

## Introduction

On 10 March 2020, the Australian Securities and Investments Commission (**ASIC**) released an updated Regulatory Guide 176 (**RG 176**) that provides guidance to foreign financial services providers (**FFSPs**) in relation to the status of existing FFSP exemptions and the introduction of the new foreign Australian financial service licence (**AFSL**) regime and funds management relief.

The existing FFSP exemptions remain available for a two-year transition period. From **1 April 2022**, an FFSP will need to obtain an AFSL or a foreign AFSL, or to rely on another exemption, to provide regulated financial services to Australia-based clients.

## Snapshot of New Regulatory Framework

### Updated Regulatory Framework for FFSPs

#### 1. Limited Connection Relief – Two-year Extension

- ASIC has extended the transition period for FFSPs relying on the “limited connection relief”<sup>1</sup> for two years (from 1 April 2020 until 31 March 2022) (**Limited Connection Relief**). An FFSP does not need to be currently relying on the Limited Connected Relief to have the benefit of the relief at any time until 31 March 2022.

#### 2. Sufficient Equivalence Relief – Two-year Extension

- The “sufficient equivalence relief” exempts eligible FFSPs from the requirement to hold an AFSL where they are regulated under overseas regulatory regimes that ASIC has assessed as “sufficiently equivalent” to Australian financial services regimes (**Sufficient Equivalence Relief**).
- If you already have the benefit of the Sufficient Equivalence Relief, or you obtain it before 31 March 2020, you can continue to rely on this exemption until 31 March 2022.

#### 3. The Introduction of the New Funds Management Relief

- Effective from 1 April 2022, the “funds management relief” is a modified version of the repealed Limited Connection Relief, which provided licensing relief where a person was deemed to be carrying on a financial services business in Australia only because of s 911D of the Corporations Act 2001 (Cth) (**Corporations Act**), which regulates activities conducted by FFSPs to induce (or is likely to induce) Australian investors to use their financial services. However, the “funds management relief” applies only in respect of inducing conduct in relation to “funds management financial services”<sup>2</sup> (**Funds Management Relief**).

#### 4. The Introduction of the New Foreign AFSL Framework

- Effective from 1 April 2020, certain FFSPs regulated in a “sufficiently equivalent” regulatory regime may be eligible to apply for a foreign AFSL to provide specified financial services to wholesale clients in Australia.
- A streamlined application process will apply for a foreign AFSL, compared to a standard AFSL (refer to “Applying for a Foreign AFSL”). Based on ASIC guidance and in our experience, it could take ASIC six to nine months to process a licence application (even for a foreign AFSL application).

## FFSPs: What to Do Next?

The new regulatory regime only impacts you if you provide, or intend to provide, financial services in Australia to wholesale clients only. If you provide financial services to retail clients, you will likely be caught by the standard AFS licensing regime.

### 1. All FFSPs

- An additional two years will be given to FFSPs eligible for transitional arrangements, such that you will have until 31 March 2022 to make the necessary arrangements to apply for one of the licences or will need to rely on the new Funds Management Relief or other exemptions after that date. FFSPs should evaluate and undertake the relevant arrangements without delay in order to continue providing financial services in Australia.
- Consider whether your business can continue to be able to rely on a current FFSP exemption (i.e. the Limited Connection Relief, Sufficient Equivalence Relief or another existing statutory exemption). If you do not presently have the benefit of the Sufficient Equivalence Relief, you may obtain it by submitting an application to ASIC before the 31 March 2020 deadline to enable reliance until 31 March 2022.
- ASIC replaces the Limited Connection Relief with the Funds Management Relief from 1 April 2022. This relief is limited to conduct by FFSPs that induces (or is likely to induce) Australian investors to use their financial services, where that conduct is limited to certain “funds management financial services” to “eligible Australian users.”

<sup>1</sup> ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182.

<sup>2</sup> ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199 (Funds Management Instrument).

