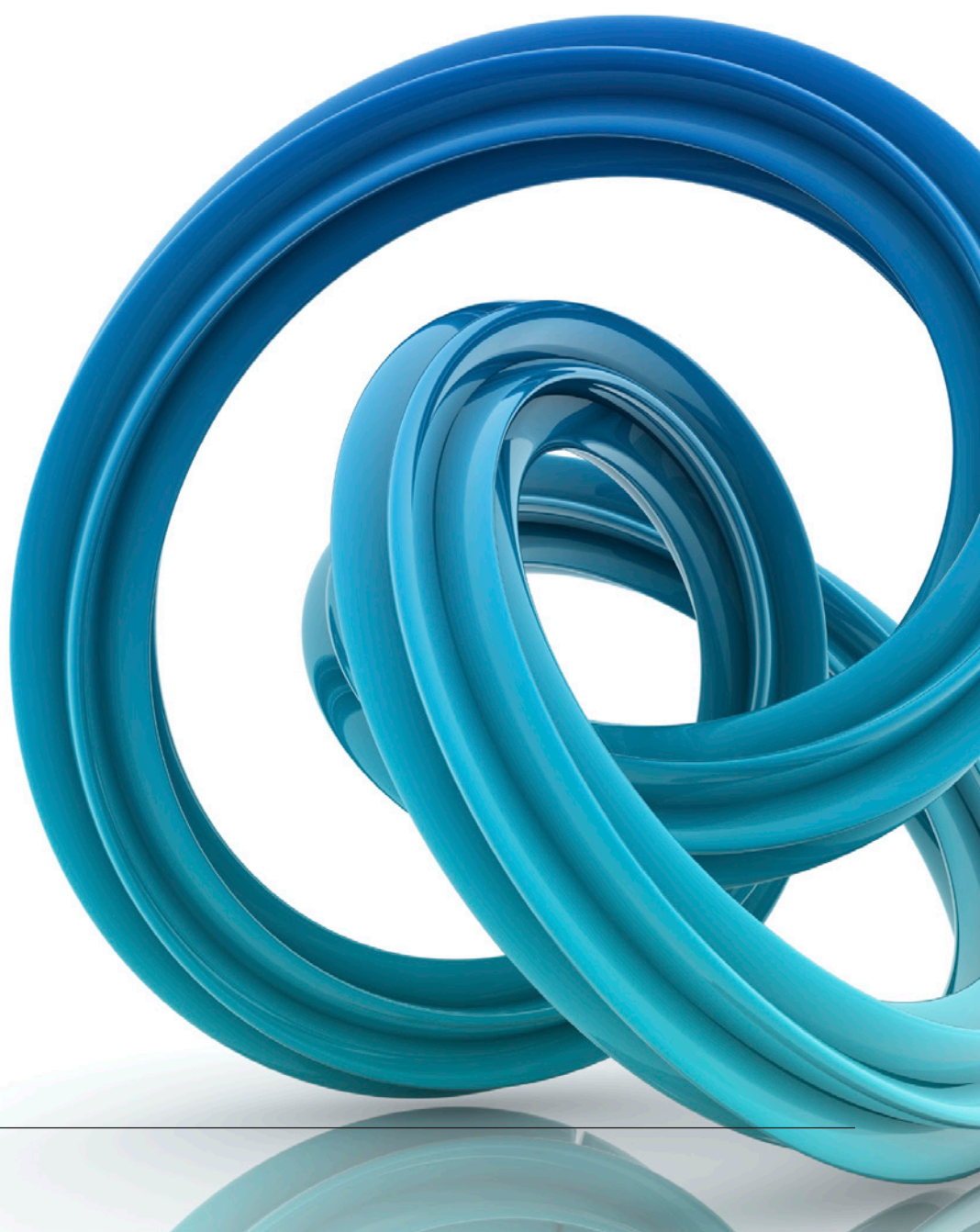


# ALLEN & OVERY

## Further consultation on changes to Australian rules for foreign financial service providers

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July 2019



On 3 July 2019, the Australian Securities & Investments Commission (ASIC) released a further consultation paper in respect of its revised proposal for Foreign Financial Service Providers (FFSPs). A copy of the consultation paper can be found here<sup>1</sup> :

