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AIMA APAC Webinar: Australia's New Regulatory Framework for Foreign Financial Service Providers (FFSPs) - The Story Continues

19 July 2021

Speakers:

- **Kher Sheng Lee**, Managing Director, Co-Head of APAC and Deputy Global Head of Government Affairs, AIMA
- **Michael Gallagher**, Managing Director, Head of Australia, AIMA
- **Nikki Bentley**, Partner, Financial Services Law, EY



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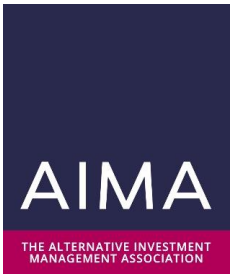
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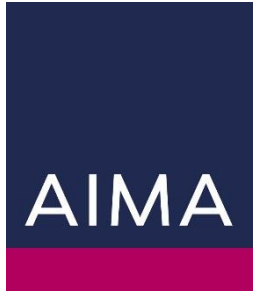
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Latest Update



Speakers:

- **Michael Gallagher**, Managing Director, Head of Australia, AIMA
- **Nikki Bentley**, Partner, Financial Services Law, EY

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- Proposed relief framework for Foreign Financial Services Providers (FFSPs)
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 - Option 3 – automatic grant of modified licence for certain FFSPs

Where we are and how we got here.

FFSP relief before 31 March 2020

Since 2003, ASIC has provided sufficient equivalence relief and the limited connection relief to FFSPs. Both forms of relief allowed FFSPs to conduct their financial service business with Australian wholesale clients without the need to hold an AFSL.



Sufficient equivalence relief:

- Relief from the requirement to hold AFSL where:
 - the financial services were provided to wholesale clients only;
 - the provision of the financial services by the FFSP is regulated by a 'sufficiently equivalent' overseas regulatory regime to Australia's covering the financial services (Denmark, France, Germany, Hong Kong, Luxembourg, Ontario Canada, Singapore, Sweden, United Kingdom, United States);
 - effective cooperation arrangements in place between the overseas regulatory authority and ASIC; and
 - the FFSP meets all the relevant conditions of relief contained in the relevant ASIC instruments.

Limited connection relief:

- ASIC provided relief to FFSPs from the requirement to hold an AFSL where the FFSP providing the financial services was:
 - not in Australia;
 - dealing only with wholesale clients; and
 - carrying on a financial services business in Australia only because the entity was engaging in conduct that was intended to induce, or was likely to induce, people in Australia to use the financial services it provides.

FFSP relief between 31 March 2020 to 31 March 2023 (transitional period)



March 2020 Announcement

- ASIC announced that from 1 April 2020 FFSPs wanting to commence a financial services business in Australia were not eligible for the sufficient equivalence relief
- FFSPs already relying on the sufficient equivalent relief have until 31 March 2022 (now extended to 31 March 2021) to obtain a foreign or standard AFSL to remain in the Australian financial services market.

June 2021 Announcement

- ASIC announced that it would extend transitional relief for foreign financial services providers for 12 months until 31 March 2023 pending the outcome of the Government's consultation.
- As such, the limited connection relief and sufficient equivalent relief (for those who applied prior to April 2020) will now apply until 31 March 2023.
- New entrants to the market can apply for individual relief on basis of sufficient equivalent relief
- Applications for foreign AFSL applications will only be progressed for those that can't rely on transitional relief

FFSP relief and licensing after 31 March 2023

- The Australian Government has indicated its concern that the foreign AFSL regime and funds management relief may not have struck the right balance and announced in 2021-22 Budget that it will consult on:
- options to restore the regulatory relief provided for FFSPs who are licensed and regulated in equivalent jurisdictions with comparable financial service rules and obligations. The relief would be limited to FFSPs that deal with wholesale clients and professional investors.
- options to create a fast-track licensing process for FFSPs who wish to establish more permanent operations in Australia.

Relief framework.

