AND FINALLY .... THE FOREIGN FINANCIAL SERVICE PROVIDER (FFSP) LICENSING REFORMS ARE CONFIRMED

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Legal Briefings – By **Fiona Smedley, Nick Alexander and David Curley**

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WHAT'S HAPPENED?

Yesterday, the Australian Securities & Investments Commission (**ASIC**) released a much anticipated update, setting out its finalised position in relation to the foreign financial service provider (**FFSP**) reforms. The update includes ASIC's feedback in relation to FFSPs and industry submissions in response to ASIC consultation papers 301 and 315.

The update confirms:

- the timing of the expiry of the current FFSP exemptions;
- the introduction of the new funds management exemption; and
- the introduction of the new foreign Australian financial services licence (**foreign AFSL**) framework for FFSPs regulated in a sufficiently equivalent manner overseas, including those relying on *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* (**passporting exemptions**) and similar specific relief exemptions from other jurisdictions, to enable them to provide financial services to wholesale clients in

Australia.   FFSPs regulated by certain regulators in the US, Singapore, Hong Kong, Germany, Luxembourg, UK, Denmark, Sweden, France and Canada are eligible to apply for a foreign AFSL and others will be considered on a case by case basis.

ASIC has also now published an updated *Regulatory Guide 176: Foreign financial services providers* (**RG 176**).

WHAT'S CHANGED?

Key changes to the earlier consultation positions include:

1. **Extension of time for the limited connection exemption:** ASIC has extended the transition period for FFSPs relying on *ASIC Corporations (Foreign Financial Services Providers - Limited Connection) Instrument 2017/182* (**limited connection exemption**) from 6 to 24 months. This gives FFSPs using the limited connection exemption until 31 March 2022 to make alternative compliance arrangements; and

2. **Amended new 'funds management exemption':** this will be available from 1 April 2022 to FFSPs that provide a limited range of funds management financial services to a specified subset of wholesale clients, called 'eligible Australian users'. The key changes are:

   ✖ the categories of clients who can receive the FFSP's services are generally narrower. The exemption only allows financial services to be provided to 'eligible Australian users', which is more limited than the category of 'professional investor';

   ✔ the 10% cap on annual aggregated revenue condition and the revenue forecasting condition have been dropped;

   ✔ the exemption is not limited to foreign companies so it can now be used by limited partnerships; and

   ✔ the FFSP does not need to enter into a deed submitting to the non-exclusive jurisdiction of the Australian courts.

ASIC'S EXTENSION OF THE LIMITED CONNECTION EXEMPTION

ASIC has extended the limited connection exemption by 24 months (18 months more than previously proposed).

It has done this by introducing ASIC Corporations (Amendment) Instrument 2020/200 which preserves the effect of the limited connection exemption until 31 March 2022, to provide transitional relief to FFSPs relying on that exemption.

ASIC has confirmed its earlier consultation position to not grant relief for FFSPs providing financial services to professional investors on a reverse solicitation basis. ASIC was not persuaded that mechanisms could be implemented to address ASIC's concerns about its ability to monitor reverse solicitation conduct.

AMENDED 'FUNDS MANAGEMENT EXEMPTION'

As an alternative to the limited connection exemption, ASIC has introduced the new funds management exemption effective from 1 April 2022, for certain FFSPs.

The funds management exemption is narrower than the limited connection exemption but pleasingly the submission to jurisdiction deed, forecasting and 10% revenue cap conditions in the consultation draft have been dropped.

The funds management exemption is available to foreign persons that:

- notify ASIC in writing that they intend to use it;
- engage in specified 'funds management financial services' (a category of financial services activity which has now been expanded to include custodial or depository services);
- only provide such services to 'eligible Australian users':

    ✖ this is more limited than the category of 'professional investors' and does not include entities in a listed group, AFSL holders or persons who control at least A$10million. Listed investment companies, high net worth individuals and corporate family offices will not qualify as 'eligible Australian users';

✖ also, the category of ‘a trustee of a managed investment scheme with assets of at least A$10million’ has been replaced with a responsible entity of a registered scheme or a trustee of a wholesale trust who holds an AFS licence or would be required to hold an AFS licence but for ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849. This means that wholesale feeder funds may not qualify as ‘eligible Australian users’.

