

ASIC PUBLISHES FINAL GUIDANCE FOR FOREIGN FINANCIAL SERVICE PROVIDERS

Date: 6 April 2020

Australia Financial Services Alert

By: Jim Bulling, Felix Charlesworth

The Australian Securities and Investments Commission (ASIC) released on 10 March 2020 its finalised Regulatory Guide 176 for Foreign Financial Services Providers (FFSPs).

There are some differences in the final RG 176 compared with ASIC's earlier Consultation Paper 315 released in July 2019 and in the main the changes are mostly helpful for FFSPs.

IN BRIEF

Some of the more relevant changes include the following:

1. Applying for a Foreign Australian Financial Services Licence (AFSL)

- the overseas regulatory regimes in which an FFSP must hold an authorisation to obtain a Foreign AFSL has expanded to include Denmark, France, Luxembourg, Ontario and Sweden in addition to the US, UK, Hong Kong, Singapore and Germany (the jurisdictions permitted under the existing Sufficiently Equivalent relief);
- ASIC has indicated that where an FFSP is authorised in a jurisdiction or by a regulator that is not on the list, it may still consider applications for eligibility where appropriate.

2. Funds Management Relief

- the conditions attached to the new Funds Management Relief (which will replace the existing Limited Connection relief) have been relaxed compared to what was announced in July and no longer include a limit on the percentage of total revenue that the FFSP is entitled to earn in Australia;
- the Limited Connection relief provided by ASIC to those FFSPs who do not carry on a financial services business in Australia has been extended to 31 March 2022 and not 30 September 2020 as previously announced; and
- the extent of financial services which are permitted to be provided under the Funds Management Relief has also been broadened.

Certain parts of the new requirements specified in RG 176 commence on 31 March 2020 with transitional arrangements for holders of Sufficiently Equivalent relief expiring as previously announced on 31 March 2022.

While the 31 March 2022 deadline for obtaining a Foreign AFSL looks generous, ASIC is encouraging all FFSPs

who wish to make an application for a Foreign AFSL to do so early. ASIC will not entertain an extension of relief to any applicant making a late application that is still in progress on 31 March 2022.

KEY REQUIREMENTS - A FULL SUMMARY

A summary of the key requirements contained in RG 176 are as follows:

1. Applying for a Foreign Australian Financial Services Licence (AFSL)

As part of its release of information on 10 March 2020, ASIC published the final version of the *ASIC Corporations (Foreign Financial Services Providers - Foreign AFS Licensees) Instrument 2020/198* (Foreign AFS Licensees Instrument).

This instrument sets out the key processes that are relevant to the application and ongoing obligations that will apply to Foreign AFSL licensees, including the following:

(a) Eligibility requirements

In order to meet the eligibility requirements needed to apply for a Foreign AFSL, an FFSP must be authorised by one of the prescribed overseas regulatory regimes as described above.

In addition an FFSP will also need to check that the financial services it intends to provide to Australian wholesale clients are within the scope of services specified for that regulatory regime (there are differences depending on the regulator).

(b) Application process

The substantive part of the application process will involve providing ASIC with 'proof' documents which broadly set out the details about the financial services and products the FFSP will provide to Australian wholesale clients as well as certain details about the FFSP's business.

While ASIC is updating its guidance on which proof documents will be required to be lodged in order to obtain a Foreign AFSL, we note this will most likely include:

- an A5 Business Description core proof document (which provides an overview of the FFSPs financial services business); and
- a people proof document for each responsible officer (which involves describing the qualifications, previous experience and character of the responsible managers).

In addition to lodging proof documents, ASIC will seek declarations from FFSPs that they have the systems and processes in place to comply with their ongoing obligations and licence conditions which are set out in further detail in the section below.

Once an FFSP has determined that it meets the eligibility requirements for an application for a Foreign AFSL, it will also need to consider whether it is required to register as a foreign company - this will depend on the structure of the FFSP's Australian offering.

(c) Ongoing obligations and conditions of relief

Once an FFSP has obtained a Foreign AFSL, it is required to comply with the conditions for the relief set out under the Foreign AFS Licensees Instrument. These conditions are similar to the conditions that were previously required under the existing Sufficiently Equivalent relief and include:

- appointing an agent and not failing to have an agent for a period of more than 10 consecutive days; and
- notifying ASIC of each significant investigation, enforcement or disciplinary action undertaken by any overseas regulatory authority.

In addition to the conditions of relief, licensed FFSPs will also be subject to specific conduct obligations under the Corporations Act 2001 (Cth) (Corporations Act) including, but not limited to:

- the provision of financial services fairly, honestly and efficiently;
- having adequate risk management systems;
- breach reporting requirements; and
- providing written statements to ASIC directed to do so under section 912C of the Corporations Act.

While these fundamental conduct obligations that FFSPs will be subject to may appear to be somewhat comprehensive, ASIC has noted that these obligations are generally similar, or equivalent, to those required of FFSPs in their home jurisdictions.

2. Funds Management Relief

As foreshadowed in July 2019, ASIC has also published the *ASIC Corporations (Foreign Financial Service Providers - Funds Management Financial Services) Instrument 2020/199* (Funds Management Relief Instrument) which introduces licensing relief for those FFSPs providing a limited financial services offering in Australia.

The Funds Management Relief will be available to those FFSPs who engage in conduct that induces persons in Australia to use the financial services provided by the FFSP where those services are not provided in Australia (ie, are provided from offshore).

By obtaining this relief, FFSPs will, among other things, be able to:

- deal in financial products in, or issued by, an offshore fund to an 'eligible Australian user';
- deal in financial products under an arrangement with an 'eligible Australian user' to provide portfolio management services to the 'eligible Australian user';
- provide financial product advice to an 'eligible Australian user' in relation to financial products in, or issued by an offshore fund;
- provide financial product advice under an arrangement with an 'eligible Australian user' to provide portfolio management services to the 'eligible Australian user'; or
- provide custodial or depository services in connection with the financial products set out above or in relation to the above sections.

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The provision of these services is limited to a category of professional investors known as an 'eligible Australian user' (which includes superannuation trustees and responsible entities of registered managed investment schemes).

From 1 April 2022, an FFSP that intends to rely on the Funds Management Relief Instrument will be required to, among other things, provide ASIC with a written confirmation of certain material and appoint an agent who will be able to receive notices and respond to requests for relevant information about activities involving investors in Australia.

As part of the ongoing conditions for this relief, FFSPs will need to ensure that they do not fail to have an agent for service for any consecutive period of 10 days and will also need to provide ASIC with written details of any changes to the agent or agent's contact information.

It should be noted that prior to the commencement of the Funds Management Relief Instrument from 1 April 2022, ASIC has extended the operation of Limited Connection Relief to 31 March 2022.

We plan to host a webinar in the next few weeks to discuss the new arrangements for FFSPs and will be in touch again soon with more details about the webinar.

KEY CONTACTS



JIM BULLING
PARTNER
MELBOURNE
+61.3.9640.4338
JIM.BULLING@KLGATES.COM



FELIX CHARLESWORTH
LAWYER
MELBOURNE
+61.3.9205.2128
FELIX.CHARLESWORTH@KLGATES.COM

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