

ALLEN & OVERY

Imminent changes to Australian rules for foreign financial service providers

On 1 June 2018, the Australian Securities & Investments Commission (ASIC) released a consultation paper in respect of its proposal to Foreign Financial Service Providers (**FFSP**). A copy of the consultation paper can be found here: <https://download.asic.gov.au/media/4752740/cp301-published-1-june-2018.pdf>

A FFSP is a person who provides financial services to Australian Wholesale (institutional) clients who either:

(a) rely on existing “equivalency relief”, typically those whose domestic or home jurisdictions and regulators are as follows:

Jurisdiction	Regulator(s)
United Kingdom	Financial Conduct Authority and Prudential Regulation Authority
United States	U.S. Securities and Exchange Commission U.S. Federal Reserve and Comptroller of the Currency U.S. Commodities Futures Trading Commission
Singapore	Monetary Authority of Singapore
Hong Kong	Securities & Futures Commission
Germany	BaFin
Luxembourg	CSSF

or (b) rely on the existing “limited connection to Australia” relief contained in ASIC Class Order 03/824.

Having reviewed the existing FFSP relief, and having regard to regulatory and supervisory concerns, ASIC has determined that the relief may no longer be appropriate. Accordingly, the consultation paper indicates that if your organisation currently relies on FFSP instruments of relief, going forward you will need to apply for a modified form of an Australian Financial Services (AFS) Licence (Foreign AFS Licence) or obtain an existing form of Australian financial services licence (Ordinary AFS Licence). The new category of Foreign AFS Licence is proposed as a less onerous compliance regime than an Ordinary AFS Licence for FFSPs who can demonstrate that their domestic regulatory regime is sufficiently equivalent to the legal regime applying in Australia.

ASIC has also indicated its intention to extend the current relief, currently scheduled to expire on 28 September 2018, for 12 months until 30 September 2019.

The consultation paper proposes a further transition period of 12 months to 30 September 2020 if ASIC proceeds with the new Foreign AFS Licence regime.

HOW YOU MAY BE AFFECTED:

(a) If you are currently relying on FFSP relief:

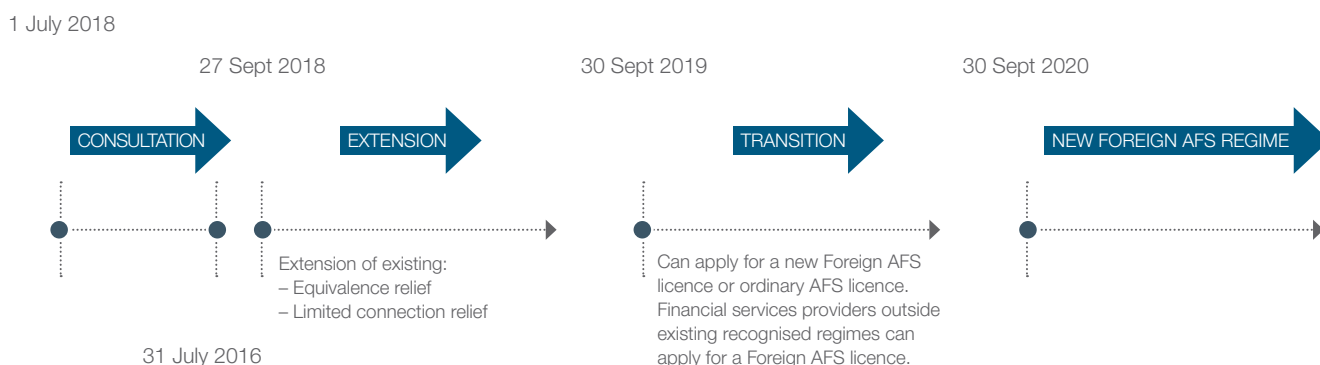
If you wish to continue to provide financial services to Australian clients, you will need to make a decision as to whether you will:

- apply for a Foreign AFSL or an Ordinary AFSL; or
- determine whether it is possible to rely on another exemption

(b) If you intend on providing financial services in Australia in the future:

You can rely on existing relief until 30 September 2019, and then transition to either a Foreign AFSL or an Ordinary AFSL. In any event, it is proposed that FFSPs who are able to demonstrate regulatory equivalency will be able to apply for a Foreign AFSL on and from 1 October 2019.

