



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 268

Licensing relief for foreign financial services providers with a limited connection to Australia

September 2016

About this paper

This consultation paper seeks feedback on our proposal to repeal Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients*, which is due to expire on 1 April 2017.

It also provides an update for foreign financial services providers (FFSPs) and other relevant stakeholders on:

- the recent temporary extension of our relief for FFSPs from the United Kingdom, United States of America, Germany, France, Singapore and Hong Kong that provide a range of financial services to Australian wholesale clients; and
- our plans to comprehensively review our relief for FFSPs during the extension period, which will involve us engaging with stakeholders about the terms of any relief.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 28 September 2016 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at www.asic.gov.au/privacy for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 2 December 2016 to:

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What will happen next: Proposed repeal of [CO 03/824]?

Stage 1	28 September 2016	Release of this consultation paper
Stage 2	2 December 2016	Comments due on this consultation paper
Stage 3	March 2016	Repeal of [CO 03/824]

What will happen next: Relief for FFSPs?

Stage 4	October 2016– December 2017	Comprehensive review of our relief for FFSPs
Stage 5	January 2018	Indicative release of consultation paper on our proposals to remake our relief for FFSPs
Stage 6	1 October 2018	ASIC Corporations (Repeal and Transitional) Instrument 2016/396 is due to expire

A Background

Key points

Legislative instruments such as class orders are repealed automatically, or ‘sunset’, after 10 years unless action is taken to exempt or preserve them. We will consult on all sunsetting legislative instruments that have more than a minor or machinery regulatory impact.

This consultation paper:

- sets out our proposal to repeal [Class Order \[CO 03/824\] Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients](#), which sunsets on 1 April 2017; and
- details the rationale behind the recent two-year extension of our relief for certain foreign financial services providers (FFSPs) (see [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#)).

Purpose of ‘sunsetting’ legislative instruments

- 1 Under the *Legislation Act 2003*, legislative instruments cease automatically, or ‘sunset’, after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislation (FRL). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument such as a class order must be remade before the sunset date. The purpose of sunsetting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose, necessary and relevant.
- 3 Where an instrument is deemed to no longer serve a regulatory purpose we will consult on repealing it. We will repeal instruments rather than allow them to sunset so that industry is certain of our intentions and confident that, where instruments are removed, this was our intention.

Proposed repeal of [CO 03/824]

- 4 Section B of this paper seeks feedback on our proposal to repeal [CO 03/824] because, in our view, the relief is substantively replicated in the Corporations Regulations 2001 (Corporations Regulations). In proposing to repeal this instrument, we aim to ensure that only instruments that serve a regulatory purpose are maintained.

- 5 We have a deregulatory focus. We are aware of the burden unnecessary red tape or duplicated regulation can impose on business and the potential impact of this on productivity. To address this, we continue to pursue initiatives to reduce red tape for individuals and businesses. We welcome feedback where repealing an instrument would impose an unnecessary or excessive regulatory burden on business.

Temporary extension of relief for foreign financial services providers

- 6 We have temporarily extended for two years our existing relief for FFSPs from the need to hold an Australian financial services (AFS) licence for certain financial services: see ASIC Corporations (Repeal and Transitional) Instrument 2016/396. Our existing class orders were due to ‘sunset’ (expire) between 1 October 2016 and 1 April 2017. Section C of this paper provides an update for FFSPs and other stakeholders on the rationale behind this temporary extension and our plans for future consultation on this relief.

B Proposal to repeal ASIC class order

Key points

We are proposing to repeal [CO 03/824], which sunsets on 1 April 2017. We have formed the preliminary view that this class order is no longer required and does not form a necessary and useful part of the regulatory framework.

If we repeal [CO 03/824], we are proposing a one-year transitional period for entities that rely on the relief to make arrangements to allow them to continue carrying on their financial services business in Australia.

Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients*

Background

- 7 Generally, entities that carry on a financial services business in Australia must hold an AFS licence unless they are otherwise exempted: see s911A of the *Corporations Act 2001* (Corporations Act).
- 8 [CO 03/824] provides relief for a foreign entity from the need to hold an AFS licence where it is:
- (a) dealing only with wholesale clients; and
 - (b) carrying on a financial services business by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services it provides, or is likely to have that effect (see s911D of the Corporations Act).
- 9 The original policy rationale for this relief was to ensure that isolated transactions by a foreign entity with Australian wholesale clients would not require that entity to hold an AFS licence. It was granted in part due to concerns that overseas counterparties to derivatives and foreign exchange transactions may be caught engaging in inducing conduct under s911D when issuing financial products to Australian wholesale clients. This would require those overseas counterparties to be licensed for entering into ad-hoc derivatives and foreign exchange contracts with Australian wholesale clients.
- 10 Unlike our relief for FFSPs (discussed at paragraphs 19–21), there is no requirement for foreign entities that rely on [CO 03/824] to notify us of their reliance on that class order. We understand from our engagement with industry that in many cases entities rely on [CO 03/824] generally because

they do not qualify for our broader FFSP relief, or they only carry on small and infrequent business in this jurisdiction.

- 11 We note that relief for foreign entities from the requirement to hold an AFS licence when providing certain financial services is also provided in s911A(2E) as inserted by reg 7.6.02AG of the Corporations Regulations. Section 911A(2E) provides that a person (person 1) is exempt from the requirement to hold an AFS licence for a financial service they provide to a person (person 2) in the following circumstances:
- (a) person 1 is not in this jurisdiction;
 - (b) person 2 is a professional investor; and
 - (c) the service consists of any or all of the following:
 - (i) dealing in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
 - (ii) providing advice on derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
 - (iii) making a market in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units.

Proposal

- B1** We propose to repeal [CO 03/824], which would otherwise sunset on 1 April 2017, on the basis that its substantive effect is now covered by s911A(2E). We consider that a one-year transitional period will be sufficient to facilitate compliance with the Corporations Act. You can access the current instrument at www.legislation.gov.au by clicking on the following direct link: [\[CO 03/824\]](#).

Your feedback

- B1Q1 Are you an entity that relies on [CO 03/824] and, if so, for what financial services? Please provide details.
- B1Q2 Do you consider that [CO 03/824] is currently operating effectively and efficiently? Please give reasons for your view.
- B1Q3 Do you rely on [CO 03/824] to provide financial services in relation to financial products that are not referred to in s911A(2E)? If so, please provide details of these services and products.

- B1Q4 If we repeal [CO 03/824], do you think that one year is an appropriate transitional period to facilitate future compliance with the Corporations Act, including seeking any other relevant exemptions that may be necessary for you to continue providing financial services to Australian wholesale clients? Please give reasons for your view.
- B1Q5 If we were to continue the relief in [CO 03/824], what would be the costs associated with a requirement to notify ASIC when you are relying on [CO 03/824]? Please give reasons for your view.
- B1Q6 If we were to temporarily extend the relief in [CO 03/824] until the expiry of ASIC Corporations (Repeal and Transitional) Instrument 2016/396, what would be the costs associated with a requirement to notify ASIC when you are relying on [CO 03/824] during the extension period? Please give reasons for your view.

Note: See Section C of this paper on the temporary extension of our relief for FFSPs in ASIC Corporations (Repeal and Transitional) Instrument 2016/396, and our plans to comprehensively review this relief and engage with stakeholders before it is due to expire in two years.

Rationale

- 12 We consider that [CO 03/824] should be repealed because the major types of financial services that it applies to are now substantially covered by the AFS licensing exemption for those financial services contained in s911A(2E).
- 13 We recognise that the relief in [CO 03/824] is different from that under s911A(2E) in two ways:
- (a) *Financial service limitation*: [CO 03/824] applies to ‘the provision of [any] financial service’ for all financial products, rather than the financial services listed in s911A(2E), which are limited to dealing, advising or making a market in derivatives, foreign exchange contracts and a range of financial products related to carbon emissions.
 - (b) *Identity of counterparty*: [CO 03/824] applies where the service is provided to a wholesale client, while s911A(2E) states that the financial service must be provided to a professional investor, as defined in s9 of the Corporations Act.
- 14 We consider that repealing [CO 03/824] is appropriate because it substantively replicates the exemption in s911A(2E) and as such may no longer serve a regulatory purpose for those financial services specified in s911A(2E). We note that the exemption in s911A(2E) applies to the major types of financial services involving those financial products where we understand the relief is most needed, such as dealings with overseas counterparties in derivatives. We also consider that most wholesale clients

that rely on [CO 03/824] fall within the definition of professional investor for the purposes of s911A(2E).

