ASIC CHANGES COURSE ON PROPOSALS FOR RELIEF FOR FOREIGN FINANCIAL SERVICES PROVIDERS

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Financial Services Alert

By: Jim Bulling

The Australian Securities and Investments Commission (ASIC) released on 3 July 2019 Consultation Paper 315: Foreign financial services providers (CP 315) which seeks feedback on the proposed introduction of a modified Australia Financial Services (AFS) Licencing regime for foreign financial services providers (FFSPs).

The proposals contained in CP 315 are significantly different to those contained in the earlier Consultation Paper 301 (CP 301) in June 2018 in which it proposed to repeal the conditional relief available to FFSPs (FFSP Relief) and implement a modified form of AFS Licence for FFSPs. For further details about ASIC's proposals as outlined in CP 301, please read our previous article here.

In CP 315, ASIC have modified their earlier announcements as follows:

1. CANCELLING FFSP RELIEF

ASIC will extend the availability of FFSP Relief until 31 March 2020 (previously 30 September 2019), after which time it intends to cancel FFSP Relief. In addition, ASIC will give FFSPs who are then relying on the relief until 31 March 2022 to either obtain a Foreign AFS Licence, rely on the alternative Funds Management Relief (discussed below) or obtain an authority from an existing AFS Licensee.

ASIC will also cancel the "Limited Connection Relief" from 31 March 2020, which is currently available to FFSPs that are deemed to be carrying on a financial services business in Australia only because they induce persons in Australia to use their financial services. FFSPs that are relying on this relief will have a 6 month transitional period, meaning that they will be able to continue to rely on it until 30 September 2020.

2. PROPOSED FOREIGN AFS LICENCE

ASIC has provided additional detail in relation to the proposed Foreign AFS Licencing regime and have said FFSPs that are regulated in the equivalent jurisdictions described in the existing FFSP Relief will be eligible to apply for a Foreign AFS Licence from 1 April 2020.

Updated Regulatory Guide 176 which was attached to CP 315 outlines a streamlined Foreign AFS Licence application process. FFSP applicants for a Foreign AFS Licence, will be the entity which is licensed or regulated in one of the established equivalent jurisdictions and will be required to:

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- submit an A5 Business Description core proof document (which provides an overview of the FFSPs financial services business)
- submit a people proof document for each responsible officer (which involves describing the qualifications, previous experience and character of the responsible managers)
- have in place adequate risk management systems
- have in place adequate arrangements to manage conflicts of interest.

However, FFSP applicants will be exempt from several significant obligations on the basis that they are subject to sufficiently equivalent offshore regulatory requirements. As a result FFSP applicants will not be required to:

- submit a B1 Organisational Competence core proof document (which requires a detailed description of the experience and qualifications of each responsible manager)
- submit a B5 Financial Statements and Financial Resources core proof document (which involves details of how you will comply with your financial obligations)
- maintain adequate resources
- maintain the competence to provide the financial services it is authorised to provide
- ensure that representatives are appropriately trained.

3. PROPOSED FUNDS MANAGEMENT RELIEF

ASIC is concerned to ensure that smaller scale FFSPs are able to participate in the Australian market without having to commit to obtain an AFS Licence. As a result, CP 315 proposes to introduce a new Funds Management Relief that certain FFSPs may be able to rely on after the expiry of the existing FFSP Relief. ASIC considers that an FFSP engages in "Funds Management" if it provides:

- any of the following financial services to professional investors (which is a narrower definition than wholesale investors) in Australia:
  - dealing in interests of a managed investment scheme established outside of Australia or securities of a body that carries on a business of investment that is not incorporated in Australia
  - providing financial product advice in relation to the interests or securities of the scheme or body
  - making a market in relation to the interests or securities of the scheme or body
- portfolio management services to a limited category of professional investors that are specified as "eligible Australian users" (which includes superannuation trustees and managed investment schemes with net assets of at least $10 million AUD).

To be eligible for the relief, the revenue generated from providing the financial services in Australia must account for less than 10% of the FFSP's annual aggregate consolidated gross revenue.

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ASIC is proposing to make the Funds Management Relief available from 1 April 2020, with a 6 month transitional period to facilitate compliance with the conditions of the relief.

WHAT DOES THIS MEAN FOR FFSPS?

- Those that are relying on FFSP Relief can continue to do so until the transitional period ends, which is now 31 March 2022. By 1 April 2022, FFSPs will need to have either obtained a Foreign AFS Licence, commenced relying on the Funds Management Relief or have obtained authorisation from an existing licensee.
- FFSPs can start applying for a Foreign AFS Licence from 1 April 2020. In this regard ASIC are saying that FFSPs ought to consider applying early as processing times for applications will increase as more applications are lodged.
- FFSPs can apply for the Funds Management Relief from 1 April 2020. The new relief will be available to FFSPs regardless of whether they are regulated in one of the established equivalent jurisdictions that are covered by the existing FFSP Relief.

In the meantime, FFSPs should familiarise themselves with the proposals in CP 315 and closely monitor the outcome of the consultation process.

The release of the further details on the application process for a foreign AFS Licence and the introduction of the new Funds Management Relief mean that FFSPs will need to think very carefully not only about which option is available to them but also which option is the most appropriate.

We will provide further details as the process for FFSPs unfolds.

KEY CONTACTS



JIM BULLING
CONSULTANT

MELBOURNE
+61.3.9640.4338
JIM.BULLING@KLGATES.COM



DANIEL KNIGHT
PARTNER

MELBOURNE
+61.3.9640.4324
DANIEL.KNIGHT@KLGATES.COM

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