



ASIC

Australian Securities &
Investments Commission

CONSULTATION PAPER 315

Foreign financial services providers: Further consultation

July 2019

About this paper

This paper is for foreign financial services providers (FFSPs) that wish to provide financial services in Australia to wholesale clients or professional investors only. It seeks feedback on our proposal to introduce Australian financial services (AFS) licensing relief for FFSPs known as the 'funds management' relief to allow FFSPs to provide relevant services to professional investors in Australia. We will proceed with repealing 'limited connection' relief as we have previously proposed.

We are not currently proposing to give AFS licensing relief to allow FFSPs to provide financial services to professional investors in Australia where the investor initiates an inquiry about the service ('reverse solicitation' relief). This paper seeks feedback on this issue.

Note: This paper attaches draft updated Regulatory Guide 176 *Foreign financial services providers* (Attachment 1), draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2) and draft ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2019/XXX (Attachment 3). These attachments are available on our website at www.asic.gov.au/cp under CP 315.

About ASIC regulatory documents

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

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

Regulatory guides: give guidance to regulated entities by:

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

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

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

Document history

This paper was issued on 3 July 2019 and is based on the Corporations Act as at the date of issue.

Disclaimer

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

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on foreign financial services providers. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section E, 'Regulatory and financial impact'.

Making a submission

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

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

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

Comments should be sent by 9 August 2019 to:

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What will happen next?

Stage 1	3 July 2019	ASIC consultation paper released
Stage 2	9 August 2019	Comments due on the consultation paper
Stage 3	By 30 September 2019	Current legislative instruments rolled over for a further six months until 31 March 2020 (i.e. the 'sufficient equivalence' relief and the 'limited connection' relief)
Stage 4	Before March 2020	Updated Regulatory Guide 176 released
Stage 5	1 April 2020	Proposed commencement date of the foreign AFS licensing regime and transitional period for sufficient equivalence relief. FFSPs should apply for a licence where applicable. Proposed commencement date of the funds management relief and transitional period for limited connection relief.
Stage 6	30 September 2020	Proposed end of transition period for FFSPs relying on limited connection relief.
Stage 7	31 March 2022	Proposed end of transitional period for FFSPs relying on sufficient equivalence relief.

A Background to the proposals

Key points

In [Consultation Paper 301 *Foreign financial services providers*](#) (CP 301), we consulted on proposals to repeal the ‘sufficient equivalence’ relief and the ‘limited connection’ relief and implement a foreign AFS licensing regime.

As a result of the responses to CP 301, we are now seeking feedback on our proposal to give ‘funds management’ relief to FFSPs providing ‘funds management financial services’ to professional investors in Australia, subject to a cap on the scale of those services. We are also repealing the limited connection relief.

Attached to this paper are:

- draft updated Regulatory Guide 176 *Foreign financial services providers* (Attachment 1), which sets out information on the foreign AFS licensing regime, and how we would apply the proposed funds management relief; and
- draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2) and draft ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2019/XXX (Attachment 3).

These attachments are available on our website at www.asic.gov.au/cp under CP 315.

Note: See the ‘Key terms’ in draft updated RG 176 (Attachment 1) for a list of terms and definitions used in this paper.

The current relief framework for FFSPs

- 1 If you carry on a financial services business in Australia, you must hold an Australian financial services (AFS) licence, unless relief is granted by ASIC or an exemption applies.
- 2 Under s911A(2)(h), 911A(2)(l) and 926B of the *Corporations Act 2001* (Corporations Act), we can exempt an FFSP from the requirement to hold an AFS licence if it meets certain requirements.

Note: In this paper, references to sections (s), chapters (Chs) and parts (Pts) are to the Corporations Act, unless otherwise specified. References to regulations are to the Corporations Regulations 2001 (Corporations Regulations), unless otherwise specified.

- 3 We have given two types of relief to FFSPs providing financial services to wholesale clients in Australia:

- (a) 'sufficient equivalence' relief; and
- (b) 'limited connection' relief.

Current sufficient equivalence relief

4 In 2003 and 2004, we made ASIC instruments that conditionally exempted FFSPs from the requirement to hold an AFS licence when providing specified financial services if:

- (a) the financial services are provided to wholesale clients only;
- (b) the provision of the financial services by the FFSP is regulated by an overseas regulatory authority;
- (c) the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
- (d) there are effective cooperation arrangements in place between the overseas regulatory authority and ASIC; and
- (e) the FFSP meets all the relevant conditions of relief contained in the relevant ASIC instruments.

5 This relief is currently due to expire on 30 September 2019. We intend to extend this relief to 31 March 2020 and commence the foreign AFS licensing regime on 1 April 2020. FFSPs currently relying on the sufficient equivalence relief will have a two-year transitional period (from 1 April 2020 to 31 March 2022) to apply for a foreign AFS licence and implement the necessary compliance arrangements to meet the requirements of the foreign AFS licensing regime.

Note: For further information on the sufficient equivalence relief, see Section A in [CP 301](#).

Current limited connection relief

6 In 2003, we made Class Order [CO 03/824] *Licensing relief for financial services providers with limited connection to Australia dealing with wholesale clients* to provide relief from the requirement to hold an AFS licence when the person providing the financial services is:

- (a) not in this jurisdiction (i.e. Australia);
- (b) dealing only with wholesale clients; and
- (c) carrying on a financial services business only because the person is 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 (see s911D(1)).

Note: In 2017, the limited connection relief was remade in the form of [ASIC Corporations \(Foreign Financial Services Providers—Limited Connection\) Instrument 2017/182](#).

- 7 The limited connection relief was granted to ensure that an FFSP transacting with wholesale clients in Australia would not require an AFS licence when there is a limited connection between the FFSP and Australia.
- 8 This relief is due to expire on 30 September 2019. We are proposing to extend this relief to 31 March 2020 to maintain the status quo while we consult on the proposals in this paper.

Note: For further information on the limited connection relief, see Section A in [CP 301](#).

Our proposals in CP 301

- 9 In June 2018, we released [CP 301](#) to seek feedback on our proposals to:
- (a) repeal the sufficient equivalence relief and limited connection relief; and
 - (b) implement a modified AFS licensing regime to enable eligible FFSPs to apply for and maintain a modified form of AFS licence (foreign AFS licence).
- 10 We indicated that our policy objective was to strike an appropriate balance between cross-border financial services facilitation, market integrity and investor protection. Our proposals were based on the principles outlined in [Regulatory Guide 54 Principles for cross-border financial regulation \(RG 54\)](#).
- 11 We also outlined our concerns that the relief we had granted no longer strikes the appropriate balance described in paragraph 10. In arriving at this view, we considered:
- (a) non-compliance with the relief by FFSPs we have been notified of or we have identified;
 - (b) our ability to effectively supervise and enforce obligations on FFSPs providing financial services to wholesale clients in Australia;
 - (c) how our approach to cross-border regulation of financial services is generally more permissive compared to our peer regulators;
 - (d) developments in cross-border financial regulation, including the focus by the International Organization of Securities Commissions (IOSCO) on misconduct in wholesale financial markets; and
 - (e) the ongoing availability of other AFS licensing exemptions and relief to FFSPs providing financial services to wholesale clients in Australia.

Feedback from industry on proposals in CP 301

Limited connection relief

- 12 The feedback to [CP 301](#) highlighted the benefit of the limited connection relief to facilitate the provision of cross-border financial services to

wholesale clients in Australia, particularly for activities associated with the Australian funds management sector.