<https://download.asic.gov.au/media/5191721/cp315-published-3-july-2019.pdf>

An FFSP is a person who provides financial services to Australian Wholesale (institutional) clients who either:

(a) rely on existing “equivalency relief”, typically those whose domestic or home jurisdictions and regulators are as follows:

Jurisdiction	Regulator(s)
United Kingdom	Financial Conduct Authority and Prudential Regulation Authority
United States	U.S. Securities and Exchange Commission U.S. Federal Reserve and Comptroller of the Currency U.S. Commodities Futures Trading Commission
Singapore	Monetary Authority of Singapore
Hong Kong	Securities & Futures Commission
Germany	BaFin
Luxembourg	CSSF

or (b) rely on the existing “limited connection to Australia” relief contained in ASIC Class Order 03/824.

Having consulted in relation to the existing FFSP relief, and having regard to regulatory and supervisory concerns, ASIC has revised its proposals for reform. Accordingly, the consultation paper indicates that if your organisation currently relies on FFSP instruments of relief, going forward you will need to either:

- rely on proposed new funds management relief;
- apply for a modified form of an Australian Financial Services (AFS) Licence (Foreign AFS Licence);
- obtain an existing form of Australian financial services licence (Ordinary AFS Licence); or
- rely on another exemption from the requirement to be licensed.

The new category of Foreign AFS Licence is proposed as a less onerous compliance regime than an Ordinary AFS Licence for FFSPs who can demonstrate that their domestic regulatory regime is sufficiently equivalent to the legal regime applying in Australia.

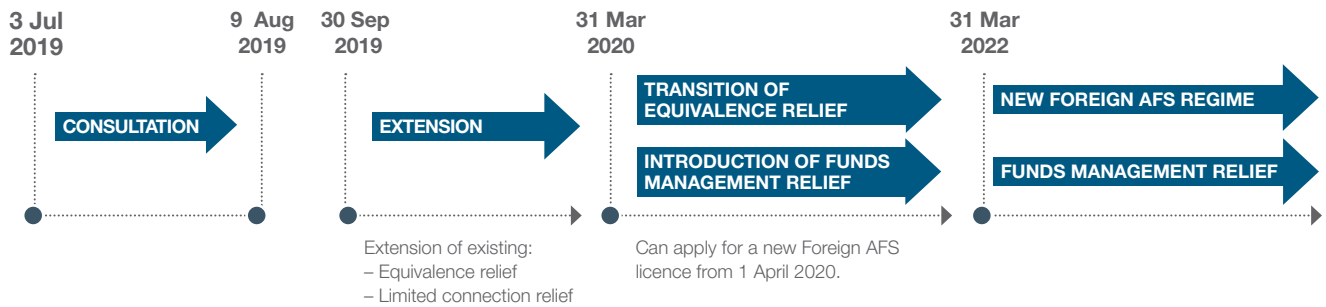
ASIC intends the current relief, which was scheduled to expire on 30 September 2019, to be extended for 6 months until 31 March 2020.

The consultation paper proposes a further transition period of 24 months to 31 March 2022 if ASIC proceeds with the new Foreign AFS Licence regime.

ASIC has requested submissions on the consultation paper by 9 August 2019.

<sup>1</sup> This is a revised version of ASIC’s Consultation Paper 301 published on 1 June 2018.

## Timing



We have set out an overview of the new foreign AFS Licence and Funds Management relief, together with background to the limited connection and sufficiently equivalent relief below.



## The new Foreign AFS Licence

Currently, FFSPs are able to provide services to Australian institutional clients on the basis that they comply with the laws that apply to them in their home jurisdiction. The Foreign AFS Licence regime represents a significant departure from the existing position for FFSPs as it will be necessary to be licensed in Australia and comply with certain Australian financial services regulatory requirements when dealing with Australian institutional clients. For example, it is proposed that:

- conditions which apply to Ordinary AFS Licensees, relating to managing conflicts of interests, and providing financial services honestly, efficiently and fairly would also apply to FFSPs;
- the holder of a Foreign AFS Licence would not need to comply with conditions relating to the need to have adequate financial, technological and human resources and conditions in relation to the training of its representatives; and
- key enforcement powers will be available to ASIC, including breach reporting obligations, the power to issue directions, the requirement to provide reasonable assistance to ASIC during surveillance checks and the ability to impose licence conditions, vary, cancel or suspend a licence and impose penalties.

