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ASIC Guidance: Funds Management, Corporate Collective Investment Vehicles and the Asia Region Funds Passport

Submissions to ASIC – Allens
2 December 2017

Allens welcomes the opportunity to comment on the draft guidance on funds management, Corporate Collective Investment Vehicles and the Asia Region Funds Passport.

In preparing this submission, we have had regard to our own experience in advising clients. We have approached our submission from both a policy and practical perspective, including an examination of the likely impacts of the proposed guidance on our clients and the Australian funds management industry.

1. RG 000 *FUNDS MANAGEMENT: ESTABLISHING AND REGISTERING A FUND* [1]		
	Issue	**Allens Comment**
1.1	ASIC may decide to assess an application for registration of a CCIV (RG000.16)	The draft legislation does not give ASIC power to assess or review CCIV applications. This statement and related paragraphs should be deleted. Alternatively, ASIC should at least provide further guidance as to what this review will entail and a maximum timeframe within which the review must be completed.
1.2	ASIC may review the constitution or compliance plan of a CCIV (RG000.22)	The draft legislation does not give ASIC power to review CCIV constitutions or compliance plans. This statement and related paragraphs should be deleted. Alternatively, ASIC should at least provide further guidance as to what this review will entail and a maximum timeframe within which the review must be completed.
1.3	Asset kind classifications (RG000.23-25)	The proposal to include more and more detailed categories of asset kinds is, in our view, unnecessary and unhelpful. It creates further bureaucracy for applicants and, as the draft RG itself effectively admits, increases the risk that applicants will miss or be confused about the applicable asset kinds and the need to align those categories with their AFSL authorisations. We understand that the categories will be based on Morningstar categories. It does not seem appropriate to us that ASIC endorse a system developed by a commercial enterprise. See also our comment at 2.2 below regarding compliance plans.
1.4	Time frame for registering as an Australian passport fund (RG000.29)	It is not satisfactory that ASIC merely note that there is no time period for registering an Australian passport fund. The Guide should at least give an indication of the time ASIC expects it will take or, preferably, a commitment to endeavour to register within a specified time.
1.5	Representations to be given about compliance with the Australian Passport Rules (RG.000.111)	It is not clear what the statutory basis is for requiring these representations
1.6	Compliance management system for passport fund operator (RG000.156-161)	See our comments on RG132 below.

[1] We have not commented on existing policy regarding ASIC's review of registered scheme applications. This should not be taken as an endorsement of that policy. In fact, in our view, it unfairly forces applicants to accept ASIC requirements regarding, for example, registered scheme constitutions.

2. RG 132 *FUNDS MANAGEMENT: COMPLIANCE AND OVERSIGHT*

	Issue	Allens Comment
2.1	The draft regulatory guide effectively imposes on responsible entities, corporate directors and licensed trustees of unregistered managed investment schemes a requirement to have and document compliance management systems.	As a general observation, in our view, the extensive requirements regarding compliance management systems are likely to create a new layer of costly, administrative burden without delivering any benefit to investors. Furthermore, we do not think that there is a real legislative basis for these requirements. In our view, the imposition of these requirements in the context of unregistered managed investment schemes is especially unwarranted and unwelcome. The scheme of the Corporations Act is that these investment vehicles are not regulated by ASIC and are not required to be registered under, or comply with, the Corporations Act. This is a reflection of the fact that investors in such schemes are wholesale investors who can make their own judgements and protect their own interests. We therefore think that it is neither appropriate nor necessary for ASIC to prescribe compliance standards for unregistered managed investment schemes. Such obligations will impose significant and unnecessary burdens on the trustees of unregistered managed investment schemes; increasing the costs of these schemes, while delivering few, if any, benefits to wholesale investors. To the extent that trustees of such schemes hold an Australian Financial Services Licence, they are already subject to extensive oversight by ASIC and regulation under the Corporations Act in their capacity as holders of Australian Financial Services Licences.
2.2	Incorporating other parts of compliance plans (RG132.82)	It is proposed that a compliance plan should only incorporate parts of another plan where the incorporated plan is for the same 'type' of investment fund. Presumably this is a reference to the proposed 'asset kind' classifications referred to in item 1.3 above. If so, it is not clear what the statutory basis for this is, and why a compliance plan should not be able to incorporate parts of another compliance plan even if they do not relate to the same 'asset kind' (noting the granularity of those classifications).

3. RG 133 *FUNDS MANAGEMENT AND CUSTODIAL SERVICES: HOLDING ASSETS*

	Issue	Allens Comment
3.1	Minimum standards where custody function is outsourced to a licensed custodian	It remains unclear in RG133 whether, and if so how, the minimum standards apply to a licensed custodian that has appointed a sub-custodian to hold financial products – e.g. a licensed trustee of a wholesale trust that has appointed a third party custodian to hold all of the assets of the trust. It appears from RG133 (and Class Order 13/1410 – see s912AAC(7)) that the licensee must nevertheless continue to meet the organisational standards itself, and the custodian must also separately meet those requirements. This is contrary to the position that applies to responsible entities that outsource the custody function (see s601FCAA(2) as notionally inserted by Class Order 13/1409). The policy rationale for this difference is unclear. There are some conflicting statements in proposed RG133 in relation to this point, which make it difficult for a licensee to comply with the requirements in practice.