- 15 Entities that are relying on [CO 03/824] to provide financial services in relation to products or services that are not specified in s911A(2E) are invited to identify themselves as part of this consultation. Where only a small number of entities engaging in activities not covered by s911A(2E) identify themselves in this consultation, we will consider repealing [CO 03/824] and encourage those entities to apply for individual relief.

Note: See [Regulatory Guide 51 Applications for relief](#) (RG 51) at RG 51.57–RG 51.62 for more information about when we will exercise our discretion to grant individual relief.

One-year transitional period

- 16 We consider that a one-year transitional period would assist industry if we repeal [CO 03/824]. This will allow sufficient time for any entities that are relying on [CO 03/824] to provide services for products other than those in s911A(2E) to make alternative arrangements. This could include seeking any other relevant exemptions that may be necessary for those entities to continue providing financial services to Australian wholesale clients in compliance with the Corporations Act.

Temporary extension of relief in [CO 03/824]

- 17 If submissions show a need for the relief in [CO 03/824] to be considered in the context of the review of our relief for FFSPs (see Section C), we will temporarily extend the relief in [CO 03/824] until the expiry of ASIC Corporations (Repeal and Transitional) Instrument 2016/396. This would allow us to consider [CO 03/824] more broadly in the context of our planned review of the relief for FFSPs.

C Update on our relief for foreign financial services providers

Key points

We have extended for two years our existing relief for FFSPs that operate from specified countries from the need to hold an AFS licence for certain financial services: see ASIC Corporations (Repeal and Transitional) Instrument 2016/396.

Our previous class orders were due to sunset between 1 October 2016 and 1 April 2017. We have temporarily extended this relief to conduct a comprehensive review of the policy settings underlying our relief for FFSPs. We intend to consult with stakeholders during 2017–18 in the course of this review.

We are committed to ensuring that any relief for FFSPs operates to ensure that Australia's financial markets are fair and efficient in the current market and regulatory environment.

Temporary extension of relief

- 18 Our relief for FFSPs has been a part of the regulatory landscape since 2003. Until recently, this relief was contained in the following class orders:
- (a) [CO 03/1099] *UK regulated financial service providers*;
 - (b) [CO 03/1100] *US SEC regulated financial service providers*;
 - (c) [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*;
 - (d) [CO 03/1102] *Singapore MAS regulated financial service providers*;
 - (e) [CO 03/1103] *Hong Kong SFC regulated financial service providers*;
 - (f) [CO 04/829] *US CFTC regulated financial services providers*; and
 - (g) [CO 04/1313] *German BaFin regulated financial service providers*.
- 19 ASIC Corporations (Repeal and Transitional) Instrument 2016/396 was made to temporarily extend the effect of these class orders that were due to sunset between 1 October 2016 and 1 April 2017. We have temporarily extended our existing relief for FFSPs from the need to hold an AFS licence for certain financial services. This temporary extension of relief will sunset two years from the commencement of the instrument unless we take action to preserve it.
- 20 This relief exempts certain FFSPs from the requirement to hold an AFS licence to provide financial services in Australia if:

- (a) the particular financial services are provided to wholesale clients only (see [Regulatory Guide 176](#) *Foreign financial services providers* (RG 176) at RG 176.16–RG 176.17);
- (b) the particular financial services (not the financial product) are regulated by an overseas regulatory authority (see RG 176.18–RG 176.27);
- (c) the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime (see RG 176.28–RG 176.39);
- (d) there are effective cooperation arrangements between the overseas regulatory authority and ASIC (see RG 176.40–RG 176.47); and
- (e) the FFSP meets all the relevant conditions of relief (see Section E of RG 176).

21 The policy rationale behind our relief was to attract additional investment and liquidity to Australian markets by addressing the duplicated regulatory burden arising from compliance with Australia’s regulatory regime where FFSPs were already subject to sufficiently equivalent regimes in their home jurisdictions.

22 In providing this temporary extension to our relief for FFSPs we do not require entities that were relying on the superseded class orders listed in paragraph 18 to lodge any new notification to indicate to ASIC that they are now relying on ASIC Corporations (Repeal and Transitional) Instrument 2016/396. Similarly, we do not require those same entities to provide us with any new notification about the agent that they appointed as part of satisfying the conditions of the superseded class orders. Those entities will need to comply with all other notification requirements under ASIC Corporations (Repeal and Transitional) Instrument 2016/396 from its commencement.

Reasons for temporary extension of our relief

23 We are committed to facilitating the cross-border provision of financial services where it does not undermine our ability to ensure fair and efficient markets.