## 2. FFSPs That Currently Rely on an FFSP exemption

- By 31 March 2022, each FFSP that services wholesale clients in Australia must have already implemented their decision to:
  - Apply for, and hold, a standard AFSL or a foreign AFSL (if regulated under “sufficient equivalence” overseas regulatory regimes)
  - Take steps to ensure they can rely on the Funds Management Relief or other exemptions
  - Limit its activities to those covered by existing statutory exemptions (if applicable)
- The new “foreign AFSL” will be available from 1 April 2020 for entities regulated by the regulators in jurisdictions recognised under the former Sufficient Equivalence Relief regime. ASIC has extended this relief to those entities regulated under the regimes in the following additional countries, Denmark, France, Sweden and Canada (Ontario).
- ASIC is encouraging foreign AFSL applications to be lodged as soon as possible to provide time for processing the application with ASIC, which could take six to nine months.
- ASIC proposes a “streamlined application process” for foreign AFSL applications (compared to a standard AFSL) in recognition of the applicant’s existing authorisation to provide the relevant financial services in a sufficiently equivalent overseas regulatory regime. Only certain “proof” documentation will need to be submitted to ASIC and not all of the AFSL obligations will apply to foreign AFS licensees. ASIC will update the AFS Licensing Kits to include new guidance for eligible FFSP applicants.

## 3. Other FFSPs

- If you do not qualify for any of the licences or exemptions outlined above, you should consider whether you should apply for a standard AFSL, become an authorised representative of a licensee or otherwise qualify for the Australian licensing exemptions in Chapter 7 of the Corporations Act and associated regulations.

## New Regulatory Framework

### Repeal of Sufficient Equivalence Relief

Commencing 1 April 2020, a new foreign AFSL regime will replace the Sufficient Equivalence Relief for those FFSPs that currently rely on the current relief, subject to a 24-month transition period ending on 31 March 2022.

If an FFSP does not presently have the benefit of the Sufficient Equivalence Relief, the FFSP will need to have filed the relevant documents with ASIC prior to 31 March 2020, to be able to rely on it during the transition period.

## Foreign AFSL Regime

In summary, the foreign AFSL regime is a modified AFSL regime that applies to bodies corporate or partnerships incorporated or formed in a relevant foreign jurisdiction that:

- Carries on business in their relevant foreign jurisdiction
- Holds a relevant authorisation under a sufficiently equivalent overseas regulatory regime to provide relevant financial services to wholesale clients
- Provides those financial services to wholesale clients in Australia

For the purposes of the foreign AFSL regime, ASIC has confirmed that Canada (Ontario), Sweden, Denmark and France will also be considered sufficiently equivalent. Where an FFSP is unable to rely on the foreign AFSL regime, ASIC may consider extending the relief to cover other overseas regulatory regimes for particular financial services in certain circumstances, and issue relief on a “class” or an “individual” basis.

## Applying for a Foreign AFSL

A streamlined application process will apply for a foreign AFSL, compared to a standard AFSL in recognition of the applicant’s existing authorisation to provide the relevant financial services in a sufficiently equivalent overseas regulatory regime.

ASIC is encouraging foreign AFSL applications to be lodged as soon as possible, as the application with ASIC could take six to nine months (even a foreign AFSL application). Even though it is a “streamlined” application process, it will still take time to compile the relevant documents.

In summary, for a foreign AFSL, an applicant must ensure the following:

- It is eligible to apply for a foreign AFSL (i.e. is licensed in a “sufficiently equivalent jurisdiction” for the relevant financial services)
- It is registered as a foreign company, if so required under the Corporations Act
- It provides the required “proof” documents with its application (see below)
- It understands and will be able to comply with its obligations as a foreign AFS licensee and with its AFSL conditions
- Its application is lodged with the application fee

An FFSP applying for a foreign AFSL will only need to provide an A5 Business Description proof and criminal history and bankruptcy checks for its responsible managers. Based on RG 176, it appears that FFSPs will not be required to provide B1 Organisational Competence and B5 Financial Statements and Financial Resources proofs.

If an FFSP is not eligible for the above regime, and no other licensing exemption applies, the FFSP must hold a standard AFSL to carry on a financial services business in Australia.

## Obligations of a Foreign AFS Licensee

Foreign AFSL holders will be exempt from a number of the obligations applying to a standard AFSL in Chapter 7 of the Corporations Act, including the obligation to have adequate resources (such as financial resources), on the basis they are subject to “sufficiently equivalent” overseas regulatory requirements.<sup>3</sup>

Obligations that will apply in the same way as a standard AFSL include (but are not limited to) fundamental conduct obligations, requirements for conflicts arrangements, compliance with applicable financial services laws and having adequate risk management systems. Foreign AFSL holders will also be subject to supervisory and enforcement provisions, such as breach reporting and potential regulator surveillance checks.

