

FOREIGN FINANCIAL SERVICES PROVIDERS UPDATE

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Asset Management and Investment Funds Alert

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UPDATE ON ASIC FOREIGN AFSL REGIME

It has now been over five months since the Australian Securities and Investments Commission (ASIC) commenced its foreign Australian Financial Services Licence (AFSL) regime. Existing class order relief will expire on 31 March 2022 and we are seeing several Foreign Financial Services Providers (FFSPs) already moving forward with their plans to obtain a foreign AFSL and prepare the required documents for the ASIC application.

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. We further understand that ASIC is currently contacting entities relying on existing class order relief to determine what their plans are and ASIC has stated it will not entertain an extension of relief to any applicant making a late application that is still in progress on 31 March 2022.

Based on the above, it is our view that the planning and preparation of the foreign AFSL application should commence by no later than Q4 2020 with a view to lodging the application with ASIC by no later than Q1 2021.

For more information on this new ASIC regime as well as details on the application process, please refer to our [legal alert](#) published in April this year.

GETTING READY FOR THE FOREIGN AFSL REGIME

Prior to making an application for a foreign AFSL there are some pre-application checks that you can usefully do to avoid surprises down the track which can either compromise the application or require a change to your business model for doing financial services business in Australia.

Ongoing disclosure obligations as FFSPs and/or registered foreign companies

If you are currently relying on class order relief and/ or are registered with ASIC as a foreign company, you are currently required to comply with certain ongoing disclosure obligations. Prior to making an application for a foreign AFSL, it is a really good idea to check to see whether these ongoing filings have been made within the stated timeframes. ASIC consider instances of non-compliance with ongoing reporting and filings when assessing an application for a foreign AFSL.

A summary of these obligations is as follows.

Registered foreign company

Registered foreign companies are required to comply with the following ongoing disclosure obligations:

| Notification Event | Notification Timeframe |
|---|---|
| A change to the name of the company or business name | 14 days |
| A change to the registered office address or office opening hours in the local jurisdiction | 1 calendar month |
| A change to the registered office address or office opening hours in Australia | 7 days |
| Winding up of foreign company | 14 days |
| Cessation of business in Australia | 7 days |
| Changes to local agents or their details | 1 calendar month |
| Changes to foreign company's directors or their details | 1 calendar month |
| A change to foreign company's articles of association or changes to the directors' powers in Australia | 1 calendar month |
| Form 405 - Lodgement of financial records (comprising of a balance sheet, profit and loss statement and cash flow statement as well as any financial statements required by the local regulator). | Annually – foreign company must lodge within 15 months of its last Form 405 lodgement |

FFSP relying on class order relief

FFSPs relying on class order relief are required to notify ASIC at FFSP@asic.gov.au as soon as possible by letter of any of the following notifiable matters:

| Notification Event | Notification Timeframe |
|---|------------------------|
| FFSP no longer wishes to rely on the instrument | 15 business days |
| A change of the name or the address of the FFSP | 15 business days |
| A change of the name or the address of your agent, or change in your agent, or both | 15 business days |
| A change in their business structures (e.g. from limited partnership to limited liability company or other type of structure) | 15 business days |
| Any significant change to the FFSP's authorisation relevant to the financial services provided or intended to be provided in Australia (e.g. if part or all of it is terminated, if you are authorised to | 15 business days |

| Notification Event | Notification Timeframe |
|---|------------------------|
| engage in any additional types of financial service, or if you are granted a significant exemption or other relief) | |
| Any significant investigation, enforcement or disciplinary action against the FFSP in an overseas jurisdiction | 15 business days |

Please let us know if you need assistance with complying with the abovementioned ongoing obligations (such as the lodgement of the Form 405) or if you have any queries in relation to other FFSP/ registered foreign company ongoing compliance obligations.

Consideration of taxation status in Australia

FFSPs should also consider their tax status in Australia.

We note that the tax status of an FFSP in Australia depends on, among other things, whether it is considered to have a permanent establishment in Australia. A consequence of being deemed to have a permanent establishment in Australia may mean that any Australian derived income is subject to Australian income tax.

There is no single test to determine if an FFSP has a permanent establishment in Australia. However, the Australian Tax Office (ATO) has identified that it will depend on the type of activities and the frequency of such activities that the FFSP conducts in Australia.

In particular, if FFSPs have seen growth in the number of their Australian clients or have been operating within the Australian jurisdiction with increasing regularity, it may be timely to assess and document the reasons why an FFSP does or does not have an Australian permanent establishment.

This assessment and documentation is also important even where FFSPs do not consider that they have a tax presence in Australia. This is because in the event that the ATO takes a different view and deems an FFSP to have an Australian tax presence, it may not seek to impose penalties on those FFSPs that have a documented "reasonably arguable position" as to why they did not have a permanent establishment in the first place.

Please let us know if you have any questions and we would be happy to discuss any of the above points further.

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