



**ASIC**

Australian Securities & Investments Commission

## REGULATORY GUIDE 176

# Foreign financial services providers

June 2012

### **About this guide**

This guide is for foreign financial services providers (FFSPs) that are regulated by an overseas regulatory authority and that wish to provide financial services in Australia to wholesale clients only.

It explains when we may exercise our discretion to exempt FFSPs from the requirement to hold an Australian financial services (AFS) licence under s911A(2)(h) of the *Corporations Act 2001* (Corporations Act).

## 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 version was issued in June 2012 and is based on legislation and regulations as at the date of issue.

Previous versions:

- Superseded Policy Statement 176, issued 12 September 2003, reissued 17 May 2005, rebadged as a regulatory guide 5 July 2007

## Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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## A Overview

### Key points

ASIC can exempt foreign financial services providers (FFSPs) from the obligation to hold an Australian financial services (AFS) licence, where the provision of financial services in Australia is to wholesale clients only and other requirements are met.

This guide discusses:

- our general approach to granting relief (see Section B);
- the types of relief available (see Section C);
- how to apply for relief (see Section D); and
- complying with the conditions of relief (see Section E).

### Discretionary relief for foreign financial services providers

- RG 176.1 Generally, if you carry on a financial services business in Australia, you will need to hold an Australian financial services (AFS) licence, unless relief is granted.
- RG 176.2 Under s911A(2)(h) of the *Corporations Act 2001* (Corporations Act), ASIC can exempt a foreign financial services provider (FFSP) from the requirement to hold an AFS licence, where the FFSP:
- (a) provides services to wholesale clients only; and
  - (b) is regulated by an overseas regulatory authority.

### Our approach to granting relief

- RG 176.3 Section B discusses when we will use our exemption powers so that an FFSP can provide particular financial services in Australia without an AFS licence.
- RG 176.4 Generally this is *only* if:
- (a) the particular financial services are provided in Australia to wholesale clients only (see RG 176.16–RG 176.17);
 

Note: Relief under this guide is not available to FFSPs that provide financial services to retail clients.
  - (b) the particular financial services 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).

## Types of relief available

- RG 176.5 Section C outlines the two types of relief available to FFSPs: class order relief and individual relief.
- RG 176.6 Class order relief applies to multiple applications, a joint application or an application through an industry association for a group of FFSPs regulated by a particular overseas regulatory authority.
- Note: If an FFSP is already covered by an existing class order, it only needs to notify ASIC that it is relying on the class order and provide other documentation deemed necessary. The usual application fees do not apply.
- RG 176.7 Individual relief is specific to a particular FFSP and the services it provides, or intends to provide, in Australia.

## How to apply for relief

- RG 176.8 Section D discusses what you need to do to apply for relief.
- Note: The appendix to this guide and Information Sheet 157 *Practical guidance for foreign financial services providers* (INFO 157) set out the type of information that we need from an FFSP to assess an application for relief.
- RG 176.9 This guide deals only with applications for relief received from FFSPs or their industry associations.
- RG 176.10 If an overseas regulatory authority wishes to initiate an approval process for the purposes of obtaining relief for a group of FFSPs regulated by them, it should contact us to express its interest and discuss an appropriate process. In considering an application from an overseas regulatory authority, we will be guided by the approach in Regulatory Guide 54 *Principles for cross-border financial regulation* (RG 54) and will consider whether it would be appropriate to pursue a mutual recognition arrangement with that authority in the circumstances.
- RG 176.11 We may provide an opportunity for public comment on a proposed extension of class order relief under this guide. For example, we may invite comment on whether there is any reason to believe that the overseas regulatory regime is not sufficiently equivalent to Australia's regulatory regime.

## Complying with the conditions of relief

RG 176.12 FFSPs that are granted relief will be subject to certain ongoing requirements: see Section E.

RG 176.13 The standard conditions of relief, or requirements that we will impose on all relief, are intended to:

- (a) ensure that the FFSP's conduct and status are such that it remains entitled to relief;
- (b) give us sufficient information to enable us to assess whether:
  - (i) the FFSP is complying with its relevant (whether home or host) overseas regulatory regime; and
  - (ii) the relevant overseas regulatory regime continues to satisfy our 'equivalence test';
- (c) inform wholesale clients that the FFSP is relying on relief; and
- (d) enable us to enforce the law and the conditions of relief.

## B Our approach to granting relief

### Key points

We may grant relief to FFSPs for financial services provided in Australia to wholesale clients only, and where the financial services are regulated by an overseas regulatory authority.

The regulatory regime overseen by the relevant overseas regulatory authority needs to be 'sufficiently equivalent' to the Australian regulatory regime.

Effective cooperation arrangements must also exist between the relevant overseas regulatory authority and ASIC before relief is granted.

The FFSP will need to meet the relevant conditions of relief.

### General approach

- RG 176.14 We will use our discretionary relief powers so that an FFSP can provide particular financial services in Australia without an AFS licence *only* if:
- (a) the particular financial services are provided in Australia to wholesale clients only (see 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);
 

Note: Examples of financial services that must be regulated include the provision of advice, dealing in financial products and market making.
  - (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).
- RG 176.15 In assessing whether regulation by an overseas regulatory authority is sufficiently equivalent to regulation by ASIC for the purposes of granting relief, we will be guided by RG 54.

### Financial services are provided in Australia to wholesale clients only

- RG 176.16 We may grant relief to FFSPs for financial services provided in Australia to wholesale clients only.

RG 176.17 Accordingly, we will consider the equivalence of regulatory outcomes from the perspective of market integrity and systemic risk. We will not focus on investor protection issues, because this guide does not apply to FFSPs providing financial services to retail clients.

