

MEMO# 31897

August 9, 2019

ICI Global Comment Letter on ASIC Consultation on Foreign Financial Services Providers Licensing Regime

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August 9, 2019 TO: ICI Global Members SUBJECTS: International/Global RE: ICI Global Comment Letter on ASIC Consultation on Foreign Financial Services Providers Licensing Regime

On July 3, the Australian Securities and Investments Commission (ASIC) issued a consultation on relief for foreign providers of funds management services to Australian professional investors.[\[1\]](#) This consultation follows ASIC's June 2018 consultation (CP 301) on foreign financial services providers (FFSPs), in which ASIC consulted on proposals to repeal the "sufficient equivalence" relief and the "limited connection" relief and implement a foreign Australian Financial Services (AFS) licensing regime.[\[2\]](#)

ICI Global, together with the Investment Adviser Association (IAA), submitted the attached comment letter on August 8.

ASIC's Proposed Approach

New Funds Management Relief and Repeal of "Limited Connection" Relief

ASIC is proposing to exempt foreign financial services providers (FFSPs) from the requirement to hold an AFS license to provide a "funds management financial service" to professional investors in Australia. This relief is subject to a cap on the scale of those activities and certain conditions that apply to the operation of the relief.

ASIC further proposes to repeal the "limited connection" relief, as it proposed in CP 301. However, ASIC will extend the "limited connection" relief, which is due to expire on September 30, 2019, until March 31, 2020, while it consults on the funds management relief and repeal of the "limited connection" relief. Should ASIC proceed with adopting its proposals, ASIC proposes to further extend this relief until September 2020, to allow FFSPs sufficient time to obtain an AFS license if needed.

Reverse Solicitation

ASIC is seeking information from industry on the situation where an Australian professional

client initiates an inquiry or request to an FFSP operating outside of Australia, referred to as “reverse solicitation.” At this time, ASIC has declined to grant relief in this situation because it lacks sufficient information about how this relief would be used and has concerns about monitoring compliance with the conditions of such relief.

Foreign AFS License and Transition Period for “Sufficient Equivalence” Relief

ASIC will be implementing the foreign AFS licensing regime for FFSPs relying on the licensing relief known as “sufficient equivalence,” as was proposed in CP 301. As part of CP315, ASIC has released a draft updated RG 176, which provides guidance on how foreign providers may apply for the foreign AFS license. ASIC has proposed a more streamlined application process compared to an application for a standard license, and applicants will need to provide some, but not all, of the standard licensing information.

ASIC will extend the “sufficient equivalence” relief until March 31, 2020, to allow foreign providers to engage with the details of the new guidance. The new foreign AFS licensing regime will begin on April 1, 2020. FFSPs currently relying on the “sufficient equivalence” relief will have a transition period of 24 months from April 1, 2020, to comply with the new regime. This includes, for example, submitting an application for a foreign AFS license and having the application assessed by ASIC.

ASIC’s Proposed New Regulatory Framework for FFSPs

As a result of the proposals in CP 315 and the proposals in CP 301, ASIC has developed the following framework for the regulation of FFSPs providing financial services to clients in Australia. Below is a short description of the three types of regulatory arrangements that will apply to FFSPs if the proposals in CP 315 are adopted by ASIC.

Funds Management Relief

An FFSP is exempt from the requirement to hold an AFS license to provide “funds management financial services” in Australia, subject to:

- a cap on the scale of those services; and
- conditions that apply to the operation of the relief.

A person engages in a “funds management financial service” if they provide:

- any of the following financial services to a professional investor in Australia:
 - dealing in interests of a managed investment scheme established outside Australia (scheme) or securities of a body that carries on a business of investment that is not incorporated in Australia (body);
 - providing financial product advice in relation to the interests or securities of the scheme or body; and/or
 - making a market in relation to the interests or securities of the scheme or body; and
 - portfolio management services to a limited category of professional investors (“eligible Australian users”).

Foreign AFS License

An FFSP that is licensed or authorized (as applicable) by an overseas regulatory authority

that regulates the FFSP under a sufficiently equivalent regime (as assessed by ASIC) may be eligible to apply for a foreign AFS license to provide financial services to wholesale clients in Australia.

Foreign AFS licensees are exempt from certain provisions in Ch 7 of the Corporations Act on the basis that they are subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the Australian provisions from which ASIC has issued an exemption.

Standard AFS License

This requires the FFSP to comply with all the general obligations under s912A, and all the applicable provisions of the Corporations Act and the Corporations Regulations.

This would apply to an FFSP that is carrying on a financial services business in Australia and is not able to come within one of the other two regulatory arrangements or any other available exemption.

ICI Global Comments and Recommendations

Our letter states that we generally believe that ASIC strikes the right balance between its regulatory and supervisory needs to protect investors with the importance of not unduly reducing the benefits that FFSPs can provide to their clients, and that we agree with ASIC's proposal to grant FFSPs relief to provide funds management financial services to professional investors in Australia. We express it is for the benefit of Australian professional investors, including superannuation funds, to have access to a broad range of funds management expertise and to diversified portfolios and that, absent this proposed relief, many FFSPs that provide funds management services (even if they are part of a global group with affiliates that have Australian operations) would not be able to provide services to Australian professional investors.

We then state that, to ensure that ASIC can achieve its objectives, it should make the following recommendations:

Fund Management Relief

- We recommend that the scope of the funds management relief be expanded so that all foreign fund managers would be permitted to rely on it, and not just those that are brought into the Australian regulatory regime due to the deeming provision in section 911D of the Corporations Act.
- We request that ASIC permit FFSPs to notify ASIC of their reliance on the funds management relief on a corporate group level rather than at specific entity level.
- We recommend that ASIC allow grandfathering for an FFSP relying on existing relief if the FFSP does not otherwise qualify for the funds management relief and does not obtain a foreign Australian financial services license.
- We urge ASIC to reconsider conditioning the funds management relief on a cap and to consider whether its policy objectives can be met in another manner. We recommend that, if ASIC determines to proceed with a cap, the methodology and testing for the cap be significantly simplified.
- We request that ASIC include custodial and depository services within the scope of the funds management relief.
- We recommend that ASIC remove the condition that an FFSP not be a registered

foreign company.

- We request that ASIC extend the transition period for FFSPs currently relying on the limited connection relief and transitioning to the funds management relief to two years, which would align with the transition period for the foreign AFS license.

Funds Management Relief: Portfolio Management Services

- We recommend that the relief for portfolio management services include Australian securities if they are an incidental part of the overall portfolio (for example, in a global mandate).
- We request that the FFSPs be able to provide portfolio management services to existing categories of “professional investors” rather than creating a new category of “eligible Australian users.”

Reverse Solicitation

- We request that ASIC either separately consult on this matter at a later date or permit interested parties to make supplemental submissions on this issue.

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[Attachment](#)

endnotes

[1] The consultation is *available at* <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-315-foreign-financial-services-providers-further-consultation/>.

[2] For a description of ICI Global’s response to CP 301, see Memorandum No. 31308, dated August 1, 2018, *available at* <https://www.iciglobal.org/iciglobal/pubs/memos/memo31308>; ICI Global’s letter responding to CP 301 is *available at* <https://www.iciglobal.org/pdf/31308a.pdf>.