

MEMO# 32432

May 1, 2020

Australian Securities and Investments Commission Adopts New Regulatory Framework for Foreign Financial Services Providers

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TO: ICI Members

ICI Global Members SUBJECTS: International/Global RE: Australian Securities and Investments Commission Adopts New Regulatory Framework for Foreign Financial Services Providers

In March, the Australian Securities and Investments Commission (ASIC) released its new regulatory framework for foreign financial services providers (FFSPs).[\[1\]](#) The new FFSP regulatory framework has two key elements:

- a new foreign Australian financial services (AFS) licensing regime for FFSPs; and
- licensing relief for providers of funds management financial services seeking to induce some types of professional investors.

The existing “sufficient equivalence” relief and “limited connection” relief upon which FFSPs have previously relied are being repealed. ASIC’s updated Regulatory Guide 176: Foreign Financial Services Providers (RG 176) contains the details of the new framework.[\[2\]](#)

ASIC developed the new framework following extensive consultation[\[3\]](#) and engagement with industry and overseas regulators. ICI Global provided input to ASIC in 2018 and 2019, both formally and informally, raising concerns with certain aspects of ASIC’s proposals.[\[4\]](#) We are pleased that ASIC revised its proposed rules to address a number of the issues that were put forth by ICI Global and other stakeholders.

Foreign AFS Licensing Regime

Although the majority of respondents to ASIC’s consultation disagreed with the proposal to implement a foreign AFS licensing regime and repeal the sufficient equivalence relief, ASIC determined that requiring FFSPs to hold a foreign AFS will more effectively address ASIC’s supervisory and enforcement concerns than imposing additional conditions under the sufficient equivalence relief. Prior misuse of the existing relief and the approaches taken by

overseas regulators also influenced ASIC's decision.

Under the AFS licensing regime, an FFSP may apply for and hold a foreign AFS license when it:

- is authorized in a sufficiently equivalent overseas regulatory regime to provide specified financial services to wholesale clients; and^[5]
- wishes to provide those financial services to wholesale clients in Australia.

A foreign AFS licensee is subject to many of the general obligations under s912A *Corporations Act 2001* (Corporations Act). However, it is exempt from certain obligations on the basis that it is subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the exempted provisions.^[6] In addition, a streamlined process will apply to applications for a foreign AFS license.

Foreign providers may apply to obtain a foreign AFS beginning April 1, 2020. Existing providers currently relying on pre-existing relief have until March 31, 2022, to make arrangements to continue their operations in Australia, which may include applying for a foreign AFS license.

Funds Management Relief

ASIC has adopted a new exemption from licensing called "funds management relief," which facilitates access by some types of professional investors in Australia to funds management-related services provided by FFSPs. ASIC has repealed the existing "limited connection" relief because giving that relief, in its view, no longer strikes the appropriate balance between cross-border investment facilitation, market integrity, and investor protection.

Scope. The funds management relief exempts an FFSP from the requirement to hold an AFS license if the FFSP is *only* carrying on a financial services business in Australia because of the operation of s911D of the Corporations Act in relation to the provision of "funds management financial services" to certain types of professional investors in Australia, referred to as "eligible Australian users." Section 911D provides that a financial services business is taken to be carried on in Australia by a person if, in the course of carrying on the business, the person engages in conduct that is intended to, or will likely, induce people in Australia to use the financial services the person provides (inducing conduct). The effect of the funds management relief is that s911D will not apply in this circumstance, so that FFSPs may engage in "inducing conduct" without being required to hold an AFS license. ASIC did not revise the proposed funds management relief to apply at group level, rather than at an entity level, as ICI Global had recommended; however, it did revise the relief to include custodial and depository services within the scope, as we had requested.

Funds Management Financial Service. ASIC had proposed to limit the provision of services to the management of assets located outside of Australia, to which ICI Global objected. ASIC has amended the proposed definition of "funds management financial services" so that it refers to the specific forms of financial services described in Chapter 7 of the Corporations Act and covers "financial products" rather than "assets," and does not refer to the location of the financial products in relation to which the FFSP is providing financial services.

