clients in Australia strikes the appropriate balance between investment facilitation, market integrity and investor protection;

(ii) we do not agree with the level of regulation of FFSPs that has been proposed and maintain our preference to continue the status quo, which would involve ASIC continuing to make the "limited connection" and the "sufficient equivalence" class order relief available; and

(iii) we consider that any ASIC concerns about the way the class orders currently work could be adequately addressed by introducing additional requirements into the existing class orders, and that this would be more cost-effective than requiring the FFSPs which are currently eligible for class order relief to obtain an Australian financial services licence (**AFSL**).

(b) We refer to the obligation imposed on ASIC by subsection 1(2A) of the *Australian Securities and Investments Commission Act 2001* (Cth) to consider the effects that the performance of its functions and exercise of its powers will have on competition in the financial system. We do not consider that imposing the AFSL requirement on FFSPs that have historically operated under the sufficient equivalence or limited connection class orders and/or individual exemptions is conducive to promoting competition in the provision of financial services to wholesale clients in Australia, as it will likely result in some providers exiting the Australian market. We do not consider that the proposed "funds management relief" exemption would adequately address concerns about a reduction in competition.

(c) Adopting a more restrictive policy position relating to FFSPs who service only wholesale clients in Australia at this point in time appears to be at odds with the policy objective of opening up Australian markets to appropriately regulated foreign investment products under the recently introduced (and long awaited) Asia Region Funds Passport (**ARFP**) regime.[1] It is difficult to understand why FFSPs who service only wholesale clients in Australia are facing the prospect of greater regulatory burdens when a new regulatory gateway has just been provided (through the ARFP regime) to foreign regulated fund managers seeking investment capital from retail clients in Australia.

(d) As noted in paragraph (a) above, we consider that ASIC could use and enhance the existing class order regime to sufficiently monitor and sanction the behaviour of FFSPs, instead of requiring FFSPs to hold an AFSL and then partially exempting them from the AFSL regime. We submit that ASIC could amend the existing class orders so that they would only apply to FFSPs if they met certain conduct obligations (which could mirror some of the obligations of AFSL holders, where appropriate). We note that:

    (i) ASIC has the power under the class orders to notify FFSPs that they are excluded from relying on the class order, which would allow ASIC to stop the FFSP providing financial services in Australia in a more streamlined manner than going through the formal AFSL suspension or cancellation process; and

    (ii) if ASIC had particular concerns about an FFSP's activities, it would be open for ASIC to exclude that FFSP from relying on a class order and introduce an individual AFSL exemption instrument which contained more onerous obligations – in a similar manner to the way in which ASIC will from time to time impose additional non-standard AFSL conditions to address compliance concerns about a particular licensee.

(e) We thank ASIC for considering our previous submission on CP 301 and acknowledge that our request for a 24 month transition period instead of the original 12 month period has to some extent been taken on board in the revised proposals.

[1] We acknowledge that foreign issuers relying on the ARFP exemptions do need to hold their own AFSL or offer their products through an AFSL holder, including to retail clients in Australia, and we consider this to be an appropriate outcome, particularly given the result was driven by Treasury of the Australian Government policy, with collaboration from ASIC.

2. Our responses to the specific questions posed in CP 315

   (a) We have **attached** a table setting out our response to each specific question posed by ASIC in CP 315.

   (b) Where we disagree with an ASIC proposal, we have explained the basis for our views.

   (c) Even where we disagree with a proposal ASIC has put forward, we have made constructive suggestions as to how ASIC might best implement the relevant proposal, should it choose to proceed.

   (d) We hope that ASIC will take this feedback on board and that it will prove useful in determining the final policy outcome.

If you wish to discuss or have any questions or comments on this submission, please do not hesitate to contact Financial Services Committee members Henrietta Thomas, Tabcorp Limited (Committee Chair) or Pip Bell, PMC Legal (Committee Member) or Corporations Committee member Jeremy Williams, Goldman Sachs (Committee Member).

