



**ASIC**

Australian Securities & Investments Commission

**REPORT 519**

# **Response to submissions on CP 268 Licensing relief for FFSPs with a limited connection to Australia**

March 2017

## **About this report**

This report highlights the key issues that arose out of the submissions received on Consultation Paper 268 *Licensing relief for foreign financial services providers with a limited connection to Australia* (CP 268) and details our responses to those issues.

### 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.

### Disclaimer

This report 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.

This report does not contain ASIC policy. Please see [Regulatory Guide 176 Foreign financial services providers](#) (RG 176).

Note: RG 176 is due to be updated in September 2018 at the conclusion of our review of the policy settings underpinning our relief for foreign financial services providers.

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## A Overview

- 1 In [Consultation Paper 268](#) *Licensing relief for foreign financial services providers with a limited connection to Australia* (CP 268), we sought feedback on whether Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients* is unnecessary in light of s911A(2E) of the *Corporations Act 2001* (Corporations Act), which was introduced after we made [CO 03/824].
- 2 In CP 268, we also provided an update on the temporary extension of our relief for some foreign financial services providers (FFSPs) operating from a number of designated countries, which was due to sunset between 1 October 2016 and 1 April 2017.
- 3 This report highlights the key issues that arose out of the submissions received on CP 268, and our responses to those issues. It is not meant to be a comprehensive summary of all responses received. This report is limited to the key issues.
- 4 For a list of the non-confidential respondents to CP 268, see the appendix. Copies of these submissions are available on the ASIC website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 268.

## Responses to consultation

- 5 We received 12 responses to CP 268 (including eight confidential responses) from industry bodies, law firms, investment managers and foreign banks. We are grateful to respondents for taking the time to send us their comments.
- 6 Additionally, we met with a number of industry bodies, law firms and interested entities to discuss our proposed approach.
- 7 Sections B and C of this report set out the issues respondents raised during consultation, and our responses to those issues.

## B Proposal to repeal [CO 03/824]

### Key points

This section outlines the feedback we received on our proposal to repeal [CO 03/824], including:

- the relationship between [CO 03/824] and s911A(2E) of the Corporations Act;
- if we were to repeal the relief—feedback on a one-year transitional period; and
- if we were to continue the relief—feedback on a requirement to notify ASIC when relying on the relief.

### Relationship between [CO 03/824] and s911A(2E)

- 8 In CP 268, we noted that entities carrying on a financial services business in Australia must hold an Australian financial services (AFS) licence unless otherwise exempted: s911A of the Corporations Act.
- 9 To ensure that offshore foreign entities engaging in infrequent transactions with wholesale entities in Australia do not require an AFS licence where there is a limited connection between the overseas financial services provider and Australia, we made [CO 03/824].
- 10 [CO 03/824] provides relief for a foreign entity from the need to hold an AFS licence if 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 Australia to use the financial services it provides, or is likely to have that effect.
- 11 [CO 03/824] will expire ('sunset') on 1 April 2017 unless we take action to preserve its effect. In CP 268, we expressed the view that the major types of financial services that [CO 03/824] applies to are now covered by an AFS licensing exemption contained in s911A(2E), as inserted by reg 7.6.02AG of the Corporations Regulations 2001. Consequently, we proposed to repeal [CO 03/824].
- 12 We also indicated in CP 268 that 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.

- 13 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.

### **Stakeholder feedback**

- 14 Respondents strongly supported the continuation of [CO 03/824] because s911A(2E) is not a complete replacement for [CO 03/824] due to that section's limited scope. Respondents suggested that there are no viable alternatives that would allow entities relying on [CO 03/824] to continue their Australian activities without an AFS licence.
- 15 [CO 03/824] applies to 'the provision of [any] financial service' for all financial products. As was indicated by a number of respondents, this extends to activities particularly involving securities, managed investments and debentures. In contrast, the financial services listed in s911A(2E) are limited to dealing, advising or making a market in derivatives, foreign exchange contracts and a range of financial products related to carbon emissions.
- 16 In addition, [CO 03/824] applies where the service is provided to a wholesale client, while s911A(2E) states the financial service must be provided to a professional investor, as defined in s9 of the Corporations Act.
- 17 We also note that the relief for FFSPs is not an option for entities that are licensed in jurisdictions outside of the United Kingdom, United States, Germany, Singapore, Hong Kong or Luxembourg.
- 18 Respondents noted that, in the absence of relief, the cost of getting an AFS licence to continue the limited engagement with clients in Australia would far outweigh the benefits, and would be likely to lead to a withdrawal from the Australian market.

*ASIC's response*

We acknowledge the feedback that industry relies on this relief and that s911A(2E) is not a complete replacement for [CO 03/824]. Industry submissions have highlighted the importance of the relief—particularly for activities associated with securities, debentures and managed investments. However, we also note that feedback to CP 268 did not provide ASIC with sufficient information about:

- the costs that a repeal of [CO 03/824] would impose on entities and the broader economy;
- how industry views the relationship between [CO 03/824] and the FFSP relief;
- the types of products and services offered in reliance on [CO 03/824];
- the jurisdictions that might be affected by a repeal of [CO 03/824]; or
- the number of clients that would be affected by a repeal of [CO 03/824].

We have therefore rolled over [CO 03/824] in its existing form—in [ASIC Corporations \(Foreign Financial Services Providers—Limited Connection\) Instrument 2017/182](#)—until 27 September 2018. This date aligns with the expiry of [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#), which provides relief for some FFSPs operating from a number of designated countries.

