ASIC EXTENDS FOREIGN FINANCIAL SERVICE PROVIDER RELIEF – BUT THERE'S A CATCH...

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Legal Briefings – By **Fiona Smedley**, **Steven Rice** and **Aaron Jones**

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ASIC has extended seven Class Orders [CO 03/1099, CO 03/1100, CO 03/1101, CO 03/1102, CO 03/1103, CO 04/829 and CO 04/1313] which provide conditional relief to foreign financial services providers (**FFSPs**) with wholesale clients. The Class Orders were due to expire ('sunset') between 1 October 2016 and 1 April 2017 but the relief under those Class Orders has been extended for two years under *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* (Instrument 2016/396).

ASIC has extended the relief under the Class Orders in order to review and consult on the policy settings underlying its FFSP relief. ASIC released Consultation Paper 268 *Licensing relief for foreign financial services providers with limited connection to Australia* (CP 268) to seek feedback on these policy settings. The catch is that ASIC is proposing to repeal Class Order [CO 03/824].

Class Order 03/824 currently exempts a person from the requirement to hold an Australian financial services licence (**AFSL**). This exemption applies for the provision of a financial service where the person does not currently hold an AFSL, services only wholesale clients, and does not induce persons to use its financial services. Class Order 03/824 is due to expire on 1 April 2017. ASIC's rationale for proposing to repeal Class Order 03/824 is because, ASIC says, the relief intended to be provided by that Class Order has subsequently been provided under s 911A(2E) of the Corporations Act. However:

- Section 911A(2E) applies to a narrower range of financial products and financial services than Class Order 03/824. Section 911A(2E) only applies in respect of dealing in and providing advice on derivatives, foreign exchange contracts and certain carbon units. Class Order 03/824 applies to all products and all financial services.
- Section 911A(2E) can only be used by 'professional investors', which is a subset of 'wholesale clients'. This means fewer FFSPs will have relief from the AFSL requirement.

ASIC is also proposing a one year transitional period if it repeals Class Order 03/824.

Importantly, CP 268 provides that ASIC is seeking information about:

1. the type of entities that rely on ASIC's relief;
2. the range of activities for which entities rely on ASIC's relief; and
3. the volume of business for entities that rely on ASIC's relief.

The current Class Orders provide that if so directed by ASIC, an FFSP must provide a written statement containing specified information about "any financial service" provided by that FFSP. In contrast, Instrument 2016/396 grants transitional licensing relief provided the FFSP complies with a written notice issued by ASIC to provide a written statement to ASIC containing specified information about the "financial service business" operated by the FFSP.

Comments and submissions in relation to CP 268 are due before 2 December 2016. If you use Class Order 03/824 in a broader context than derivatives, foreign exchange and carbon units (for example, if you are a manager promoting an offshore fund who cannot rely on reg 7.1.33H, or an offshore fund issuer visiting Australia to promote an offshore fund to Australians), then you need carefully consider making a submission so ASIC is aware of your reliance on Class Order 03/824 and has visibility on the broader use of Class Order 03/824 beyond the limited circumstances in section 911A(2E).

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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