



ASIC

Australian Securities &
Investments Commission

REPORT 656

Response to submissions on CP 301 and CP 315 on foreign financial services providers

March 2020

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 301](#) *Foreign financial services providers* (CP 301) and [Consultation Paper 315](#) *Foreign financial services providers: Further consultation* (CP 315) 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).

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A Overview/Consultation process

- 1 In [Consultation Paper 301](#) *Foreign financial services providers* (CP 301), we consulted on proposals to:
 - (a) repeal ASIC Corporations (Repeal and Transitional) Instrument 2016/396 and any individual relief granted on similar terms (sufficient equivalence relief);
 - (b) repeal ASIC Corporations (Foreign Financial Services Providers— Limited Connection) Instrument 2017/182 (limited connection relief); and
 - (c) implement a modified Australian financial services (AFS) licensing regime for foreign financial services providers (FFSPs) to enable FFSPs to apply for and maintain a modified form of AFS licence (foreign AFS licence).
- 2 In [Consultation Paper 315](#) *Foreign financial service providers: Further consultation* (CP 315), we consulted on proposals to:
 - (a) give AFS licensing relief for FFSPs wishing to provide funds management financial services to professional investors in Australia (funds management relief);
 - (b) not give AFS licensing relief for FFSPs providing financial services to professional investors in Australia on a reverse solicitation basis (reverse solicitation relief); and
 - (c) provide updated guidance in [Regulatory Guide 176](#) *Foreign financial services providers* (RG 176) on the foreign AFS licensing relief and the proposed funds management relief.
- 3 This report highlights the key issues that arose out of the submissions received on CP 301 and CP 315 and our responses to those issues.
- 4 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question from CP 301 and CP 315. We have limited this report to the key issues.

Responses to consultation

- 5 We received 14 confidential and 22 non-confidential responses to CP 301 and six confidential and 18 non-confidential responses to CP 315. Respondents included financial services providers, industry associations, law firms and market operators. We are grateful to respondents for taking the time to send us their comments.

6 For a list of the non-confidential respondents to CP 301, see Appendix 1. For a list of the non-confidential respondents to CP 315, see Appendix 2. Copies of these submissions are currently at www.asic.gov.au/cp under CP 301 and CP 315.

7 Additionally, we met with a number of industry bodies, law firms and interested entities to discuss our proposed approach.

8 The main issues raised by respondents related to:

- (a) our proposal to implement the foreign AFS licensing regime (see Section B);
- (b) our proposal to implement the funds management relief (see Section C);
and
- (c) our proposal to provide updated guidance in RG 176 and not provide reverse solicitation relief (see Section D).

B Foreign AFS licensing regime

Key points

This section outlines the feedback we received on our proposal in CP 301 to repeal the sufficient equivalence relief and implement the foreign AFS licensing regime, including feedback on:

- the licensing obligations from which foreign AFS licensees will be exempt;
- the relief conditions that will apply to foreign AFS licensees;
- the proof documents that will be required to support an application for a foreign AFS licence;
- the transitional period for FFSPs that currently rely on the sufficient equivalence relief; and
- how ASIC will undertake sufficient equivalence assessments.

Repeal of the sufficient equivalence relief and implementation of a foreign AFS licensing regime

- 9 In [CP 301](#), we proposed to repeal the sufficient equivalence relief and implement a foreign AFS licensing regime. Under this regime, an FFSP may apply for and hold a foreign AFS licence when it:
- (a) is authorised in a sufficiently equivalent overseas regulatory regime to provide specified financial services to wholesale clients; and
 - (b) wishes to provide those financial services to wholesale clients in Australia.
- 10 A foreign AFS licensee is exempt from certain provisions in Ch 7 of the *Corporations Act 2001* (Corporations Act) on the basis that it is subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the exempted provisions.

Stakeholder feedback

- 11 The majority of respondents disagreed with our proposal to repeal the sufficient equivalence relief and implement a foreign AFS licensing regime. Respondents submitted that:
- (a) the proposal may lead to FFSPs exiting the Australian market due to the cost of obtaining and maintaining a foreign AFS licence, which may limit the range of FFSPs and financial services provided by FFSPs accessible to wholesale investors in Australia;

- (b) ASIC could achieve greater oversight over the activities of FFSPs by imposing additional conditions under the sufficient equivalence relief instead; and
- (c) FFSPs relying on the sufficient equivalence relief are already highly regulated in their home jurisdictions and requiring them to obtain a foreign AFS licence to provide financial services to wholesale investors is an unnecessary regulatory burden.

ASIC's response

ASIC has repealed the sufficient equivalence relief and implemented a foreign AFS licensing regime for FFSPs that are regulated by overseas regulatory authorities that ASIC has assessed as sufficiently equivalent (foreign AFS licensing regime).

We consider entities that carry on a financial services business in Australia should be required to hold an AFS licence, unless relief is granted by ASIC or an exemption applies. The foreign AFS licensing regime ensures FFSPs that carry on a financial services business in Australia are subject to fundamental conduct obligations in the Corporations Act.