## FFSP is regulated by an overseas regulatory authority

RG 176.18 Generally, an FFSP will be regulated by one regulatory authority in its home jurisdiction. This regulator will be the ‘relevant overseas regulatory authority’, and we will:

- (a) assess the overseas regulatory regime overseen by this regulatory authority against our ‘equivalence test’; and
- (b) only require effective cooperation arrangements with this regulatory authority.

### Why do we rely on overseas regulatory authorities?

RG 176.19 Regulation involves more than the imposition of legal obligations and requirements. A person is only regulated by a body that has the ability to monitor compliance with legal obligations and requirements, conduct investigations through the use of compulsory powers, and enforce compliance with legal obligations and requirements. Generally, an overseas regulatory authority has these powers over persons present in its jurisdiction.

Note: Generally, we will require all financial services that are to be provided in Australia by an FFSP to be authorised under its home regulatory regime. However, in certain situations, we will give relief to allow certain services to be provided in Australia where some services are authorised and other services are permitted in the home regulatory regime without direct authorisation. In such cases, the FFSP should apply for individual relief, and we will consider the application on a case-by-case basis. In any case, the FFSP must comply with all home regulatory requirements (including prohibitions) as if the financial services provided in Australia were provided in the home jurisdiction in like circumstances.

### What if the FFSP is regulated by more than one regulatory authority?

RG 176.20 In some cases, more than one overseas regulatory authority may regulate an FFSP, either within its home jurisdiction, or in another jurisdiction (host jurisdiction).

RG 176.21 Where an FFSP is regulated by more than one overseas regulatory authority (whether within its home jurisdiction or elsewhere), we regard the relevant overseas regulatory authority to be the regulator which, in our view, has primary responsibility for monitoring and enforcing compliance by the FFSP with its regulatory obligations for providing financial services similar to those for which relief is being sought. This may be a regulator in a host jurisdiction where the FFSP is authorised to operate, rather than the regulator in its home jurisdiction.

RG 176.22 We only require effective cooperation arrangements with the relevant overseas regulatory authority. However, we may consider the cooperation arrangements in place between the relevant overseas regulatory authority and other regulatory authorities, including regulatory authorities within the same jurisdiction.

**Example A**

An FFSP trading in securities is overseen by Home Regulator A for its trading activities and Home Regulator B for its risk management and financial requirements. In these circumstances, we consider that Home Regulator A would be the relevant overseas regulatory authority. However, we will also consider the cooperation arrangements in place between Home Regulator A and Home Regulator B.

**Example B**

An FFSP trading in both derivative and equity-based products is regulated by different regulators for the two categories of product. The FFSP proposes to offer derivative products in Australia. The regulator with oversight of the FFSP's derivatives business would be the relevant overseas regulatory authority.

**Example C**

An FFSP is incorporated in Country A, but only offers financial services in Host Country B, and these financial services are only regulated by Regulator B in Host Country B. Regulator B would be the relevant overseas regulatory authority.

RG 176.23 We recognise that occasions may arise, however, where there is more than one relevant overseas regulatory authority for the purposes of our assessment under this policy. In these circumstances, we will assess the collective regulation of all the relevant overseas regulatory authorities and may require effective cooperation arrangements with each relevant overseas regulatory authority. This may affect the reporting requirements of the FFSP under the terms of its relief.

**Example D**

An FFSP that is established in one European country (where its home regulator is situated) takes advantage of the European Union passporting regime to establish a branch office to offer financial services in another European country (under the supervision of a host regulator). The branch office provides financial services in Australia from the host European country. We would generally assess the regulatory authorities in both the home and host countries for the purposes of our assessment.

RG 176.24 If it is not clear which regulatory authority is ‘relevant’, or whether several regulatory authorities will need to be assessed, we encourage FFSPs to discuss their application for relief with ASIC staff before lodging it.

Note: Applicants should bear in mind that preliminary discussions with ASIC staff are not a substitute for legal advice and the views of individual ASIC officers on policy issues do not bind ASIC.

### **What is our approach to SROs?**

RG 176.25 When considering whether there is ‘sufficiently equivalent’ regulation by an overseas regulatory authority, we will take into account the role of a self-regulatory organisation (SRO) that has responsibilities delegated to it by an overseas regulatory authority. We note that, in some jurisdictions, SROs often have authority delegated to them by a statutory authority.

RG 176.26 In our view, an ‘overseas regulatory authority’ is a body established by, or for the purpose of, a foreign government, and we therefore consider that this term does not include overseas SROs.

RG 176.27 If an overseas regulatory authority delegates its responsibilities to an SRO, the overseas regulatory authority remains the statutory authority. However, we will recognise the role played by SROs with authority delegated to them from a statutory authority, and may require effective cooperation arrangements with both the SRO and the overseas regulatory authority.

### **‘Sufficient equivalence’ of overseas regulatory regime**

RG 176.28 The granting of relief may, in part, involve overseas regulatory authorities playing a role in ensuring the integrity of Australian markets and the stability of the Australian financial system. To minimise regulatory and enforcement gaps, it is essential that we assess the nature of the regulatory regime overseen by a relevant overseas regulatory authority before we grant relief.

RG 176.29 An overseas regulatory regime will be sufficiently equivalent to regulation by ASIC if it:

- (a) achieves sufficiently equivalent outcomes to the Australian regulatory regime for the regulation of wholesale financial services (see RG 176.30–RG 176.31, question 3.4 in Table 3 of INFO 157, and the appendix to this guide);
- (b) is clear, transparent and certain (see RG 176.32–RG 176.34);
- (c) is consistent with the IOSCO Objectives and Principles of Securities Regulation (see RG 176.35–RG 176.36); and
- (d) is adequately enforced (see RG 176.37–RG 176.39 and question 3.4 in Table 3 of INFO 157).

These criteria form our outcomes-based ‘equivalence test’.

