

ASIC UNVEILS NEW LICENSING FRAMEWORK FOR FOREIGN FINANCIAL SERVICES PROVIDERS

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Legal Briefings - By **Fiona Smedley, Nick Alexander and Jennifer Xue**

EXECUTIVE SUMMARY

Today, the Australian Securities & Investments Commission (**ASIC**) has released *Consultation Paper 315 Foreign financial services providers* ([CP 315](#)), consulting on:

1. its new licensing framework for foreign financial service providers (**FFSPs**) with wholesale clients in Australia (referred to as the **foreign AFSL**), providing:
 - a limited extension of relief for FFSPs who currently use the '*passporting exemptions*' and '*limited connection exemption*' from the requirement to hold an full Australian financial services licence (**AFSL**) until 31 March 2020;
 - a 24 month transition period until 1 April 2022 for FFSPs relying on the passporting exemptions (and similar specific relief exemptions) to apply for and obtain a foreign AFSL; and
 - a 6 month transition period until 30 September 2020 for FFSPs relying on the limited connection exemption to make alternative compliance arrangements; and
2. a proposal to replace the limited connection exemption with a new '*funds management exemption*' from 31 March 2020, available only to FFSPs that provide a limited range of

funds management or portfolio management services to a specified subset of wholesale clients, subject to a cap on the scale of their activities in Australia (measured by aggregated annual revenue) and a wide range of other conditions.

Under the proposed arrangements:

a. **Passporting FFSPs from 'sufficiently equivalent' jurisdictions:** from 1 April 2022 these FFSPs will need to:

- have applied for and obtained a new foreign AFSL, which will increase their regulation and compliance costs in Australia compared to the passporting exemption;
- have applied for and obtained a full AFSL which would impose greater regulation and compliance costs in Australia compared to the foreign AFSL;
- identify and rely on one or more other AFSL exemptions which fully cover their activities; or
- cease providing financial services to Australian clients.

b. **FFSPs from non-equivalent jurisdictions:** from 1 April 2022, FFSPs that are authorised under an overseas regulatory regime that is not currently recognised by ASIC as 'sufficiently equivalent' will need to both: (i) have applied for and obtained recognition from ASIC as a 'sufficiently equivalent jurisdiction'; and (ii) have applied for and obtained a new foreign AFSL. Otherwise, these FFSPs will need to:

- apply for and obtain a full AFSL;
- identify and rely on one or more other AFSL exemptions which fully cover their activities; or
- cease providing financial services to Australian clients.

c. **Limited connection FFSPs:** ASIC is proposing to repeal the limited connection exemption from 31 March 2020 and replace it with a new funds management exemption, only available to FFSPs that provide a limited range of funds management or portfolio management services to a specified subset of wholesale clients, and subject to a wide range of conditions (including a cap on scale). If implemented, this would require FFSPs currently using the limited connection exemption to:

- identify and rely on one or more other AFSL exemptions to cover their activities, including (if applicable) the new funds management exemption;
- apply for and obtain a foreign AFSL or a full AFSL; or
- cease providing financial services to Australian clients,

by 30 September 2020.

OUTCOME OF THE FFSP EXEMPTIONS CONSULTATION

After a couple of years of formal and informal consultation, ASIC released *Consultation Paper 301: Foreign financial services providers (CP 301)* in June 2018, which proposed to repeal two ASIC instruments which provide conditional relief to FFSPs providing financial services to wholesale clients in Australia:

- [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#) (the 'passporting exemption') used by FFSPs which are subject to regulation in their home jurisdiction which is sufficiently equivalent to Australian regulatory requirements that apply to financial services providers in Australia; and
- [ASIC Corporations \(Foreign Financial Services Providers - Limited Connection\) Instrument 2017/182](#) (the 'limited connection exemption') used by FFSPs physically located outside Australia,

(together, the **FFSP Relief**) and implement a modified licensing regime, a 'foreign AFSL', available to certain FFSPs providing financial services to wholesale clients in Australia.