3.2	Controlled sub-trusts	The RG does not expressly recognise structures (which are very common) where the responsible entity of a registered scheme (or the licensed trustee of an unregistered scheme) holds assets indirectly via one or more wholly-owned and controlled sub-trusts. For example, it is not clear whether the trustee of each sub-trust would be an 'asset holder' for the purposes of RG133 and whether this would mean that each sub-trustee, as well as the head responsible entity/trustee, would need to satisfy the minimum standards. Existing RG136 does provide some broad guidance by including, at paragraph 57, a statement that ASIC considers property held through a controlled sub-trust to be scheme property of the registered scheme that controls the sub-trust. ASIC goes on to say that 'we will regard the sub-trustee of a controlled sub-trust as a custodian which must comply with our standards and requirements for custodians set out in RG133.' However, that paragraph has not been retained in the proposed RG 136. In any event, the paragraph does not deal with the position of unregistered schemes. We think it is important that this be dealt with expressly in RG133 given how common sub-trust structures are, particularly in the property and infrastructure sectors.
3.2	Deletion of current RG 133.36	Currently, RG133.36 requires the asset holder's organisational structure to ensure that 'custodial staff can report directly to the directors of the asset holder or, in the case of a responsible entity, the compliance committee (directly or through other custodial staff)'. While we have no objection to this deletion, is it proposed that the corresponding class order requirements will also be deleted? (s601FCAA(1)(e)(i) as notionally inserted by Class Order 13/1409 and s912AAC(7)(e)(i) as notionally inserted by Class Order 13/1410 [and, in the latter case, we think the reference to reporting to the 'client' should instead be reporting to the 'licensee']).

4. RG 134 *FUNDS MANAGEMENT: CONSTITUTIONS*[2]

	Issue	Allens Comment
4.1	Replaceable rules do not apply to CCIVs (RG134.9).	We do not understand why this is the case. The explanation is unclear.
4.2	The powers of the corporate director should be set out in the constitution of a wholesale CCIV (note to RG134.10).	A company constitution will normally reserve all powers to the Board and management unless specified otherwise by the constitution or the Corporations Act. We assume this will be sufficient.
	References to legislative instruments in RG134.27.	It is unclear which instrument is being referred to (presumably it is meant to refer to both).
	Partly-paid units (RG134.52).	In practice, ASIC seems reluctant to permit provisions for partly-paid units in pricing formula. It would be helpful if ASIC could provide examples of formulae it considers acceptable (or unacceptable).
	Establishing sub-funds of CCIVs (RG134.120)	Will it be sufficient to provide in the constitution that, while there is only one sub-fund, all shares will be taken to be referrable to that sub-fund?

[2] In these comments we do not generally cover matters of existing policy with which we do not agree. However, we do note that we do not agree with ASIC's prescriptive view on what constitutes adequate provision for consideration for constitutions of registered schemes. ASIC's view, in our opinion, leads to unnecessary and problematic complexity. It follows therefor, that we don't agree with extending this policy to CCIVs. This includes the extension of the relief for sales on forfeiture (where in our view it is incorrect to consider the purchase of a forfeited interest an acquisition for the purposes of section 601GA(1)(a)).

	Fees and indemnities (RG134.129-143) and borrowing	While the draft CCIV legislation contemplates a corporate director having rights of indemnity from sub-fund assets, it is unlikely that a corporate director will want or need to incur expenses 'on behalf of' the CCIV or a sub-fund. This is because the CCIV is a distinct legal person and can incur the expenses directly. We expect that constitutions may nevertheless give a corporate director a right to recoup expenses in case there is some advantage in paying expenses this way (and also to cover expenses incurred pre-incorporation or pre-establishment of a sub-fund). The same applies to borrowing although we think it is unlikely that constitutions will give corporate directors the right to borrow on behalf of the CCIV.
	Relief to incorporate by reference listing rules (RG134.263-4).	We suggest that this relief be extended to CCIV constitutions, noting this would appear to be consistent with the approach in the draft CCIV legislation (see the redemption provisions for redeemable shares).[3]
5. RG 136 *FUNDS MANAGEMENT: DISCRETIONARY POWERS*		
	Issue	**Allens Comment**
5.1	CP 296.86 and CP 296.88, RG136.5	We agree that, in addition to RG51, it is helpful for ASIC to provide information on when it might grant relief, what factors it will take into account and the conditions it might impose for common forms of relief. We also agree that it is sensible to update RG136 to reflect new forms of commonly applied-for relief, as trends change from time to time. In particular, in relation to the new CCIV and Asia Region Funds Passport legislation, it is often only when tested in practice that issues become apparent and so it would be advisable to update RG136 following implementation of that legislation to reflect any common relief applications and ASIC's policy in relation thereto.
5.2	RG136.16	We note that ASIC will take into account the direct financial impact of any relief sought. In line with its existing guidance, we suggest that ASIC takes into account the general commercial benefit, rather than confining its consideration to direct financial impact.
	RG136.21	We would appreciate clarification as to whether the weight given to promoting international harmonisation applies only to the Asia Region Funds Passport and/or CCIV regimes, or more generally.
	RG136.26	We agree that consideration of the same or similar relief granted (coupled with the publication of relief granted) is a sensible approach – a consistent approach by ASIC will provide market participants with greater certainty as to the likelihood of obtaining relief and of the conditions likely to be attached to that relief. To avoid doubt, we suggest it be clarified that while ASIC will consider precedent, it will not do so rigidly and will depart from precedent where the facts justify a distinction.