## Sufficiently equivalent regulatory outcomes

RG 176.30 Whatever its regulatory mechanisms, a sufficiently equivalent regulatory regime must achieve regulatory *outcomes* that are sufficiently equivalent to the regulatory outcomes achieved by the Australian regulatory regime. We will assess whether these outcomes are sufficiently equivalent from the perspective of Australian markets and the Australian financial system. As noted earlier, investor protection outcomes will not be assessed because relief will apply only to services provided to wholesale clients.

RG 176.31 An overseas regulatory regime will be assessed as sufficiently equivalent to the Australian regime if it achieves regulation that ensures that financial services are provided by persons who:

- (a) are fair and honest;
- (b) are competent to provide financial services;
- (c) have adequate resources; and
- (d) have adequate risk management processes.

Note 1: See Principle 10 of RG 54 for further details.

Note 2: See also the appendix to this guide for some examples of the regulatory mechanisms that might achieve regulatory outcomes sufficiently equivalent to Australian regulation.

## Clear, transparent and certain

RG 176.32 The outcome-focused equivalence test involves an assessment of the outcomes of the overseas regulatory regime against those of the Australian regulatory regime. This includes testing against the following criteria:

- (a) a ‘clear’ regulatory regime—that is, one that is clearly articulated and easily understood;
- (b) a ‘transparent’ regulatory regime—that is, one where the rules, policies and practices are readily available to, and known by, all relevant persons; and
- (c) a ‘certain’ regulatory regime—that is, one that is consistently applied and is not subject to indiscriminate application or changes.

Note: See Principle 7 of RG 54 for further details.

RG 176.33 An overseas regulatory regime that is not clear, transparent and certain will not be regarded as sufficiently equivalent to the Australian regulatory regime because:

- (a) it cannot be consistently or reliably applied or enforced; and
- (b) we may not be able to obtain sufficient information about how the regime works in practice to assess the regime.

RG 176.34 Therefore, at a minimum, a sufficiently equivalent regulatory regime must:

- (a) be in written form;
- (b) be available in English (even if this is a translation from the original version in another language); and
- (c) not be subject to an unfettered, arbitrary discretion.

Note 1: If we seek verification of any English translation or other relevant details of an overseas regulatory regime, we will require the applicant to meet the costs of such verification.

Note 2: See Principle 7 of RG 54 for further details.

### **Consistent with IOSCO Objectives and Principles of Securities Regulation**

RG 176.35 We require an overseas regulatory regime to be consistent with the IOSCO Objectives and Principles of Securities Regulation. In assessing whether an overseas regulatory regime meets these standards, we will consider whether:

- (a) the overseas regulatory authority has assessed its regulatory regime against the IOSCO Objectives and Principles of Securities Regulation and has reasonably determined that the regulatory regime broadly complies with them; and
- (b) other international organisations have assessed the regulatory regime against the IOSCO Objectives and Principles of Securities Regulation and have reasonably determined that the regulatory regime broadly complies with them. For example, the International Monetary Fund, the World Bank and the Financial Stability Board all assess national financial systems against these objectives and principles.

RG 176.36 The Australian regulatory regime is measured against, and is compliant with, the IOSCO Objectives and Principles of Securities Regulation. The overseas regulatory regime would need to share a similar regulatory philosophy. Adherence to these objectives and principles would be an indication, at least at a high level, of equivalence.

Note: See Principle 8 of RG 54 for further details.

### **Adequately enforced**

RG 176.37 A regulatory regime is adequately enforced if the regulatory authority:

- (a) has sufficient powers of investigation and enforcement;
- (b) has sufficient resources to use those powers;
- (c) uses those powers and resources consistently to promote compliance with its regulatory regime; and
- (d) operates within a legal framework that is independent and has a reputation for integrity.

- RG 176.38 We will assess the adequacy of an overseas regulatory authority's enforcement capability with reference to:
- (a) the international reputation of that overseas regulatory authority;
  - (b) any IOSCO assessments of the overseas regulatory authority, including self-assessments or assessments by other IOSCO members; and
  - (c) any assessments of the overseas regulatory regime by international financial institutions or other international organisations.
- RG 176.39 It is unlikely that an overseas regulatory regime that is frequently ignored or inconsistently applied will provide sufficiently equivalent regulatory outcomes to the Australian regulatory regime. An inadequately enforced regulatory regime will not reliably protect market integrity.

Note: See Principle 9 of RG 54 for further details.

## Effective cooperation arrangements

- RG 176.40 We will grant relief only if we are satisfied that there are effective cooperation arrangements between the relevant overseas regulatory authority and ASIC. This is a matter for ASIC to decide, in consultation with the relevant overseas regulatory authority. It cannot be dealt with by FFSPs in an application for relief.
- RG 176.41 Effective cooperation arrangements will usually be in the form of a Memorandum of Understanding (MOU), or some other documented arrangement, although they may be established or supplemented by less formal arrangements.
- RG 176.42 Effective cooperation arrangements will provide for:
- (a) the prompt sharing of information by the relevant overseas regulatory authority; and
  - (b) effective cooperation on:
    - (i) supervision and investigation; and
    - (ii) enforcement.
- RG 176.43 We will also rely on effective cooperation arrangements with the relevant overseas regulatory authority to help inform us of:
- (a) significant changes to the authorisation, licence or registration of an FFSP or class of FFSP;
  - (b) significant exemptions or other relief an FFSP or class of FFSP may obtain from the overseas regulatory regime;
  - (c) significant changes to the relevant overseas regulatory regime; and

- (d) significant investigation, enforcement or other disciplinary activity against an FFSP operating in Australia with the benefit of relief.