In [CP 301](#), we outlined our supervisory and enforcement concerns about the activities of FFSPs providing financial services to wholesale clients in Australia in reliance on the sufficient equivalence relief. These included:

- non-compliance by FFSPs with the conditions of the sufficient equivalence relief;
- our restricted ability to monitor and supervise arrangements outside Australia without assistance from the overseas regulatory authority;
- limitations for ASIC in enforcing overseas regulatory requirements; and
- the reduced range of supervisory and enforcement tools available to ASIC under the sufficient equivalence relief.

ASIC will also have the full range of supervisory and enforcement tools to allow us to more adequately and effectively monitor and supervise the conduct of FFSPs in Australia. These include a number of provisions in the Corporations Act, such as:

- our directions power in s912C;
- the breach reporting requirements in s912D;
- the requirement to give us reasonable assistance during surveillance checks in s912E; and
- the remedies and penalties available to us against AFS licensees in s914A, 915A, 915B and 1311.

We consider that requiring FFSPs to hold a foreign AFS licence will more effectively address our supervisory and enforcement

concerns than imposing additional conditions under the sufficient equivalence relief. For example, the foreign AFS licensing regime will provide us with a more graduated range of enforcement options, such as the ability to impose licence conditions and seek civil penalties for relevant breaches of Ch 7.

We acknowledge the submissions that repealing the sufficient equivalence relief and implementing the foreign AFS licensing regime may lead to some FFSPs exiting the Australian market. However, we consider that the potential detriment associated with this risk is outweighed by the market integrity and investor protection benefits that the new regime brings.

We do not consider that regulation under a sufficiently equivalent overseas regulatory regime is an adequate reason to maintain the sufficient equivalence relief. As noted in CP 301, there are practical challenges such as prioritisation, risk decisions and application of law issues that limit each overseas regulator's ability to be able to take action to monitor and supervise the conduct of FFSPs in Australia. This suggests that, in some cases, overseas regulators may look to ASIC to more extensively monitor and supervise the conduct of FFSPs in Australia.

Other factors that have influenced our decision to introduce the foreign AFS licensing regime include:

- the misuse of the sufficient equivalence relief; and
- the approach taken by overseas regulators.

Misuse of the sufficient equivalence relief

We have observed that some FFSPs apply to rely or use the sufficient equivalence relief to avoid the AFS licensing regime to carry on a financial services business in Australia without the appropriate level of supervision. The sufficient equivalence relief, as currently drafted, allows an Australian-based 'FFSP' to obtain an authorisation as a foreign financial services provider from a sufficiently equivalent regulatory authority even though it does not carry on a financial services business in that sufficiently equivalent jurisdiction.

These entities applied to rely on the sufficient equivalence relief so that they did not need to hold an AFS licence to carry on a financial services business in Australia.

In 2018 and 2019, ASIC excluded two FFSPs from relying on the sufficient equivalence relief because we were not satisfied that the FFSP applicant was providing financial services in the United States (its home jurisdiction) that were subject to any kind of overseas regulatory oversight based upon the information and documents provided to ASIC in support of the application.

Case study: ASIC v Goldsky

In June 2018, ASIC excluded Goldsky Asset Management LLC from relying on the sufficient equivalence relief for breaching a

condition of the relief—that is, failing to notify ASIC of a significant enforcement action brought against it by its home regulator.

While relying on the sufficient equivalence relief, Goldsky operated an unregistered managed investment scheme raising money from more than 50 investors. Its sole director and shareholder, Mr Kenneth Grace, used those funds for his personal use.

Wholesale investors in the Goldsky funds have been unable to recover their money to date. Approximately \$25 million of investor funds is outstanding.

Under the sufficient equivalence relief framework and in addition to excluding Goldsky from relying on the relief, ASIC has been able to obtain orders placing several Goldsky entities into liquidation and freezing the assets of its sole director. We have also obtained declarations that the Goldsky-related entities breached s911A of the Corporations Act by holding investor funds.

Under the foreign AFS licensing regime, ASIC would have approached the matter differently. For example:

- Goldsky would have been subject to the requirement to respond to ASIC notices under s912C of the Corporations Act.
- Goldsky would have been subject to the requirement to provide reasonable assistance to ASIC under s912E of the Corporations Act, and ASIC would have been able to obtain documents earlier from Goldsky.
- Importantly, Goldsky would have been subject to the fundamental AFS licensing obligations under s912A of the Corporations Act.

Access to these powers and a greater range of regulatory tools under the foreign AFS licensing regime would have meant earlier action to determine that Goldsky had breached the fundamental licensing obligation to provide financial services efficiently, honestly and fairly: see s912A(1)(a). Access to these powers may potentially limit greater investor losses.

International regulatory approaches

As outlined in CP 301, we consider that the foreign AFS licensing regime, and the supervisory and enforcement tools that ASIC may use in relation to a licensee, will bring us into step with the regulatory approaches taken by our major peer regulators for equivalent types of financial services providers. For example:

- The Hong Kong Securities and Futures Commission provides temporary licences to persons regulated by a relevant overseas regulatory body to provide certain financial services in Hong Kong for a period of three months. Such persons are prohibited from holding a temporary licence for more than six months within any two-year period (see Part V of the Securities and Futures Ordinance).