Eligible Australian Users. To rely on the funds management relief, an FFSP can provide services only to "eligible Australian users," a newly defined term that is more limited than

the existing professional investor definition. ICI Global urged ASIC to expand the definition to include all professional investors and their related bodies corporate. ASIC, however, determined to proceed with its approach of limiting the relief to only a subset of professional investors that are more likely to require funds management and are subject to certain requirements (e.g., regulation by the Australian Prudential Regulation Authority (APRA), AFS licensing obligations or a best interests duty) which will provide an additional level of protection for the end client of the eligible Australian user. Under the final definition, an “eligible Australian user” includes:

- a responsible entity of a registered scheme;
- a person that is a trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation fund within the meaning of the Superannuation Industry (Supervision) Act and the fund, trust or scheme has net assets of at least Australian \$10 million;
- a trustee of a wholesale trust who holds an AFS license or would be required to hold an AFS license but for ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849;
- a body regulated by APRA; and
- an exempt public authority other than a local council.

Revenue Cap. In CP 315, ASIC proposed that an FFSP would only have the benefit of the funds management relief if less than 10% of its annual aggregated consolidated gross revenue of entities within its corporate group is generated from the provision of funds management financial services in Australia. The revenue cap was designed to limit the scale of activities that could be undertaken in Australia using the proposed relief. ICI Global, as well as other stakeholders, strongly disagreed with this proposed approach, explaining that it was too onerous, complex and impractical to implement. Based on the feedback it received, ASIC reconsidered its approach and determined to eliminate the proposed revenue cap, on the basis that the overall conditions of the relief (including the relief conditions described below) will adequately limit the scale of activities undertaken in Australia by FFSPs relying on the relief and will allow ASIC to adequately monitor and supervise those activities.

Relief Conditions. In order to rely on the funds management relief, FFSPs must additionally comply with a list of conditions, including:

- the FFSP must provide reasonable assistance to ASIC during surveillance checks;
- the FFSP must comply with directions from ASIC to provide a statement (similar to s912C);
- the FFSP must appoint an agent for service;
- the FFSP must give ASIC confirmation that:
 - it intends to rely on the relief for the provision of funds management financial services to eligible Australian users;
 - identifies its home jurisdiction and confirms that the person would not contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide those funds management financial services in its home jurisdiction;
 - there is an overseas regulator of the FFSP in its home jurisdiction that is a signatory to the International Organisation of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU);
 - it has an agent for service appointed and includes the name and address of the

agent for service;

- the FFSP does not have a place of business in Australia; and
- the FFSP has updated ASIC if its home jurisdiction changes or if its agent for service changes.

ICI Global had requested that the proposed condition specifying that an FFSP not be registered as a foreign company be removed, which ASIC has done.^[7]

Transition Period. ASIC has proposed to make the funds management relief available beginning on April 1, 2020, and to allow for a six-month transition period for FFSPs that provided financial services in reliance on the limited connection relief. ICI Global, as well as other respondents, strongly urged ASIC to provide a substantially longer transition period and, based on this feedback, ASIC has provided a transition period of 24 months (until March 31, 2022).

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endnotes

[1] The media release, with links to legal text and other relevant documents, is available at <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-058mr-folling-consultation-asic-releases-new-regulatory-framework-for-foreign-financial-services-providers/>.

[2] ASIC Regulatory Guide 176 is available at <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-176-foreign-financial-services-providers/>.

[3] See information about CP 301 on Foreign Financial Services Providers, available at <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-301-foreign-financial-services-providers/> (CP 301) and CP 315 on Foreign Financial Services Providers: Further Information, available at <https://asic.gov.au/regulatory-resources/find-a-document/consultation-papers/cp-315-foreign-financial-services-providers-further-consultation/> (CP 315).

[4] See Letter from Jennifer S. Choi to Mr. Alan Worsley, dated August 8, 2019, at <https://www.ici.org/pdf/31897a.pdf>.

[5] Table 2 of RG 176 lists the overseas regulatory regimes that are currently found to be sufficiently equivalent.

[6] The most important obligations that a foreign AFS license holder is exempted from are the obligations to (1) maintain organizational competence in section 912A(1)(e) of the Corporations Act and (2) ensure that its representatives are adequately trained and are competent to provide those financial services.

[7] Offshore operators may be registered as a foreign company out of an abundance of

caution and may not actually be carrying on a business in Australia.

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