- 13 However, the feedback also reaffirmed our view that some FFSPs have taken a broad interpretation of the operation of the limited connection relief, particularly when other exemptions from the AFS licensing requirements do not apply to their activities with non-retail clients in Australia (e.g. exemptions under reg 7.6.02AG or the sufficient equivalence relief).
- 14 Section 911D provides that a person is taken to be carrying on a financial services business (and therefore must be licensed) if they carry on conduct that induces, or is likely to induce, persons in Australia to use their services. Respondents submitted that the breadth of the expression ‘induce or likely to induce’ and the extraterritorial application of s911D can be problematic. Industry also indicated that the current limited connection relief provided some regulatory certainty as to the territorial application of Australia’s licensing regulatory framework.
- 15 As we noted above, some respondents submitted that continuing the limited connection relief is important for the provision of certain financial services involving funds management activities to professional investors in Australia. This is for the following reasons:
- (a) The provision of financial services relating to funds management by some FFSPs is on a very limited basis. Often these FFSPs do not provide a significant volume of financial services to clients in Australia each year, which does not justify bearing the costs of applying for and maintaining any form of an AFS licence.
 - (b) The relief allows FFSPs to test the Australian market before deciding whether to apply for an AFS licence.
 - (c) It is burdensome for an FFSP to establish sufficient equivalence for a new jurisdiction because the provision of discrete financial services is on a very limited basis. Further, due to the differences in their home regulatory regimes and Australia’s regime, some FFSPs would be unable to establish sufficient equivalence.

Our response

- 16 We did not receive adequate detailed information or data that supports the continuation of the limited connection relief and so we will be repealing the limited connection relief. Since the commencement of the relief, Parliament made reg 7.6.02AG in 2005. Regulation 7.6.02AG modifies s911A by inserting s911A(2A)–(2E). These five exemptions facilitate the provision of cross-border financial services, particularly for professional investors in Australia.

Note: ‘Professional investors’ are a subset of wholesale clients. Section 9 states that professional investors include AFS licensees, bodies regulated by the Australian Prudential Regulation Authority (APRA), trustees, a listed entity or a related body corporate of a listed

entity, a body corporate, or a person that controls at least A\$10 million. In contrast, wholesale clients include persons who invest more than A\$500,000.

- 17 Taking into account the feedback we received on our proposals in [CP 301](#) and the available statutory exemptions, we consider there is benefit in us proposing AFS licensing relief for FFSPs that provide ‘funds management financial services’ to professional investors in Australia in limited circumstances.
- 18 We think that the adoption of this relief, together with the exemptions in reg 7.6.02AG, would facilitate access by professional investors in Australia to offshore services in a way that provides the appropriate balance between cross-border facilitation, market integrity and investor protection.

Sufficient equivalence relief

- 19 In [CP 301](#), we also proposed to repeal the sufficient equivalence relief and implement a modified AFS licensing regime to enable eligible FFSPs to apply for and maintain a modified form of AFS licence (foreign AFS licence).

Our response

- 20 We have decided to require FFSPs that rely on the sufficient equivalence relief to obtain a modified AFS licence (foreign AFS licence). We will be extending the transitional period proposed in [CP 301](#) from 12 months to two years for FFSPs that are currently relying on the sufficient equivalence relief to facilitate compliance with the new foreign AFS licensing regime. Table 1 sets out the implementation timeline for the foreign AFS licensing regime.
- 21 The details of the foreign AFS licensing regime are set out in draft updated RG 176 (Attachment 1). This paper does not propose any further changes to the foreign AFS licensing regime that was set out in [CP 301](#).

Table 1: Timeline of foreign AFS licensing regime

Date	Event
1 October 2019 to 31 March 2020 (roll-over period)	ASIC will roll over the sufficient equivalence relief for a further six months.
1 April 2020 to 31 March 2022 (transitional period)	The foreign AFS licensing regime commences with the transitional period. FFSPs can apply for a foreign AFS licence, if applicable.

Our proposals in this paper

- 22 This paper seeks your feedback on our proposals to:
- (a) provide ‘funds management’ relief to FFSPs to allow for the provision of financial services related to funds management activities to professional investors in Australia, subject to:

- (i) a cap on the scale of those activities; and
 - (ii) conditions that apply to the operation of the relief (see Section B);
- (b) not provide ‘reverse solicitation’ relief (see Section C); and

Note: We considered providing reverse solicitation relief on the terms set out in the appendix to this paper; however, at this stage we have decided not to provide it: see Section C.

- (c) update our guidance for FFSPs in RG 176 on the funds management relief, as proposed in this paper.

23 We have also updated our guidance for FFSPs in RG 176 on the foreign AFS licensing regime, as proposed in [CP 301](#): see Section D.

Overview of our proposed regulatory framework for FFSPs

24 As a result of the proposals in this paper and the proposals in [CP 301](#), we have developed the framework we will adopt for the regulation of FFSPs providing financial services to clients in Australia. Table 2 sets out the three types of regulatory arrangements that will apply to FFSPs if the proposals in this paper are adopted by ASIC.

Table 2: Our proposed regulatory framework for FFSPs

Regulatory arrangement	Description	For more information
Funds management relief	<p>An FFSP is exempt from the requirement to hold an AFS licence to provide ‘funds management financial services’ in Australia, subject to:</p> <ul style="list-style-type: none"> • a cap on the scale of those services; and • conditions that apply to the operation of the relief. <p>A person engages in a ‘funds management financial service’ if they provide:</p> <ul style="list-style-type: none"> • any of the following financial services to a professional investor in Australia: <ul style="list-style-type: none"> – dealing in interests of a managed investment scheme established outside Australia (scheme) or securities of a body that carries on a business of investment that is not incorporated in Australia (body); – providing financial product advice in relation to the interests or securities of the scheme or body; and/or – making a market in relation to the interests or securities of the scheme or body; and – portfolio management services to a limited category of professional investors (‘eligible Australian users’). 	<p>See Section B of this paper, Section F of draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>

Regulatory arrangement	Description	For more information
Foreign AFS licence	<p>An FFSP that is licensed or authorised (as applicable) by an overseas regulatory authority that regulates the FFSP under a sufficiently equivalent regime (as assessed by ASIC) may be eligible to apply for a foreign AFS licence to provide financial services to wholesale clients in Australia.</p> <p>Foreign AFS licensees are exempt from certain provisions in Ch 7 of the Corporations Act on the basis that they are subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the Australian provisions from which we have issued an exemption.</p>	<p>See Section D of this paper, Sections B–E of draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2019/XXX (Attachment 3).</p>
Standard AFS licence	<p>This requires an FFSP to comply with all the general obligations under s912A, and all the applicable provisions of the Corporations Act and the Corporations Regulations.</p> <p>This would apply to an FFSP that is carrying on a financial services business in Australia and is not able to come within one of the other regulatory arrangements listed in this table or any other available exemption (e.g. the exemptions under reg 7.6.02AG).</p>	<p>See the AFS Licensing Kit and related regulatory guides.</p>

B Funds management relief

Key points

We consider professional investors in Australia should continue to have access to funds management financial services provided by FFSPs, particularly as they may want to access global providers of such financial services. These FFSPs are unlikely to apply for or hold an AFS licence, given the limited activity conducted in Australia, and may not be eligible to rely on other exemptions.

This section seeks your feedback on our proposals to:

- provide AFS licensing relief to allow FFSPs to provide funds management financial services to professional investors in Australia;
- impose a cap on the scale of the FFSP's services provided to professional investors in Australia based on annual aggregated revenue; and
- impose conditions that apply to the operation of the relief.

Funds management financial services

Proposal

B1 We propose to provide relief to FFSPs that provide funds management financial services—subject to a cap on the scale of the FFSP's services provided to professional investors in Australia (see proposal B3) and conditions that apply to the operation of the relief (see proposal B4). A person engages in a funds management financial service if they provide:

- (a) any of the following financial services to a professional investor in Australia:
 - (i) dealing in interests of a managed investment scheme established outside Australia (scheme) or securities of a body that carries on a business of investment that is not incorporated in Australia (body);
 - (ii) providing financial product advice in relation to the interests or securities of the scheme or body; and
 - (iii) making a market in relation to the interests or securities of the scheme or body; and
- (b) portfolio management services to a limited category of professional investors ('eligible Australian users') (see proposal B2).

