Memo

A S I C

Australian Securities & Investments Commission

TO: RPB

CC: s 22 , Lawyer, AAA

FROM: s 22 , Graduate, AAA

RE: **Houlihan Rovers SA ACN 118 445 168- APPLICATION FOR EXEMPTION FROM S911(2)(L): FOREIGN FINANCIAL SERVICE PROVIDER LICENSING**

FILE REF: FSR2006/5149

DATE: 10 March 2006

Background/Relief Sought

Houlihan Rovers SA (**"the applicant"**) is a Belgian incorporated and based company which is also registered and regulated by the US Securities and Exchange Commission (**"SEC"**). The applicant seeks relief under subsection 911A(2)(l) of the Corporations Act 2001 (**"the Act"**) from the requirement to hold an Australian financial services licence (**"AFSL"**). But for the fact that the applicant is not incorporated in the US, the applicant would be able to rely on class order [CO 03/1100], since paragraph (aa) in Schedule A of the class order requires that the applicant be either incorporated in the US or be a partnership formed in the US. The applicant is seeking relief of the same form as the class order, without the requirement as set out in paragraph (aa) of schedule A.

Submissions

The applicant submits:

- that when operating in Australia they will be subject to a regulatory regime which satisfies the "sufficiently equivalent" policy requirement found in [PS 176.7]:
    - in that the US system has been recognised by ASIC as 'sufficiently equivalent' to the regime in Australia.

  - The applicant points out that the services which are to be provided in Australia would be provided by the same staff who provide services under the applicant's SEC registration

- that the regulation of the applicant by the SEC is not affected by the fact that it is incorporated in Belgium, rather than the US:
  - s202 of the *Investment Advisers Act 1940 (US)*, in its definition of an Investment Adviser does not make any distinction based on the residency or place of incorporation of the advisor.
  - The obligations imposed by the *Investment Advisers Act* do not distinguish between US and non-US incorporated companies
  - The Form ADV, which must be completed to register as an investment adviser, treats non-US companies differently for administrative matters only, such as the requirement to appoint an agent for service of process and access to books and records. Otherwise, the SEC draws no distinction between US and non-US entities who are registered as investment advisers.

- That if ASIC were to grant the requested relief, the position of the applicant would be no different to that of other SEC regulated entities who are able to rely on [CO 03/1100].

- That the relief granted to Goldman Sachs (Asia) LLC ("GSA") under the same section of the Act should be considered in relation to this application. GSA was incorporated in Delaware in the United States and a registered foreign financial service provider in Hong Kong by the HKSFC. Relief was granted to GSA in the form of the relevant class order, without the requirement to be incorporated in the same jurisdiction as the regulator – in this case the HKSFC.

Analysis

In summary, my appraisal of the key issues in this case:

1. The only services that will be provided in Australia are those which are also provided under the SEC registration and by the same staff. For the purposes of the applicant's operation in Australia, the applicant is primarily regulated by the SEC, with whom ASIC is satisfied in terms of their equivalency to ASIC and also the level of effective co-operation with ASIC.

2. The SEC does not appear to distinguish the way in which it regulates non-US licensee vis-à-vis US-incorporated licensees (other than the previously stated technical requirements).

3. The relief sought mirrors the terms of [CO 03/1100], but for the requirement in (aa) of Schedule A).

Subsection 911A(1) of the Act requires that a person who carries on a financial services business holds an AFSL. ASIC is empowered by subsection 911A(2)(l) to grant exemptions from this rule. In considering this application, I am minded by Policy Statement 176 *Licensing: Discretionary Powers- wholesale foreign financial services providers* (**[PS 176]**). In particular, PS176.7, which requires that:

(c) the regulation by the overseas regulatory authority must be sufficiently equivalent to regulation by ASIC;
(d) there are effective co-operation arrangements between the overseas regulatory authority and ASIC.

It can be argued in this case that if relief were granted, the applicant would be subject to a regulatory authority which ASIC considers is sufficiently equivalent to itself. I have considered whether it would be appropriate to evaluate the Belgian regulatory environment in this case, and see that as not directly relevant to the application. While the applicant is incorporated in Belgium, the only staff that will be providing any services to Australian clients will be those that are operating under the SEC registration. Hence the SEC is the only regulatory body to consider with regard to its equivalency with ASIC, which has been satisfied, given [CO 03/1100].