- The UK Financial Conduct Authority (FCA) provides a licensing exemption to overseas persons that provide financial services where the nature of the regulated activity requires the direct involvement of another person and that person is FCA-authorized or exempt, or the provision of the financial service is as a result of ‘reverse solicitation’ (see [PERG 2.9.17](#)).
- The German BaFin may provide an individual licensing exemption to foreign entities that provide banking and financial services to ‘institutional investors’—provided that the entity does not require supervision by BaFin due to effective supervision in their home country (see section 2(4) of the *Kreditwesengesetz*).

Accordingly, we have repealed the sufficient equivalence relief (with a 24-month transitional period) and implemented the foreign AFS licensing regime, with a commencement date of 1 April 2020.

Application of general obligations under s912A

- 12 In [CP 301](#), we proposed that the general obligations under s912A(1)(a)–(ca) and (h) would apply to foreign AFS licensees. These obligations would require a foreign AFS licensee to:
- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (see s912A(1)(a));
 - have in place adequate arrangements for managing conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative (see s912A(1)(aa));
 - comply with the conditions on the licence (see s912A(1)(b));
 - comply with the financial services laws (see s912A(1)(c)), subject to the modifications to the Corporations Act proposed under proposals C4–C8 of CP 301;
 - take reasonable steps to ensure that representatives comply with the financial services laws (see s912A(1)(ca)); and
 - have adequate risk management systems (see s912A(1)(h)).

Stakeholder feedback

- 13 There was a divergence of views on whether all the general obligations in s912A(1)(a)–(ca) and (h) should apply to foreign AFS licensees. A number of respondents agreed with the application of the general obligations to

foreign AFS licensees. Some of the reasons for this view included that the general obligations are:

- (a) fundamental principles ASIC should have to directly regulate; and
- (b) similar or equivalent to those required of FFSPs in their home jurisdictions and FFSPs would generally satisfy these requirements already.

14 Other respondents raised concerns about the application of the obligations to:

- (a) comply with financial services laws in s912A(1)(c);
- (b) have in place adequate arrangements for managing conflicts of interest in s912A(1)(aa); and
- (c) have adequate risk management systems in s912A(1)(h).

15 Some of the reasons for these concerns included:

- (a) requirements about managing risk and conflicts of interests should be determined by the foreign AFS licensee's home jurisdiction—otherwise, the licensee may be subject to inconsistent requirements, which will impose additional costs for little benefit; and
- (b) a longer transitional period is required to help firms understand the obligation to comply with financial services laws.

ASIC's response

We continue to hold the view that foreign AFS licensees should be subject to the general obligations in s912A(1)(a)–(ca) and (h) because we consider them to be fundamental conduct obligations. The application of these obligations to foreign AFS licensees:

- reflects the concerns we identified about the conduct of FFSPs, as outlined in [CP 301](#); and
- will allow ASIC to take appropriate regulatory action where we have identified breaches of the law.

We note the submissions regarding the potential costs associated with complying with inconsistent requirements in the foreign AFS licensee's home jurisdiction and Australia. However, we also note the submissions suggesting that the obligations are generally similar, or equivalent, to those required of FFSPs in their home jurisdictions.

Further, based on the feedback received to CP 301, we have provided a two-year transitional period for FFSPs previously relying on the sufficient equivalence relief to ensure compliance with the new regime: see Section E of updated [Regulatory Guide 176](#) *Foreign financial services providers* (RG 176).

The longer transitional period should assist FFSPs in:

- understanding the obligations that will apply under the foreign AFS licensing regime; and
- implementing any required changes to their systems and procedures.

Accordingly, we have not exempted foreign AFS licensees from the general obligations in s912A(1)(a)–(ca).

Exemptions from provisions of the Corporations Act

- 16 In [CP 301](#), we proposed to exempt foreign AFS licensees from certain provisions of the Corporations Act. These provisions include:
- (a) the obligation to have adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements in s912A(1)(d);
 - (b) the obligation to maintain the competence to provide those financial services in s912A(1)(e);
 - (c) the obligation to ensure that representatives are adequately trained and are competent to provide those financial services in s912A(1)(f); and
 - (d) other requirements, when:
 - (i) the overseas regulator will monitor or enforce the foreign AFS licensee’s compliance with the overseas regulatory regime as they apply to the licensee’s business activities; and
 - (ii) the regulatory regime in the foreign AFS licensee’s home jurisdiction produces similar regulatory outcomes to the Australian regime.
- 17 We also proposed to exempt foreign AFS licensees from the client money and client property requirements in Divs 2 and 3 of Pt 7.8 of the Corporations Act when the client money and client property protections under the overseas regulatory regime apply to client money paid to, and client property held by, the foreign AFS licensee from a wholesale client in Australia relating to the financial service.

Stakeholder feedback

- 18 The majority of respondents agreed with our proposal to exempt foreign AFS licensees from:
- (a) the provisions of the Corporations Act referred to in paragraph 16; and
 - (b) the client money and client property requirements referred to in paragraph 17.

- 19 Respondents noted that the proposed exemptions would prevent duplication of obligations in the foreign AFS licensee's home jurisdiction.
- 20 Some respondents suggested that foreign AFS licensees should also be exempt from other provisions of the Corporations Act, including:
- (a) the record-keeping requirements in Div 6 of Pt 7.8 because:
 - (i) these requirements are unduly onerous for a foreign AFS licensee, particularly when the requirements do not purport to be confined to transactions or matters with a nexus to Australia; and
 - (ii) wholesale clients have the ability to insist foreign AFS licensees keep appropriate records;
 - (b) the requirements about conduct in Div 7 of Pt 7.8 because they are not necessary to protect wholesale clients; and
 - (c) the title and transfer provisions in Pt 7.11 because these provisions apply only to companies registered under the Corporations Act and to registered managed investment schemes (registered schemes).