Yours sincerely

Rebecca Maslen-Stannage
Chair, Business Law Section

Attachment – Table of responses to specific questions from ASIC

ASIC Question	Response
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 agree in principle with the concept of allowing financial services to be provided to wholesale clients in Australia without being required to hold an AFSL. We would prefer to see the breadth of the exceptions in the class orders retained, with additional safeguards added if necessary to address any concerns ASIC has about the operation of the relief. If the existing "sufficient equivalence" class orders are not going to be retained, then we support having some form of AFSL exemption available. We note that the proposed relief in the draft instrument would only apply to a "foreign company" (which has not been defined). We are aware of FFSPs that use other structures (such as a limited partnership). We therefore recommend that the relief be available to an "entity" (as defined in the draft instrument) rather than a "foreign company". We further request that ASIC consider permitting an FFSP to apply for the relief at the corporate group or investment manager level, rather than at the level of a specific entity or fund. We believe that this approach would best achieve ASIC's objectives, whilst minimising the administrative burden for the FFSP and fund vehicles that it manages or advises. The proposed relief in the draft instrument would also only apply where the FFSP is carrying on a financial services business in Australia "only because of the operation of section 911D". We consider this to be too narrow and would unduly restrict reliance on the relief. We also note that there are differing interpretations of what "inducing" involves for section 911D purposes and therefore, if section 911D is going to be relevant to the relief, we recommend that ASIC provide clear guidance around its interpretation of "inducing" – for example, clarify whether it is meant to only cover approaches made to non-existing clients of the FFSP, or whether activities that involve servicing existing clients (such as client care visits and/or portfolio reporting) would come within the "inducing" concept.

ASIC Question	Response
	We consider that an FFSP should be able to engage in activities that are ancillary to financial services it is already providing in reliance on an AFSL exemption to an existing wholesale client in Australia (such as client care and portfolio reporting), as well as engage in activities that it is already providing in reliance on an existing AFSL exemption, without triggering the AFSL requirement. FFSPs should not be deterred, discouraged or prevented from providing client relationship management and support services that are associated with the ongoing delivery of financial services which the FFSP provided in reliance on an AFSL exemption. Equally, FFSPs should be permitted to continue to engage in activities with respect to Australian investors where such activities fall within an existing AFSL exemption. We consider that there are a number of other problems with the proposed funds management relief, which we have explained in more detail in response to specific questions below. In addition, we think ASIC should give consideration to expanding the funds management relief to capture other products. One example where we think this would be appropriate, is for debt capital market product, in particular, having regard to the cross-border nature of fixed income markets. For example, in cases where Australian investors seek to access issuance in offshore markets or Australian issuers seek to access offshore debt capital markets, FFSPs may provide advisory and dealing services to Australian investors or the Australian issuer. However, in the absence of a proposal to exempt such FFSPs from licensing, these FFSPs may be deterred from extending their services to Australian investors and issuers given licensing implications. This could restrict investment opportunities for Australian investors and limit offshore access to funds for Australian companies in the future.

ASIC Question	Response
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.	We do not agree with this proposal. In addition to some of the practical limitations the proposal creates, which we outline below, we also do not understand the policy rationale for the decision. We consider that regulation 7.6.01(1)(k) will be too narrow because it only applies to financial services provided in respect of arrangements where there is an Australian licensed provider of custodial or depository services holding an interest in a financial product on behalf of an investor in Australia. We have no reason to believe or expect that every wholesale client in Australia receiving these types of funds management services from FFSPs would necessarily use a structure for holding their investments that would fall within the scope of regulation 7.6.01(1)(k). This practically limits the ability of Australian investors to select the most appropriate custodian. In addition, the provision of custodial or depository services is an important part of a fund (structured as a non-corporate vehicle such as trusts or limited partnerships in certain jurisdictions) offering interests to Australian investors. In these cases, the operator of the fund (e.g., trustee, general partner, etc.) will hold the fund's assets on trust for, or on behalf of, investors in the fund and, therefore, be providing a custodial or depository service regardless of whether it then appoints a "master custodian". We believe that regulation 7.6.01(1)(k) would not be sufficient in these situations. ASIC has not provided an explanation in paragraph 39 of CP 315 to support this assumption.

