

# CHANGES FOR AFSL APPLICANTS AND UPDATES FOR FOREIGN AFSL APPLICANTS, INCLUDING GUIDANCE ON THE ‘FIT AND PROPER PERSON’ TEST

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Legal Briefings - By **Fiona Smedley, Ewan MacDonald, Nick Alexander and Soraya Pradhan**

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The Australian Securities and Investments Commission (**ASIC**) has made important changes to the requirements for new and current applicants for a ‘full’ Australian financial services license (**AFSL**) and a ‘foreign’ AFSL. By updating Information Sheet 240 (**[INFO 240](#)**), Regulatory Guide 105 (**[RG 105](#)**), and its licensing kit in Regulatory Guides 1 to 3 (**[RG 1](#)**, **[RG 2](#)**, and **[RG 3](#)**), ASIC has:

- provided guidance on how it will administer the new “fit and proper person” test;
- reduced the potential number of non-core proofs that must be provided at the commencement of the application for a new or varied AFSL; and
- clarified the application process for foreign AFSL applicants, including by:

- reducing the number of core proofs that must be provided; and
- requiring foreign AFSL applicants to nominate Responsible Managers in the Form FS01.

## **ASIC'S NEW APPROACH TO ADMINISTERING THE FIT AND PROPER PERSON TEST**

As noted in our article of [28 February 2020](#), under recent changes to the Corporations Act, ASIC must satisfy itself that AFSL applicants pass a new “fit and proper person” test in relation to its officers and controllers (and officers of controllers where the controller is a company). The test also applies to ‘senior managers’ in the case of applicants or controllers that are organised as trusts or partnerships.

So far ASIC has been administering the new test by requiring all relevant persons to provide certain “People Proofs”, being a national criminal history check, a bankruptcy check and a tailored 17-question ‘Statement of Personal Information’ questionnaire.

As a concession apparently directed at the practical difficulties posed for large corporate groups, ASIC has updated [INFO 240](#), so that certain persons can be *certified* as fit and proper by the applicant without the need to provide the “People Proofs”. However the certification option is not available for officers of the applicant, for officers of an ultimate holding company or for controllers who are natural persons.

Importantly, ASIC has reserved its position on permitting fit and proper certifications, and may subsequently request applicants to provide “People Proofs” or other additional information.

The certification option will be welcomed by a range of applicants, particularly large corporate groups with layers of controlling companies between the applicant and the ultimate parent company.

An applicant who seeks to take advantage of the certification process will need to:

- undertake some careful analysis to identify the entities and persons who may be covered by the certification; and
- prepare a range of documents to ASIC to give effect to and support the certification,

both of which we can assist with.

Applicants will need to take particular care in identifying relevant “officers” given the subjective nature of the definition. As well as appointed directors and secretaries, “officer” includes a person:

- who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- who has the capacity to affect significantly the corporation's financial standing; or
- in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation).

## **REDUCING REQUIREMENT TO PROVIDE NON-CORE PROOFS AT LODGMENT**

The original INFO 240 introduced a requirement to provide non-core proofs for specified requested full AFSL authorisations at the time of the lodgement of the application (instead of when and if requested by ASIC subsequently).

ASIC has now reduced the number of circumstances in which non-core proofs are required at lodgment. For example, full AFSL applicants who seek a derivatives or foreign exchange contract authorisation are no longer required to provide the following non-core proofs at lodgment:

- B3: Arrangements for Managing Conflicts of Interests;
- B3: Compliance Arrangements; and

- B7: Risk Management System Statement.

ASIC may still require these applicants to provide these non-core proofs at a later stage in the process upon request.

## **CLARIFYING THE APPLICATION PROCESS FOR FOREIGN AFSL APPLICANTS**

Through a series of amendments to [RG 1](#), [RG 2](#), and [RG 3](#), ASIC has provided guidance on how it will administer the foreign AFSL application process.

Importantly:

- foreign AFSL applicants are not required to provide the following core proofs:

1. the B1: Organisational Competence Proof; and
2. the B5: Financial Statements and Financial Resources Proof; and

- foreign AFSL applicants are still required to nominate Responsible Managers in the Form FS01 and provide their respective “People Proofs” (described above), notwithstanding the fact that ASIC has exempted foreign AFSL holders from the ‘organisational competence’ obligation.

## **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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