Note 1: We are proposing not to provide relief in relation to the provision of a custodial or depository service for the interests or securities of the scheme or body on the basis that it is covered by reg 7.6.01(1)(k).

Note 2: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).

Your feedback

- B1Q1 Do you agree with our proposal to provide AFS licensing relief to permit FFSPs to provide funds management financial services to professional investors (subject to the cap in proposal B3 and the conditions in proposal B4)? If not, why not? Please be specific in your response.
- B1Q2 Do you agree with our proposal to not provide relief in relation to the provision of a custodial or depository service on the basis that it is covered by reg 7.6.01(1)(k)? If not, why? Please be specific in your response.

B2 For the purposes of the funds management relief, we propose to define ‘portfolio management services’ to mean the management of assets located outside Australia by a manager on behalf of ‘eligible Australian users’. We propose to define eligible Australian users to include:

- (a) a person in Australia who is a trustee of:
- (i) a superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), with net assets of at least A\$10 million;
 - (ii) an approved deposit fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (iii) a pooled superannuation trust, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (iv) a public sector superannuation fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
- (b) a person in Australia who operates a managed investment scheme, with net assets of at least A\$10 million;
- (c) a person who operates a statutory fund under the *Life Insurance Act 1995* in Australia; and
- (d) an exempt public authority, as defined in s9 of the Corporations Act.

Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).

Your feedback

- B2Q1 Do you agree with our proposed inclusion of ‘portfolio management services’ as a discrete type of funds management financial service that FFSPs can provide under the relief? If not, why not? Please be specific in your response.
- B2Q2 Do you agree with our proposed definition of ‘portfolio management services’? If not, why not? Please be specific in your response.

B2Q3 Do you agree with our proposed definition of 'eligible Australian users' of portfolio management services? If not, why not? Please be specific in your response.

Rationale

- 25 As discussed in Section A, the current limited connection relief was granted to ensure that an FFSP transacting with wholesale clients in Australia would not require an AFS licence when there is a limited connection between the FFSP and Australia.
- 26 The current limited connection relief had the effect of altering the extraterritorial application of s911D. Under s911D, an FFSP is considered to be carrying on a financial services business in Australia when it engages in conduct that induces, or is likely to induce, a person to use the financial services the person provides.
- 27 The feedback to [CP 301](#) reaffirmed our view that the scope of the limited connection relief is being interpreted broadly by FFSPs, particularly in circumstances when other relief or exemptions are unavailable. We think FFSPs are purporting to rely on the relief in circumstances that are beyond what had been envisaged when the relief was granted.
- 28 The limited connection relief has provided some regulatory certainty about the territorial operation of our regime. However, we consider that we need to ensure that AFS licensing relief is only available when financial services are clearly provided only on a limited basis. We also think the relief should be provided to FFSPs providing services to professional investors only.
- 29 Although a majority of respondents to [CP 301](#) disagreed with our proposal for the complete repeal of the limited connection relief, a significant number of respondents observed that the relief is particularly important and necessary for FFSPs that:
- (a) offer interests or securities in an offshore fund to investors in Australia; or
 - (b) provide portfolio management services to wholesale clients in Australia.
- 30 This is because some FFSPs are unable to rely on other relief or statutory exemptions, being based and regulated in jurisdictions that fall outside ASIC's sufficient equivalence relief. Some of these jurisdictions are unlikely to be assessed by ASIC as sufficiently equivalent to the Australian financial services regulatory regime.
- 31 Respondents submitted that if these offshore funds or offshore portfolio managers—who engage in limited activity—are required to apply for a licence (a foreign AFS licence or a standard AFS licence), they may withdraw from providing financial services to clients in Australia. Those clients may then be precluded from participating in time-sensitive

investment opportunities overseas because the offshore entity would need to obtain a relevant licence before it could provide the service to those clients.

32 Further, clients in Australia may be restricted to investing with larger offshore investment managers that have the resources to obtain and comply with the AFS licensing regime, instead of taking up other opportunities with smaller offshore investment managers who may not consider it economically viable to obtain a licence. This could have the unintended consequence of increasing fees and costs to the detriment of clients in Australia who invest in these funds or seek to obtain the relevant financial services from overseas providers to support their funds management activities in Australia.

33 We consider that our proposed funds management relief preserves competition by ensuring that a diversified range of investment managers and investment products may be made available to professional investors in Australia, which will ultimately benefit investors in Australia investing through these institutions.

34 We also think that the scope of the activities that come within our definition of funds management should address limitations that have been identified by industry about the operation of the exemptions in reg 7.6.02AG.

Investment management structures

35 We recognise from the feedback to [CP 301](#) that there is a broad range of investment management structures that professional investors in Australia may invest in, other than those that we regulate under Ch 5C of the Corporations Act. We are proposing to include in our funds management relief those investment management structures that are commonly employed in offshore jurisdictions, such as body corporates limited by shares that operate in a similar way to an investment fund.

Funds management financial services

36 We are proposing to clarify the types of financial services that are covered by the funds management relief. Unlike some managed investment arrangements in Australia where a trustee of a trust may be both the legal owner of the investments of the fund and responsible for the financial services delivered by the vehicle, in many offshore jurisdictions the investment vehicle is separate from the entity that has been appointed to manage the funds that have been invested in the vehicle.

37 An offshore investment fund may itself be taken to engage in dealing services when interests or securities in the offshore fund are issued to clients in Australia. The offshore investment fund in issuing interests or securities to clients in Australia may be carrying on a financial services business in Australia and therefore be required to hold an AFS licence, despite having

acted only as directed by the investment manager and having no employees in Australia.

Custodial or depository services

38 We are not proposing to extend the funds management relief to cover the provision of custodial and depository services for the interests or securities of the scheme or body because an existing AFS licensing exemption is available under reg 7.6.01(1)(k). The exemption in reg 7.6.01(1)(k) applies to the provision of custodial or depository services when:

- (a) the service is provided under an arrangement with a master custodian that holds an AFS licence; and
- (b) the master custodian holds a beneficial interest in the financial product on trust for, or on behalf of, the client as part of the provision of the service.

39 We consider that, in most cases, professional investors can engage an AFS licensee as custodian, who can then hold the interests or securities through a foreign sub-custodian in reliance on reg 7.6.01(1)(k) if required.

Portfolio management services

40 We are proposing to use the term ‘portfolio management services’ because:

- (a) it is used internationally; and
- (b) it reflects the range of services that may be provided by an FFSP under an investment mandate given to an FFSP by a client in Australia engaged in funds management activities.

41 This term is also used in proposed amendments to the Corporations Act.

Note: See draft s1226B(3)(b)(i) of the Exposure Draft Treasury Laws Amendment (Corporate Collective Investment Vehicle) Bill 2018 and discussed in the [Explanatory Material](#).

42 Where funds management financial services are primarily concerned with financial services in relation to offshore interests or securities, we use the expression ‘portfolio management services’ to cover the provision of financial services to ‘eligible Australian users’ who require portfolio management services for the assets located outside Australia they require to be managed.

43 We consider that portfolio management services should only be available to a limited category of professional investors that may use such services, which we are proposing to call ‘eligible Australian users’. These users are in the business of funds management or have a portfolio of assets that requires investment management to meet specific investment objectives or goals of the portfolio. We have not included all categories of professional investors as defined in s9 (e.g. we have excluded listed entities from the definition).

Imposing a cap on the scale of activities

Proposal

- B3** To ensure that the funds management financial services are provided on a limited basis, we propose that the FFSP will only have the benefit of the funds management relief if less than 10% of its annual aggregated consolidated gross revenue, including the aggregated consolidated gross revenue of entities within its corporate group (for each of the previous and current financial years), is generated from the provision of funds management financial services in Australia (aggregated revenue cap).

Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).

Your feedback

- B3Q1** Do you agree with our proposal to apply an aggregated revenue cap to ensure that the financial services provided by FFSPs under the funds management relief are provided on a limited basis? If not, why not?
- B3Q2** What systems and processes will you need to implement to monitor your compliance with the aggregated revenue cap? Please be specific in your response.
- B3Q3** What are the costs associated with implementing the systems and processes to monitor compliance with the aggregated revenue cap? Please be specific in your response.
- B3Q4** Are there any other caps that we should consider as an alternative (see Table 3 for other caps we have considered)? What are the costs associated with monitoring compliance with your alternative cap? Please be specific in your response.
- B3Q5** Is the proposed aggregated revenue cap able to be applied to all the types of financial services that you may provide to professional investors in Australia (e.g. providing financial product advice)? Please be specific in your response.
- B3Q6** If you currently have the benefit of the limited connection relief and intend to reduce the size of your activities in Australia to have the benefit of the proposed funds management relief, how long would it take to do so? What are the costs associated with this? Please be specific in your response.

Rationale

- 44 We are proposing to apply the aggregated revenue cap to FFSPs providing funds management financial services to professional investors in Australia to ensure that those services do not form a substantial part of their business.

The 10% threshold represents the level of services by reference to the revenue generated from professional investors in Australia that ASIC is comfortable to allow an FFSP to provide without needing to obtain an AFS licence.

- 45 This approach reflects our concern that the costs of obtaining and maintaining an AFS licence when an insignificant proportion of revenue is generated from professional investors in Australia may mean that such services may cease to be available in Australia if the FFSP is required to obtain an AFS licence.
- 46 To determine the revenue derived from funds management financial services, we consider that an FFSP would apply the relevant accounting practice to determine revenue in its home jurisdiction.
- 47 To measure its compliance with the aggregated revenue cap, the FFSP would, at the time it proposes to provide the funds management financial service to professional investors in Australia, need to:
- (a) assess whether, in the financial year that ended immediately before the provision of the funds management financial service, it has complied with the aggregated revenue cap; and
 - (b) form a view about whether it will comply with the aggregated revenue cap in the current financial year if it were to provide the financial service.
- 48 If the FFSP forms a view that it will or may breach the aggregated revenue cap in the financial year that it provides the service, the FFSP should not provide the service.
- 49 Our approach is similar to the approach adopted by other regulators—namely, the Ontario Securities Commission (OSC) (and several other provincial Canadian regulators). The OSC provides a licensing exemption to foreign advisers provided that the adviser does not generate more than 10% of its aggregated consolidated gross revenue from portfolio management activities in Canada. We recognise, however, that a cap based on revenue may involve some more complex measures and monitoring than other caps that do not require estimating the level of activity with professional investors in Australia.
- 50 If the FFSP finds itself in a position that it is close to exceeding the proposed aggregated revenue cap, the FFSP would need to consider whether it should:
- (a) apply for and hold a standard AFS licence;
 - (b) apply for and hold a foreign AFS licence if it is regulated by a sufficiently equivalent overseas regulatory regime;
 - (c) reduce its activities so that it can maintain the benefit of the funds management relief; or

- (d) limit its activities to that which is covered by existing statutory exemptions, as applicable.

Alternatives to the aggregated revenue cap

- 51 We have considered some alternative caps to the aggregated revenue cap. The details of these alternative caps are set out in Table 3.

Table 3: Alternative options to the aggregated revenue cap

Option	Description
Option 1: Number-of-clients cap	The FFSP does not provide funds management financial services to more than three professional investors in Australia in a financial year.
Option 2: Service-specific caps	Service-specific caps could include: <ul style="list-style-type: none"> • for FFSPs providing financial product advice—less than 10% of its gross revenue is derived from the provision of financial product advice to professional investors in Australia; • for FFSPs dealing in interests in, or securities issued by, an offshore fund—less than 10% of the total interests in, or securities issued by, an offshore fund are held by or issued to professional investors in Australia; or • for FFSPs providing portfolio management services—less than 10% of gross revenue is derived from the provision of portfolio management services to eligible Australian users.

Option 1: Number-of-clients cap

- 52 Some of the respondents to [CP 301](#) submitted that some FFSPs relying on the limited connection relief only provide services to one or two clients in a financial year.
- 53 Other peer regulators impose restrictions on FFSPs that provide financial services to clients in their respective jurisdictions without a licence:
- in Ontario, the OSC previously permitted the unsolicited advising of not more than five clients in Canada; and
 - in Singapore, the Monetary Authority of Singapore permits advisers to provide financial product advice to 30 accredited investors without a licence. However, this exemption is only available to domestic advisers.
- 54 While the number-of-clients cap is a simple test that can easily be monitored by FFSPs to ensure compliance with the terms of the relief, we consider that this cap may not be appropriate because an FFSP could generate a substantial amount of business from one or two professional investors in Australia. FFSPs generating a substantial amount of business should obtain an AFS licence.

Option 2: Service-specific caps

- 55 An alternative approach could be to impose on FFSPs providing only a specific type of funds management financial service a cap that is directly relevant to the type of financial service being provided. For example, for FFSPs dealing in interests in, or securities issued by, an offshore fund, the applicable cap could be less than 10% of the total interests in, or securities issued by, an offshore fund are held by or issued to professional investors in Australia.

Imposing conditions on the operation of the relief

Proposal

- B4** We propose that FFSPs seeking to have the benefit of the funds management relief will be subject to the following conditions:
- (a) the FFSP must not be carrying on a business in Australia;
 - (b) the FFSP has appointed a local agent who is authorised to accept, on the FFSP's behalf, service of process and notices;
 - (c) the FFSP must enter into a deed submitting to the non-exclusive jurisdiction of the Australian courts in relation to action by ASIC and other Australian government entities, and lodge it with ASIC;
 - (d) the FFSP must notify ASIC of the types of funds management financial services it intends to provide to professional investors in Australia;
 - (e) the FFSP must maintain adequate proof of its compliance with the proposed 10% aggregated revenue cap (see proposal B3);
 - (f) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C);
 - (g) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E);
 - (h) the financial services must be provided only to clients in Australia who meet the definition of professional investor, or, in the case of portfolio management services, only to clients who meet the definition of eligible Australian user; and
 - (i) the FFSP cannot rely on the relief if ASIC has notified the FFSP, or its agent, that the FFSP is excluded from relying on the relief, and ASIC has not withdrawn the notice.

We also propose to use our powers, as set out in proposal B4(f), where we may require an FFSP to provide information about its activities in Australia and to demonstrate eligibility under the proposed 10% aggregated revenue cap, as required.

Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).

Your feedback

- B4Q1 Do you agree with our proposal to impose these conditions on the funds management relief? If not, why not? Please be specific in your response.
- B4Q2 Are there any other conditions that you think we should impose on FFSPs? Please be specific in your response.
- B4Q3 Are there any conditions that you think we should not impose on FFSPs? Please be specific in your response.
- B4Q4 Should the provider of the funds management financial services be subject to an additional condition that it be regulated by a regulatory authority that is a signatory to the IOSCO [Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information](#) (IOSCO MMOU) or the IOSCO [Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information](#) (IOSCO Enhanced MMOU)? How would this additional condition affect the provision of funds management financial services to professional investors in Australia? Please be specific in your response.
- B4Q5 What are the costs associated with complying with these conditions? Please be specific in your response.
- B4Q6 Do you agree with our proposal to use our powers to require an FFSP to provide information about the services the FFSP provides to professional investors in Australia, as well as its compliance with the proposed aggregated revenue cap? Please be specific in your response.
- B4Q7 If you disagree with the proposal to use our powers, would you prefer that we impose the requirement to provide an annual declaration about the activities the FFSP conducts in Australia as an explicit condition on the relief? Please be specific in your response.