Option 1A – sufficient equivalence and limited connection relief



- This option would restore the sufficient equivalence relief and limited connection relief as it applied before it was repealed on 31 March 2020.
- The sufficient equivalence relief would apply to FFSPs regulated by the United Kingdom, United States, Hong Kong, Singapore, Germany and Luxembourg.

Option 1B – sufficient equivalence and funds management relief



- This option would restore the sufficient equivalence relief as it applied before it was repealed on 31 March 2020 and continue the current funds management relief in place of the limited connection relief for eligible FFSPs.
- The sufficient equivalence relief would apply to United Kingdom, United States, Hong Kong, Singapore, Germany and Luxembourg regulated FFSPs.

Option 2 – expanded sufficient equivalence relief

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- This option would provide relief to FFSPs providing certain financial services to wholesale clients including:
 - Providing financial product advice;
 - Dealing in a financial product;
 - Making a market for a financial product; and
 - Providing a custodial or depositary service.
 - Expanded jurisdictions including Denmark, France, Germany, Hong Kong, Luxembourg, Canada, Singapore, Sweden, United Kingdom, United States regulated FFSPs.
 - Subject to various licence conditions

Option 3 – option 2 with no financial services limitation

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- This option would provide FFSP relief to all financial services provided to wholesale clients (all financial services in Option 2 but in addition:
 - operate a registered managed investment scheme (fund)
 - crowd funding services
 - Claims handling services
 - Superannuation trustee services
 - Traditional trustee services
 - Subject to various licence conditions.

Options 2 and 3 – *proposed conditions*

Proposed conditions which already apply to FFSPs relying on the sufficient equivalence relief:

- notifying clients when the FFSP is relying on the relief;
- appointing a local agent for the FFSP;
- notifying ASIC when the FFSP is relying on the relief or ceases to use the relief;
- applying to ASIC for approval to use the relief;
- consenting to information sharing between ASIC and the FFSP's home jurisdiction regulator;
- assisting ASIC in any supervision or investigation matters;
- complying with information requests from ASIC within the specified time;
- notifying ASIC of any changes to the FFSP or the home jurisdiction regulator that affect their eligibility for relief;
- submitting to the jurisdiction of Australian courts;
- maintaining the relevant authorisation in the FFSP's home jurisdiction to provide the financial service they are providing in Australia;
- providing each of the financial services in Australia in a manner which would comply, so far as is possible, with the home jurisdiction regulatory requirements if the financial service
- a condition that ASIC can notify the FFSP of any additional conditions it believes are necessary to address any concerns ASIC may have;
- a condition that ASIC can exclude FFSPs from relying on the relief where it has concerns the FFSP is not fit to provide services to Australian clients, or where a provider is using relief in a manner the relief is not intended to be used.

Options 2 and 3 – proposed conditions (cont.)



Additional proposed conditions (going beyond the existing relief conditions):

- not dealing with unauthorised or unlicensed entities – (noting this could restrict dealings with family offices and unregulated corporations);
- complying with directions from ASIC;
- complying with auditing and reporting requirements;
- ensuring that financial services are provided efficiently, honestly and fairly;
- applying protections for dealing with client’s money and property;
- having adequate conflict of interest arrangements in place;
- having adequate risk management systems in place;
- ensuring representatives are appropriately trained; and
- breach reporting obligations, similar to that of AFSL holders.

Options 2 and 3 – proposed conditions (cont.)



- Periodic information requirements to ASIC including:
 - the FFSP's fund or business type;
 - detailed description of the intended business activity, market presence and client groups targeted in Australia;
 - copy of the FFSP's constitution and/or articles of association;
 - the FFSP's investment strategy;
 - the number of Australian clients;
 - confirmation that financial services are only provided to wholesale clients or professional investors;
 - certain financial statements that cover the financial services provided in Australia;
 - assets under management (FUM) of Australian investors in funds;
 - increase/decrease in FUM from Australian investors from prior reporting period;
 - dealings with derivatives;
 - name of foreign legal entity adviser promoting fund(s) in Australia, including name of onshore Australian licensee where relevant;
 - the agreement with a local agent;
 - annual compliance attestation;
 - liquidity terms of the fund; and
 - for funds that offer liquidity, redemption information from the prior reporting period.