ASIC's response

Based on the feedback received, we have provided an exemption from the provisions of the Corporations Act referred to in paragraph 18 in [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#).

We are satisfied that these provisions are sufficiently equivalent to requirements that exist in the relevant overseas jurisdictions, and that compliance by foreign AFS licensees in their home jurisdictions would translate to the activities of the licensee in Australia.

In the case of the client money and client property provisions, we are also satisfied that Australian-based clients will be subject to adequate protection when the client money and client property protections under the overseas regulatory regime apply to client money paid to, and client property held by, the foreign AFS licensee from a wholesale client in Australia relating to the financial services provided by the licensee.

We have not provided an exemption from Div 6 of Pt 7.8 of the Corporations Act in [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#) because [ASIC Corporations \(Financial Licensees and ADIs\) Instrument 2016/186](#) already exempts foreign licensees from certain record-keeping obligations in Div 6 of Pt 7.8. We consider the provisions that are not exempt under that instrument should continue to apply because they are necessary for the protection of wholesale clients in Australia.

In terms of the conduct requirements in Div 7 of Pt 7.8, we have included exemptions in [ASIC Corporations \(Foreign Financial](#)

[Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#) from:

- s991E—to the extent the financial product transaction is entered into or arranged outside Australia; and
- s991F—if the foreign AFS licensee is only carrying on a financial services business in Australia because it carries on the business of providing eligible financial services under the instrument in Australia.

We consider the remaining provisions in Div 7 of Pt 7.8 (e.g. the requirement that a licensee must not engage in unconscionable conduct) should continue to apply because they are necessary for the protection of wholesale clients in Australia.

We have not provided an exemption from the title and transfer provisions in [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#). These provisions govern the title and transfer of securities and financial products. We consider there is no basis to exempt foreign AFS licensees from these provisions because they may be holding or dealing in those securities and financial products.

Foreign AFS licensee relief and conditions of relief

21 In [CP 301](#), we proposed to impose the conditions set out in [Pro Forma 209 Australian financial services licence conditions](#) (PF 209) that apply to financial services and products provided only to wholesale clients, as well as the following conditions by legislative instrument:

- (a) the foreign AFS licensee is not permitted to appoint representatives other than employees or directors of the licensee, wholly owned bodies corporate of the licensee, or employees or directors of wholly owned bodies corporate of the licensee;
- (b) the foreign AFS licensee must notify ASIC of certain matters, such as changes to the licensee's authorisation in the licensee's home jurisdiction and enforcement actions undertaken by the relevant overseas regulatory authority; and
- (c) the foreign AFS licensee must notify ASIC of changes to the contact details of the local agent appointed by the licensee.

Stakeholder feedback

22 The majority of respondents disagreed with our proposal to impose the relief condition relating to the appointment of authorised representatives. Respondents considered that the proposal was unnecessarily narrow and restrictive and would significantly affect the manner in which foreign AFS licensees would be able to deliver foreign services, compared with other AFS licensees.

- 23 Respondents generally agreed with the proposals to impose the relief conditions relating to notifying ASIC of certain matters because these conditions are similar to those in the sufficient equivalence relief.

ASIC's response

Based on the feedback received, we have not imposed a relief condition about the appointment of authorised representatives. A foreign AFS licensee will be subject to the obligation in s912A(ca) to take reasonable steps to ensure that its representatives comply with the financial services laws and the liability provisions in Div 6 of Pt 7.6.

We have imposed a relief condition requiring notification by the foreign AFS licensee to ASIC of:

- changes to the licensee's authorisations in the relevant home jurisdiction;
- exemptions or other relief that the licensee obtains in the relevant home jurisdiction; and
- significant investigation, enforcement or disciplinary action undertaken by the relevant overseas regulatory authority against the licensee.

Under the foreign AFS licensing relief, a licensee must also appoint an agent that:

- in the case of a foreign entity that is a foreign company—is a local agent appointed under s601CG; and
- in the case of a foreign entity that is not a foreign company—an agent in relation to whom the requirements in reg 7.6.03B(2) of the Corporations Regulations 2001 (Corporations Regulations) apply.

The provisions relating to such agents require notification to ASIC of certain matters relating to the agent.

The licence conditions set out in [PF 209](#) will apply to foreign AFS licensees, as applicable.

Proof documents

- 24 In [CP 301](#), we proposed to require similar core and additional supporting proof documents to support an FFSP's application for a foreign AFS licence as that required for a standard AFS licence.

Stakeholder feedback

- 25 The majority of respondents submitted that only minimal proof documents should be required. Respondents raised concerns about the cost and time burden of the foreign AFS licence application process, which may be

disproportionate to the type and range of financial services provided to wholesale clients in Australia.

ASIC's response

Based on the feedback received, and as set out in updated [RG 176](#), a streamlined application process will apply to applications for a foreign AFS licence. The streamlined process means that the application will generally have fewer questions and require fewer proof documents. Exactly how many questions and proof documents will depend on the type and complexity of the financial services and products that the foreign AFS licensee applies for.

