FOREIGN FINANCIAL SERVICES PROVIDERS – ONLY 13 MONTHS REMAIN TO CHOOSE AUSTRALIAN REGULATORY OPTIONS

AUSTRALIA FINANCIAL SERVICES ALERT

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As many global financial services organisations know, the Australian Securities and Investments Commission (ASIC) during 2020 finalised its Regulatory Guidance for Foreign Financial Services Providers (FFSPs) to transition to the new Australian licensing regime which will commence on 31 March 2022. The new licensing regime is being introduced to replace the Class Order exemptions from licensing that ASIC granted in the last 15 years to many FFSPs allowing the provision of investment management services to wholesale and institutional Australian investors.

FFSPs will have three fundamental regulatory options available to them if they want to continue to provide financial services to Australian wholesale and institutional investors after March 2022:

- Obtain a foreign Australian Financial Services Licence (AFSL).
- Obtain appropriate authorisation from an existing AFSL holder.
- Funds management relief.

Each of these options is discussed below.

APPLYING FOR A FOREIGN AUSTRALIAN FINANCIAL SERVICES LICENCE (AFSL)

A foreign AFSL will permit an FFSP to conduct the same investment management activities in Australia as they conduct in their home jurisdiction. This may include marketing of their offshore products to Australian investors and providing portfolio management services via an investment management agreement.

ASIC's guidelines for FFSPs seeking an AFSL were contained in *ASIC Corporations (Foreign Financial Services Providers - Foreign AFS Licensees) Instrument 2020/198* (Foreign AFS Licensees Instrument).

This instrument sets out the key processes that are relevant to the application and ongoing obligations that will apply to foreign AFSL licensees, including the following:

- **Eligibility requirements**

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In order to meet the eligibility requirements needed to apply for a foreign AFSL, an FFSP must be authorised by one of the equivalent foreign regulatory regimes eg U.S., United Kingdom, Hong Kong, Singapore, Germany and others.

In addition an FFSP will also need to check that the financial services it intends to provide to Australian wholesale clients are within the scope of services specified for that regulatory regime (there are differences depending on the regulator).

- **Application process**

The substantive part of the application process will involve providing ASIC with 'proof' documents which broadly set out the details about the financial services and products the FFSP will provide to Australian wholesale clients as well as certain details about the FFSP's business.

These documents include:

- an A5 Business Description core proof document (which provides an overview of the FFSP's financial services business and the products and services it wishes to offer in Australia); and
- a people proof document for each responsible officer (which involves describing the qualifications, previous experience and character of the responsible managers) and details around controlling entities and persons.

In addition to lodging proof documents, ASIC will seek declarations from FFSPs that they have the systems and processes in place to comply with their ongoing obligations and licence conditions under the foreign AFSL which are set out in further detail in the section below.

- **Ongoing obligations and conditions of relief**

Once an FFSP has obtained a foreign AFSL, it is required to comply with the conditions for the relief set out under the Foreign AFS Licensees Instrument. These conditions are similar to the conditions that were previously required under the existing Class Order relief that many FFSPs have been using for some time and include:

- appointing an agent and not failing to have an agent for a period of more than 10 consecutive days; and
- notifying ASIC of each significant investigation, enforcement or disciplinary action undertaken by any overseas regulatory authority.

In addition to the conditions of relief, licensed FFSPs will also be subject to specific conduct obligations under the *Corporations Act 2001* (Cth) (Corporations Act) including, but not limited to:

- the provision of financial services fairly, honestly and efficiently;
- having adequate risk management systems;
- breach reporting requirements; and
- providing written statements to ASIC directed to do so under section 912C of the Corporations Act.

We expect that most of these obligations are generally similar, or equivalent, to those required of FFSPs in their home jurisdictions.

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OBTAIN APPROPRIATE AUTHORISATION FROM AN EXISTING AFSL HOLDER

If an FFSP does not want to go through the process of obtaining a foreign AFSL, it could instead choose to enter into an authorised representative arrangement with a local AFSL holder. This arrangement if appropriately structured will also permit an FFSP to conduct similar activities in Australia to those which they conduct in their home jurisdiction, including marketing of offshore product and portfolio management activities through an investment management agreement.