## Proposed Funds Management Relief

This is a new form of proposed relief, which is intended to provide a form of “middle ground” between:

- (a) the current limited connection relief (which is to be repealed); and
- (b) the new Foreign AFS Licence regime.

This relief is proposed to apply to any of the following financial services provided to professional investors:

- dealings in interests in foreign collective investment schemes (including those using corporate structures);
- financial product advice in relation to these interests;
- making a market in relation to these interests; and
- providing “portfolio management services” to a limited category of professional investors.



The availability of the relief is also intended to be subject to a cap on the scale of activities. For example, a cap on no more than 10% of an entity's aggregated consolidated gross revenue being generated from the provision of funds management financial services in Australia. There are also alternative caps being proposed in the form of a 'number of clients cap' (eg not providing services to more than 3 professional investors in Australia in a financial year) and a 'service specific' cap (eg less than 10% of interests in a foreign fund are issued to Australian investors).

The proposed funds management relief will be subject to a number of conditions, which will require some engagement with ASIC, including:

- notifying ASIC of the types of fund management activities it intends to provide;
- maintaining adequate proof of compliance with the 10% revenue cap;
- complying with ASIC directions; and
- providing reasonable assistance to ASIC during surveillance checks.

Professional investors are intended to be a subset of investors who would normally be considered to be "wholesale" investors for the purposes of Australian law. These include, broadly speaking, superannuation (pension) funds and collective investment schemes with assets of greater than AUD10 million and life insurance funds.

This relief is proposed to come into effect on 1 April 2020 with a 6 month transitional period to 30 September 2020 (which is when the existing limited connection relief is proposed to end).

## Background to the sufficiently equivalent relief

The sufficiently equivalent relief is provided by seven separate ASIC instruments (called class orders) that relieve foreign financial service providers (FFSPs) from the requirement of holding an Australian financial services licence (AFSL) in the provision of financial services to wholesale clients. The rationale behind introducing the sufficiently equivalent relief was to attract foreign investment and liquidity to Australian markets by preventing duplicated regulatory burdens, as FFSPs were already subject to equivalent regulations in their home jurisdictions.

The proposed extension of relief until 31 March 2022 also applies to an ASIC instrument that exempts qualifying Luxembourg fund managers.

The relevant FFSP Class Order Relief<sup>2</sup> includes:

- [CO 03/1099] UK regulated financial service providers;
- [CO 03/1100] U.S. SEC regulated financial service providers;
- [CO 03/1101] U.S. Federal Reserve and OCC regulated financial service providers;

<sup>2</sup> The term of these instruments has been extended to 30 September 2019 by ASIC Instrument 2016/396.

- [CO 03/1102] Singapore MAS regulated financial service providers;
- [CO 03/1103] Hong Kong SFC regulated financial service providers;
- [CO 04/829] U.S. CFTC regulated financial services providers;
- [CO 04/1313] German BaFin regulated financial service providers; and
- CSSF Regulated Financial Services Providers via Instrument 2016/1109.

In addition, individual sufficiently equivalent relief has been provided to FFSP's from Denmark, Sweden, France and Brazil.

## Background to the limited connection relief

In 2003, ASIC issued 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 where the person providing the financial services is:

- not in this jurisdiction;
- dealing only with wholesale clients; and
- carrying on a financial services business only by engaging in conduct that is intended to induce people in this jurisdiction to use the financial services it provides, or is likely to have that effect (see s911D(1)).

ASIC has indicated that the purpose of the relief was to address concerns that overseas counterparties to derivatives, foreign exchange transactions and providers of investment management services may be engaging in 'inducing' activities under s911D when inducing wholesale clients in Australia to use their financial services.

Without the benefit of this "limited connection relief", ASIC indicated that they would be required to hold an AFS licence when engaging in inducing activity even when they are not otherwise carrying on a financial services business in Australia.