Generally, foreign AFS licence applicants will not be required to submit proofs relating to the provisions of the Corporations Act from which they are exempt. However, we will require the proof documents that relate to the provisions of the Corporations Act from which foreign AFS licensees are not exempt. This is because we need to consider whether the licensee can meet those obligations before we decide to grant the licence: see s913B.

Guidance on the proof documents required to be provided to ASIC will be contained in:

- [Regulatory Guide 1](#) *AFS Licensing Kit: Part 1—Applying for and varying an AFS licence* (RG 1); and
- [Regulatory Guide 2](#) *AFS Licensing Kit: Part 2—Preparing your AFS licence application* (RG 2).

RG 1 and RG 2 are currently being updated to reflect the foreign AFS licensing regime.

Transitional period

- 26 In [CP 301](#), we proposed to provide a 12-month transitional period for FFSPs relying on the sufficient equivalence relief to comply with the foreign AFS licensing regime.

Stakeholder feedback

- 27 The majority of respondents submitted that a 12-month transitional period would not be sufficient given:
- (a) the time involved in implementing the appropriate systems and procedures to comply with the new foreign AFS licensing regime; and
 - (b) the number of applications expected to be received by ASIC and ASIC's ability to assess all of those applications within the 12-month timeframe.

ASIC's response

Based on the feedback received, ASIC has provided a transitional period of 24 months for entities currently relying on the sufficient equivalence relief: see Section E of the updated [RG 176](#).

Sufficiently equivalent regimes

- 28 In [CP 301](#), we proposed to not undertake a further sufficient equivalence assessment of the regimes already covered by the sufficient equivalence relief (in relation to the relevant financial services and financial products covered by the relief).

Stakeholder feedback

- 29 The majority of respondents agreed with our proposal to not undertake a further sufficient equivalence assessment of the regimes already covered by the sufficient equivalence relief.

ASIC's response

Based on the feedback received, we have not undertaken a further sufficient equivalence assessment of the regimes already covered by the sufficient equivalence relief.

Given these regimes have already been assessed by ASIC to be sufficiently equivalent, we have included those jurisdictions in Schedule 1 of [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#).

Accordingly, an FFSP regulated under one of those regimes may apply for a foreign AFS licence as long as it meets all the conditions set out in that instrument.

'Scaled-back' assessment of sufficient equivalence

- 30 In [CP 301](#), we proposed that our assessment of sufficient equivalence under the foreign AFS licensing regime would only involve assessing whether outcomes of the requirements in the overseas regime are similar to those outcomes produced by the requirements in the Corporations Act that we propose to exempt a foreign AFS licensee from (scaled-back assessment).

Stakeholder feedback

- 31 The majority of respondents agreed with our proposal to conduct scaled-back sufficient equivalence assessments under the foreign AFS licensing regime. Respondents supported a principles-based approach focusing on the outcomes achieved by the relevant requirements, rather than an approach that requires the specific requirements in each jurisdiction to be identical.

ASIC's response

Based on the feedback received, and as set out in the updated [RG 176](#), our assessment of sufficient equivalence will be outcomes-based and focused on an assessment of whether the overseas regulation produces similar outcomes to the provisions of the Corporations Act that foreign AFS licensees are exempt from.

C Funds management relief

Key points

This section outlines the feedback received on our proposal in [CP 301](#) to repeal the limited connection relief and our proposal in [CP 315](#) to give funds management relief, including our proposals on:

- the scope of the funds management relief;
- the conditions that will apply to the funds management relief; and
- the transitional period for the repeal of the limited connection relief.

The limited connection relief

- 32 In [CP 301](#), we proposed to repeal the limited connection relief because giving the relief no longer strikes the appropriate balance between cross-border investment facilitation, market integrity and investor protection.
- 33 Under this proposal, FFSPs carrying on a financial services business in Australia because of s911D would be required to obtain an AFS licence (unless they can rely on another licensing exemption).

Stakeholder feedback

- 34 The majority of respondents disagreed with our proposal to repeal the limited connection relief. Respondents submitted that:
- (a) the limited connection relief should be maintained to assist FFSPs in addressing the extensive and far-reaching scope of s911D when they are not otherwise carrying on a financial services business in Australia;
 - (b) requiring FFSPs that were previously relying on the limited connection relief to obtain an AFS licence would impose an unnecessary or excessive regulatory burden because 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 a licence; and
 - (c) ASIC can instead introduce enhanced conditions to the limited connection relief to enable ASIC to have greater oversight over the FFSPs relying on the relief.

ASIC's response

Based on the feedback received, we have repealed the limited connection relief and, in its place, have provided 'funds management relief' following further consultation in [CP 315](#).

As outlined in CP 315, we hold the view that some FFSPs have taken a broad interpretation of the operation of the limited connection relief. We did not receive adequate information or data from respondents to CP 301 or CP 315 to support the continuation of the limited connection relief in its current form.

Having regard to the licensing exemptions available in s911A(2A)–(2E), as inserted by reg 7.6.02AG (which includes a licensing exemption for derivatives and foreign exchange contracts) and taking into account the feedback received in response to CP 301, we have provided funds management relief to facilitate access by some types of professional investors in Australia to funds-management-related financial services provided by FFSPs.