Rationale

- 56 In [CP 301](#), we outlined our concern that we have little to no visibility of the entities relying on the current limited connection relief. We also were concerned that we have limited powers to adequately supervise the activities of such persons when engaging with clients in Australia.
- 57 The majority of respondents to [CP 301](#) agreed that ASIC should impose the requirements in proposal B4 to address our supervisory and enforcement concerns.
- 58 As our proposals for the funds management relief will require an FFSP to engage with and monitor its activities in relation to professional investors in Australia, we think it is important that we impose obligations on the FFSP that will assist with our oversight of its activities for professional investors in

Australia and its compliance with the limitations in the proposed relief. Our experience with the sufficient equivalence relief has highlighted issues about compliance with all the conditions of the relief.

- 59 If we identify circumstances when an FFSP is not complying with the conditions of the funds management relief, we will be able to take action to exclude the FFSP from being able to rely on the relief. We will also notify the home regulator of our concerns.

Obligation to appoint a local agent

- 60 As the FFSP will not be carrying on a business in Australia or hold an AFS licence, it would not otherwise be required to appoint a local agent. To ensure that Australians, including ASIC, may effectively engage with an FFSP, the FFSP must appoint a local agent who will be able to receive notices and respond to requests for relevant information about the activities involving investors in Australia.

Obligation to submit to the non-exclusive jurisdiction of the Australian courts

- 61 This is a current requirement for FFSPs wanting to rely on the sufficient equivalence relief. We are proposing to include this as a requirement of the funds management relief to facilitate us being able to take enforcement actions relating to FFSPs (if necessary): see current [RG 176](#) at RG 176.93. We think this is important to ensure that ASIC can commence legal proceedings in an Australian court.

Obligation to notify ASIC of the types of funds management financial services the FFSP intends to provide

- 62 In other jurisdictions, an entity is generally required at a minimum to indicate to the relevant foreign regulator that it is engaging in activities with a client who is a resident in that jurisdiction. For example, in Germany an FFSP, among other requirements, must notify the regulator in the form of a letter of an entity's activities. This involves providing a description of the intended business activity (e.g. an account of specific transaction procedures, intended market presence in the country, and client groups targeted), a copy of the FFSP's constitution or articles of association, and an executed agreement with a local agent.
- 63 While we are not proposing to require the same level of detail as Germany, we consider that a requirement to notify ASIC of the FFSP's reliance on the funds management relief is crucial in providing us with the information we need to identify FFSPs operating in Australia that are relying on the relief. The majority of the respondents to [CP 301](#) agreed that we should impose a notification requirement.

Obligation to maintain proof of compliance with the proposed aggregated revenue cap

64 To ensure that an FFSP complies with the requirements of the funds management relief and so that ASIC may, from time to time, verify the information produced by the FFSP, we consider that it is necessary for an FFSP to maintain proof:

- (a) of its compliance with the proposed aggregated revenue cap; and
- (b) that it provided financial services to professional investors only, or, in the case of portfolio management services, to eligible Australian users only.

65 We consider that these records should be kept for a period of seven years from the day the financial service was transacted or provided.

Obligation to comply with directions from ASIC

66 In [CP 301](#), we sought feedback on whether there are any conditions that ASIC could impose on FFSPs seeking to continue to rely on the limited connection relief to better facilitate supervision by ASIC.

67 The majority of respondents agreed that we should impose an obligation to comply with directions similar to that outlined in s912C.

Obligation to provide reasonable assistance to ASIC during surveillance checks

68 The majority of respondents to [CP 301](#) agreed that we should impose an obligation to provide reasonable assistance to ASIC during surveillance checks. This is to address our concerns about the lack of regulatory tools we have to supervise the conduct of FFSPs in Australia.

Who the funds management relief will apply to

69 We have specified that the provision of funds management financial services can only be to professional investors, and portfolio management services can only be provided to eligible Australian users.

70 Professional investors are a subset of wholesale clients. Section 9 of the Corporations Act states that ‘professional investors’ include AFS licensees, APRA-regulated bodies, trustees, a listed entity or a related body corporate of a listed entity, a body corporate, or a person who controls at least A\$10 million. In contrast, ‘wholesale clients’ include persons who invest more than A\$500,000.

71 We consider that limiting the funds management relief to the provision of financial services to professional investors is consistent with the approach currently provided under the Corporations Regulations, particularly by

s911A(2E) for financial services involving derivatives and foreign exchange contracts.

- 72 We consider it is prudent to limit the provision of financial services to ensure FFSPs are dealing only with professional investors, rather than the broader category of investors that comes within the definition of wholesale clients who may have a heightened need for the benefits of the application of the AFS licensing regime. We are ensuring consistency across the range of financial services that may have the benefit of a similar type of licensing exemption.
- 73 We have also sought to identify who we think will be major users in Australia of portfolio management services.

Transitional arrangements

Proposal

- B5** We propose that the funds management relief will be available to eligible FFSPs from 1 April 2020, with a six-month transitional period to 30 September 2020 to facilitate compliance with the conditions of the funds management relief.

Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).

Your feedback

- B5Q1 Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?

Rationale

- 74 The six-month transitional period should allow FFSPs relying on the current limited connection relief to assess whether they are eligible to rely on the funds management relief and make the necessary arrangements to comply with the conditions of the relief. FFSPs currently providing funds management financial services in reliance on the current limited connection relief beyond the aggregated revenue cap in proposal B3 should also be able to reduce their activities in Australia within six months.

C Repeal of the limited connection relief

Key points

We will proceed with repealing the limited connection relief as proposed in CP 301.

We think that the proposed funds management relief, together with the AFS licensing exemptions in the Corporations Regulations, will assist professional investors in Australia in obtaining financial services from FFSPs.

We have also considered providing AFS licensing relief to an FFSP that provides financial services to a professional investor who made the initial application or inquiry for the financial service from the FFSP (reverse solicitation). Similar relief is offered in some other jurisdictions. However, we are not currently proposing to give this relief because we are concerned about our ability to monitor the conduct of FFSPs providing financial services using reverse solicitation.

In addition, we received insufficient information supported by data in response to previous consultations about activities conducted in Australia under the current limited connection relief. In particular, there was an absence of strong evidence, particularly quantitative evidence, to support the need for such relief. We also did not receive submissions that adequately addressed our regulatory concerns about providing such relief.

Repeal of the limited connection relief

- 75 ASIC will be proceeding with its repeal of the limited connection relief as proposed in CP 301. Under the current limited connection relief, ASIC continues to have lack of visibility relating to:
- (a) the types and number of entities relying on the relief;
 - (b) the types of financial services and financial products being provided under the relief; and
 - (c) the scale of activities being conducted in Australia under the relief.
- 76 In both [Consultation Paper 268](#) *Licensing relief for foreign financial services providers with a limited connection to Australia* (CP 268) and [CP 301](#), we sought detailed information on the entities that rely on the current limited connection relief and the types of services they provide under the relief that they are not able to provide under existing statutory exemptions.
- 77 Although respondents to CP 268 and CP 301 provided anecdotal feedback about some circumstances in which the limited connection relief is used, we

did not receive any data to support the continuation of such relief, such as the size of the financial services that are provided to clients in Australia in reliance on the relief.

78 If our proposals for funds management relief in Section B of this paper are adopted, we think there will be extensive relief available to support the provision of financial services by FFSPs. In response to [CP 301](#), the majority of submissions emphasised the importance of the current limited connection relief for FFSPs providing financial services to the funds management sector.

79 There are a number of other exemptions in the Corporations Act and Corporations Regulations that are available to FFSPs when they provide other types of financial services to non-retail clients in Australia (most relevantly, reg 7.6.02AG, which was made in 2005 after we had provided the limited connection relief).

