

Proposed changes to the AFS licensing regime for Foreign Financial Services Providers

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In brief

On 1 June 2018, the Australian Securities and Investments Commission (ASIC) released a consultation paper (CP 301) announcing proposed changes to the current licensing regime applying to foreign financial services providers (FFSPs) carrying on business in Australia. The proposed changes include the repeal of current relief instruments, the introduction of a 'foreign Australian Financial Services Licence', and the imposition of a 12-month transitional period to enable FFSPs to comply with the changes. Outlined below is a summary of the proposed changes, which are expected to take effect from 30 September 2019, subject to consultation with the financial services industry and the passage of legislation.

ASIC is currently seeking feedback from relevant stakeholders on the proposed changes, with final submissions to be received by no later than 31 July 2018.

In detail

The consultation paper released by ASIC proposes changes to the current licensing regime applying to FFSPs which provide financial services to wholesale clients in Australia.

The current regime

Currently, certain FFSPs that wish to carry on a financial services business in Australia are able to access one of two types of relief provided by ASIC:

1. Limited connection relief: class order [CO 03/824] (as extended by *ASIC Corporations (Foreign Financial Services Providers – Limited Connection, Instrument 2017/182)*) exempts FFSPs from holding an Australian financial services licence (AFSL) where the FFSP's services in Australia are limited to inducing or intending to induce persons in Australia to use its financial services, and where the provider only provides financial services to wholesale clients.
2. Sufficient equivalence relief: *ASIC Corporations (Repeal and Transitional) Instrument 2016/396* currently offers relief from the requirement to hold an AFSL where the FFSP is regulated under one of eight specified overseas regulatory regimes that ASIC considers to be 'sufficiently equivalent' to the regime in Australia.

The abovementioned relief instruments are set to expire on 27 September 2018. ASIC's consultation paper confirms that the current relief regime will be extended past the original expiry date for a further twelve months (i.e. until 30 September 2019) while ASIC consults with the financial services industry in respect of the proposed changes.

The proposed regime

From 30 September 2019, ASIC proposes that a new licensing regime apply to FFSPs. Under this proposed regime, FFSPs will no longer be able to access relief from the requirement to hold an AFSL, and will be required to either apply for an ordinary AFSL or a new, modified form of AFSL, termed a 'foreign AFSL'.

Holders of 'foreign AFSLs' will be required to provide similar documentation in support of their application as required for an ordinary AFSL, and will be required to comply with some (but not all) of the general obligations applying to ordinary AFSL holders under s912A(1) of the *Corporations Act 2001* (Cth). A foreign AFSL may also impose tailored conditions on a licence holder, depending on the jurisdiction in which it is registered and the services that it intends to provide in Australia.

However, foreign AFSL holders will be exempted from complying with certain obligations required of an ordinary AFSL holder if the FFSP is licensed in a foreign jurisdiction with a financial services regime that ASIC considers is 'sufficiently equivalent' to the Australian financial services regime. The jurisdictions currently assessed by ASIC as being of 'sufficient equivalence' (subject to the financial service being provided) include Germany, Hong Kong, Luxembourg, United Kingdom, Singapore, USA, Denmark, Sweden, France, and Brazil.

ASIC's intention is that the 'foreign AFSL' will allow for the continued operation of FFSPs in Australia while enabling ASIC to achieve greater oversight of the compliance of FFSPs with Australian regulatory requirements, and in effect maintain desired regulatory outcomes as well as the integrity of Australia's financial services industry.

ASIC's consultation paper proposes that in the event that ASIC proceeds with the proposed 'foreign AFSL' licencing regime, a 12 month transition period will apply (to 30 September 2020) to provide time for affected FFSPs to adapt to the regulatory changes.

The takeaway

ASIC's proposed licensing changes for FFSPs intend to address various concerns raised by ASIC in respect of the operation and regulation of the current financial services licensing regime and related exemptions. If implemented, the proposed changes will have a significant impact on FFSPs, which will need to consider whether they will be required to go through the process of obtaining an Australian or foreign financial services licence or whether alternate arrangements can be entered into with an existing AFSL holder, in relation to the financial services that are proposed to be provided in Australia. If you are a FFSP currently relying on the existing relief, you should continue to monitor the progress of the new licensing laws proposed in CP 301 and commence planning for potential changes to your current arrangements.

Let's talk

If you would like to make a submission to ASIC in response to consultation paper CP 301, would like to explore the options available to you under the proposed regime, or have any other queries or concerns in relation to the proposed changes to the licensing regime for FFSPs, please reach out to one of our financial services specialists:

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