We consider that the funds management relief, together with the exemptions in s911A(2A)–(2E) in particular, 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.

The funds management relief

- 35 In [CP 315](#), we proposed to provide licensing relief to FFSPs that are carrying on a financial services business in Australia only because of s911D in relation to the provision of funds management financial services to professional investors in Australia (funds management relief). The proposed funds management relief did not include relief in relation to the provision of a custodial or depository service because there is an existing exemption in reg 7.6.01(1)(k).

Stakeholder feedback

- 36 The majority of respondents agreed with our proposal to provide funds management relief. However, some respondents submitted that the scope of the relief should be drafted more broadly to:
- (a) cover limited partnership arrangements;
 - (b) extend beyond activities that are only caught because of the operation of s911D (i.e. 'inducing conduct'); and
 - (c) apply at a group level, rather than each FFSP having to comply with the conditions of the relief individually (which, for example, required them to separately notify ASIC of reliance on the relief).

37 The majority of respondents disagreed with our proposal to not provide relief for the provision of a custodial or depository service on the basis that it is covered by reg 7.6.01(1)(k). Respondents submitted that:

- (a) the provision of custodial or depository services is an integral component of operating a fund that does not adopt a corporate structure; and
- (b) reg 7.6.01(1)(k) is too narrow and would not cover custodial or depository services when, for example, the responsible entity of a registered scheme invests in the offshore fund (some offshore funds may also not provide a beneficial interest in a particular fund asset or assets).

ASIC's response

Based on the feedback received, we have amended the scope of the funds management relief in [ASIC Corporations \(Foreign Financial Services Providers—Funds Management Financial Services\) Instrument 2020/199](#) to:

- apply to 'a person' rather than 'a foreign company'; and
- include relief in relation to custodial and depository services.

We have not amended the scope of the funds management relief to apply at a group level, rather than on an entity level, because the focus of the relief (and our regulatory framework more broadly) is on the FFSP that engages with the eligible Australian user in a way that triggers the operation of s911D—that is, the FFSP that engages in conduct that is intended to induce people in Australia to use the financial services the FFSP provides or is likely to have that effect ('inducing conduct').

We have retained the scope of the funds management relief to apply to FFSPs carrying on a financial services business in Australia only because of the operation of s911D (i.e. due to 'inducing conduct'). We consider that FFSPs that are otherwise carrying on a financial services business in Australia are engaging in a level of activity in Australia that indicates that they should be required to hold an AFS licence.

Section 911A(1) provides that a person who carries on a financial services business in Australia must hold an AFS licence.

Accordingly, as the funds management relief has the effect of 'turning off' the operation of s911D in the circumstances described in the relief, broader licensing relief is not necessary for FFSPs relying on the relief when:

- the FFSP provides funds management financial services to eligible Australian users outside Australia; or
- to the extent the funds management financial services are provided in Australia, the totality of the FFSP's activities do not constitute carrying on a financial services business in Australia.

Definition of portfolio management services

- 38 In [CP 315](#), we proposed to define ‘portfolio management services’ to mean the management of assets located outside Australia by a manager on behalf of ‘eligible Australian users’. We defined ‘eligible Australian users’ to include a person in Australia who is a trustee of:
- (a) a superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), with net assets of at least A\$10 million;
 - (b) an approved deposit fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (c) a pooled superannuation trust, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (d) a public sector superannuation fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (e) a person in Australia who operates a managed investment scheme, with net assets of at least A\$10 million;
 - (f) a person who operates a statutory fund under the *Life Insurance Act 1995* in Australia; and
 - (g) an exempt public authority, as defined in s9 of the Corporations Act.

Stakeholder feedback

- 39 A number of respondents submitted that the definition of ‘portfolio management services’ should:
- (a) refer to the specific forms of financial services defined in Ch 7;
 - (b) include the management of assets located in Australia because global managers often have global mandates under which the manager may hold financial products in Australia;
 - (c) not use the term ‘assets’ because it is too narrow and it is not evident whether it includes rights, liabilities and obligations under derivatives and other instruments that may comprise a portfolio; and
 - (d) not restrict the provision of services to eligible Australian users because the category is too narrow—instead, the definition should allow the provision of services to all categories of professional investors and their related bodies corporate.

ASIC’s response

Based on the feedback received, we have amended the definition of funds management financial services in [ASIC Corporations \(Foreign Financial Services Providers—Funds Management Financial Services\) Instrument 2020/199](#) to:

- replace the definition of 'portfolio management services' with a definition that refers to the specific forms of financial services defined in Ch 7 and which covers 'financial products' rather than 'assets'; and
- not refer to the location of the financial products in relation to which the FFSP is providing financial services.

An FFSP will need to have regard to s21 of the Corporations Act when considering whether its activities constitute carrying on a financial services business in Australia other than because of the operation of s911D.

For example, s21(2)(b) provides that a body corporate is carrying on a business in Australia if it administers, manages or otherwise deals with property (including personal property) situated in Australia, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise: see also [Regulatory Guide 121](#) *Doing financial services business in Australia* (RG 121) at RG 121.42–RG 121.50.

