

ASIC REPEAL OF CLASS ORDERS AFFECTING FOREIGN FINANCIAL SERVICES PROVIDERS

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Investment Management Alert

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OVERVIEW

Offshore providers of financial services to the Australian market should be aware that the Australian Securities & Investments Commission (ASIC) has recently repealed its relief for regulated foreign financial services providers in the UK, U.S., Singapore, Hong Kong and Germany from the requirement to hold an Australian financial services licence. However, ASIC has granted a temporary extension of the relief for two years during which time ASIC will consult with industry to determine what, if any, relief should continue to apply on a long term basis.

ASIC has also signalled its intent to repeal Class Order 03/824 which provides licensing relief for financial services providers whose only connection to Australia is the inducement, or likely inducement, of wholesale clients in Australia to use its financial services. ASIC has formed the preliminary view that this class order is no longer required as the relief is substantively replicated elsewhere. However, ASIC has acknowledged that the forms of relief do not completely overlap meaning some affected providers may fall outside the scope of the alternative relief options. ASIC's consultation period on the repeal of CO 03/824 concludes on 2 December 2016.

TEMPORARY EXTENSION OF RELIEF FOR REGULATED FOREIGN FINANCIAL SERVICES PROVIDERS

Offshore providers of financial services to the Australian market should be aware that on 28 September 2016 the Australian Securities & Investments Commission (ASIC) repealed its relief for regulated foreign financial services providers in the UK, U.S., Singapore, Hong Kong and Germany from the requirement to hold an Australian financial services licence (AFSL) with respect to certain services provided to wholesale clients in Australia.

The relevant class orders (FFSP Class Orders) are as follows:

- [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.

The FFSP Class Orders were due to expire automatically between 1 October 2016 and 1 April 2017. In advance of these sunset dates, ASIC has acted to repeal the FFSP Class Orders but also to grant a temporary extension of the operation of the FFSP Class Orders for a two year period while it consults with industry as to what, if any, relief should continue to apply on a long term basis.

Who is affected?

Many regulated offshore financial services providers rely on the FFSP Class Orders to promote and distribute their financial services and products to wholesale clients in Australia, particularly to Australian superannuation funds. Those regulated offshore financial service providers based in the U.S., UK, Singapore, Hong Kong who rely, or intend to rely, upon the FFSP Class Orders to provide financial services in Australia are affected by the repeal and transitional arrangements.

What should I do?

While the FFSP Class Orders have been repealed their legal effect continues under the transitional arrangements. Accordingly, immediate action is not required of affected financial services providers. However, as part of the transitional arrangements ASIC has imposed an additional condition on offshore financial services providers relying on the FFSP Class Orders being an obligation to comply with any written notice given by ASIC directing the person to give to ASIC, within the time specified in the notice, a written statement containing specified information about the financial service business operated by the person in Australia. It is expected that this additional condition will be used by ASIC to collect information regarding the nature, scale and scope of financial services provided by offshore financial services providers in Australia, the risks, if any, imposed on the Australian market by the use of the FFSP Class Orders and whether, in the future, the relief should continue and if so, on the same or additional conditions. ASIC has stated that any proposals to amend the current relief will seek to strike an appropriate balance between facilitating the cross-border provision of financial services and ensuring adequate supervision of foreign entities in the Australian market.

ASIC expects to commence the consultation process on the proposals to amend its relief for regulated offshore providers in January 2018. Managers should be prepared to engage with ASIC (directly or through their legal counsel or industry body) as part of the consultation process.

PROPOSED REPEAL OF CLASS ORDER 03/824

ASIC has also signalled its intent to repeal CO 03/824 which provides licensing relief for a foreign financial service provider where it:

- deals only with wholesale clients; and
- carries on a financial services business by engaging in conduct that is intended to induce people in Australia to use the financial services it provides, or is likely to have that effect (see s911D of the Corporations Act).

ASIC has formed the preliminary view that this class order, which expires on 1 April 2017, is no longer required as the relief is substantively replicated in the Corporations Act 2001 (specifically, section s911A(2E)). Despite this, ASIC does acknowledge that the relief in CO 03/824 diverges from that under s911A(2E) in two ways:

- CO 03/824 applies to any financial service and for all financial products whereas s911A(2E) offers relief with respect to a limited range of financial services, specifically, dealing, advising or making a market in derivatives, foreign exchange contracts and a range of financial products related to carbon emissions;
- CO 03/824 applies where the service is provided to a 'wholesale client' whereas s911A(2E) applies to services provided to the narrower category of 'professional investor'.

Who is affected?

Offshore financial service providers who rely on the class order relief to avoid the requirement to hold an AFSL and whose only connection to Australia is the inducement, or likely inducement, of wholesale clients in Australia to use its financial services, are affected by the proposal.

What should I do?

Entities that are relying on CO 03/824 to provide financial services in relation to products or services should engage in the consultation process (directly or through their legal counsel or industry body) in particular if you provide services with respect to products outside of derivatives, foreign exchange contracts and carbon units and do not qualify for the broader relief afforded under the FFSP Class Orders. ASIC has indicated that if only a small number of financial services providers identify themselves it will likely repeal the class order leaving those providers who require relief to apply for it on an individual basis.

Submissions to ASIC are due on 2 December 2016.

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