80 Regulation 7.6.02AG modifies s911A of the Corporations Act by inserting s911A(2A)–(2E). These subsections provide exemptions from the need for FFSPs to obtain an AFS licence in relation to the provision of certain financial services, subject to various conditions.

Note: See the [Explanatory Statement](#) of Select Legislative Instrument 2005 No. 324 for further information on s911A(2A)–(2E).

81 We think that the adoption of the proposed funds management relief in Section B, together with the exemptions in reg 7.6.02AG, will facilitate access by professional investors in Australia to offshore services in a way that provides the appropriate balance between cross-border facilitation, market integrity and investor protection.

ASIC's consideration of reverse solicitation relief

Proposal

C1 We are not currently proposing to give AFS licensing relief to an FFSP that provides financial services to a professional investor who made the initial application or inquiry for the financial services from the FFSP (reverse solicitation). We are concerned about our ability to monitor the conduct of FFSPs providing financial services to professional investors in Australia on a reverse solicitation basis.

Your feedback

C1Q1 Are there any significant reasons why ASIC should provide an AFS licensing exemption based on reverse solicitation, given our proposed funds management relief in Section B and the licensing exemptions available in reg 7.602AG? Please be specific in your response.

- C1Q2 If you are an FFSP that may not be able to rely on the proposed new funds management relief or existing statutory licensing exemptions, please outline the specific financial services you wish to provide on a reverse solicitation basis? Please be specific in your response.
- C1Q3 How significant is the volume of those specific financial services provided to Australian clients to your overall business? Please be specific in your response and include quantitative information.
- C1Q4 If a strong case for reverse solicitation relief, as set out in the appendix to this paper, was established, do you agree with our approach to defining reverse solicitation and how it will operate with s911D, as set out in paragraphs 104 and 107–109 respectively? If not, why not? Please be specific in your response.
- C1Q5 If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, we consider conditions should apply to the FFSP providing financial services on a reverse solicitation basis. Do you agree with the conditions we set out in paragraph 105? If not, why not?
- C1Q6 What are the costs associated with complying with the conditions set out in paragraph 105, including maintaining adequate records of proof of reverse solicitation and communications with the investor?
- C1Q7 If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, are there any mechanisms that could be implemented by the FFSP or the professional investor in Australia to assist in monitoring the conduct of FFSPs to ensure that the engagement was on a reverse solicitation basis? If not, why not? Please be specific in your response.

Rationale

- 82 Some of the feedback to [CP 301](#) highlighted the exemptions available in other jurisdictions, including the reverse solicitation exemption. Under this exemption, foreign providers are not required to hold a licence to provide a financial service following an application by, or an inquiry from, a person based in the relevant jurisdiction.
- 83 Reverse solicitation exemptions are available in jurisdictions that have implemented the Alternative Investment Fund Managers (AIFM) Directive, including the United Kingdom, Germany, France and Italy. Significantly, this relief only applies to jurisdictions within the European Economic Area. For example, in a policy statement published by the UK Financial Conduct Authority (FCA) in 2013, to demonstrate reverse solicitation, confirmation

may be required from an investor that the purchase of any units in the AIFM was done at the investor's own initiative.

Note: See FCA, Policy Statement 13/5, [Implementation of the alternative investment fund managers directive](#), June 2013, for further information about the UK's approach on monitoring reverse solicitation.

- 84 However, we note there have been varying approaches adopted by the different jurisdictions towards enforcing the AIFM Directive and we understand that this has resulted in supervisory challenges and regulatory arbitrage.
- 85 We are concerned that if ASIC were to provide a similar exemption in Australia, it may be too broadly interpreted and/or misused by industry participants. As we have noted in [CP 301](#), we are aware of industry taking a broad interpretation of the operation of the current limited connection relief to provide financial services to wholesale clients in Australia.
- 86 We have considered the operation of the approach to reverse solicitation in other jurisdictions as well as the operation of the existing exemptions, including s911A(2D) and 911A(2E). In addition, the proposed funds management relief in Section B, if adopted, will allow for the provision of a broad range of financial services.
- 87 We also think that compliance with reverse solicitation relief is difficult for ASIC and FFSPs to monitor because the reverse solicitation occurs outside Australia. The financial service is also being provided by a person that would otherwise have no connection with Australia. These matters will significantly affect the ability to take immediate action about misuse of the relief based on reverse solicitation or any potential misconduct by an FFSP.
- 88 Taking into account all these matters and the evidence we have at present, we do not think there is adequate justification to provide any relief based on reverse solicitation by professional investors in Australia, or any other relief from s911D other than the proposed funds management relief in Section B.

Possible reconsideration of our proposal

- 89 We recognise that reverse solicitation relief is available in other jurisdictions and we invite any final submissions, supported by data, about activities conducted in Australia under the current limited connection relief that would not be covered by the proposed funds management relief in Section B and the existing statutory licensing exemptions.
- 90 The submissions should also identify and describe mechanisms that industry would suggest ASIC could adopt to address our current concerns about the ability to monitor the activities of the FFSP providing financial services on a reverse solicitation basis from outside Australia.

- 91 We have set out the key elements of the reverse solicitation relief we considered in the appendix to this paper.
- 92 In order to be convinced to provide reverse solicitation relief, we would require compelling and specific:
- (a) evidence from industry of the need for such relief; and
 - (b) material addressing the ability of both ASIC and FFSPs to adequately monitor and enforce compliance with relief conditions.

D Changes to our guidance in RG 176

Key points

We have updated the current guidance in the draft updated RG 176 (Attachment 1) to include guidance on:

- the foreign AFS licensing regime;
- the application process for a foreign AFS licence; and
- how we would apply the proposed funds management relief.

New guidance for FFSPs

Proposal

D1 We propose to:

- (a) update RG 176 to include information on our proposed regulatory framework for FFSPs, including information on:
 - (i) the foreign AFS licensing regime; and
 - (ii) how we would apply the proposed funds management relief; and
- (b) withdraw [Information Sheet 157](#) *Foreign financial services providers: Practical guidance* (INFO 157) when we release the updated version of RG 176.

Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2019/XXX (Attachment 3).

Your feedback

D1Q1 Do you think we have provided adequate guidance to FFSPs about how our proposed regulatory framework for FFSPs will apply? If not, why not? Please be specific in your response.

Rationale

- 93 The current version of RG 176 contains ASIC’s guidance for FFSPs that are regulated by an overseas regulatory authority and that wish to provide financial services in Australia to wholesale clients only. The current guide explains when we may exercise our discretion to exempt FFSPs from the requirement to hold an AFS licence under s911A(2)(h).
- 94 As stated in paragraph 19, we have decided to proceed with the foreign AFS licensing regime for FFSPs that currently rely on the sufficient equivalence

relief. We have included information in the draft updated RG 176 to provide clarity to FFSPs on how they may apply for a foreign AFS licence at the beginning of the transitional period. Under the new foreign AFS licensing regime, INFO 157 will no longer be applicable.

- 95 Our proposed updated RG 176 will also include details about the funds management relief that will be available to FFSPs providing financial services under the proposals in this paper, as set out in Section B of this paper.

E Regulatory and financial impact

96 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:

- (a) facilitating access to foreign financial services and relevant foreign markets for non-retail clients in Australia;
- (b) ensuring that the providers of financial services to non-retail clients in Australia do not adversely affect the integrity of Australia's financial markets or create systemic risks in our financial system;
- (c) ensuring that ASIC can administer and enforce the Australian laws that apply to foreign financial services;
- (d) ensuring that investors in Australia who access foreign facilities, services and products are adequately protected; and
- (e) reflecting the current international regulatory approach to regulating cross-border activities.

97 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:

- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
- (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
- (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).

98 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.

99 To ensure that we are in a position to properly complete any required RIS, please give us as much information as you can about our proposals or any alternative approaches, including:

- (a) the likely compliance costs;
- (b) the likely effect on competition; and
- (c) other impacts, costs and benefits.