24 An initial review of our relief for FFSPs has determined that our relief is relied on by approximately 775 entities and has been effective in avoiding the duplicated regulatory burden where FFSPs are already subject to sufficiently equivalent regulation in their home jurisdictions.

25 However, we consider that further review is required before we can make an informed decision about whether the current relief settings should continue on a long-term basis. This review would need to consider, among other things:

- (a) in light of recent evidence of non-compliance with our relief for FFSPs, the extent to which the current relief settings provide an effective mechanism to:
 - (i) monitor the conduct of FFSPs in our markets; and
 - (ii) allow us to take appropriate action against FFSPs in the event of non-compliance; and
- (b) the impact of increased regulatory focus on wholesale cross-border markets since the relief was originally granted, including the over-the-counter (OTC) derivative reforms adopted by the Group of Twenty (G20) in 2009.¹

26 Accordingly, we determined to temporarily extend the operation of our previous class order relief to make sure that industry can continue to have the benefit of the relief for another two years. The temporary extension of our relief will ensure we have the opportunity to consider relevant information that may shape our proposals about the regulation of FFSPs. This includes, among other things, the findings of the following external reviews and inquiries that have the potential to affect our proposals for relief:

- (a) the implementation of recommendations made by the Financial System Inquiry² (Murray report) relating to competition, including the introduction of a competition mandate for ASIC and a review into the state of financial sector competition;
- (b) the implementation of recommendations made by the ASIC Capability Review³ panel relating to ASIC's data analytics capabilities, including efforts to facilitate data collaboration among peer regulators; and
- (c) any further findings to be made by the International Organization of Securities Commissions (IOSCO) Task-Force on Cross-Border Regulation to better facilitate cross-border regulation.

We will also conduct further surveys of international approaches to the cross-border provision of financial services during this period.

27 A temporary extension of our relief further ensures that we have sufficient time to consult with affected stakeholders on potential amendments to the current relief that are informed by the outcomes of the above initiatives.

¹ [G20 Leaders Statement: The Pittsburgh Summit](#), 24–25 September 2009.

² [Financial System Inquiry Final Report](#), November 2014.

³ [Fit for the future: A capability review of the Australian Securities and Investments Commission](#), 20 April 2016.

Our plans for consultation

- 28 We intend to consult with industry on any proposals to amend our relief for FFSPs that arise from the reassessment of the policy underlying the relief. Any proposals to amend the current relief arising from the reassessment will aim to strike an appropriate balance between:
- (a) facilitating the cross-border provision of financial services on the basis of substituted compliance; and
 - (b) ensuring we can adequately supervise these foreign entities in our markets.
- 29 We will advise interested stakeholders of our consultation plans to ensure there are appropriate opportunities to engage with our proposals as they develop.

Data to inform our review

- 30 The review of our relief for FFSPs will be most effective where stakeholders can share information about their current operations with us. Without this information, we may not be able to conclude that the relief is currently operating in a way that promotes our strategic priority of fair and efficient markets. Our subsequent consultation proposals for FFSPs will be shaped by our objective of promoting investor trust and confidence in our markets.
- 31 To that end, the following information from interested stakeholders will assist us in reviewing the relief for FFSPs and developing subsequent consultation proposals:
- (a) the type of entities that rely on our relief;
 - (b) the type of activities for which entities rely on our relief; and
 - (c) the volume of business for entities that rely on our relief.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
[CO 14/26] (for example)	An ASIC class order (in this example numbered 14/26) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
foreign financial services provider (FFSP)	A provider of financial services that is regulated by an overseas regulatory authority and that wishes to provide its wholesale financial services in Australia without obtaining an AFS licence
home jurisdiction	The jurisdiction from which the FFSP originates and in which it is regulated
overseas regulatory authority	The relevant regulatory authority of the FFSP in its home jurisdiction
overseas regulatory regime	The regulatory regime administered by the relevant regulatory authority of the FFSP in its home jurisdiction
professional investor	Has the meaning given in s9 of the Corporations Act
reg 7.6.02AG (for example)	A regulation of the Corporations Regulations (in this example numbered reg 7.6.02AG), unless otherwise specified
RG 51 (for example)	An ASIC regulatory guide (in this example numbered 51)
s25 (for example)	A section of the Corporations Act (in this example numbered 25), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
wholesale client	A wholesale client as defined in s761G of the Corporations Act