Note: We will also require the FFSP itself to notify us of any significant investigation, enforcement or other disciplinary action against it, and of any significant change to its authorisations in the relevant overseas regulatory regime (or regimes) relevant to the financial services the FFSP provides or intends to provide in Australia: see RG 176.82.

RG 176.44 Effective cooperation arrangements ensure that the relevant overseas regulatory authority will, if requested by us, take appropriate steps to protect Australian market integrity and reduce systemic risk in the Australian financial system. This action should be as effective as action the relevant overseas regulatory authority would take to protect the integrity of markets and reduce systemic risk in its own jurisdiction.

RG 176.45 We consider that, particularly in the supervision of FFSPs, effective cooperation arrangements with an overseas regulatory authority will mean that we have the potential for direct contact with the relevant officers of that authority to enable prompt exchanges of information and effective cooperation.

RG 176.46 Generally, effective cooperation arrangements will not be possible unless the overseas regulatory authority has the power under its regulatory regime to cooperate with us in these ways.

RG 176.47 When assessing whether we have effective cooperation arrangements with an overseas regulatory authority, we will take into account whether:

- (a) there are supervisory cooperation arrangements between the relevant overseas regulatory authority and ASIC that are consistent with the IOSCO Principles Regarding Cross-Border Supervisory Cooperation;

Note: These principles provide a framework for regulators seeking to establish supervisory cooperation agreements. Supervisory cooperation involves the day-to-day exchange of information for general supervisory and oversight purposes (i.e. not just for enforcement purposes).

- (b) the overseas regulatory authority is a signatory to Appendix A of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU); and

Note: The IOSCO MMOU sets an international benchmark for cross-border cooperation between securities regulators on enforcement matters. In general, we consider IOSCO MMOU Appendix A signatory status as a good indicator of effective cooperation. However, we will also consider IOSCO MMOU Appendix B signatory status as an indicator together with the particular circumstances of the relevant overseas regulatory authority.

- (c) there is an existing MOU between the overseas regulatory authority and ASIC that creates an effective cooperation arrangement.

Note: See Principle 3 of RG 54 for further details.

## C Types of relief available

### Key points

There are two types of relief available to FFSPs: class order relief and individual relief.

Class order relief applies to multiple applications, a joint application or an application through an industry association for a group of FFSPs regulated by the same overseas regulatory authority.

Individual relief is specific to a particular FFSP and the services it provides, or intends to provide, in Australia.

### General approach

RG 176.48 We may provide either individual or class order relief to an FFSP.

RG 176.49 To be considered for relief, an FFSP must:

- (a) apply for relief (either individually or as part of a joint application); and
- (b) be willing and able to provide all the information we need to assess the particular financial services they intend to provide in Australia.

Note: For details of what information must accompany an application, see Section D and INFO 157.

### Class order relief

RG 176.50 Where we have the power, and it is appropriate to do so, we will issue a class order to avoid the need for applicants to apply for relief on an individual basis. For this reason, we will only execute a class order where it is not necessary to consider any relevant factual matters on a case-by-case basis.

RG 176.51 Generally, we will consider providing class order relief if:

- (a) we receive several applications for a particular financial service that is regulated by the same overseas regulatory authority; or
- (b) we receive a joint application, or an application through an industry association, for a group of FFSPs that are regulated by the same overseas regulatory authority and that will offer a particular financial service (or services) in Australia.

RG 176.52 Certain overseas regulatory regimes have been assessed as meeting the equivalence criteria under this guide.

Note: These regimes are identified in the following class orders: Class Order [CO 03/1099] *UK FSA regulated financial service providers*; Class Order [CO 03/1100] *US SEC regulated financial service providers*; Class Order [CO 03/1101] *US Fed Reserve and OCC regulated financial service providers*; Class Order [CO 03/1102] *Singapore MAS regulated financial service providers*; Class Order [CO 03/1103] *HK SFC regulated financial service providers*; Class Order [CO 04/829] *US CFTC regulated financial service providers*; Class Order [CO 04/1313] *German BaFin regulated financial service providers*.

RG 176.53 FFSPs regulated by those overseas regulatory regimes and that are seeking to take advantage of class order relief must notify us of the class order they are relying on, as well as meeting our standard conditions of relief (and any tailored conditions): see Section E.

Note: One of the standard conditions of relief includes submitting to the non-exclusive jurisdiction of the Australian courts and complying with any order of an Australian court.

## Individual relief

RG 176.54 Where class order relief is not appropriate, we may exercise our discretionary powers to grant relief on a case-by-case basis.

RG 176.55 Individual relief will be limited to:

- (a) a particular FFSP; and
- (b) the particular financial services provided by that FFSP in Australia.

## D How to apply for relief

### Key points

While there is no prescribed application form, we require certain information to be provided as a minimum in assessing an application for relief.

The information required for us to assess an application is outlined in INFO 157 and the appendix to this guide. We may also request additional information.

We need to understand how the particular financial services to be provided in Australia are regulated under the relevant overseas regulatory regime.

If an FFSP is already covered by an existing class order, it must notify ASIC that it is relying on that relief.

Note: This section mainly applies to FFSPs that are applying for individual relief, or to FFSPs or groups making a joint application for class order relief on behalf of a number of FFSPs. FFSPs that are already covered by an existing class order do not need to apply for individual relief.

