

§ 22 | Senior Manager | Investment Managers and Superannuation | ASIC | 61 7 3867 4804 | 61 7 3867 4800 | § 22 @asic.gov.au
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Status: FINALISED

ALPHAMALL~ LLC

Last updated on 01/10/2019 by Application Messenger (NSW)

Decision Details

		Security Classification	In Confidence	Date Submitted	20/08/2018
Agenda Item Title		Confidential submission		Epsom Id	
Action Officer	§ 22 Melbourne/VIC/ASIC	Office	MEL	Telephone	33346
Authorising Officer	§ 22 Brisbane/QLD/ASIC	Office		Telephone	
Decision Date	26/09/2018	Decision	Refused		

Rationale:

Background

HWL Ebsworth Lawyers (**Applicant**) lodged a notice of reliance on ASIC Class Order [CO 03/1100] (continued in force by ASIC Corporations (Repeal and Transition) Instrument 2016/396) (Class Order) on behalf of their client, AlphaMall LLC (**AlphaMall**). AlphaMall seeks to provide financial services in Australia to provide investment advisory services to wholesale clients. AlphaMall is also registered as a Foreign Company with ASIC on 19/06/2018.

§ 22 as SO and I discussed and reviewed this matter several times and multiple requisitions were required to be sent to the Applicant to receive adequate documents. Requisitions were also required in relation to other matters.

During the Supervisor's leave from 24 August 2018 to 12 September 2018 § 22, Senior Manager, replaced the Supervisor. While § 22 went on leave from 4 September 2018 § 22, Lawyer, stood in her stead. On 12 September 2018 § 22 took over the matter as Supervisor again.

Excerpts from AlphaMall LLC ADV

Supervisor's initial concerns resulting from the AO raising the issue that the foreign company's Principal Place of Business (PPB) was located in Australia were confirmed after sighting AlphaMall's Australian PPB on the SEC IAPD Website (<https://adviserinfo.sec.gov>) and on AlphaMall's ADV (SEC authorised 11/9/2017).



After undertaking ASCOT and ASCERTAIN Searches on AlphaMall LLC, concerns were confirmed around the bona fides of the application where a financial services business may be operated in Australia under FFSP Relief as opposed to being conducted offshore because :

- AlphaMall LLC's principal place of business in the ADV is recorded as Suite 224, 838 Collins Street, Docklands VIC 2008;
- AlphaMall Pty Ltd's website is alphasmall.com.au (domain held by Talentop Pty Ltd, an Australian company), and AlphaMall's Website being identified on the ADV as being used to provide the app and interact with clients.; and
- The address of the Director of AlphaMall LLC § 22, is also located in Australia.

- AlphaMall's ADV indicates no financial services are undertaken in the USA in that the ADV states on ASIC noted that the ADV under item 5 - Information About Your Advisory Business - Regulatory Assets Under Management indicated that there were \$9,990 under Discretionary management. On page 6, the ADV also stated that 100% of AlphaMall's clients are non-US clients.

Requisitions were issued to AlphaMall on 22 August 2018, and a response was received on 27 August 2018 from AlphaMall stating it was not carrying on a financial services business in the US at this time, this being the reason why it could not provide any financials requested by ASIC.

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As such, AlphaMall's response on 27 August 2018 confirmed that a US business was not being carried out at this stage.

The Decision Rationale sets out the process and steps followed when assessing this application.

A. CONCERNS - INITIAL

AlphaMall's business (or proposed business in Australia) may not meet the conditions of the relief in that financial services are

- not being provided in the US at this time, due to the absence of evidence that a business is not being run overseas at this stage. Therefore, the business would not be subject to regulatory oversight at this stage.
- financial services are being provided to retail clients, as
- not confined to wholesale clients (as per statements on the AlphaMall ADV Part 2);
- as per AlphaMall Pty Ltd Website at alphasmall.com.au (domain pertaining to Talentop Pty Ltd., an Australian entity, of which the Director, of AlphaMall § 22 is also a Director), which stated: "Our vision is to provide highly intelligent and fully automated digital wealth management solutions to every Australian".