In relation to both of these points, while the new RG 176 notes that ASIC will consider applications made on a case by case basis by other types of investors in accordance with its policy in RG 51 we anticipate that it will be challenging in practice for a FFSP to obtain an exemption for other types of investor;

✔‘eligible Australian users’ still includes 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 SIS Act where the fund, trust or scheme has net assets of at least A$10million; and

✔‘eligible Australian users’ now includes a body regulated by APRA;

- do not carry on a business in Australia (and only require the exemption because of the operation of the deeming provision in section 911D *Corporations Act 2001* (Cth) (**Act**);
- are regulated overseas by a signatory to the IOSCO MOU; and
- confirm that the activities in Australia would not contravene any financial services laws in the FFSP’s home jurisdiction.

The conditions applicable to a FFSP using the funds management exemption include that the FFSP must:

- maintain a local agent appointment (but not having an agent for less than 10 business days is permitted);
- comply with directions from ASIC;
- provide reasonable assistance to ASIC during surveillance checks; and
- notify ASIC of any changes to their home jurisdiction or agent within a certain period.

THE NEW FOREIGN AFSL FRAMEWORK

The foreign AFSL framework is largely unchanged from the earlier consultation. Key changes are that:

- corporate FFSPs are not required to appoint an agent (because ASIC assumes that they will register as a foreign company and will appoint an agent in connection with that registration); and
- the foreign AFSL holder must reasonably believe that it would not contravene any financial services laws in its home jurisdiction.

We are expecting more guidance from ASIC shortly in relation to the foreign AFSL application kit, application form and application process.

HOW DOES THE FOREIGN AFSL COMPARE TO A STANDARD AFSL?

As foreshadowed in our article of July 2019, foreign AFSL holders will be:

- required, amongst other things, to comply with most of the general obligations under section 912A(1) of the Act. The most important obligations that a foreign AFSL holder is exempted from are the obligations to:
    - maintain organisational competence in section 912A(1)(e) of the Act. This means that foreign AFSL holders don't need to have and train 'responsible managers'; and
    - ensure that its representatives are adequately trained and are competent to provide those financial services in section 912A(1)(f) of the Act.

- subject to the same range of ASIC supervisory and enforcement powers that apply to domestically-based AFSL holders (including, but not limited to, the very recent measures introduced in response to the Royal Commission—summarised in our article of February 2020 and, assuming that they are implemented, the proposed changes to the significant breach reporting regime).

WHAT HAPPENS NEXT?

FFSPs currently using the limited connection exemption have two years to transition to the new funds management exemption or reduce their Australian financial services activity.

ASIC will shortly release a revised version of INFO 157 which will provide updated information for FFSPs using the passporting exemptions. We anticipate that FFSPs currently using a passporting exemption will need to weigh up:

- the costs of making an application for a foreign AFSL or a standard AFSL and maintaining the licence once granted;
- whether the current or projected future volume of their wholesale financial services business in Australia merits:
  - applying for and maintaining a foreign AFSL or a standard AFSL;
  - reducing their business activities to a narrower range of activities permitted under the remaining cross-border exemptions or the funds management exemption; or
  - ceasing to provide financial services to Australian investors; and
- if a standard AFSL is already held by the FFSP's corporate group, whether to apply for a standard AFSL and extend that Australian compliance framework to the FFSP rather than build a new Australian compliance framework for the foreign AFSL.

More information on the background to the FFSP regime consultations can be found in our articles of July 2019, September 2018, June 2018 and September 2016.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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