After consulting with industry, ASIC temporarily extended the effect of [CO 03/824] to 30 September 2019 by way of ASIC Corporations (Amendment) Instrument 2018/807.

It is currently proposed that this relief will be extended again and ultimately expire on 30 September 2020.

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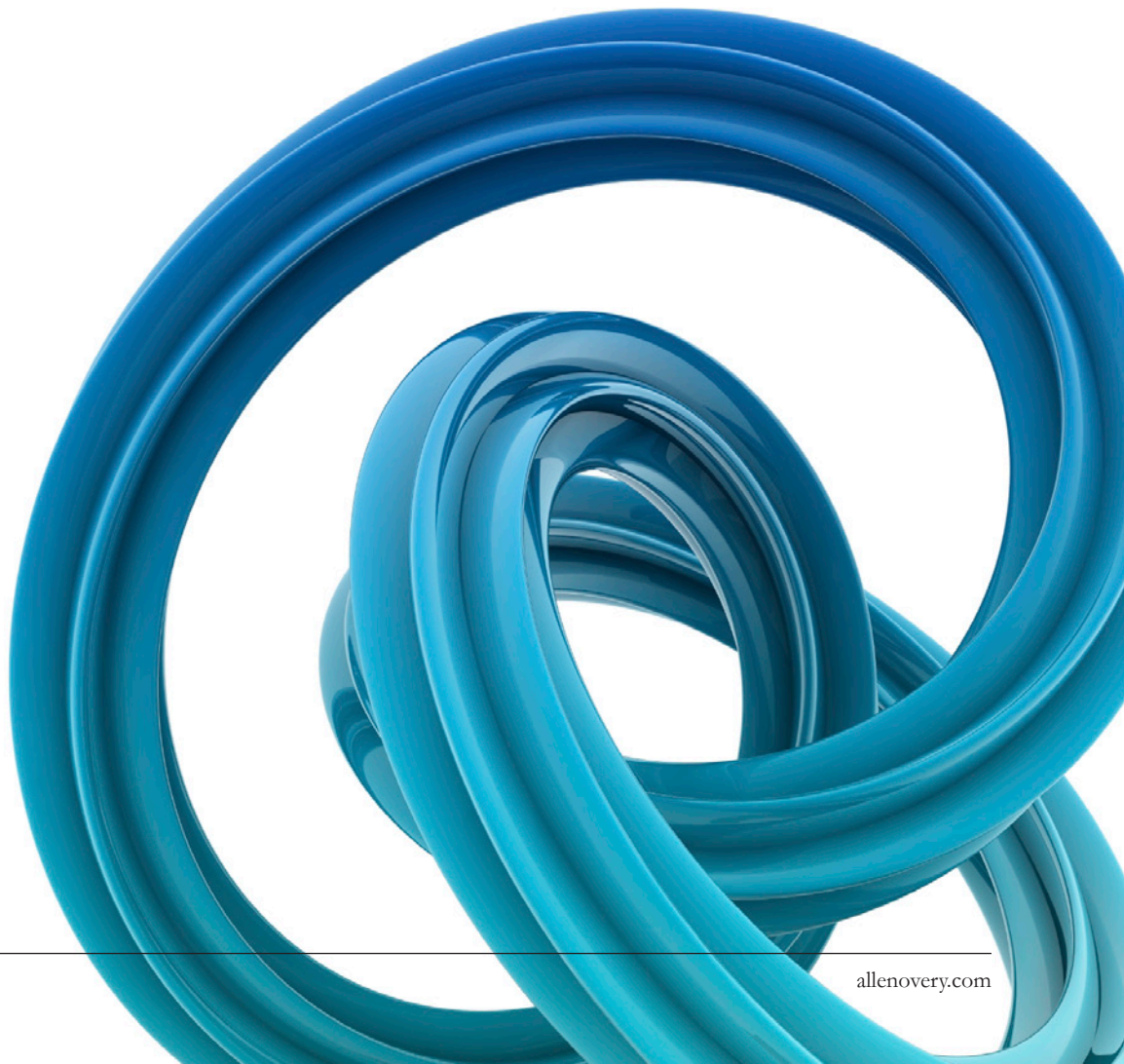


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