B. Decision to issue Requisitions

On 22 August 2018, requisitions were issued in relation to:

1. whether AlphaMall intended to provide financial services beyond the confines of CO 03/1100 - i.e. to Australian retail clients based on the statements on alphamall.com.au.
2. providing background as to why **s 22** intends to provide financial services in Australia through a Delaware incorporated Company, rather than obtaining an AFSL,
3. providing an explanation as to the financial services provided by AlphaMall LLC in a foreign jurisdiction including the USA;
4. providing the most recent financial reports / financial information file by AlphaMall LLC including with the SEC when applying for registration pursuant to Section 203 of the U.S. Investment Advisers Act of 1940; and
5. providing an explanation of the financial services provided in Australia by AlphaMall in Australia, including through other related entities.

The Website was corrected in relation to provision of financial services to wholesale clients for purposes of Chapter 7 and sophisticated investors for purposes of Chapter 6) after requisitions were issued to AlphaMall LLC on 22 August 2017, as confirmed in the response on 27/8/18. However, the privacy page remains an issue.

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D. Assessment of responses dated 27 August 2018 to ASIC Requisitions

1. whether AlphaMall intended to provide financial services beyond the confines of CO 03/1100 - i.e. to Australian retail clients based on the statements on alphamall.com.au.
Answer: It is AlphaMall's intention to only offer to its service in Australia to wholesale investors. The Website was amended to remove explicit references to retail investors, and includes qualifications that "Eligibility criteria apply: Only for wholesale clients for the purpose of Chapter 7 of the Corporations Act 2001 or "sophisticated investors" for the purposes of Chapter 6D of the Corporations Act 2001. It also includes a disclaimer that: "This information does not constitute advice nor an offer for the provision of services for products. For Australian Investors information only, not for distribution in the United State".

Question 2: Provide background as to why **s 22** intends to provide financial services in Australia through a Delaware incorporated Company.

Response: **s 22** is a director of AlphaMall LLC and AlphaMall Pty Ltd. AlphaMall was registered with the SEC in September 2017 and has become an Australian Foreign Registered Company on 19 June 2018. AlphaMall provides advice and arranges for clients to acquire US securities. In this regard, AlphaMall LLC has entered into commercial arrangements with Redbridge Securities LLC (Redbridge) for the provision of broking services and Apex Clearing (Apex) will be custodian. Apex Clearing Corporation has already received the benefit of ASIC CO 03/1100. AlphaMall Pty Ltd was registered in Australia for administrative purposes, but does not provide any financial services".

Assessment: AlphaMall failed to provide a response to the question as to why the financial services in Australia were to be provided through a Delaware company, and an AFSL was not obtained.

Specifically, the response failed to indicate that the Delaware Company was set up to service US clients, whether or not, at this stage, the Company had serviced any US clients or not after being registered with the SEC on 11 September 2017.

In addition, ASIC noted that its records indicated AlphaMall Pty Ltd had, in fact, been appointed a Corporate Authorised Representative of another AFSL, and that this information had not been provided by AlphaMall LLC in its response. ASIC also noted that the AlphaMall's ADV indicated that AlphaMall Pty Ltd owned more than 75% of shares in AlphaMall LLC.

Question 3 - provide an explanation of the financial services provided by AlphaMall LLC in a foreign jurisdiction, incl. USA

Response: As illustrated in the diagram, AlphaMall LLC intends to provide financial product advice (general advice and personal advice) and deals in (by arranging) certain financial products offered by US issuers. The advice will be given through a digital platform provided by BBAE Advisors LLC (having regard to relevant digital advice requirements). As part of that arrangement, Redbridge will act as the broker dealer (in respect of the arranging services) and Apex will be the custodian. AlphaMall clients will trade in USD and the assets will be held directly by Apex.