ASIC Question	Response
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.	As noted above, we would prefer that ASIC retain the breadth of the relief available under the current class orders. If ASIC is intent on only providing relief in narrower circumstances going forward, then we do not disagree with having a concept of "portfolio management services" which can be provided without an AFSL. We have identified problems with ASIC's proposed definition of this concept in response to specific questions below.

ASIC Question	Response
B2Q2 Do you agree with our proposed definition of 'portfolio management services'? If not, why not? Please be specific in your response.	We have identified the following issues with ASIC's proposed definition of "portfolio management services": (a) a lack of clarity as to what "management of assets" means; (b) the "management of assets located outside of Australia" requirement; and (c) what constitutes "assets" for the purpose of the instrument. With respect to (a), it would be clearer and preferable to specify the types of financial services which fall within the definition of "portfolio management services" by reference to financial services as defined in Division 4 of Part 7.1 of the Corporations Act (for example, dealing in a financial product, providing financial product advice, making a market in a financial product and providing a custodial or depository service). With respect to (b), wholesale clients in Australia may invest money with an offshore fund manager that has a global investment mandate and the global portfolio will not necessarily exclude Australian assets. We do not consider that the inclusion of a relatively insignificant proportion of Australian assets in a portfolio should preclude reliance on the AFSL exemption. Rather, we consider that it should be only the entity providing the financial services, rather than the assets, which should be required to be located outside of Australia in order for the relief to apply. It is also not clear what "located outside of Australia" would entail for certain financial products, for example, derivatives. If ASIC determines to keep the requirement that the assets be located outside Australia, we request that ASIC include a reasonable minimum value or percent of assets located in Australia that would be permissible. To be consistent with the "offshore fund" definition in the draft instrument, we believe that a 50% minimum in relation to non-cash offshore assets would be appropriate. With respect to (c), it is not clear what would be encapsulated within the term "assets". For example, it is not evident that it would include rights, liabilities and obligations under derivatives and other instruments that may comprise a portfolio. Accordingly, we think it would be better to use the term "property" as defined in section 9 of the Corporations Act.

ASIC Question	Response
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.	We do not agree with the proposed definition of "eligible Australian users". We submit that the relief should be available to all wholesale clients, and at least to all wholesale clients that meet the current definition of "professional investor". It would be more consistent (and considerably less confusing) if both limbs of "funds management financial services" were, by definition, provided to professional investors in Australia. We do not consider that ASIC has articulated a coherent rationale for limiting "portfolio management services" to a sub-set of professional investors (for example, why listed entities, authorised deposit-taking institutions and general insurance companies investing their own funds are excluded). We also understand that, for various reasons, certain institutional investors, such as large superannuation funds, establish separate vehicles to hold their investments, in which case, they would be excluded from the definition of "eligible Australian user". It may also exclude a local investment manager who sub-delegates management of an investment portfolio to an FFSP (the local investment manager may be managing the assets of, but not necessarily "operating" (which for which there may be a separate trustee) a managed investment scheme with net assets of at least $10 million). We were also confused by the use of the term "eligible Australian users" in CP 315 because it was not used in the draft ASIC instrument. The draft instrument provided with CP 315 for funds management financial services states that a "funds management financial service" involves *either* dealing in, providing advice about or making a market with a professional investor in relation to interests or securities issued by an offshore fund, *or* "portfolio management services".

ASIC Question	Response
	However, table 1 and paragraph RG 176.118 of the draft regulatory guide accompanying CP 315 provide a definition of "funds management financial services" which appears to involve *both* dealing in, providing advice about or making a market with a professional investor in relation to interests or securities issued by an offshore fund *and* providing "portfolio management services". We assume that an FFSP would not need to be providing both these types of financial services to be eligible for relief. It is difficult to make comments on proposals when the consultation documents do not express concepts in a consistent manner, and we recommend that care is taken before releasing any final instrument and regulatory guide to ensure that any unnecessary inconsistency is avoided.