### What you need to do

RG 176.56 To apply for relief:

- (a) Check to see if you are already covered by existing class order relief. Go to the 'Instruments and class orders' page on our website at [www.asic.gov.au/co](http://www.asic.gov.au/co).
- (b) If you are already covered by an existing class order, you must notify us of the class order you are relying on: see RG 176.57–RG 176.59.
- (c) If you are not already covered by an existing class order, contact us by email addressed to [FFSP@asic.gov.au](mailto:FFSP@asic.gov.au) for advice on whether you can apply for relief.
- (d) We will not be able to give you relief if your overseas regulatory authority does not have effective cooperation arrangements with ASIC. You can check with us whether we have such arrangements. To do so contact us by email addressed to [FFSP@asic.gov.au](mailto:FFSP@asic.gov.au).
- (e) Lodge your application in writing addressed to [Applications@asic.gov.au](mailto:Applications@asic.gov.au).
- (f) Make sure your application includes *all* the information in RG 176.60–RG 176.62 and the declaration in RG 176.63.
- (g) Make sure your application complies with Regulatory Guide 51 *Applications for relief* (RG 51) and INFO 157.
- (h) In the case of an individual application, include the prescribed fee with your application (see Information Sheet 30 *Fees for lodging documents* (INFO 30) on our website at [www.asic.gov.au](http://www.asic.gov.au)).

## Relying on class order relief

RG 176.57 If you want to take advantage of existing class order relief, you must notify ASIC, telling us which class order you are seeking to rely on.

RG 176.58 By relying on existing class order relief, you are agreeing to comply with:

- (a) our standard conditions of relief (see Section E), particularly the requirement to submit to the non-exclusive jurisdiction of the Australian courts; and
- (b) any tailored conditions that may apply under the class order, as appropriate.

### How to notify ASIC of reliance on class order relief

RG 176.59 You must notify us that you are relying on a particular class order:

- (a) as soon as practicable; and
- (b) in writing, addressed to [Applications@asic.gov.au](mailto:Applications@asic.gov.au).

Note: The usual application fees do not apply.

You can also contact ASIC on 1300 300 630 (or +61 3 5177 3988 if dialling from overseas) for general information and assistance.

## What information will we require?

RG 176.60 There is no prescribed application form for applying for relief. However, applicants must provide us with the relevant information and documents we need to assess their application (other than information about whether we have effective cooperation arrangements with the relevant overseas regulatory authority).

Note: See INFO 157 for additional guidance on what you must include in your application.

RG 176.61 Applicants must meet certain minimum requirements before we can adequately consider an application. In particular, an applicant must provide information about:

- (a) themselves;
- (b) the particular financial services they intend to provide in Australia; and
- (c) the equivalence of the regulatory regime overseen by the relevant overseas regulatory authority.

Note: See RG 176.20–RG 176.24 if you are subject to regulation by more than one regulatory authority.

RG 176.62 Table 3 of INFO 157 sets out the type of information we need to assess an application. These questions do not limit the information or documents applicants should provide, nor should they be regarded as an exhaustive indication of the matters we may need to consider. We will ask for additional information from an applicant if we need it to properly assess their application.

### **Applicant's declaration**

RG 176.63 An application for relief should include a declaration signed by the applicant—or, if the applicant is a corporate entity, a statement authorised by the proper authority—that to the best of their knowledge, and after making proper inquiries, the information and documents provided in response to the questions in Table 3 of INFO 157 and in support of the application are true, correct and complete.

Note: In the case of a joint application made by an industry association, we will discuss with that association the form and sign-off required for the application.

### **Individual relief: Notifying the relevant overseas regulatory authority**

RG 176.64 If an application is made for individual relief, we will ask for the applicant's consent to notify its relevant overseas regulatory authority of the application. In notifying the relevant overseas regulatory authority, we may:

- (a) inform that regulatory authority about the content of the application; and
- (b) ask that regulatory authority questions about the applicant.

### **Additional information**

RG 176.65 In assessing an application, we may also seek:

- (a) information from the relevant overseas regulatory authority; and
- (b) independent verification from overseas lawyers.

Note: If we seek verification from overseas lawyers, the applicant will need to meet the costs of such verification.

RG 176.66 We may require relevant information to be made available in English, or an independent verification to help us make an independent assessment of the overseas regulatory authority and regulatory regime.

Note: If we seek verification of any English translation, or other relevant details of an overseas regulatory regime, the applicant will need to meet the costs of this verification.

## Processing your application

- RG 176.67 The time it will take us to process an application will vary depending on:
- (a) the complexity of the application and the related difficulty of assessing the equivalence of the relevant overseas regulatory regime to the Australian regime;
  - (b) the amount of material we must assess;
  - (c) whether the information provided to us in the application is complete; and
  - (d) whether we have dealt with a similar application before.
- RG 176.68 For an application for relief by an FFSP or an industry association, we will aim to decide applications within 16 weeks of receiving all the information and documents required.
- RG 176.69 It may take us longer to deal with an application if:
- (a) the application is particularly complex;
  - (b) we experience delays in obtaining the information we require from the applicant, the relevant overseas regulatory authority or an independent overseas expert; or
  - (c) we are waiting for a response to a request for clarification.

## E Complying with the conditions of relief

### Key points

Relief granted to an FFSP is conditional.

If an FFSP does not inform us of a breach of any of its relief conditions, their relief will automatically lapse and they will no longer have the benefit of relief.

If the overseas regulatory regime ceases to be sufficiently equivalent to the Australian regime, we may remove the benefit of relief.

RG 176.70 FFSPs that are granted relief will be subject to certain conditions as set out in Table 1.