Assessment: This answer did not address whether any financial services are being provided by AlphaMall in the USA.

While the response indicates the advice is to be provide in the future ("will be given"), it fails to refer to the services to be provided to clients in the US in the absence of any descriptions around:

- the location of the clients that the advice will be provided to. We note the ADV states 100% are non-US residents;
- the type of clients that the advice will be provided to. The ADV refers to clients being Individuals other than High Net Worth Individuals)
- the manner in which the advice will be given - on AlphaMall's digital platform in the US, or BBAE Advisors LLC's digital platform in the US

Of concern was also that the response to question 3 was identical to question 5 - financial services provided in Australia. See below.

For noting only

ASIC noted that no reference had been made in the diagram to the fact that BBAE Advisors LLC, as Program Sponsor, would be providing the digital platform for AlphaMall LLC to provide its advice. Nor was any reference to BBAE Advisors LLC included in the response to item 2 - the reasons for providing financial services through a Delaware Company in Australia. The response to question 1 did not make reference to AlphaMall LLC having in place commercial arrangements with BBAE Advisors LLC, which would provide the digital platform through which AlphaMall would provide the advice. We noted that on AlphaMall's ADV Part 2, these links were also confirmed between Redbridge Securities LLC (which has AlphaMall Pty Ltd as its Agent), as well as additional links with Redbridge related party, BBAE LLC, being the Sponsor of AlphaMall's Wrap Program, which provides the App for the RoboAdvice as per AlphaMall LLC's.

ASIC noted that the description of advice authorisations under questions 3 (and 5) reflected the authorisations in AlphaMall Pty Ltd's CAR making the distinction between general advice and personal advice.

Question 4 - Provide the most recent financial reports / financial information file by AlphaMall LLC including with the SEC when applying for registration pursuant to Section 203 of the U.S. Investment Advisers Act of 1940

Response: As AlphaMall is newly established and has not commenced the provision of its services, it has not prepared any financial reports with the SEC. AlphaMall was registered as a company with the SEC on 11 September 2017.

Assessment: ASIC noted that it would appear that no financial services had been conducted in the US despite having been registered as a company with the SEC on 11 September 2017, nor that the response included any reference to Client Presentations or Client documentation in relation to financial services to be provided in the US, nor did it include information submitted to the SEC when applying for registration.

The information in the ADV referred to above would appear to be unchanged.

Question 5 - Provide an explanation of the financial services provided by AlphaMall LLC in Australia, including through any other related entities

Response: AlphaMall provides financial product advice (general advice and personal advice) and deals in (by arranging) certain financial products offered by US issuers. The advice will be given through a digital platform provided by BBAE Advisors LLC (Program Sponsor). The arranging services is proposed to be provided in conjunction with Redbridge (as broker) and Apex (as custodian). AlphaMall Pty Ltd was registered in Australia for administrative purposes but does not provide any financial services in Australia.

Assessment : the response relating to the financial services provided in Australia is identical to the response under 3 - financial services provided in a foreign jurisdiction, including the US. As a result, ASIC is of the view that in the absence of the description of any differences in the responses relating to the financial services to be provided in two separate jurisdictions - the US and Australia- this may be an additional indication that - no financial services are being provided in the US.

When the response was received from AlphaMall, ASIC had remaining concerns about the bona fides of this application.

CLO's advice was requested on 24 August 2018, prior to receiving AlphaMall's responses to ASIC's requisitions. It was determined by the AO and Phillip Mines (who was the Supervisor at the time), not to issue additional requisitions to AlphaMall LLC awaiting CLO's response.

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F. Further Information from the SEC

The Supervisor had prepared draft requisitions for the SEC on 22 August 2018. However, s 22, the Supervisor after 23 August 2018, determined they would not be issued as set out in an e-mail to s 22, International.

s 42: As in the responses provided by AlphaMall LLC on 27 August 2018 to ASIC's requisitions dated 22 August 2018, AlphaMall LLC confirmed it was not carrying on a financial services business in the USA at this time.