Today, ASIC:

- has confirmed that the passporting exemptions will cease on 31 March 2020 when the short extension period expires;
- has released draft guidance describing its new foreign AFSL licensing framework that will be available to FFSPs from passporting jurisdictions, and the transition period of 24 months until 1 April 2022 to allow FFSPs using the passporting exemptions (and similar specific relief exemptions) to apply for and obtain a foreign AFSL; and
- is consulting on a further proposal to repeal the limited connection exemption from 31 March 2020, and replace it with a new 'funds management exemption', only available to FFSPs that provide a limited range of funds management or portfolio management services to a specified subset of wholesale clients, subject to wide range of proposed conditions (including a cap on scale).

BACKGROUND TO AND REPEAL OF THE PASSPORTING EXEMPTIONS

The passporting exemptions have provided relief under a series of class orders since 2003 to FFSPs which are 'equivalently regulated' to provide financial services in certain foreign countries.

The exemptions have allowed FFSPs to 'passport' their existing overseas licence or permission, in order to provide certain financial services in Australia to wholesale clients without an AFSL. The passporting exemptions are conditional on the FFSP meeting certain requirements in relation to disclosure, reporting breaches and compliance with offshore standards.

More information in relation to the consultation to terminate the passporting exemptions in recent years is provided in our articles of [September 2018](#), [June 2018](#) and [September 2016](#).

Today, ASIC has confirmed that the passporting exemptions will be repealed with a transition period of 24 months until 1 April 2022.

Following 1 April 2022, FFSPs currently relying on the passporting exemption will need to:

- have applied for and obtained a foreign AFSL under the new regime (more information on this is set out below. The foreign AFSL will increase the FFSP's regulation and compliance costs in Australia compared to the passporting exemption);
- have applied for and obtained a full AFSL under the existing regime. A full AFSL would impose greater regulation and compliance costs in Australia compared to the foreign AFSL;
- rely on one or more other AFSL exemptions which fully cover their activities. For example, to what extent might they be able to use the new '*funds management exemption*'?; or
- cease providing financial services to wholesale clients in Australia.

WHAT IS A FOREIGN AFSL AND WHAT LEVEL OF REGULATION DOES IT IMPOSE?

Based on the draft *Regulatory Guide 176 Foreign Financial Services Providers* ([draft RG 176](#)), foreign AFSL holders will be:

- required, amongst other things, to comply with certain (but not all) general obligations under section 912A(1) of the *Corporations Act 2001* (Cth) (the **Act**). These obligations include obligations to:

- provide financial services efficiently, honestly and fairly;
- have in place adequate arrangements to manage conflicts of interest;
- have adequate risk management systems;
- comply with the conditions on its licence;
- comply with applicable financial services laws;
- take reasonable steps to ensure that representatives comply with applicable financial services laws;
- have adequate risk management systems; and
- exempted from the application of certain provisions of Chapter 7 of the Act where ASIC considers the foreign regulatory requirements in the overseas regime achieve similar regulatory outcomes to the full AFSL regime requirements.

Foreign AFSL holders will also be subject to a greater range of ASIC supervisory and enforcement powers than current FFSPs, including:

- ASIC's directions power;
- breach reporting requirements;
- the obligation to provide reasonable assistance during surveillance checks; and
- the usual range of remedies available in relation to AFSL holders, including the power to impose AFSL conditions and suspend or cancel an AFSL.

For FFSPs which will no longer be able to rely on the passporting exemption, the foreign AFSL provides a lower compliance alternative to a full AFSL. A high-level illustration of the step up from passporting, to foreign AFSL, to full AFSL is shown below.



WHO CAN APPLY FOR A FOREIGN AFSL?