**Table 1: Summary of conditions of relief**

Standard conditions	Tailored conditions	Class order conditions
<p>All FFSPs that are granted relief must comply with conditions dealing with:</p> <ul style="list-style-type: none"> <li>• conduct and status (see RG 176.77–RG 176.81);</li> <li>• notifications (see RG 176.82–RG 176.87);</li> <li>• disclosure (see RG 176.88–RG 176.91); and</li> <li>• enforcement actions in Australia (see RG 176.92–RG 176.95).</li> </ul>	<p>Additional tailored conditions of relief may be imposed, as appropriate, for a particular FFSP or a class of FFSP.</p>	<p>FFSPs taking advantage of any class order relief must generally:</p> <ul style="list-style-type: none"> <li>• notify us of the class order they are relying on (see RG 176.57–RG 176.59);</li> <li>• comply with our standard conditions, including the condition to submit to the non-exclusive jurisdiction of the Australian courts (see RG 176.94(b)); and</li> <li>• comply with any tailored conditions under the class order, as appropriate.</li> </ul>

### Standard conditions of relief

RG 176.71 We will generally impose standard conditions on any relief granted to an FFSP. These conditions are intended to:

- (a) ensure that the FFSP's conduct and status are such that it remains entitled to relief;
- (b) give us sufficient information to enable us to assess whether:
  - (i) the FFSP is complying with its relevant overseas regulatory regime; and
  - (ii) the relevant overseas regulatory regime continues to satisfy our 'equivalence test';
- (c) inform wholesale clients that the FFSP is relying on relief; and

- (d) enable us to enforce the law and the conditions of relief.

RG 176.72 Our approach to the conditions on relief for FFSPs is guided by the principles set out in RG 54.

## What happens if the conditions are breached or no longer satisfied?

RG 176.73 We may remove the benefit of relief from an FFSP if, for example, its relevant overseas regulatory regime is no longer sufficiently equivalent to the Australian regime: see RG 176.77(d). We will notify the FFSP before doing so.

RG 176.74 If an FFSP breaches any of the conditions of relief, it must notify us as soon as practicable, and in any event within 15 business days from the date they knew or should reasonably have known of the breach. If we decide that the FFSP should continue to have the benefit of relief, we will notify it of this decision within 30 business days after we receive its notification. If we do not respond to the FFSP's notification, the relief will lapse. If an FFSP fails to inform us of a breach of conditions, its relief will lapse.

### Overseas regulatory regime ceases to be sufficiently equivalent

RG 176.75 If the overseas regulatory regime ceases to be sufficiently equivalent to the Australian regime, we may remove the benefit of relief. We do not anticipate that significant changes that are relevant to the financial services the FFSP provides or intends to provide in Australia are likely to occur frequently.

RG 176.76 The types of changes that may result in the overseas regulatory regime ceasing to be sufficiently equivalent include changes to:

- (a) the regulatory structure in the overseas regulatory regime;
- (b) the supervisory arrangements for FFSPs operating under the overseas regulatory authority;
- (c) the obligations or requirements imposed on FFSPs in the overseas regulatory regime, particularly obligations or requirements relating to:
  - (i) honesty and fairness;
  - (ii) competence;
  - (iii) financial resources; and
  - (iv) risk assessment; and
- (d) the overseas regulatory authority's supervision or legislative responsibility for activities of the FFSP in Australia, or in relation to wholesale clients.

Note: This is not an exhaustive list. Relevant considerations will always depend on the applicable facts and circumstances.

## Conduct and status

- RG 176.77 The following conduct and status requirements apply to all relief granted:
- (a) the financial services must be provided in Australia to wholesale clients only;
  - (b) the financial services provided in Australia must comply with the requirements of the FFSP's relevant overseas regulatory regime;
  - (c) the FFSP must remain authorised under its relevant overseas regulatory regime; and
  - (d) the relevant overseas regulatory regime must continue to be sufficiently equivalent to the Australian regime.

Note: The precise wording of these requirements may be modified in an ASIC instrument to meet the circumstances of a particular overseas regulatory regime.

### Registration as a foreign company

- RG 176.78 Generally, an FFSP will be required to register as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act if, among other things, it:
- (a) has a place of business in Australia (e.g. a branch office);
  - (b) establishes or uses a share transfer office or share registration office in Australia; or
  - (c) administers, manages or deals with property in Australia as an agent, legal personal representative, or otherwise.
- RG 176.79 If an FFSP is required to be registered as a foreign company under Div 2 of Pt 5B.2 of the Corporations Act, it must ensure that it has done so.
- RG 176.80 An FFSP is not required to be registered under Div 2 of Pt 5B.2, it must appoint a local agent for service to facilitate the commencement of proceedings in Australia.
- RG 176.81 If an FFSP appoints a local agent, it must provide us with the agent's name and address, together with a copy of the memorandum of appointment or correspondence between the FFSP and the agent confirming the agency arrangement.

## Notifications

- RG 176.82 All FFSPs that have been granted relief must notify us as soon as practicable, and in any event within 15 business days, after the FFSP became aware or should reasonably have become aware of the following notifiable matters:
- (a) cessation of reliance on relief;
  - (b) change of name or address or agent;

- (c) change of business structure (e.g. from limited partnership to limited liability company);
- (d) a significant change to the authorisation of the FFSP relevant to the financial services the FFSP provides or intends to provide in Australia, including:
  - (i) any additional types of financial service authorised by the overseas regulatory authority;
  - (ii) any termination of part or all of the FFSP's authorisation; and
  - (iii) each significant exemption or other relief the FFSP may obtain from the relevant overseas regulatory regime.

Note: If the financial services offered in Australia are regulated by a number of overseas regulatory authorities, notifiable matters may extend to those other regulatory authorities.

- (e) the details of each significant investigation, enforcement or disciplinary action against the FFSP in a foreign jurisdiction.

Note: FFSPs may be required to notify us of other matters. See the relevant class order or individual relief instrument for further details.

### **What do we mean by a 'significant' investigation, enforcement or disciplinary action?**

RG 176.83 The requirement in RG 176.82(e) is designed to ensure that we are aware of any significant investigation, enforcement or disciplinary actions against the FFSP in an overseas regulatory regime, relevant to its provision of financial services. In determining whether an investigation, enforcement or disciplinary action is significant, FFSPs should consider whether the investigation, enforcement or disciplinary action is serious enough that it may affect our assessment that the FFSP may continue to rely on relief from the licensing requirements in Australia.