[3] Although it seems unlikely that ASX would allow redeemable shares to be quoted.

	RG136.123 and RG136.123	We agree that s.601PA(2) Corporations Act (by reference to s.601ED(2) Corporations Act) does not address the circumstances where retail clients have exited a registered scheme and that scheme consists only of wholesale members. We also agree that this position does not reflect the intent of Chapter 5C and the requirement to register as a managed investment scheme (namely, the protection of retail clients). However, given ASIC agrees that is the purpose of Chapter 5C, we question why, provided all remaining members are wholesale clients, it is relevant that they are also all bodies corporate. We therefore suggest that limb (d) be deleted from RG136.122. For the same reason, we also question the inclusion of limb (b) in RG136.122 (requiring that all members were wholesale clients at the time they acquired their interest in the scheme).
6. RG 000 *FOREIGN PASSPORT FUNDS*		
	Issue	**Allens Comment**
6.1	Registration as a foreign company	We note that the operator of a foreign passport fund must be registered as a foreign company in Australia but we would submit that this is not necessary given the information that ASIC will have access to as part of the ARFP application process, and that this additional administrative requirement and the associated disclosure obligations will limit the attractiveness of Australia as a market. If that submission is not accepted, we would submit that the application to register as a foreign company can be made and processed at the same time as the notice of intention is lodged and both applications be reviewed by the same ASIC representative to avoid inefficiency and uncertainty in the application process.
6.2	Requirement to provide a PDS	The foreign passport fund operator is required to provide a PDS and we note that the short PDS regime is unavailable. Preparation of a long-form PDS requires a significant investment of time and is expensive. In particular we note the PDS disclosure requirements in Australia, including the recent changes to fees and costs disclosure, are particularly onerous. We are of the opinion that this will be a significant deterrent to the operators whom we assume the passport is intended to be most beneficial for (eg, smaller operators without a global distribution network).
6.3	Opinion regarding compliance with home economy laws	We note that in order to determine if the foreign passport fund operator is likely to comply with applicable laws in its home jurisdiction, ASIC will request an opinion of the home regulator and, it notes that if such opinion is provided within the requested period, it must be given effect to. It is unclear how ASIC will make this determination if the home regulator does not provide this opinion within the requested period.
6.4	Breach reporting	We note that foreign passport fund operators will be required to comply with breach reporting obligations. We submit that an operator not familiar with the Australian regulatory landscape and dealing with ASIC could find these requirements difficult to interpret and unduly onerous and this could act as a significant deterrent to foreign passport fund operators.
6.5	Additional 'consideration period'	We note the time for considering an application can be extended by 21 days when ASIC asks for further information. We submit there should be a limit on the number of times this can be extended, and suggest that this be permitted to occur only once. Ultimately, we submit that the passport application for an incoming fund should be a largely mechanical process.

6.6	Content of notice of intention	The notice of intention will request detailed information about a foreign passport fund operator's ability to comply with applicable Australian law and lists a number of items against which compliance will be assessed. We submit that requiring this level of information about the applicant's business could limit the attractiveness of Australia as a market.
6.7	Notification of events	We note that certain events must be notified to ASIC, including if a foreign passport fund is permitted to be offered in a jurisdiction other than its home jurisdiction or Australia. We submit that this requirement would place undue burden on the operator and instead if this information is required we submit it should be obtained from the home regulator.
6.8	Matters for the public record	We note that if a notice of intention is rejected or has been withdrawn, this information will be available on the public record. We submit that this could act as a disincentive to submitting a notice of intention.

7. OTHER

	Issue	Allens Comment
7.1	Transitional relief for existing responsible entities and licensed custodians	The proposed changes to the RGs are not limited to CCIVs but, instead, change the existing regulatory requirements that apply to responsible entities, licensed custodians (and other regulated entities to which the RGs currently apply). On other occasions where there have been significant re-writes of existing regulatory policy, ASIC has provided helpful comparison tables that explain in some detail what is changing and the rationale for the changes. That level of detail has not been provided in the Consultation Paper and therefore it is very difficult for existing licensees to identify whether any of its existing compliance arrangements and processes will need to change. Assuming they will need to change (given the extent of the changes), there is also no transitional period for existing licensees to review their current systems and implement the changes required to comply with the new requirements. We submit that a transition period of at least 12 months would be required.