TIMING:



THE NEW FOREIGN AFS LICENCE

Currently FFSPs are able to provide services to Australian institutional clients on the basis that they comply with the laws that apply to them in their home jurisdiction. The Foreign AFS Licence regime represents a significant departure from the existing position for FFSPs as it will be necessary to be licensed in Australia and comply with certain Australian financial services regulatory requirements when dealing with Australian institutional clients. For example, it is proposed that:

- conditions which apply to Ordinary AFS Licensees, relating to managing conflicts of interests, and providing financial services honestly, efficiently and fairly would also apply to FFSPs;
- the holder of a Foreign AFS Licence would not need to comply with conditions relating to the need to have adequate financial, technological and human resources and conditions in relation to the training of its representatives; and
- key enforcement powers will be available to ASIC, including breach reporting obligations, the power to issue directions, and the ability to impose licence conditions, vary, cancel or suspend a licence and impose penalties.

BACKGROUND TO THE CONSULTATION PAPER

ASIC views its relief for foreign financial service providers (FFSPs) as being applicable to:

- "Sufficiently equivalent relief": by way of the class orders specified below; and
- "Limited connection relief": where FFSPs that are only engaged in inducing, or intending to induce, a person to use financial services.

SUFFICIENTLY EQUIVALENT RELIEF:

In September 2016, ASIC granted a two year extension for seven class orders that relieved foreign financial service providers (FFSPs) from the requirement of holding an Australian financial services licence (AFSL) in the provision of financial services to wholesale clients (Instrument 2016/396). The rationale behind introducing the class order relief was to attract foreign investment and liquidity to Australian markets by preventing duplicated regulatory burdens, as FFSPs were already subject to equivalent regulations in their home jurisdictions. The extension period allowed a review of the class order terms, which are subject to amendment if the review determines they no longer provide an effective mechanism to a) monitor the conduct of FFSPs in our markets; and b) take appropriate action against FFSPs in the event of non-compliance.

The extension of relief until 28 September 2018 also applies to an ASIC instrument that exempts qualifying Luxembourg fund managers.

The relevant FFSP Class Order Relief includes:

- [CO 03/1099] UK regulated financial service providers;
- [CO 03/1100] U.S. SEC regulated financial service providers;
- [CO 03/1101] U.S. Federal Reserve and OCC regulated financial service providers;
- [CO 03/1102] Singapore MAS regulated financial service providers;
- [CO 03/1103] Hong Kong SFC regulated financial service providers;
- [CO 04/829] U.S. CFTC regulated financial services providers; and
- [CO 04/1313] German BaFin regulated financial service providers.
- CSSF Regulated Financial Services Providers via Instrument 2016/1109.

In addition, individual sufficiently equivalent relief has been provided to FFSPs from Denmark, Sweden, France and Brazil.

LIMITED CONNECTION RELIEF:

In 2003, ASIC issued Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients* to provide relief from the requirement to hold an AFS licence where the person providing the financial services is:

- not in this jurisdiction;
- dealing only with wholesale clients; and
- carrying on a financial services business only by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services it provides, or is likely to have that effect (see s911D(1)).

ASIC has indicated that the purpose of the relief was to address concerns that overseas counterparties to derivatives, foreign exchange transactions and providers of investment management services may be engaging in ‘inducing’ activities under s911D when inducing wholesale clients in Australia to use their financial services. Without the benefit of this “limited connection relief”, ASIC indicated that they would be required to hold an AFS licence when engaging in inducing activity even when they are not otherwise carrying on a financial services business in Australia.

After consulting with industry, ASIC temporarily extended the effect of [CO 03/824] to 27 September 2018 by way of ASIC Corporations (*Foreign Financial Services Providers – Limited Connection*) Instrument 2017/182.

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