RG 176.84 An investigation, enforcement or disciplinary action may be serious even if it relates to relatively minor breaches of the overseas regulatory regime, because those breaches may indicate inadequate compliance arrangements due to their number or frequency. If you are not sure whether an investigation, enforcement or disciplinary action is significant, we encourage you to notify us about it.

Note: An investigation, enforcement or disciplinary action in a foreign jurisdiction does not have to be completed before it must be notified to us. It becomes notifiable when the FFSP knows, or should reasonably have known, of its existence.

## Assistance to ASIC

RG 176.85 An FFSP granted relief must comply with a notice from ASIC directing it to lodge with ASIC a written statement containing specific information about any financial services provided by it in Australia.

## How to send your notifications to ASIC

RG 176.86 An FFSP must send us notifications by email addressed to [FFSP@asic.gov.au](mailto:FFSP@asic.gov.au). You can also contact ASIC on 1300 300 630 (or +61 3 5177 3988 if dialling from overseas) for general information and assistance.

RG 176.87 The notifications should include:

- (a) the name of the FFSP and any change of name;
- (b) any change of address (if applicable);
- (c) any change of Australian agent (if applicable);
- (d) the number of the class order or individual relief instrument relied on;
- (e) the full name of the overseas regulatory authority; and
- (f) the full name of the person providing the notification, including their role in the organisation, their contact details and the registered address of the organisation.

## Disclosure

RG 176.88 We require all FFSPs that are granted relief to disclose to any person to whom financial services are provided in Australia that:

- (a) the FFSP is exempt from the obligation to hold an AFS licence for providing those financial services; and
- (b) the FFSP is regulated under the relevant overseas regulatory regime and this regulatory regime differs from the Australian regulatory regime.

RG 176.89 Disclosure ensures that those who deal with the FFSP are aware of the FFSP's regulatory status in Australia and of the relief granted. In our view, market integrity requires transparency of this kind.

RG 176.90 Disclosure by the FFSP needs to be made only once to each person to whom financial services are provided under the relief. Disclosure must be made before the first time financial services are provided.

RG 176.91 Failure to provide this disclosure, as set out above, is a breach of the conditions of relief and must be notified to ASIC, as set out in RG 176.74. Failure to notify us of breaches, as required under the conditions of relief, will result in the relief lapsing so that the FFSP may no longer rely on it.

Note: See Principle 6 of RG 54 for further details.

## Enforcement actions

RG 176.92 To ensure that an FFSP complies with the conditions of relief, and any other applicable Australian laws, we may need to commence legal proceedings in an Australian court.

RG 176.93 To facilitate enforcement actions in Australia, the FFSP must execute and lodge with ASIC a deed that sets out certain provisions. This deed is for the benefit of, and is enforceable by, ASIC (and other persons referred to in s659B(1) of the Corporations Act), and continues to apply even if the FFSP has ceased to rely on relief.

RG 176.94 The deed must specify that:

- (a) it is irrevocable except with the prior written consent of ASIC;

Note: Such consent would only be given in exceptional circumstances—for example, if the FFSP is no longer providing financial services and has confirmed that there are no outstanding obligations to clients or any client claims on the FFSP in Australia as a result of its provision of financial services in Australia.

- (b) the FFSP will submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings (whether brought in the name of ASIC or the Crown or otherwise) that are conducted:

- (i) by ASIC (including under s50 of the *Australian Securities and Investments Commission Act 2001*); and
- (ii) for proceedings relating to a financial services law, by any commonwealth, state or territory entity, as referred to in s659B(1);

Note: The entities referred to in s659B(1) (which refers to persons commencing court proceedings in relation to Takeover Panel proceedings) are commonwealth, state and territory entities. We have referred to s659B(1) solely because it contains this list of appropriate entities.

- (c) the FFSP will comply with any order of an Australian court for any matter relating to the provision of financial services;
- (d) if the FFSP is not required to be registered under Div 2 of Pt 5B.2 of the Corporations Act, papers relating to legal proceedings under paragraph (b) can be served on the FFSP's local agent (see RG 176.80–RG 176.81); and
- (e) on the written request of its relevant overseas regulatory authority or ASIC, the FFSP will give or vary written consent and take all other practicable steps to enable and assist the relevant overseas regulatory authority to disclose to ASIC (and ASIC to disclose to the relevant overseas regulatory authority) any information or document that the relevant overseas regulatory authority or ASIC has that relates to the FFSP.

Note: If we require the consent to be in a specific form (in addition to written), we will state this in our written request.

RG 176.95 The original deed must be dated and it must be signed by a person authorised by the FFSP to do so on its behalf. If the FFSP is an unincorporated entity, the FFSP must provide an authority for the person to sign the deed.

## Appendix: Regulatory mechanisms and outcomes

- RG 176.96 This appendix sets out some examples of regulatory mechanisms that we consider might achieve regulatory outcomes that are sufficiently equivalent to the Australian regime for the purposes of granting relief.
- RG 176.97 In most regulatory regimes, the relevant outcome is achieved by a combination of regulatory mechanisms. Generally, no single regulatory mechanism is sufficient to achieve the relevant outcome by itself.
- RG 176.98 While the examples in this appendix will help in an assessment of whether the regulatory outcomes are sufficiently equivalent, they should not be regarded as exhaustive and we may consider additional factors.

