

MEMO# 31484

November 16, 2018

ASIC Considers Alternatives to the Licensing Regime Proposal for Foreign Financial Services Providers; Input Requested by November 30

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November 16, 2018 TO: ICI Global Pacific Chapter

ICI Global Regulated Funds Committee RE: ASIC Considers Alternatives to the Licensing Regime Proposal for Foreign Financial Services Providers; Input Requested by November 30

We understand that the Australian Securities & Investments Commission (ASIC) is evaluating alternatives to its proposal^[1] to subject foreign financial services providers (FFSPs) who provide financial services to wholesale clients to a modified licensing regime in Australia. In June, ASIC consulted on the proposal to repeal the current approach of allowing FFSPs to provide financial services to wholesale clients under the exemptive class order relief, i.e., without having to obtain an Australian financial services license (AFSL).^[2] In September, ASIC announced an extension of the current relief (due to expire end of September 2018) to September 2019, while it is reviewing 36 submissions it received on its proposal.^[3]

We describe possible alternatives under consideration below. ***We are seeking your input on these alternatives by November 30th.*** Please contact Anna Driggs at adriggs@ici.org with your comments (and indicate whether you would be interested in having a member call on this topic).

Your input is critical to the outcome. We understand that ASIC thought it received too few submissions and especially too few responses from FFSPs who actually use the exemptive relief. ASIC did not receive the submissions it was expecting to receive from offshore fund and investment managers indicating they would not be able to continue to service Australian clients if the exemptions cease. ASIC is inferring from this low level of response that the FFSPs support its proposal. Our submission indicated otherwise^[4], and we urged ASIC to consider enhancing conditions for the existing relief rather than forcing FFSPs into a licensing process in Australia. This is one of the alternatives ASIC is considering (although we understand that we should keep our expectations low).

Possible Alternatives

1. Chaperoning:

- This option would require a FFSP to work with, and be chaperoned by, an AFSL holder when servicing Australian clients. FFSPs would not be able to engage unilaterally with Australian clients any more.
- Is this workable?
- Would a confidentiality agreement address client list confidentiality concerns?
- Can one AFSL holder chaperone a number of FFSPs?
- What kind of notice period would you need in a chaperoning agreement and how quickly could you find a replacement AFSL holder if you needed to?

2. Enhanced reporting:

- This option would allow a FFSP using the *passporting exemption* to continue to provide limited services in Australia but with greater periodic reporting.
- In principle is this workable?
- Is there any type of additional reporting which would be problematic (ASIC is aware that the lodgement of financial accounts which are public documents is problematic for many US investment managers).

3. Expanded Regulation 7.6.02AG:

- Regulation 7.6.02AG of the *Corporations Regulations 2001* provides an AFSL exemption which has potential for FFSPs but is rarely used in practice because:
 - it is limited to use with Australian clients who are 'professional investors', not 'wholesale clients' more generally; and
 - it is limited to a narrow range of financial products (limited to derivatives, foreign exchange contracts, carbon units, Australian carbon credits and eligible international emission units).
- If the second prong were to be expanded to include securities and interests in managed investment schemes, could this exemption become workable?
- In practice will most of your Australian clients fall into the definition of *professional investor*? "Professional investor" means a person in relation to whom one or more of the following paragraphs apply:

- a. the person is a financial services licensee;
- b. the person is a body regulated by APRA, other than a trustee of any of the following (within the meaning of the Superannuation Industry (Supervision) Act 1993):

- a superannuation fund;
- an approved deposit fund;
- a pooled superannuation trust;
- a public sector superannuation scheme;

1. the person is a body registered under the Financial Corporations Act 1974;

2. the person is the trustee of:

- a superannuation fund; or
- an approved deposit fund; or
- a pooled superannuation trust; or
- a public sector superannuation scheme; within the meaning of the Superannuation Industry (Supervision) Act 1993 and the fund, trust or scheme has net assets of at least \$10 million;

3. the person controls at least \$10 million (including any amount held by an associate or under a trust that the person manages);
4. the person is a listed entity, or a related body corporate of a listed entity;
5. the person is an exempt public authority;
6. the person is a body corporate, or an unincorporated body, that:
 - carries on a business of investment in financial products, interests in land or other investments; and
 - for those purposes, invests funds received (directly or indirectly) following an offer or invitation to the public, within the meaning of section 82, the terms of which provided for the funds subscribed to be invested for those purposes;
7. the person is a foreign entity that, if established or incorporated in Australia, would be covered by one of the preceding paragraphs.

Classes of *wholesale clients* who will not meet the test of professional investors and who FFSPs could not service under this expanded regulation would include:

- Investors investing A\$500,000+;
- Investors with an accounting certificate certifying their net assets to be A\$2.5M+ or their income to be A\$250,000+; and
- Investors with an AFSL holder's certificate that they are a sophisticated investor.

Anna Driggs
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endnotes

[1] The consultation is *available at* <https://download.asic.gov.au/media/4752740/cp301-published-1-june-2018.pdf>. See [Memorandum No. 31257](#) to ICI Global Pacific Chapter, ICI Global Regulated Funds Committee, dated 22 June 2018. For a description of ICI Global's response to the consultation, see [Memorandum No. 31308](#) to ICI Global Pacific Chapter, ICI Global Regulated Funds Committee, dated 1 August 2018.

[2] *Id.*

[3] ASIC's announcement is *available at* <https://asic.gov.au/about-asic/media-centre/find-a-media-release/2018-releases/18-278mr-asic-extends-relief-for-foreign-financial-services-providers/>. See [Memorandum No. 31413](#) to ICI Global Pacific Chapter, ICI Global Regulated Funds Committee, dated 27 September 2018.

[4] For a description of ICI Global's response to the consultation, see [Memorandum No. 31308](#) to ICI Global Pacific Chapter, ICI Global Regulated Funds Committee, dated 1 August 2018.

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