ASIC Question	Response
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?	We anticipate that the 10% revenue cap will be impractical and create complexity. Again, we would prefer that the status quo under the existing ASIC class orders be retained. If ASIC is going to require FFSPs to hold an AFSL, then we agree in principle that an obligation to hold an AFSL should only be triggered when a threshold amount of the FFSP's business is being conducted in Australia. However, ASIC's proposal creates uncertainty, not only for the FFSP, but also the investor. This is because the revenue cap may be breached due to matters outside of the FFSP's control. For example, a redemption from a fund by an investor outside of Australia could cause the proportion of revenue from professional investors in Australia to increase. We consider that: (a) a 10% of annual aggregated consolidated gross revenue is too low and a higher percentage would be appropriate, for example, 30%; (b) the cap should be limited to a cap on revenue for the most recently completed financial year; (c) it should be sufficient for an FFSP to provide reasonable evidence to ASIC of meeting the revenue cap following a request from ASIC; and (d) the assessment of whether the cap is complied with should be: (i) applied across the corporate group as a whole, and not to the individual FFSP, and should exclude any revenue generated by an AFSL holder within the group; and (ii) undertaken at the time of each applicable first service offering e.g. first offer of a fund interest to a new investor.

ASIC Question	Response
	During a financial year an FFSP will not know what proportion of its gross revenue or consolidated gross revenue will be earned from its Australian activities at financial year end. If it transpires that, during a financial year in which the FFSP relies on the exemption, the revenue cap is exceeded, ASIC should allow the FFSP to have the benefit of a transitional period, commencing from the time when they become aware that the revenue cap has been exceeded, to allow sufficient time for them to obtain an AFSL and/or restructure their activities so that the relief still applies. For this purpose, we suggest a mechanism whereby ASIC is notified once the revenue cap is exceeded the FFSP is then given a specified timeframe (we suggest 24 months or at least 12 months) to obtain an AFSL or adjust its activities so that it no longer exceeds the revenue cap. This will also provide greater certainty to Australian investors of an FFSP's relief/exemption status. This suggestion reflects the fact that an FFSP does not have control of the relative proportion of its global revenue or consolidated global revenue that its Australian revenue represents. For example, Australian revenue could proportionately increase without any change in the number of clients or A$ value of funds under management in situations where the FFSP ceases to provide services to investors in other countries (for reasons such as the sale of another business of the group in one or more countries, the termination of a particular investment product offered to investors in certain countries, a larger than expected withdrawal of funds under management from one or more investors in other countries, or even potentially an appreciation in the Australian dollar against other currencies or a depreciation of other countries against the Australian dollar).

ASIC Question	Response
	In addition, we believe that applying the revenue cap at both the corporate group level and the entity level would be overly complex and impractical. We believe that the objectives of the revenue cap (i.e. limiting the relief to FFSPs that have limited business operations in Australia) can be satisfied by applying the revenue cap at the corporate group level. If applied at the entity specific level, there may be circumstances outside of the control of the FFSP causing the revenue cap to be exceeded and it would be difficult for the FFSP to adjust its activities to bring itself back within the revenue cap. For example, if the FFSP is managing a closed-ended fund, if the revenue cap is exceeded due to a non-Australian investor withdrawing from the fund, it may be difficult for the FFSP to adjust its activities to bring itself back within the cap, even given a 12-24 month grace period. Also, from the perspective of global regulatory consistency, we are unaware of any regulatory regime which requires an individual fund vehicle (rather than the fund's investment manager) to hold a licence (as opposed to, for example regulatory registration), which could be required for offshore funds structured as corporations under this current proposal if they exceed the revenue cap. We therefore believe that it would be more appropriate for the revenue cap to apply only at the corporate group level and not to the FFSP.