As a result, further requisitions were not issued to AlphaMall LLC s 42

It was also determined that we would not seek further information or clarification from the SEC in relation as to whether (a) SEC registration is conditional upon financial services being carried on in the US within a specific time after obtaining registration, or not, as this is not an existing parameter and requirement of the Class Order;

Nor would we enquire about the nature of SEC regulatory oversight of investment advisors in general, the nature of the regulatory oversight not being an existing parameter and requirement of the Class Order and the equivalence of the US regulatory oversight of investment advisers having been established at the time the class Order relief was given without further conditions as to the nature of the oversight.

Nor would we enquire about the nature and scope of any existing oversight by the SEC of AlphaMall LLC in particular, based on the responses provided to requisitions.

Recommendation - Refusal

On 19 September 2018, after discussions were held at a meeting attended by the AO s 22, the Senior Manager in IMS having responsibility for FFSP s 22, Lawye s 22, Analyst, an s 22, Supervisor, the Supervisor took the following decision:

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ASIC is not satisfied that the applicant is carrying on a business in the United States that is subject to overseas regulatory oversight.

The Decision taken on 19 September 2018 was based on responses that confirmed a US business was not being conducted.

Decision taken on 19 September 2018 was to:

1. ISSUE a Notification that AlphaMall can not rely on the Class Order, providing the reason for the notification;
2. ISSUE a Refusal Letter after issuing Notification.

It was agreed that s 22 would draft the Notification, and that I would draft the Refusal Letter. Both would be reviewed by the Supervisor. Both letters would be issued by me. The two step process to issue a Notification including reasons, and a Refusal Letter, was run by s 22, Senior Lawyer.

It was agreed that there would be no requirement under procedural fairness to discuss the issues with the applicant prior to issuing the Notification that it can not rely on the Class Order and the Refusal Letter.

It was decided at the Meeting on 19 September 2018, that the Notification Letter and Refusal Letter would be provided to s 22, SEL s 22 was informed by s 22 on 19 September 2018 of the decisions taken on 19 September 2018 s 42

Paul also requested that the process to refuse the relief be run by s 22, Senior Lawyer, Responsible for IMS' FFSP Project in and member of the FFSP Working Group.

After discussions with s 22 on 21 September 2018, ASIC's requisitions and applicant's responses to ASIC's requisitions were included in the Decision Rationale for ease of reference, in addition to the analysis of the responses. A s 22 was not in a position to review the Notice of Exclusion and two step process prior to her leave on 26 September 2018, a final decision was made on 25 September 2018 by the Supervisor s 22, Senior Manager, IMS and Phil Mines, Lawyer, to issue the Notice of Exclusion and Refusal Letter on 26 September 2018 as:

- Decision in Principle had been taken on 19 September 2018 to issue the Notice of Exclusion and Refusal Letter s 42;
- the Decision in Principle had been endorsed by s 22, SEL, on 19 September 2018, when informed by s 22, Senior Manager, of the Decision in Principle s 22

On 26 September 2018, I approved the issue of the Notice of Exclusion and the Refusal Letter. Documents to be returned separately.

[Letter to AlphaMall - Notification of Exclusion from reliance upon CO 03-1100.docx](#)

[AlphaMall refusal letter.docx](#)

s 22 SEL, was also informed of the issue of the Notice of Exclusion and Refusal Letter.

Attachments:

InDocument Activity

17/08/2018 14:23:45	s 22	: Initialise
20/08/2018 11:48:27	s 22	: Maintain Rationale
20/08/2018 11:55:45	s 22	: Select Decision
20/08/2018 11:55:51	s 22	: Submit to Manager
26/09/2018 11:54:48	s 22	: Approve