## The New “Funds Management Relief”

ASIC have repealed the Limited Connection Relief<sup>4</sup> and, in its place, have provided the Funds Management Relief.<sup>5</sup>

### What Is the Funds Management Relief?

Subject to satisfying certain conditions (see below), the Funds Management Relief exempts FFSPs from the requirement to hold an AFSL when they engage in conduct that “induces” or is “likely to induce”<sup>6</sup> certain types of professional investors in Australia to use their “funds management financial services”.

### What Are “Funds Management Financial Services”?

In summary, a person engages in a “funds management financial service” if they provide:

1. Any of the following financial services to a professional investor in Australia:
  - a. Dealing in interests of “managed investment scheme” (MIS) established outside of Australia, or securities of a body that carries on a business of investment that is not incorporated in Australia (body)
  - b. Providing financial product advice in relation to interests or securities of the MIS or body
  - c. Making a market in relation to interests or securities of the MIS or body
2. “Portfolio management services” (defined as the management of assets located outside of Australia on behalf of an “eligible Australian user”)

FFSPs will need to separately consider if they need to hold an AFSL to provide additional financial services, as the Funds Management Relief only covers the “inducing conduct”.

<sup>3</sup> Refer to RG 176.35, which sets out the exempted provisions.

<sup>4</sup> ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182.

<sup>5</sup> ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199 (Funds Management Instrument).

<sup>6</sup> Refer to s911D of the Corporations Act 2001 (Cth). A person is taken to provide financial services in Australia where the person engages in conduct that is intended or likely to induce the person to use the financial services, even when occurring outside Australia. ASIC has noted that inducing conduct includes attempts to persuade, influence or encourage a particular person to become a client, for example, mass marketing campaigns.

## Scope of the Funds Management Relief

To rely on the relief, an FFSP must be an unregistered foreign company that does not currently hold an AFSL authorising funds management services. The scope of the exemption is quite narrow, as generally all foreign companies who are considered to be carrying on business in Australia must become a registered foreign company (refer to the “eligible Australian users” below).

### “Eligible Australian Users”

The relief limits the provision of funds management financial services to certain “eligible Australian users”, which is a new concept and is limited to:

- a. A responsible entity of a registered scheme
- b. A trustee of a superannuation fund, approved deposit fund, pooled superannuation trust or public sector superannuation scheme within the meaning of the Superannuation Industry (Supervision) Act 1993 where the fund, trust or scheme has net assets of at least AU\$10 million
- c. A trustee of a wholesale trust who holds an AFSL or would be required to hold an AFSL but for ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849
- d. A body regulated by APRA – which would include an Australian bank, life insurance company or general insurer
- e. An exempt public authority, as defined in s9 of the Corporations Act, other than a local council

This is more limited than the category of “professional investors”<sup>7</sup> and does not include entities in a listed group, AFSL holders or persons who control at least AU\$10million. Listed investment companies, high net worth individuals and corporate family offices do not qualify as “eligible Australian users”.

## Comparison With Earlier Proposals by ASIC

The new framework is not identical to the proposed Funds Management Relief as outlined in ASIC Consultation Paper 315. Notable changes include the following:

- The removal of the revenue cap of 10%, which as initially proposed, would limit the relief to those FFSPs that generate less than 10% of their annual aggregated consolidated gross revenue (for each of the previous and current financial years) from the provision of funds management financial services in Australia
- The removal of the requirement for FFSPs to enter into a deed submitting to the non-exclusive jurisdiction of Australian courts.

<sup>7</sup> Section 9 of the Corporation Act 2001 (Cth).

## How We Can Help

If you are an FFSP who is currently relying on the Sufficient Equivalence Relief or the Limited Connection Relief, or is considering providing financial services in Australia, you will need to take necessary steps to transition to the new foreign AFSL regime. Our experienced team is able to advise and assist you in relation to this transition.

If you would like further information on how ASIC's new rules for FFSPs impact you or need assistance in making the application for a new foreign AFSL, please do not hesitate to contact us.

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