

Article Information

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ASIC's new regulatory framework for foreign financial services providers

ASIC has released their new regulatory framework for foreign financial services providers which provide financial services to Australian wholesale clients.

On 10 March 2020, ASIC released its new regulatory framework for foreign financial services providers (**FFSPs**) which provide financial services to Australian wholesale clients. In order to operate a financial services business in Australia, a AFS licence needs to be held. Therefore, careful attention needs to be paid to [Regulatory Guide 176: Foreign financial services providers \(RG 176\)](#) if a financial services business is being operated.

The updated framework appear to be broadly consistent with the previous consultation papers (CP 301 and CP 315) released by ASIC. The are two legislative instruments:

- ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198 - foreign AFS licence to replace the previous 'sufficient equivalence' relief (commencing 1 April 2020, but with a two year transitional period for financial services providers relying on pre-existing relief), and
- ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199 - licensing exemption for overseas persons providing financial services by offering offshore managed investment schemes (**MIS**) and/or investment management products/services (commencing 1 April 2022).

A brief summary of both is below.

Foreign AFS licence

This requires FFSPs providing financial services only to wholesale clients to hold an AFSL but exempts them from the following requirements if they hold one of the named foreign regulatory licences (which have been assessed by ASIC as being sufficiently equivalent to Australian regulation of financial services):

- to notify ASIC of material adverse change in financial position;
- to keep records of training of representatives;
- to maintain adequate resources, training and competence to provide the financial services;
- if providing custodial/depository services, the organisational and financial requirements applying to AFS licensees with custodial/depository services authorisation;
- to pay application moneys into separate account with an ADI;
- restrictions on financial product dealings by or together with their employees; and
- obligations regarding dealing with client money and other property received from clients.

The relief from 'ordinary' AFSL requirements above is conditional on the following:

- if the licensee is not a company, to have a local agent appointed when first relying on the exemption and not being without a local agent for any period 10 business days or longer thereafter;
- the licensee would be permitted by the laws of its home jurisdiction to provide the financial services in its home jurisdiction; and
- notifying ASIC within 15 business days of ceasing to be eligible for the relief, of any change in its home jurisdiction licensing status or of any significant investigation, enforcement or disciplinary action faced overseas.

There will be a two year period for which the new foreign AFSL regime will coexist with the existing class order relief for wholesale financial service providers from certain overseas jurisdictions, in which such FFSPs will need to apply for an AFSL.

Foreign funds management services exemption

Under the framework there will be a licensing exemption for FFSPs providing certain financial services in relation to foreign MIS and investment management products if they would be carrying on a financial services business in Australian only because they are inducing persons in Australia to use their financial services. The exemption is conditional on:

- the only financial services being:
 - dealing in, providing advice in relation to, making a market for (but only in the course of redeeming or buying back financial products) and/or providing a custodial/depository service in relation to offshore MIS products;
 - dealing in financial products, providing financial product advice, making a market for financial products (but only by redeeming or buying back interests in a MIS) under a portfolio management services mandate with an Australian client; and/or
 - providing a custodial/depository service to a client under or in relation to a custodial/depository service,
- the only clients are:
 - a responsible entity of a registered scheme;
 - a trustee of a super fund/scheme or approved deposit fund;
 - a trustee of a wholesale trust who holds an AFSL or who is exempt under ASIC Corporations Instrument 2017/849 (dealing with wholesale equity schemes);
 - a body regulated by APRA other than a superannuation trustee; and/or
 - an exempt public authority other than a local council,
- giving ASIC written confirmation:
 - that they intend to rely on this exemption;
 - of their home jurisdiction and that they would not contravene their home jurisdiction's laws if they would provide the financial services in their home jurisdiction;
 - that the regulator in home jurisdiction is a signatory to the International Organisation of Securities Commissions' Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information;
 - that on the written request of ASIC or their home jurisdiction regulator, they will give any consent and take any other practicable steps to enable information sharing between ASIC and home jurisdiction regulator;
 - that they will give any information and assistance as requested by ASIC from time to time; and
 - that they have an agent for service in Australia, and the name and address of their agent for service,
- not having a place of business in Australia, and
- having an agent for service appointed in Australia at the time of starting to apply for the exemption, and not failing to have such an agent for any consecutive period of 10 business days.

This exemption will commence operation on 1 April 2022.