ASIC Question	Response
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.	We expect the systems and processes will vary depending on the nature, size and complexity of individual FFSPs, so we are not in a position to comment on behalf of individual FFSPs. However, our understanding is that imposing the aggregated revenue cap would introduce additional complexity for the affected FFSPs. The greater number of jurisdictions the FFSP and its related entities provide financial services in, the more complex it will be to comply. We note that revenue earned in different countries will be denominated in different currencies. The base currency used to perform the revenue calculation could impact the proportion that activities in each respective country represents. The introduction of these caps is likely to require the need to develop a specific control framework, including system controls, to capture the data on an on-going real time basis and will involve deploying associated employee headcount to monitor and respond to that data. In addition, we envisage that there would be ongoing additional financial audit costs, on at least an annual basis, in order to provide assurances that the calculations relating to the revenue cap had been made with accuracy.

ASIC Question	Response
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.	The difficulty with the proposal is that the impact will be felt differently across organisations depending on their size and complexity. Accordingly, we are not in a position to comment on behalf of individual FFSPs. However, for a large financial institution conducting a global business with multiple fund and product offerings, the up-front cost of building the control framework and the ongoing cost of employee time associated with monitoring and responding to the data produced is likely to be significant (potentially hundreds of thousands of dollars, at a minimum).

ASIC Question	Response
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.	We do not agree with the alternatives in Table 3. We consider a threshold of 3 professional investor clients (Option 1) to be too low. Mergers, acquisitions and divestments could cause the number of clients an FFSP has to increase for reasons outside their control. Any client cap should apply to the number of clients who actually *receive* financial services from the FFSP. An FFSP would not know in advance whether it would need to market its services to 3, 10 or 30 potential clients in order to secure 3 professional investor clients in Australia. Moreover, a client cap may not be commensurate with the size of the specific FFSP, and would likely be more difficult for larger corporate groups to comply with. We consider that service-specific caps (Option 2) would be too difficult to monitor and breaking down revenue by reference to services could be an artificial distinction – one revenue stream could relate to both advice and dealing services, for example. In addition, imposing such a cap in relation to an activity such as 'issuing' may have the consequence of reducing the ability of an FFSP to structure appropriate products for its Australian investors, for example by excluding an FFSP from being able to provide 'fund of one' investment structures, which are commonly utilised by large superannuation funds and sovereign wealth funds for, amongst other reasons, ease of administration and to assist with ring-fencing potential liabilities. We consider that a straight A$ value revenue cap would be the most simple for an FFSP to monitor because it would not be impacted by business activities in other jurisdictions. Another option for ASIC to consider is to vary how the cap operates by reference to the size of the relevant business, similar to the way in which the net tangible assets financial requirements are applied to AFSL holders.

ASIC Question	Response
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.	We are not in a position to comment on behalf of individual FFSPs. However, we understand that it should be possible to attribute revenue to the financial services an FFSP provides to an Australian investor. Although certain financial services may not directly generate revenue for the FFSP (e.g., marketing a fund may constitute providing financial product advice, but may not, without the investor making an investment in the fund, generate revenue for the FFSP), taken as a whole, it should be possible to attribute revenue to Australian investors generally.

ASIC Question	Response
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.	Our preference is for the limited connection to be retained. If ASIC is not prepared to continue the limited connection going forward, then we submit that ASIC should continue to allow FFSPs which, to date, have been relying on the limited connection relief, to continue the business they have been conducting to date in reliance on that exemption. Rather than withdrawing the class order, ASIC could amend it so that the AFSL exemption was limited to financial services provided to clients by FFSPs where the FFSP had begun to provide that service to that client before a date specified in the class order. This would ensure that FFSPs which have to date relied on the limited connection relief in good faith would not be unfairly disadvantaged by the shift in ASIC policy away from allowing FFSPs to service wholesale clients in Australia without facing a significant regulatory burden. It would be open to ASIC to also introduce a requirement for affected FFSPs to notify ASIC that they were relying on the limited connection relief if ASIC wished to have the ability to more closely monitor such activities and ensure that they were conducted within the intended scope of the exemption.