The roll-over of [CO 03/824] until 27 September 2018 will allow us time to conduct a thorough review of the relief for foreign entities providing financial services to wholesale clients in Australia. Undertaking the review of both instruments at the same time will help ensure that we develop a consistent approach to the regulation of foreign entities. This review comes as a result of market and regulatory developments since the relief was first granted and a number of ongoing international and domestic reviews affecting the cross-border provision of financial services.

A roll-over will also allow industry more time to gather information about the impact of repealing [CO 03/824] in line with the areas we have listed above.

We think that further review is needed by us of the operation of all relief and exemptions available for foreign entities providing services to wholesale clients in Australia before we can make an informed decision about whether the current relief settings should continue on a long-term basis.

There is currently a lack of visibility relating to who is relying on [CO 03/824], which makes it difficult to assess whether the relief is operating efficiently and effectively. Consequently, we are of the view that a temporary roll-over for 18 months is appropriate to enable us to review the policy underlying both [CO 03/824] and the relief for FFSPs at the same time.

We note that if further information about the areas listed above is not provided to ASIC during the roll-over period, the likely result is that [CO 03/824] will be repealed at the end of the roll-over period.

## Transitional period if [CO 03/824] is repealed

- 19 In CP 268, we suggested that a one-year transitional period would assist industry if we were to repeal [CO 03/824]. We suggested that this period would 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.
- 20 Respondents unanimously stated that a one-year transitional period would not be sufficient for entities relying on [CO 03/824] to make alternative arrangements to continue their activities in Australia. Most respondents suggested that two years would be a more appropriate timeframe in which foreign entities could restructure their businesses (including compliance controls) to ensure that they can legally continue to service existing clients in Australia.

### *ASIC's response*

As noted above, based on the feedback received, we have rolled over [CO 03/824] in its existing form—in ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182—until 27 September 2018, which will allow us to develop a consistent approach to the regulation of foreign entities. If, after our further review, we propose to discontinue the relief, we intend to consult with stakeholders further on an appropriate transitional period.

## Notification requirement if relief in [CO 03/824] is continued

- 21 In CP 268, we sought feedback on the costs associated with a requirement to notify ASIC when relying on the relief. We did not get any specific information about the costs associated with a notification requirement.
- 22 Generally, there was mixed feedback in response to this proposal. Several respondents noted the difficulty of a notification requirement given the great number of counterparties that could be involved in any cross-border transaction. Others were supportive of a notification requirement when the foreign entity commences relying on [CO 03/824] and potentially another when it ceases reliance.

23 One industry submission noted that users of the relief were not located in Australia, had no other connection to Australia and are not generally subject to Australian laws, and so it was not clear what ASIC expected to achieve through a notification requirement. The submission argued that the administrative burden of notifying ASIC would outweigh any benefit of ASIC receiving the notification.

*ASIC's response*

Based on the feedback received, we have not introduced a notification requirement at this time. As part of our further review, we will look at ways to increase the visibility of who is relying on this relief to be able to properly assess whether the relief is operating efficiently and effectively.

We understand that there may be a significant administrative burden associated with complying with a notification requirement—particularly when there are a great number of counterparties involved in a cross-border transaction.

As noted above, we have in effect rolled over [CO 03/824] in its existing form until 27 September 2018, which will allow us to develop a consistent approach to the regulation of foreign entities. We will more closely examine how a notification requirement might operate and weigh up the relative benefits/burdens of requiring this information.

## C Update on our relief for foreign financial services providers

### Key points

We temporarily extended our relief for FFSPs in September 2016 for another two years—in ASIC Corporations (Repeal and Transitional) Instrument 2016/396—while we come to an informed view about whether to continue this relief for a longer period.

While we sought preliminary information from stakeholders about their current operations, most respondents focused on the proposed repeal of [CO 03/824]. However, respondents were generally supportive of continuing the relief for FFSPs, but welcomed the opportunity to engage with our review of the underlying policy.

We intend to consult with stakeholders later this year to get a better understanding of:

- who relies on this relief;
- the types of activities it is used for; and
- the volume of business for entities that rely on this relief.

### Relief for foreign financial service providers

24 ASIC Corporations (Repeal and Transitional) Instrument 2016/396 provides relief for some FFSPs operating from a number of designated countries from the requirement to hold an AFS licence when providing certain financial services to wholesale clients in Australia. 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.*

## Our plans for future consultation

- 25 In CP 268, we noted that we have extended the relief for FFSPs so that we can comprehensively review and consult on the policy settings underlying our relief. This temporary extension of relief will sunset two years from the commencement of the instrument (i.e. 27 September 2018) unless we take action to preserve it.
- 26 We noted that we will consult with industry on any proposals to amend our relief for FFSPs that arise from the reassessment of the policy underlying the relief.
- 27 We still intend to do this and engage with interested stakeholders later this year on our proposals.

## Data to inform our review

- 28 In CP 268, we noted our review of the relief for FFSPs will be most effective where stakeholders can share information about their current operations with us. As part of our consultation we sought details of:
- (a) the type of entities that rely on our relief;
  - (b) the types of activities for which entities rely on our relief; and
  - (c) the volume of business for entities that rely on our relief.
- 29 We received very little information in response to CP 268, with most submissions focusing on the proposed repeal of [CO 03/824]. We hope to receive more detailed information as part of our consultation with stakeholders later this year.

## Appendix: List of non-confidential respondents

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- Allens Linklaters
  - Australian Financial Markets Association
  - Financial Services Council
  - MinterEllison
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