The value of the condition in paragraph (aa) of Schedule A of the Class Order must also be considered. A key consideration is whether the SEC will treat the applicant any differently by virtue of the fact that it is not incorporated in the US. The applicant argues that, the jurisdiction in which the investment adviser is incorporated does not appear to influence the manner in which the SEC regulates the licensee. This view is counter-balanced by questions as to what extent the SEC would take action to redress any mischief caused by one of its licensees where the damage caused by the mischief is wholly outside of the US.

In an unrelated application involving Banque AIG, RPB noted a significant point. Banque AIG is a French entity that was licensed by the FSA via the European passporting regime and sought to offer financial services in Australia. The issue of contention in this matter was the question as to which regulator (the French or the British) was the primary regulator for the purposes of the services to be offered in Australia. However, it was noted that if the foreign regulator (in this matter the SEC) regulates corporations incorporated outside its jurisdiction in the same manner as it does those that are incorporated within its jurisdiction, in that it doesn't rely on regulation in the jurisdiction of incorporation to reduce the extent to which its usual requirements apply, then the position of the overseas regulator as the primary regulator is enhanced. Given the above points regarding the treatment of the applicant by the SEC compared with their treatment of US-incorporated firms, I see it as appropriate that the exception highlighted in the Banque AIG application be applied to this application.

We therefore seek RPB's views as to what extent the condition in paragraph (aa) of Schedule A of [CO 03/1100] should prevent an applicant from the benefit of relief in substantially the same terms as the class order.

One area of potential concern in granting relief in this case is the enforcement avenues available to ASIC in the event of a contravention of Australian securities law. The Class Order requires in paragraph 2(c) of Schedule B that the company provides ASIC with a deed of the body for the benefit of and enforceable by ASIC which provides, among other things, that the body submits to the non-exclusive jurisdiction of the Australian courts in legal proceedings conducted by ASIC, that they covenant to comply with any order of Australian court in respect of matters related to the provision of financial services, and also that an agent be appointed for the service of process. If relief were to be granted in the same form as the Class Order, then such a condition would remain. In the event that there is cause for action, then there will be avenues which ASIC can pursue to bring action against the entity (if relief were given). It can be argued that if relief is granted, the applicant will be subject to the same regulatory environment in terms of enforcement measures as any other company that could rely upon the Class Order.

We also draw RPG's attention to the precedent created in the GSA application. GSA sought licensing relief to provide wholesale financial services in Australia. GSA was incorporated in the US but held a license in Hong Kong. The Action Officer (Wen Leung) in the GSA application considered whether [PS 176] provided any light on the issue at hand. Wen stated:

> *Under PS 176, "home jurisdiction" means the jurisdiction from which the FFSP originates and is regulated. The definition appears to contemplate one jurisdiction from which the FFSP both originates and is regulated. The definition of "home regulator" (being the authority in the FFSP's "home jurisdiction") suggests that the home regulator must be the authority in the jurisdiction in which the FFSP is incorporated*
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> *[PS 176.16] indicates that ASIC generally considers that an FFSP is 'regulated' by the authority in the home jurisdiction. [PS 176.21] then contemplates that there may be more than one "home regulator" (rather than more than one "overseas regulatory authority"). The definition of "overseas regulatory authority" means a body established by or for the purposes of a foreign government to regulate financial services and includes an FFSP's home regulator. This suggests a potential wider meaning and could arguably include an authority outside the FFSPs home jurisdiction, though the position is not entirely free from doubt.*

The present application draws support from the ambiguity espoused by Wen in the GSA matter. Also of relevance were RPB's comments in relation to the GSA matter. RPB accepted the point that the entity need not necessarily be incorporated in the country with which it is licensed to gain relief of this kind. This was on the basis that:

1. the primary regulator was in fact the HKSFC. A similar conclusion can arguably be drawn in this application given the fact that the only staff offering services within Australia are those who are licensed by the SEC; and
2. upon receipt of further submissions it was found that the HKSFC does not differentiate between entities incorporated in Hong Kong and those not incorporated in Hong Kong. Given the further submissions received from the applicant in this application (attached), a similar conclusion can be drawn with regard to the SEC.

Recommendation

That individual licensing relief is granted to the applicant under section 911A(2)(l) of the Act in the same terms as the Class Order.