ASIC Question	Response
	In making these suggestions, we note that there could be situations where obtaining an AFSL is not an economically viable proposition for an FFSP and the FFSP does not otherwise qualify for relief. Under these circumstances, the FFSP may be forced to terminate its relationship with the Australian investor, under terms that may be unfavourable to the Australian investor and the fund as a whole (e.g., by forcing the Australian investor to make a compulsory redemption from the fund, which may require assets to be sold at a point in time when the asset price is at a steep discount). There may also be scenarios where the FFSP is contractually bound to continue providing particular services to a client in Australia that have historically been provided in reliance on the "limited connection" relief, and the Australian investor refuses to engage a related Australian group entity of the FFSP to provide the service in place of the FFSP (e.g. due to its own internal risk management requirements). Similarly, the FFSP would be forced to terminate its relationship with the Australian investor in such circumstances. The change in approach ASIC is proposing to take would be problematic in this scenario.

<table>
<tr><th>ASIC Question</th><th>Response</th></tr>
<tr><td>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.</td><td>Set out below are our views on each respective condition ASIC is seeking to impose:<table>
<tr><th>Proposed ASIC condition</th><th>Our view on the proposed condition</th></tr>
<tr><td>(a) the FFSP must not be carrying on a business in Australia;</td><td>We do not object.</td></tr>
<tr><td>(b) the FFSP has appointed a local agent who is authorised to accept, on the FFSP’s behalf, service of process and notices;</td><td>We do not object to the inclusion of this condition, which forms part of the existing sufficient equivalence class orders.</td></tr>
<tr><td>(c) the FFSP must enter into a deed submitting to the non-exclusive jurisdiction of the Australian courts in relation to action by ASIC and other Australian government entities, and lodge it with ASIC;</td><td>We do not object to the inclusion of this condition, which forms part of the existing sufficient equivalence class orders.</td></tr>
<tr><td>(d) the FFSP must notify ASIC of the types of funds management financial services it intends to provide to professional investors in Australia;</td><td>We do not object to the inclusion of this condition, which forms part of the existing sufficient equivalence class orders.</td></tr>
<tr><td>(e) the FFSP must maintain adequate proof of its compliance with the proposed 10% aggregated revenue cap (see proposal B3);</td><td>We do not agree with the revenue cap.

If there is an “adequate proof” requirement, ASIC should clarify by providing examples of what is and is not “adequate proof” for this purpose.</td></tr>
<tr><td>(f) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C);</td><td>We do not object.</td></tr>
</table></td></tr>
</table>

ASIC Question	Response		
	(g) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E);	We do not object.	
	(h) the financial services must be provided only to clients in Australia who meet the definition of professional investor, or, in the case of portfolio management services, only to clients who meet the definition of eligible Australian user;	Please refer to our response to B2Q3 set out above.	
	(i) the FFSP cannot rely on the relief if ASIC has notified the FFSP, or its agent, that the FFSP is excluded from relying on the relief, and ASIC has not withdrawn the notice.	We do not object to the inclusion of this condition, which forms part of the existing sufficient equivalence class orders.	

ASIC Question	Response
B4Q2 Are there any other conditions that you think we should impose on FFSPs? Please be specific in your response.	No.

ASIC Question	Response
B4Q3 Are there any conditions that you think we should not impose on FFSPs? Please be specific in your response.	As noted above in our response to B4Q1 (and for the reasons outlined above), we do not agree with imposing the revenue cap and we do not agree with limiting the exemption for "portfolio management services" to "eligible Australian users". If ASIC determines to impose such requirements, we believe that refinements (as outlined above) will need to be made in order for the relief to be workable for an FFSP.

ASIC Question	Response
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 anticipate that ASIC would liaise directly with the relevant foreign regulators with respect to the FFSPs' activities, so the cooperation arrangements that ASIC and the foreign regulator have bilaterally agreed and implemented are more important. We are not persuaded that imposing this condition would make a material difference and ASIC has provided no explanation in CP 315 as to what any perceived benefits of imposing this condition might be. In fact, it could further restrict Australian investors from being able to access certain markets or products.

ASIC Question	Response
B4Q5 What are the costs associated with complying with these conditions? Please be specific in your response.	We are not in a position to comment on behalf of individual FFSPs. Again, the costs will vary depending on the nature, size and complexity of the FFSP.

