

ASIC CONFIRMS INTENTION TO CREATE FOREIGN ASFL REGIME AND MODIFY LIMITED CONNECTION RELIEF

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Legal Briefings – By **Fiona Smedley and Julian Vertoudakis**

EXECUTIVE SUMMARY

Following submissions made this year in response to CP 301, the Australian Securities & Investments Commission (**ASIC**) confirmed on 19 December 2018 that it proposes to:

- replace the ‘passporting exemptions’ (which currently exempt foreign financial services providers (**FFSPs**) from the requirement to hold an Australian financial services licence (**AFSL**) when providing financial services to wholesale clients in Australia where ASIC considers that the overseas regulation of the FFSP is ‘sufficiently equivalent’ to the regulation of an AFSL holder) with a new ‘foreign AFSL’ regime; but
- retain the ‘limited connection’ exemption used by FFSPs physically located outside Australia, but in a modified form.

FFSPs should prepare for change in 2019.

- FFSPs who currently use a passporting exemption will need to decide whether to apply for a foreign AFSL and assess what that will mean for their business (including in relation to resources, costs and compliance).
- FFSPs who currently use the limited connection exemption need to closely follow the

consultation next year to understand the impact of the modifications for them.

BACKGROUND TO FFSP AFSL EXEMPTION CONSULTATIONS

ASIC commenced consultation in relation to the AFSL exemptions available to FFSPs in 2016, in *Consultation Paper 268* which was followed by *Report 519*.

In June 2018, ASIC then released *Consultation Paper 301: Foreign Financial Service Providers (CP 301)*.

In CP 301 ASIC proposed revoking:

- [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#) (the 'passporting exemptions') used by FFSPs subject to regulation in their home jurisdiction which ASIC considers is sufficiently equivalent to the regulation of an AFSL holder; and
- [ASIC Corporations \(Foreign Financial Services Providers - Limited Connection\) Instrument 2017/182](#) (the 'limited connection' exemption used by FFSPs physically located outside Australia).

For further information, please see Herbert Smith Freehills' previous legal briefing on the proposals contained in [CP 301](#).

WHAT'S NEW?

On 19 December 2018 ASIC confirmed that it proposes to:

- proceed with the CP 301 proposal to replace the passporting exemption with a new 'foreign AFSL' regime; but
- retain the limited connection exemption, but in a modified form, and to consult on that exemption further in 2019.

WHAT HAPPENS NEXT?

ASIC has said that in the first half of 2019, it will:

1. issue a draft regulatory guide and draft legislative instruments in relation to the foreign AFSL regime, including details of the transitional arrangements that will apply to entities currently utilising the passporting exemptions;
2. release a consultation paper seeking feedback on new proposals for the limited connection relief to continue in some form, in response to feedback received on its proposals in CP 301; and
3. publish the public submissions made in response to CP 301 and ASIC's responses to the submissions. We expect that this will include a response to the concerns raised by some FFSPs in relation to the proposed requirement that foreign AFSL holders lodge annual accounts with ASIC (where those accounts are available to the public).

WHAT DOES THIS MEAN FOR FFSPS?

FFSPs should prepare for change in 2019.

- FFSPs who use a passporting exemption will need to decide whether to apply for a foreign AFSL in 2019 and to assess what that will mean for their business (including in relation to resources, costs and compliance). The draft regulatory guide and the detail of the transitional arrangements, when published next year, will be needed to properly perform this analysis.
- FFSPs who currently use the limited connection exemption need to closely follow the consultation next year and assess what the proposed modifications mean for their ability to use the exemption going forwards and continue to provide financial services and products to wholesale clients in Australia.

KEY CONTACTS

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



FIONA SMEDLEY
PARTNER, SYDNEY

+61 2 9225 5828
Fiona.Smedley@hsf.com

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