We have also amended the definition of funds management relief to cover the provision of services to eligible Australian users only. We have defined 'eligible Australian user' to mean any of the following persons in Australia:

- a responsible entity of a registered scheme;
- a person that is a trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation fund within the meaning of the SIS Act and the fund, trust or scheme has net assets of at least A\$10 million;
- a trustee of a wholesale trust who holds an AFS licence or would be required to hold an AFS licence but for [ASIC Corporations \(Wholesale Equity Scheme Trustees\) Instrument 2017/849](#);
- a body regulated by the Australian Prudential Regulation Authority (APRA); and
- an exempt public authority other than a local council.

We have made this amendment to ensure that the funds management relief only covers 'inducing conduct' in relation to the provision of funds management financial services to a subset of professional investors that are:

- more likely to require funds management financial services; and
- are subject to certain requirements (e.g. regulation by APRA, AFS licensing obligations or a best interests duty under s52(2)(c) of the SIS Act), which will provide an additional level of protection for the end client of the eligible Australian user.

Revenue cap

- 40 In [CP 315](#), we proposed that an FFSP would only have the benefit of the funds management relief if less than 10% of its annual aggregated consolidated gross revenue of entities within its corporate group is generated from the provision of funds management financial services in Australia. The revenue cap was designed to limit the scale of activities that could be undertaken in Australia using the proposed relief.

Stakeholder feedback

- 41 The majority of respondents disagreed with our proposal to impose a revenue cap and submitted that the requirement was onerous, complex and impractical to implement. For example, some respondents submitted that the percentage of revenue attributable to investors in Australia can fluctuate in circumstances outside of the FFSP's control, such as in the case of a large redemption from a non-Australian investor.

ASIC's response

Based on the feedback received, we have not imposed a revenue cap in the funds management relief. We consider that the conditions on the relief will adequately limit the scale of activities undertaken in Australia by FFSPs relying on the relief and allow ASIC to adequately monitor and supervise those activities.

These conditions include:

- retaining the scope of the relief to apply only when the FFSP carries on a financial services business because of s911D;
- amending the definition of 'funds management financial services', including restricting the scope of eligible Australian users; and
- including additional conditions on the relief (see below).

Relief conditions

- 42 In [CP 315](#), we proposed to impose the following conditions on FFSPs relying on the funds management relief:
- (a) the FFSP is not a registered foreign company;
 - (b) the FFSP does not hold an AFS licence covering the provision of funds management financial services;
 - (c) the FFSP has appointed a local agent who is authorised to accept, on the FFSP's behalf, service of process and notices;

- (d) 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;
- (e) the FFSP must notify ASIC of the types of funds management financial services it intends to provide to professional investors in Australia;
- (f) the FFSP must maintain adequate proof of its compliance with the proposed 10% aggregated revenue cap;
- (g) the FFSP must comply with directions from ASIC to provide a statement (similar to s912C); and
- (h) the FFSP must provide reasonable assistance to ASIC during surveillance checks (similar to s912E).

Stakeholder feedback

- 43 Some respondents submitted that a number of the proposed conditions impose significant and unnecessary limitations on the scope of the funds management relief. Some respondents also disagreed with the condition that the FFSP must not be a registered foreign company. Respondents submitted that offshore operators may be registered as a foreign company out of an abundance of caution and may not actually be carrying on a business in Australia.

ASIC's response

Based on the feedback received, we have removed a number of the proposed conditions from the funds management relief. Specifically, the conditions listed in paragraphs 42(a), (b), (d), (e), and (f).

We have retained the proposed conditions in paragraphs 42(c), (g) and (h). These require that the FFSP:

- complies with directions from ASIC to provide a statement;
- provides reasonable assistance to ASIC during surveillance checks; and
- has appointed an agent for service and includes the name and address of the agent for service that is current as at the day the written confirmation is given.

We have also imposed additional conditions to ensure that the FFSP:

- has given ASIC written confirmation that:
 - it intends to rely on the relief for the provision of funds management financial services to eligible Australian users;
 - identifies its home jurisdiction and confirms that the person would not contravene any laws of its home jurisdiction relating to the provision of financial services if

- it were to provide those funds management financial services in its home jurisdiction; and
- o there is an overseas regulator of the FFSP in its home jurisdiction that is a signatory to the International Organisation of Securities Commissions (IOSCO) [Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information](#) (IOSCO MMOU);
- o it has an agent for service appointed and includes the name and address of the agent for service that is current as at the day the written confirmation is given; and
- the FFSP does not have a place of business in Australia; and
- the FFSP has updated ASIC if its home jurisdiction changes or if its agent for service changes.

We consider these conditions are necessary to ensure that ASIC can adequately monitor and supervise the activities of FFSPs relying on the funds management relief. In particular, the condition requiring the home jurisdiction of the FFSP to be a signatory to the IOSCO MMOU will facilitate cooperation between ASIC and the FFSP's home regulator for the purpose of enforcement activities.

Transitional arrangements

- 44 In [CP 315](#), we proposed that the funds management relief will be available to eligible FFSPs from 1 April 2020. We also proposed that the limited connection relief would be repealed on the same day, with a six-month transitional period for FFSPs that provided financial services in reliance on the limited connection relief immediately before the commencement of the funds management relief.
- 45 The six-month transitional period was proposed to allow FFSPs relying on the 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.

