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*Practice Group(s):*

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## ASIC Proposes New Foreign Licensing Regime

On 1 June 2018, the Australian Securities and Investments Commission (**ASIC**) announced that it is proposing to implement a modified form of an Australian Financial Services Licence (**AFS Licence**) for Foreign Financial Service Providers (**FFSPs**) in Australia (**Foreign AFS Licence**). This proposal is a significant change to the existing regulatory regime which currently provides a large number of FFSPs with relief from the requirement to hold an AFS Licence when providing financial services to wholesale clients in Australia.

### Background

Many FFSPs regulated in the UK, US, Singapore, Hong Kong, Germany and Luxembourg currently provide financial services to wholesale clients in Australia pursuant to conditional relief (or individual relief issued by ASIC on similar terms) from the requirement to hold an AFS Licence under the Corporations Act 2001 (Cth) (**Corporations Act**). Until recently, this relief was contained in the following ASIC class orders:

- [CO 03/1099] *UK regulated financial service providers*
- [CO 03/1100] *US SEC regulated financial service providers*
- [CO 03/1101] *US Federal Reserve and OCC regulated service providers*
- [CO 03/1102] *Singapore MAS regulated financial service providers*
- [CO 03/1103] *Hong Kong SFC regulated financial service providers*
- [CO 04/829] *US CFTC regulated financial service providers*
- [CO 04/1313] *German BaFin regulated financial service providers*
- ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109

(together, the **Sufficient Equivalence Relief**)

In 2016, the Sufficient Equivalence Relief was extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396 for a period of two years until 27 September 2018.

ASIC also provides licensing relief to FFSPs whose only connection to Australia is the inducement, or likely inducement, of wholesale clients in Australia to use its financial services (the **Limited Connection Relief**).

The Limited Connection Relief was intended by ASIC to ensure a FFSP transacting with wholesale clients in Australia would not require an AFS Licence when there is a limited connection between the overseas financial services provided and Australia. ASIC also extended the Limited Connection Relief so that it will apply until 27 September 2018.

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### ASIC's Current Proposal

On 1 June 2018, after a period of initial consultation with industry, ASIC released *Consultation Paper 301: Foreign financial services providers (CP 301)* in which it proposes to:

1. Extend the Sufficient Equivalence Relief and Limited Connection Relief (together, **FFSP Relief**) for a period of 12 months until 30 September 2019.
2. Implement a modified AFS Licence regime for FFSPs commencing from 1 October 2020.

It is proposed that the FFSP Relief would be repealed from 1 October 2019. However, ASIC has indicated that it proposes a further 12-month transitional period allowing those entities relying on the FFSP Relief prior to 30 September 2019 to obtain a Foreign AFS Licence by 30 September 2020 if they wish to continue to provide financial services to wholesale clients in Australia. FFSPs will be able to apply for a Foreign AFS Licence from 1 October 2019.

### Foreign AFS Licence Regime

Under CP 301, ASIC proposes a Foreign AFS Licence regime from 1 October 2019 which would (if implemented):

- require a Foreign AFS Licence holder to comply with a number of general obligations that are imposed on all Australian AFS Licence holders under Australian financial services laws. In particular, it will require a Foreign AFS Licence holder to:
  - do all things necessary to ensure that the financial services covered by the Foreign AFS Licence are provided efficiently, honestly and fairly;
  - have in place adequate arrangements for managing conflicts of interest;
  - comply with the conditions of the Foreign AFS Licence;
  - comply with Australian financial services laws (subject to some modifications);
  - take reasonable steps to ensure that its representatives comply with Australian financial services laws; and
  - have adequate risk management systems in place;
- exempt a Foreign AFS Licence holder from the application of particular provisions of Chapter 7 of the Corporations Act and Corporations Regulations 2001 (Cth) where ASIC considers the overseas regulatory requirements achieve similar regulatory outcomes to the Australian requirements;
- impose tailored conditions on a Foreign AFS Licence holder, including some additional obligations relating to the appointment of representatives and the making of various notifications to ASIC; and
- require a Foreign AFS Licence applicant to provide similar documentation (core and additional supporting proof documents) in support of their application as that required for an Australian AFS Licence applicant.

This proposal is a significant departure from the existing regime and if implemented will require those FFSPs that rely on the FFSP Relief (and are unable to rely on any other exemption under the Corporations Act) to obtain a Foreign AFS Licence in relation to their Australian financial services activities.

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ASIC has indicated in CP 301 that its rationale for repealing the FFSP Relief is that it no longer strikes the appropriate balance between cross-border investment facilitation, market integrity and investor protections. However, some industry participants have raised concerns that the cost of obtaining a Foreign AFS Licence to continue a limited engagement with clients in Australia would outweigh the benefits, which in turn could lead to a withdrawal of a significant number of FFSPs from the Australian market.

### What does this mean for Foreign Financial Service Providers?

Under ASIC's proposal, the FFSP Relief will continue to apply until 30 September 2019 and entities relying on the FFSP Relief at that time may continue to rely on the FFSP Relief for a further 12-month transitional period ending 30 September 2020. However, this is subject to ASIC formally extending the FFSP Relief until that time. In the meantime, FFSPs should continue to closely monitor the consultation process.

### What should Foreign Financial Service Providers be doing now?

ASIC has invited all stakeholders to make submissions on CP 301.

FFSPs currently relying on FFSP Relief should consider engaging in the consultation process (either directly or through their legal counsel or industry body) and make submissions to ASIC.

ASIC has specifically sought feedback from FFSPs on the likely compliance costs, effect on competition and other impacts the proposed Foreign AFS Licence requirements might have, and is also interested to know how FFSPs conduct their cross-border financial services in other jurisdictions (and whether a licence is required in those other jurisdictions).

Submissions are due by 31 July 2018.

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