Fast-tracking licensing applications of FFSPs.

Option 1 – modified fit and proper person test



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- Current ASIC requires FFSPs to demonstrate that certain influential persons within the businesses are 'fit and proper' to provide financial services (ie. that they are of suitable character):
 - any officers of a body corporate
 - any partners or senior managers of a partnership applicant
 - any trustees or senior managers of a multiple trustee of a trust applicant
 - any controllers of the applicant
 - if a controller is a body corporate, any officer of the controller
 - if a controller is a partnership, any partner or senior managers of the controller.
 - It is proposed under Option 1 that ASIC has the discretion to determine whether a fit and proper person test is required to rely on similar assessments of fitness and propriety carried out by other regulators.
 - Providing evidence to satisfy the fit and proper persons tests has been challenging to foreign AFSL applicants to date, especially those with complex business structures.

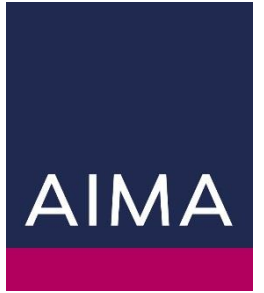
Option 2 – modified licensing regime for certain FFSPs servicing wholesale clients

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- A modified licensing regime would apply to FFSPs that:
 - are regulated by an overseas regulatory authority that is a signatory to the IOSCO multilateral MOU (noting there are currently 124 signatory jurisdictions); and
 - provide financial services to wholesale clients in Australia.
 - Under this option, FFSPs could be exempt from some provisions relating to the licensing process or obligations in Chapter 7 of the Corporations Act.
 - The basis of these exemptions would be that it is duplicative to impose Australia's licensing requirements in addition to what is required in the home jurisdiction.
 - Stakeholder feedback is sought on what provisions should be exempted.

Option 2 – modified licensing regime for certain FFSPs servicing wholesale clients – conditions

-
- the FFSP must carry on a business in the relevant foreign jurisdiction;
 - must have a local agent in Australia;
 - the FFSP must not believe it will contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide the wholesale financial service in its home jurisdiction;
 - the FFSP must notify ASIC within 15 business days after it becomes aware details of:
 - each significant change to, including the termination of, the FFSP's relevant registration or authorisation in the FFSP's home jurisdiction;
 - each significant exemption or other relief that the FFSP obtains from the regulatory requirements in its home jurisdiction; and
 - each significant investigation, enforcement or disciplinary action undertaken by any overseas regulatory authority against the FFSP

Option 3 – automatic grant of modified licence for certain FFSPs



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- This option would grant an AFSL to FFSPs that provide appropriate evidence to demonstrate that the FFSP:
 - is regulated by an overseas regulatory authority that is an IOSCO board member (noting there are currently 34 jurisdictions which are IOSCO Board Members);
 - holds an existing licence and is specifically authorised to provide the financial services intended to be provided in Australia; and
 - will just provide financial services to wholesale clients in Australia.

Option 3 – automatic grant of modified licence for certain FFSPs - *conditions*



The same conditions as for Option 2 (as follows):

- the FFSP must carry on a business in the relevant foreign jurisdiction;
- must have a local agent in Australia;
- the FFSP must not believe it will contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide the wholesale financial service in its home jurisdiction;
- the FFSP must notify ASIC within 15 business days after it becomes aware details of:
 - each significant change to, including the termination of, the FFSP's relevant registration or authorisation in the FFSP's home jurisdiction;
 - each significant exemption or other relief that the FFSP obtains from the regulatory requirements in its home jurisdiction; and
 - each significant investigation, enforcement or disciplinary action undertaken by any overseas regulatory authority against the FFSP

Open Discussion with Audience

IMPORTANT NOTES



- For all feedback/comments please email Michael Gallagher: mgallagher@aima.org
- Please send through feedback no later than COB AEST **22/7/2021**

Contact

The AIMA logo consists of a dark blue square with the letters 'AIMA' in white, positioned above a horizontal magenta bar.

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