Stakeholder feedback

- 46 The majority of respondents disagreed with the six-month transitional period. A number of respondents submitted that a transitional period of 18–24 months would be more appropriate based on the estimated time required to:
- (a) lodge a licensing application with ASIC, if required;
 - (b) implement the necessary business structures to comply with the conditions of the funds management relief; and

- (c) if required, inform clients that the FFSP will no longer be able to provide financial services to them.

ASIC's response

Based on the feedback received, we have provided a transitional period of 24 months by extending the effect of [ASIC Corporations \(Foreign Financial Services Providers—Limited Connection\) Instrument 2017/182](#) until 31 March 2022. The [ASIC Corporations \(Foreign Financial Services Providers—Funds Management Financial Services\) Instrument 2020/199](#) will commence on 1 April 2022.

D Other issues

Key points

This section outlines the feedback we received on our other proposals in [CP 315](#), including our proposals to:

- update RG 176 to include guidance about our proposed regulatory framework for FFSPs; and
- not provide reverse solicitation relief for FFSPs.

Updated Regulatory Guide 176

- 47 In [CP 315](#), we proposed to:
- update RG 176 to include guidance on the foreign AFS licensing regime and the proposed funds management relief; and
 - withdraw [Information Sheet 157 Foreign financial services providers: Practical guidance \(INFO 157\)](#) because it will no longer be applicable after the foreign AFS licensing regime has been implemented.

Stakeholder feedback

- 48 Feedback from respondents on the proposed updated RG 176 included requests for further guidance on:
- the content of proof documents, and which additional proof documents are likely to be required, to support a foreign AFS licence application;
 - whether jurisdictions the subject of individual instruments granted on substantially the same terms as the sufficient equivalence relief will be covered in [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#);
 - application fees for foreign AFS licences; and
 - whether an industry levy will be charged to foreign AFS licensees.

ASIC's response

Based on the feedback received, we have made a number of amendments to [RG 176](#), including in relation to:

- the inclusion of certain jurisdictions in [ASIC Corporations \(Foreign Financial Services Providers—Foreign AFS Licensees\) Instrument 2020/198](#), which are the subject of individual instruments granted on substantially the same terms as the sufficient equivalence relief and which are still currently being relied on;

- where to find information about fees for foreign AFS licence applications; and
- where to find information about industry levy fees that will be charged to foreign AFS licensees.

We have also updated the guidance to reflect the updated terms of the funds management relief, as outlined in Section C of this report.

Additional guidance on the proof documents that may be required for foreign AFS licence applications will be provided in updated RGs 1–2.

ASIC will be maintaining [INFO 157](#) to provide important information regarding transitional arrangements. We will withdraw INFO 157 on 1 April 2022.

Reverse solicitation relief

- 49 In [CP 315](#), we proposed to not provide AFS licensing relief for FFSPs providing financial services to professional investors on a reverse solicitation basis because we were concerned about our ability to monitor the conduct of such FFSPs and their compliance with any conditions on the relief.

Stakeholder feedback

- 50 A number of respondents supported the provision of reverse solicitation relief:
- (a) given the limited scope of the existing licensing exemptions in the Corporations Act; and
 - (b) to facilitate access by professional investors in Australia to financial services provided by FFSPs.
- 51 Some respondents submitted that ASIC’s concerns about the ability to monitor the conduct of these FFSPs could include imposing appropriate conditions on the relief.

ASIC’s response

While a number of respondents supported the provision of reverse solicitation relief, we did not receive any submissions that demonstrated:

- significant reasons why the relief should be granted; and
- adequate mechanisms that could be implemented by the FFSP or professional investors in Australia that would address our concerns about our ability to monitor the conduct of FFSPs relying on such relief.

While it is open for ASIC to impose conditions on the relief, this would not address our concerns about our ability to monitor whether FFSPs are complying with these conditions. Accordingly, we have not provided relief for FFSPs providing financial services to professional investors on a reverse solicitation basis.

Appendix 1: List of non-confidential respondents to CP 301

- Allens
- Alternative Investment Manager Association
- Ashurst
- Asia Securities Industry & Financial Markets Association
- Association of the Luxembourg Fund Industry
- ASX Limited
- Australian Financial Markets Association
- Australian Private Equity and Venture Capital Association Limited
- Baker & McKenzie
- CGS-CIMB Securities (Singapore) Pte Ltd
- Chi-X Australia
- FEXCO Merchant Services Unlimited Company
- Financial Services Council
- Herbert Smith Freehills
- ICI Global
- Law Council of Australia
- MinterEllison
- New Zealand Financial Markets Association
- Perpetual Corporate Trust
- PMC Legal
- Property Funds Association
- River and Mercantile Asset Management

Appendix 2: List of non-confidential respondents to CP 315

- Allens
- Ashurst
- Asia Securities Industry & Financial Markets Association
- Association of the Luxembourg Fund Industry
- ASX Limited
- Auron Consulting Pty Ltd
- Australian Financial Markets Association
- Australian Investment Council
- Baker & McKenzie
- Financial Services Council
- Herbert Smith Freehills
- ICI Global and Investment Advisor Association
- Johnson Winter Slattery
- Law Council of Australia
- Minter Ellison
- Norton Rose Fulbright
- Perpetual Corporate Trust
- The Alternative Investment Management Association