- During the 24 month transition period, FFSPs which are passported now (or using equivalent specific relief) can apply for a foreign AFSL.
- FFSPs which are eligible for a passporting exemption now (ie. are licensed in jurisdictions already assessed to be sufficiently equivalent), but which have not been approved for passporting, can also apply.
- FFSPs licensed in other jurisdictions which ASIC has not already assessed to be sufficiently equivalent:
 - can apply to ASIC to obtain 'sufficient equivalence' recognition; and
 - if their home jurisdiction is then assessed to be equivalent, they will be eligible to apply for a foreign AFSL.

HOW DO YOU APPLY FOR A FOREIGN AFSL?

To apply for a foreign AFSL, you need to:

- a. ensure that you are authorised in a 'sufficiently equivalent regime';
- b. ensure that you are registered as foreign company if you are required to under the Corporations Act;
- c. provide the required 'proof' documents with your application;
- d. understand and be able to comply with your obligations as a foreign AFS licensee and your licence conditions; and
- e. lodge your application and pay the application fee.

If an application for a foreign AFSL has been made but not granted by the end of the 24 month transitional period then ASIC may, only in rare and exceptional circumstances, consider a further extension of the transitional relief, but only where it considers that the delay was not caused by the applicant.

WHAT PROOF DOCUMENTS WILL AN APPLICANT FOR A FOREIGN AFSL NEED TO SUBMIT?

Applicants for a foreign AFSL will still need to submit:

- an *A5 Business Description Proof*;
- *People Proofs* for each responsible officer (including a criminal history check and bankruptcy check); and
- any *Non-Core Proofs* that may be required depending on the complexity of the business (ie. custodial and depository arrangements, derivatives and foreign exchange contracts).

Importantly, applicants for a foreign AFSL will not need to submit:

- a *B1 Organisational Competence Proof*; or
- a *B5 Financial Statements and Resources Proof*.

WHAT IS THE NEW 'FUNDS MANAGEMENT EXEMPTION' AND HOW DOES IT COMPARE TO THE 'LIMITED CONNECTION EXEMPTION'?

The 'limited connection' exemption provides relief to FFSPs with a limited connection in Australia and which do not (through a physical presence in Australia) carry on a financial services business in Australia. This exemption has been used by a number of FFSPs since 2003 and does not require any application or notification to ASIC. More information on the limited connection exemption is provided in our articles of [September 2018](#), [June 2018](#), [March 2017](#) and [September 2016](#).

ASIC is consulting on a proposal to repeal the limited connection exemption and replace it with a new funds management exemption.

Unlike the limited connection exemption, the new funds management exemption will only be available to FFSPs that:

- engage in specified 'funds management financial services' or 'portfolio management services';
- only provide such funds management financial services to 'professional investors' (a subset of wholesale clients). Generally, professional investors include AFS licensees, bodies regulated by APRA, trustees, a listed entity or a related body corporate of a listed entity, a body corporate, or a person that controls at least A\$10 million;
- only provide such portfolio management services to a new category of client called an 'eligible Australian user';
- adhere to a cap based on annual aggregated revenue that limits the provision of those services; and
- comply with certain other proposed conditions, including that they:

- do not carry on a business in Australia;
- have appointed a local agent;
- have entered into a deed submitting to the non-exclusive jurisdiction of the Australian courts;
- must notify ASIC of the types of funds management services it intends to provide;
- must maintain adequate proof of compliance with the revenue cap;
- must comply with directions from ASIC;
- must provide reasonable assistance to ASIC during surveillance checks; and
- have not been notified by ASIC that they are excluded from relying on the relief.

WHAT KEY DATES SHOULD YOU KEEP IN MIND?

- 31 March 2020 – the date that the passporting exemptions and limited connection exemption will cease;
- 1 April 2020 – the date that the new foreign AFSL regime commences and the 24 month transition period begins;
- 30 September 2020 – the proposed date that the 6 month transition period for limited connection exemptees will expire; and
- 1 April 2022 – the date that the 24 month transition period for the new foreign AFSL regime expires.

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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