See 'The consultation process', p. 4.

Appendix: Reverse solicitation

Key points

We have considered providing AFS licensing relief to FFSPs that provide financial services to a professional investor who made the initial application or inquiry for the financial service (reverse solicitation). Similar relief is offered in some other jurisdictions. However, we are not currently proposing to give this relief.

To assist industry with feedback, this appendix sets out details of the reverse solicitation relief ASIC has been considering.

ASIC's consideration of reverse solicitation relief

- 100 As noted in Section C, we did not receive any significant data to support the continuation of the limited connection relief. We consider that the proposed new funds management relief (see Section B), together with the existing AFS licensing exemptions in reg 7.6.02AG, would facilitate the necessary access by professional investors in Australia to offshore financial services without the FFSP needing to hold an AFS licence.
- 101 In Section C, we discussed the fact that we have considered the idea of reverse solicitation relief, but we are not proposing to give this further relief. We also asked questions to understand the types of financial services that FFSPs provide to professional investors in Australia that may justify the need for further relief.
- 102 We recognise that reverse solicitation relief is available in other jurisdictions and we invite any final submissions, supported by data, about activities conducted in Australia that would not be covered by the proposed funds management relief in Section B and the existing statutory licensing exemptions, but would be assisted by reverse solicitation relief.
- 103 We are currently not convinced of the need for reverse solicitation relief, particularly because of our concerns about effectively monitoring and supervising entities if we accommodated reverse solicitation. We would only consider providing licensing relief for FFSPs providing financial services following reverse solicitation by a professional investor in Australia if we are satisfied that both ASIC and FFSPs have adequate mechanisms to oversee and enforce the obligations on FFSPs engaging in reverse solicitation.

How would reverse solicitation work?

- 104 Reverse solicitation would occur when:
- (a) a professional investor makes the initial application or inquiry for financial services from an FFSP; and
 - (b) the FFSP provides the financial services covered by the professional investor's application or inquiry, or a related financial service that is necessary to the provision of the financial service that the investor initially applied for or inquired about.

What conditions would apply?

- 105 The conditions we considered for any possible reverse solicitation relief were:
- (a) the FFSP must not be carrying on a business in Australia;
 - (b) the FFSP (or any persons acting on behalf of the FFSP) must not have engaged in conduct that is intended, or may reasonably be regarded as intended, to induce professional investors in Australia to make an application or inquiry about, or use, the financial services that the FFSP provides or can provide;
 - (c) the FFSP must maintain adequate records of the unsolicited application or inquiry for seven years (proof of reverse solicitation)—for example, the FFSP could obtain a letter of acknowledgement from the professional investor that the investor initiated the contact;
 - (d) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C);
 - (e) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E); and
 - (f) the FFSP cannot rely on the relief if ASIC has notified the FFSP, or its agent, that the FFSP is excluded from relying on the relief, and ASIC has not withdrawn the notice.

How reverse solicitation relief and s911D would operate

- 106 An FFSP would not be regarded as engaging in conduct that is intended, or is reasonably regarded as intended, to induce persons in Australia, merely because of a communication by the FFSP that is made, or directed, to persons who receive it outside Australia—even if it is eventually received by a person in Australia.
- 107 In determining whether the communication is directed to persons outside Australia, we would consider the following factors:

- (a) the communication is not referred to in, or directly accessible from, another communication (e.g. an advertisement in an Australian newspaper or on a website on an Australian domain), which is made to or directed to persons in Australia by the FFSP that is directing it; and
- (b) there are proper systems and procedures in place to prevent recipients in Australia who are not professional investors from engaging the FFSP to provide financial services to which the communication relates.

108 We have provided examples of the types of activities that we consider may or may not be intended to induce, or reasonably be regarded as intended to induce, persons in Australia to use the financial services that the FFSP provides, having regard to the factors in paragraph 107: see Table 4.

Table 4: Activities or conduct that may or may not be intended, or reasonably be regarded as intended, to induce

Activity or conduct	Intended, or reasonably be regarded as intended, to induce?
An FFSP sends invitations to attend meetings or to receive telephone calls or visits in Australia about relevant financial services the FFSP may provide to a professional investor in Australia.	This conduct may be intended, or reasonably be regarded as intended, to induce. You WOULD NOT be able to rely on the relief.
An FFSP sends a ‘markets outlook and investment information’ communication to its clients. This includes a summary of the FFSP’s outlook on particular markets. This newsletter is made available to a person who received it outside Australia, or it is directed at persons who are outside Australia, who may hold specific products covered in the FFSP’s communication.	This conduct may not be intended, or reasonably be regarded as intended, to induce. You WOULD be able to rely on the relief.

109 Section 911D of the Corporations Act provides that a person is carrying on a financial services business if they engage in conduct that induces, or is likely to induce, persons in Australia to use the financial services that the FFSP provides. The Corporations Act does not define ‘inducing’, so its ordinary meaning would be used to determine if a person is inducing. We recognise that the expression ‘inducing’ is broad. To determine whether an FFSP is inducing, or likely to be inducing, involves the consideration of facts and circumstances around the engagement of the FFSP with the relevant professional investor in Australia.

110 The reverse solicitation relief contemplated above would apply a different test from that in s911D for deciding whether the conduct affects investors in Australia. The relief would only be available to an FFSP that has not engaged in conduct that is intended, or would *reasonably be regarded as* intended, to induce professional investors in Australia to make an application or inquiry about, or use, a financial service that an FFSP provides or can provide.

- 111 We would require that there be proper systems and procedures to ensure FFSPs are not engaging in conduct that is intended, or that may reasonably be regarded as intended, to induce professional investors in Australia. In our view, proper systems and procedures would involve arrangements for scrutinising inquirers or applications to help identify persons who are located in Australia.

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to provide relief to FFSPs that provide funds management financial services—subject to a cap on the scale of the FFSP’s services provided to professional investors in Australia (see proposal B3) and conditions that apply to the operation of the relief (see proposal B4). A person engages in a funds management financial service if they provide:</p> <p>(a) any of the following financial services to a professional investor in Australia:</p> <ul style="list-style-type: none"> (i) dealing in interests of a managed investment scheme established outside Australia (scheme) or securities of a body that carries on a business of investment that is not incorporated in Australia (body); (ii) providing financial product advice in relation to the interests or securities of the scheme or body; and (iii) making a market in relation to the interests or securities of the scheme or body; and <p>(b) portfolio management services to a limited category of professional investors (‘eligible Australian users’) (see proposal B2).</p> <p>Note 1: We are proposing not to provide relief in relation to the provision of a custodial or depository service for the interests or securities of the scheme or body on the basis that it is covered by reg 7.6.01(1)(k).</p> <p>Note 2: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>	<p>B1Q1 Do you agree with our proposal to provide AFS licensing relief to permit FFSPs to provide funds management financial services to professional investors (subject to the cap in proposal B3 and the conditions in proposal B4)? If not, why not? Please be specific in your response.</p> <p>B1Q2 Do you agree with our proposal to not provide relief in relation to the provision of a custodial or depository service on the basis that it is covered by reg 7.6.01(1)(k)? If not, why? Please be specific in your response.</p>