ASIC Question	Response
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.	We do not object to ASIC using its powers to obtain information from FFSPs relying on exemptions. As we have mentioned, we would prefer for ASIC to retain existing class order exemptions and make more effective use of its powers to monitor the conduct of FFSPs rather than to require FFSPs that are not eligible for the proposed funds management relief or any other exemptions to obtain an AFSL.

ASIC Question	Response
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.	We do not disagree with ASIC's proposal to use its powers. We don't see any particular benefit arising from an annual declaration.

ASIC Question	Response
B5Q1 Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?	We do not agree with the proposed transitional period. We consider that six months is an insufficient time to facilitate compliance with the proposed conditions of the funds management relief. We are concerned that FFSPs who would not be eligible for the funds management exemption may be unable to obtain an AFSL by 30 September 2020 due to ASIC's Licensing function's resourcing constraints. Historically ASIC has reduced the resourcing allocated to the Licensing function in recent years. We consider that this proposal would require ASIC to increase its resourcing allocation to the Licensing function for at least the transition period and, to a lesser extent, on an ongoing basis. As far as we are aware, the federal government has not announced any additional funding to ASIC for this purpose. We note that when ASIC introduced ASIC Corporations (Managed Discretionary Accounts) Instrument 2016/968 on 1 October 2016, ASIC allowed managed discretionary account (**MDA**) providers who, until that time, had been offering their MDA services under the ASIC no-action letter for regulated platforms until 1 October 2018 to comply with the new requirements. We advocate a consistent approach by ASIC and therefore recommend a 24 month transition period, which would also be consistent with the other proposals in CP 315 for the foreign regulated FFSPs which currently rely on sufficient equivalence class orders.

ASIC Question	Response
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 7.6.02AG? Please be specific in your response.	Yes. We are not persuaded that there is a clear basis for ASIC to distinguish itself from other regulators in key financial centres with respect to reverse solicitation relief. The licensing exemptions in regulation 7.6.02AG are too narrow and in some cases very fact-specific, as discussed in the examples below. With respect to notional section 911A(2A) of the Corporations Act, as we have mentioned above, the question of whether someone is engaging in conduct intended (or likely) to induce people in Australia to use the financial services they provide depends on the breadth of the concept of what constitutes "inducing". Clear guidance from ASIC as to what falls within and outside the "inducing" concept would be beneficial. Similarly, notional section 911A(2C) of the Corporations Act is only applicable when the recipient of the financial service is not a trustee or responsible entity. In our experience trustees and responsible entities do engage FFSPs to provide investment management services.

ASIC Question	Response
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.	We are unable to comment on behalf of any individual FFSPs. We reiterate the specific examples we gave in our previous submission in response to CP 301, which would not be covered by the proposed funds management relief: (a) fund structures that include a general partner (typically a special purpose Cayman Islands entity which is ultimately owned by an FFSP) of Cayman Islands limited partnerships (managed investment schemes) which offer interests in the limited partnership to professional/institutional type investors globally; and (b) bodies such as listed investment companies (LICs) that issue interests in themselves and are taken to be dealing in a financial product under subsection 766C(5) of the Corporations Act. With respect to (a), the limited partnership will typically appoint an external (third party) custodian. Where one single investor in the limited partnership is an Australian domiciled professional/institutional entity, Australian licensing requirements could be triggered. Because the fund is structured as a limited partnership, under Australian law, there is a risk that (1) the custodian could be 'inducing' Australian clients (the Australian limited partner investors); and (2) the general partner is 'arranging' custodial services to be provided to each limited partner by the custodian. Where the custodian is not licensed or exempt from Australian licensing requirements, then the 'arranging' of these custody services through the general partner may attract a licensing requirement. Without the limited connection relief, it may not be possible for the general partner to rely on any exemption in relation to the general partner 'arranging' for the provision of the custody services to the Australian client (the Australian limited partners). With regard to (b), an issue of shares in the LIC to an Australian institutional investor will, without some form of relief, trigger an AFS licensing requirement for the LIC. This is particularly difficult to structure around without triggering an AFSL requirement, considering the breadth of scope of section 911D.