One of the advantages of this approach is that an FFSP can put the arrangement into place relatively quickly, but it does mean that the AFSL holder is involved to a degree in the investment management business of the FFSP.

Unlike the sometimes extended process of application to ASIC for an AFSL, becoming an authorised representative of an AFSL holder is effected by private contract with the appointment subject only to notification to ASIC rather than the seeking of a permission.

The obligations under a typical authorised representative agreement include only a modest amount of reporting to and monitoring by the AFSL holder.

This is a conventional and commonplace arrangement in Australia which wholesale and institutional investors are accustomed to entering into arrangements with authorised representatives of AFSL holders.

FUNDS MANAGEMENT RELIEF

Funds Management Relief is appropriate where an FFSP is only involved in limited investment management activities in Australia and the FFSP does not have a physical presence in Australia. This relief will typically apply where an FFSP has a handful of Australian investor clients which they service from offshore without any dedicated personnel in Australia.

ASIC has published the *ASIC Corporations (Foreign Financial Service Providers - Funds Management Financial Services) Instrument 2020/199* (Funds Management Relief Instrument) which introduces licensing relief for those FFSPs providing a limited financial services offering in Australia.

The Funds Management Relief will be available to those FFSPs who engage in conduct that induces persons in Australia to use the financial services provided by the FFSP where those services are not provided in Australia (ie are provided from offshore).

By obtaining this relief, FFSPs will, among other things, be able to:

- deal in financial products in, or issued by, an offshore fund to an 'eligible Australian user';
- deal in financial products under an arrangement with an 'eligible Australian user' to provide portfolio management services to the 'eligible Australian user';
- provide financial product advice to an 'eligible Australian user' in relation to financial products in, or issued by an offshore fund;
- provide financial product advice under an arrangement with an 'eligible Australian user' to provide portfolio management services to the 'eligible Australian user'; or

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- provide custodial or depository services in connection with the financial products set out above or in relation to the above sections.

The provision of these services is limited to a category of professional investors known as an 'eligible Australian user' (which includes superannuation trustees, licensed trustees of wholesale funds and responsible entities of registered managed investment schemes).

From 1 April 2022, an FFSP that intends to rely on the Funds Management Relief Instrument will be required to, among other things, provide ASIC with a written confirmation of certain matters and appoint an agent who will be able to receive notices and respond to requests for relevant information about activities involving investors in Australia.

As part of the ongoing conditions for this relief, FFSPs will need to ensure that they do not fail to have an agent for service for any consecutive period of 10 days and will also need to provide ASIC with written details of any changes to the agent or agent's contact information.

It should be noted that prior to the commencement of the Funds Management Relief Instrument from 1 April 2022, ASIC has extended the operation of the predecessor arrangements known as Limited Connection Relief to 31 March 2022.

NEXT STEPS

During the second half of 2020 we were involved in discussions with several clients with global distribution channels on finalising their strategies for their regulatory status in Australia post March 2022. Where those clients opted for options two or three above, there remains plenty of time to put in place the necessary arrangements to give effect to those strategies.

However, where entities are looking to obtain a foreign AFSL (and the majority of the clients we have been speaking to fit within this category) the 13 months remaining to obtain a foreign AFSL is now looking a little tight, bearing in mind:

- the anticipated flood of applications which ASIC will need to process prior to March 2022; and
- the volume of application material which each applicant will need to produce and furnish to ASIC as part of the application process.

ASIC have stated that FFSPs who have applied for a foreign AFSL but have not obtained it by 31 March 2022 will need to look at other options if they want to continue to provide financial services to Australian customers beyond that date.

The K&L Gates team in Melbourne and Sydney have been working with FFSP clients on these issues for many years and we have the necessary skills and experience to ensure that FFSPs obtain the financial services authorisations that they require and that are appropriate to their business in Australia.

If you require further information in relation to the new Australian regulatory regime for FFSPs please don't hesitate to call one of the team in Melbourne or Sydney.

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