Proposal	Your feedback
<p>B2 For the purposes of the funds management relief, we propose to define 'portfolio management services' to mean the management of assets located outside Australia by a manager on behalf of 'eligible Australian users'. We propose to define eligible Australian users to include:</p> <ul style="list-style-type: none"> (a) a person in Australia who is a trustee of: <ul style="list-style-type: none"> (i) a superannuation fund, within the meaning of the <i>Superannuation Industry (Supervision) Act 1993</i> (SIS Act), with net assets of at least A\$10 million; (ii) an approved deposit fund, within the meaning of the SIS Act, with net assets of at least A\$10 million; (iii) a pooled superannuation trust, within the meaning of the SIS Act, with net assets of at least A\$10 million; (iv) a public sector superannuation fund, within the meaning of the SIS Act, with net assets of at least A\$10 million; (b) a person in Australia who operates a managed investment scheme, with net assets of at least A\$10 million; (c) a person who operates a statutory fund under the <i>Life Insurance Act 1995</i> in Australia; and (d) an exempt public authority, as defined in s9 of the Corporations Act. <p>Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>	<p>B2Q1 Do you agree with our proposed inclusion of 'portfolio management services' as a discrete type of funds management financial service that FFSPs can provide under the relief? If not, why not? Please be specific in your response.</p> <p>B2Q2 Do you agree with our proposed definition of 'portfolio management services'? If not, why not? Please be specific in your response.</p> <p>B2Q3 Do you agree with our proposed definition of 'eligible Australian users' of portfolio management services? If not, why not? Please be specific in your response.</p>

Proposal	Your feedback
<p>B3 To ensure that the funds management financial services are provided on a limited basis, we propose that the FFSP will only have the benefit of the funds management relief if less than 10% of its annual aggregated consolidated gross revenue, including the aggregated consolidated gross revenue of entities within its corporate group (for each of the previous and current financial years), is generated from the provision of funds management financial services in Australia (aggregated revenue cap).</p> <p>Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>	<p>B3Q1 Do you agree with our proposal to apply an aggregated revenue cap to ensure that the financial services provided by FFSPs under the funds management relief are provided on a limited basis? If not, why not?</p> <p>B3Q2 What systems and processes will you need to implement to monitor your compliance with the aggregated revenue cap? Please be specific in your response.</p> <p>B3Q3 What are the costs associated with implementing the systems and processes to monitor compliance with the aggregated revenue cap? Please be specific in your response.</p> <p>B3Q4 Are there any other caps that we should consider as an alternative (see Table 3 for other caps we have considered)? What are the costs associated with monitoring compliance with your alternative cap? Please be specific in your response.</p> <p>B3Q5 Is the proposed aggregated revenue cap able to be applied to all the types of financial services that you may provide to professional investors in Australia (e.g. providing financial product advice)? Please be specific in your response.</p> <p>B3Q6 If you currently have the benefit of the limited connection relief and intend to reduce the size of your activities in Australia to have the benefit of the proposed funds management relief, how long would it take to do so? What are the costs associated with this? Please be specific in your response.</p>

Proposal	Your feedback
<p>B4 We propose that FFSPs seeking to have the benefit of the funds management relief will be subject to the following conditions:</p> <ul style="list-style-type: none"> (a) the FFSP must not be carrying on a business in Australia; (b) the FFSP has appointed a local agent who is authorised to accept, on the FFSP's behalf, service of process and notices; (c) the FFSP must enter into a deed submitting to the non-exclusive jurisdiction of the Australian courts in relation to action by ASIC and other Australian government entities, and lodge it with ASIC; (d) the FFSP must notify ASIC of the types of funds management financial services it intends to provide to professional investors in Australia; (e) the FFSP must maintain adequate proof of its compliance with the proposed 10% aggregated revenue cap (see proposal B3); (f) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C); (g) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E); (h) the financial services must be provided only to clients in Australia who meet the definition of professional investor, or, in the case of portfolio management services, only to clients who meet the definition of eligible Australian user; and (i) the FFSP cannot rely on the relief if ASIC has notified the FFSP, or its agent, that the FFSP is excluded from relying on the relief, and ASIC has not withdrawn the notice. <p>We also propose to use our powers, as set out in proposal B4(f), where we may require an FFSP to provide information about its activities in Australia and to demonstrate eligibility under the proposed 10% aggregated revenue cap, as required.</p> <p>Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>	<p>B4Q1 Do you agree with our proposal to impose these conditions on the funds management relief? If not, why not? Please be specific in your response.</p> <p>B4Q2 Are there any other conditions that you think we should impose on FFSPs? Please be specific in your response.</p> <p>B4Q3 Are there any conditions that you think we should not impose on FFSPs? Please be specific in your response.</p> <p>B4Q4 Should the provider of the funds management financial services be subject to an additional condition that it be regulated by a regulatory authority that is a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO MMOU) or the IOSCO Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO Enhanced MMOU)? How would this additional condition affect the provision of funds management financial services to professional investors in Australia? Please be specific in your response.</p> <p>B4Q5 What are the costs associated with complying with these conditions? Please be specific in your response.</p> <p>B4Q6 Do you agree with our proposal to use our powers to require an FFSP to provide information about the services the FFSP provides to professional investors in Australia, as well as its compliance with the proposed aggregated revenue cap? Please be specific in your response.</p> <p>B4Q7 If you disagree with the proposal to use our powers, would you prefer that we impose the requirement to provide an annual declaration about the activities the FFSP conducts in Australia as an explicit condition on the relief? Please be specific in your response.</p>

Proposal	Your feedback
<p>B5 We propose that the funds management relief will be available to eligible FFSPs from 1 April 2020, with a six-month transitional period to 30 September 2020 to facilitate compliance with the conditions of the funds management relief.</p>	<p>B5Q1 Do you agree with the proposed transitional period? If not, do you think it should be longer or shorter?</p>
<p>Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2019/XXX (Attachment 2).</p>	

Proposal	Your feedback
<p>C1 We are not currently proposing to give AFS licensing relief to an FFSP that provides financial services to a professional investor who made the initial application or inquiry for the financial services from the FFSP (reverse solicitation). We are concerned about our ability to monitor the conduct of FFSPs providing financial services to professional investors in Australia on a reverse solicitation basis.</p>	<p>C1Q1 Are there any significant reasons why ASIC should provide an AFS licensing exemption based on reverse solicitation, given our proposed funds management relief in Section B and the licensing exemptions available in reg 7.602AG? Please be specific in your response.</p> <p>C1Q2 If you are an FFSP that may not be able to rely on the proposed new funds management relief or existing statutory licensing exemptions, please outline the specific financial services you wish to provide on a reverse solicitation basis? Please be specific in your response.</p> <p>C1Q3 How significant is the volume of those specific financial services provided to Australian clients to your overall business? Please be specific in your response and include quantitative information.</p> <p>C1Q4 If a strong case for reverse solicitation relief, as set out in the appendix to this paper, was established, do you agree with our approach to defining reverse solicitation and how it will operate with s911D, as set out in paragraphs 104 and 107–109 respectively? If not, why not? Please be specific in your response.</p> <p>C1Q5 If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, we consider conditions should apply to the FFSP providing financial services on a reverse solicitation basis. Do you agree with the conditions we set out in paragraph 105? If not, why not?</p> <p>C1Q6 What are the costs associated with complying with the conditions set out in paragraph 105, including maintaining adequate records of proof of reverse solicitation and communications with the investor?</p> <p>C1Q7 If we were to provide a form of reverse solicitation relief, as set out in the appendix to this paper, are there any mechanisms that could be implemented by the FFSP or the professional investor in Australia to assist in monitoring the conduct of FFSPs to ensure that the engagement was on a reverse solicitation basis? If not, why not? Please be specific in your response.</p>

Proposal	Your feedback
<p>D1 We propose to:</p> <ul style="list-style-type: none"> (a) update RG 176 to include information on our proposed regulatory framework for FFSPs, including information on: <ul style="list-style-type: none"> (i) the foreign AFS licensing regime; and (ii) how we would apply the proposed funds management relief; and (b) withdraw Information Sheet 157 Foreign financial services providers: Practical guidance (INFO 157) when we release the updated version of RG 176. <p>Note: See draft updated RG 176 (Attachment 1) and draft ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2019/XXX (Attachment 3).</p>	<p>D1Q1 Do you think we have provided adequate guidance to FFSPs about how our proposed regulatory framework for FFSPs will apply? If not, why not? Please be specific in your response.</p>