ASIC Question	Response
	We do not intend for the above examples to be considered exhaustive and there may well be a number of others. For example, we also highlighted potential problems concerning debt capital markets activity in our response to question B1Q1.

ASIC Question	Response
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.	We are unable to make comments on behalf of any individual FFSPs. Again, this will vary depending on the nature, size and complexity of the FFSP.

ASIC Question	Response
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.	We note that the proposed reverse solicitation relief would only apply where there has been no conduct by an FFSP that is intended, or would reasonably be regarded as intended, to induce professional investors to make an application or inquiry about, or use, a financial service that an FFSP provides or can provide. We consider that using a different test to section 911D of the Corporations Act and other exemptions will be confusing and add unnecessary complexity. Again, we would welcome clear guidance from ASIC as to what falls within and outside the “inducing” concept to enhance certainty.

<table>
<tr><th>ASIC Question</th><th>Response</th></tr>
<tr><td>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?</td><td>Set out below are our views on each respective condition ASIC is seeking to impose in paragraph 105:
<table><tr><th>Proposed ASIC condition</th><th>Our view on the proposed condition</th></tr><tr><td>(a) the FFSP must not be carrying on a business in Australia;</td><td>We do not object.</td></tr><tr><td>(b) the FFSP (or any persons acting on behalf of the FFSP) must not have engaged in conduct that is intended, or may reasonably be regarded as intended, to induce professional investors in Australia to make an application or inquiry about, or use, the financial services that the FFSP provides or can provide;</td><td>We consider that the test should be the same as for section 911D, in the interests of maintaining consistency and avoiding confusion. Again, we would welcome clear guidance from ASIC as to what falls within and outside the “inducing” concept to enhance certainty.</td></tr><tr><td>(c) the FFSP must maintain adequate records of the unsolicited application or inquiry for seven years (proof of reverse solicitation) —for example, the FFSP could obtain a letter of acknowledgement from the professional investor that the investor initiated the contact;</td><td>We do not object.</td></tr><tr><td>(d) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C);</td><td>We do not object.</td></tr></table></td></tr>
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ASIC Question	Response	
	(e) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E); and	We do not object.
	(f) the FFSP cannot rely on the relief if ASIC has notified the FFSP, or its agent, that the FFSP is excluded from relying on the relief and ASIC has not withdrawn the notice	We do not object.

ASIC Question	Response
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?	We are unable to comment on behalf of individual FFSPs. Again, the costs will vary depending on the nature, size and complexity of the FFSP.

ASIC Question	Response
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.	If ASIC was to provide reverse solicitation relief (which we would support), then we consider that it would be reasonable for FFSPs seeking to rely on the relief to create and retain a record explaining how the relationship with a client came into existence in order to be eligible to rely on reverse solicitation relief. Obtaining an acknowledgment from the client seems to us to be sensible and practical.

ASIC Question	Response
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.	We consider that the guidance set out in the draft regulatory guide could be improved in a number of respects. Elsewhere in this submission we have drawn ASIC's attention to: • discrepancies between different consultation documents causing confusion; • the need for guidance around what is (and is not) "inducing"; • concerns about the length of transition periods; and • proposals that have been put forward without explaining the rationale. If ASIC will be proceeding to require FFSPs to hold an AFSL, there should be guidance as to how long ASIC might be expected to take to assess the application. FFSPs should be given a date by which applications must be lodged if they need to have an AFSL in place by the end of the relevant transition period. It is also difficult for FFSPs to make submissions estimating the likely costs of complying with ASIC's proposed new regulatory regime in circumstances where ASIC has not provided information estimating the amounts it would charge for such regulation. The application fee for a "foreign AFS licence" is not specified in the draft regulatory guide. We anticipate that ASIC will have less work to do assessing these types of applications than domestic AFSL applications and therefore we would expect the application fees to be lower. The draft regulatory guide does also not explain whether an industry levy would be charged to the FFSPs and, if it was charged, the basis upon which it would be assessed (for example, whether it would be a flat or graded amount and, if graded, what the percentage or the base would be).