**Table 2: Regulatory mechanisms contributing to our desired regulatory outcomes**

Key outcome	Examples of regulatory mechanisms
FFSPs are fair and honest	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs that are of good reputation and character or, if the FFSP is not a natural person, to FFSPs whose officers, partners or controllers are persons of good reputation and character.</li> <li>• A statutory obligation to act fairly and honestly is imposed on FFSPs.</li> <li>• FFSPs are subject to fiduciary or contractual obligations to act fairly and honestly in their dealings with clients.</li> <li>• The FFSP's regulator licenses or otherwise approves key employees and representatives of the FFSP by reference to their good reputation and character.</li> </ul>
FFSPs are competent	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs that are competent to provide the financial services they wish to provide.</li> <li>• A statutory obligation to maintain competence is imposed on FFSPs.</li> <li>• A statutory obligation is imposed on FFSPs to ensure that their employees and representatives are adequately trained and competent.</li> <li>• FFSPs are subject to obligations to ensure they and their employees and representatives are competent. (Such general law obligations may, for example, arise under contract or the laws of negligence.)</li> <li>• The FFSP's employees and representatives must meet specified minimum educational and other qualification requirements.</li> <li>• The FFSP's regulator licenses or otherwise approves key employees and representatives by reference to competence criteria.</li> </ul>
FFSPs have adequate resources	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs that establish that they have adequate resources (including financial, technological and human resources) to provide the financial services they wish to provide.</li> <li>• A statutory obligation is imposed on FFSPs to have adequate resources to provide the financial services.</li> <li>• FFSPs or their boards are required to periodically certify that they have adequate resources.</li> <li>• FFSPs must meet specified minimum resource requirements.</li> <li>• FFSPs are subject to prudential supervision by an independent regulator.</li> </ul>

Key outcome	Examples of regulatory mechanisms
FFSPs have adequate risk management processes	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs that establish that they have adequate risk management systems to provide the financial services they wish to provide.</li> <li>• A statutory obligation to have adequate risk management systems is imposed on FFSPs.</li> <li>• A statutory obligation to have adequate internal controls is imposed on FFSPs.</li> <li>• A statutory obligation to have adequate compliance arrangements is imposed on FFSPs.</li> <li>• FFSPs or their boards are required to periodically certify that they have adequate risk management processes.</li> <li>• The FFSP's risk management processes are periodically reviewed and approved by an independent auditor.</li> <li>• FFSPs are required to comply with specific obligations to ensure that client funds are properly dealt with.</li> <li>• FFSPs are required to comply with specific obligations to ensure they keep financial records that correctly record and explain the transactions and financial position of the financial services business carried on by the FFSP.</li> </ul>

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B that authorises a person who carries on a financial services business to provide financial services  Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Div 2 (for example)	A division of the Corporations Act (in this example numbered 2)
equivalence test	The criteria set out in RG 176.29 by which we will assess the equivalence of a relevant overseas regulatory regime to the Australian regulatory regime
financial services law	Has the meaning given in s761A
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
host jurisdiction	A jurisdiction, other than the jurisdiction from which the FFSP originates, in which the FFSP provides financial services
IOSCO	International Organization of Securities Commissions
IOSCO Objectives and Principles of Securities Regulation	The Objectives and Principles of Securities Regulation, originally adopted by IOSCO in September 1998, as amended from time to time
IOSCO Principles Regarding Cross-Border Supervisory Cooperation	The Principles Regarding Cross-Border Supervisory Cooperation, originally adopted by IOSCO in May 2010, as amended from time to time
MOU	Memorandum of Understanding
overseas regulatory authority	The relevant regulatory authority of the FFSP in its home jurisdiction
overseas regulatory regime	The regulatory regime supervised and administered by the overseas regulatory authority

Term	Meaning in this document
principles for cross-border financial regulation	The principles set out in RG 54
Pt 5B.2 (for example)	A part of the Corporations Act (in this example numbered 5B.2)
regulatory regime	The rules that govern a financial facility, service or product, and include legislation, the rules, policies and practices of a regulatory authority
relevant overseas regulatory authority	The overseas regulatory authority which, in our view, has primary responsibility for monitoring and enforcing compliance by the FFSP with its regulatory obligations in relation to the financial services that it provides or intends to provide in Australia with the benefit of relief  Note: For some examples of how we identify the relevant overseas regulatory authority, see RG 176.22–RG 176.23.
relevant overseas regulatory regime	The regulatory regime supervised and administered by the relevant overseas regulatory authority
RG 54 (example)	An ASIC regulatory guide (in this example, numbered 54)
s911A(2)(h) (for example)	A section of the Corporations Act (in this example, numbered 911A(2)(h)), unless otherwise specified
self-regulatory organisation (SRO)	A non-government entity that has the authority to create, amend, implement and enforce rules of conduct and resolve disputes through arbitration or other means
wholesale client	A wholesale client as defined in s761G

## Related information

### Headnotes

class order relief, effective cooperation arrangements, foreign financial services providers, licensing, overseas regulatory authorities, sufficiently equivalent regulation, wholesale clients

### Class orders

[CO 03/1099] *UK FSA regulated financial service providers*

[CO 03/1100] *US SEC regulated financial service providers*

[CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*

[CO 03/1102] *Singapore MAS regulated financial service providers*

[CO 03/1103] *Hong Kong SFC regulated financial service providers*

[CO 04/829] *US CFTC regulated financial services providers*

[CO 04/1313] *German BaFin regulated financial service providers*

### Regulatory guides

RG 54 *Principles for cross-border financial regulation*

RG 121 *Doing financial services business in Australia*

RG 177 *Australian market licences: Overseas operators*

RG 178 *Foreign collective investment schemes*

RG 190 *Offering securities in New Zealand and Australia under mutual recognition*

### Legislation

Corporations Act, Pt 5B.2, s911A(2)(h), 911A(2)(g)

### Consultation papers and reports

CP 98 *Cross-border recognition: Facilitating access to overseas markets and financial services*

REP 134 *Enhancing capital flows into and out of Australia*

### Information sheets

INFO 30 *Fees for lodging documents*

INFO 157 *Practical guidance for foreign financial services providers*