AUSTRALIAN REGULATORY CHANGES IMPACTING GLOBAL FUND MANAGERS

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Australia is in the midst of a number of regulatory changes that are impacting local banks, fund managers, financial advisers, insurance providers and superannuation funds following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

While most of these regulatory changes will impact local Australian entities, this article focuses on a couple of changes that will impact global fund managers wanting to do business in Australia.

New Foreign Financial Services Providers licensing regime

The Australian Securities and Investments Commission (ASIC) has been undertaking a comprehensive review and consultation of the Australian Financial Services (AFS) licensing regime for Foreign Financial Services Providers (FFSPs) looking to carry on financial services activities in Australia, including marketing their offshore funds or providing portfolio management services to Australian clients. This impacts FFSPs currently relying on the existing sufficient equivalence relief and new FFSPs looking to enter the Australian market.

On 10 March 2020, ASIC released the updated version of Regulatory Guide 176: Foreign financial services providers (RG 176) following extensive consultation with industry and overseas regulators.

The updated RG 176 provides guidance on the new AFS licensing regime for FFSPs providing financial services to Australian wholesale clients. The new licensing regime has two key elements:
• Foreign AFS licence: a new foreign AFS licensing regime for FFSPs.
• Funds management relief: a limited licensing relief for providers of funds management financial services seeking to induce eligible Australian users.

Foreign AFS licence

An FFSP that is authorised by an overseas regulatory authority that regulates the FFSP under a "sufficiently equivalent" regime is eligible to apply for a foreign AFS licence.

ASIC has expanded the list of "sufficiently equivalent" regimes to now include Denmark, France, Germany, Hong Kong, Luxembourg, Ontario Canada, Singapore, Sweden, the UK and the US. ASIC will continue to assess applications to extend the foreign AFS licence to cover additional overseas regulatory regimes.

The updated online application and the licensing regulatory guides released in April allow FFSPs to apply for the new foreign AFS license.

The application process for a foreign AFS licence is intended to be more streamlined than a standard AFS licence application, and an FFSP holding a foreign AFS licence will be exempt from certain obligations that apply to AFS licensees, such as financial requirements.

However, a foreign AFS licensee will still be subject to several obligations including, to have in place adequate arrangements for management of conflicts of interest and risk management systems.

Funds management relief

The newly introduced funds management relief is narrower in application than what was initially sought by the industry and so may be of limited use. The funds management relief only provides relief for the conduct of "inducement" activities.

If an FFSP is otherwise carrying on a financial services business in Australia (e.g. because of ongoing financial services being provided after the initial "inducement" activities) then it is likely that they would fall outside the scope of the funds management relief and a foreign AFS licence is required unless another applicable exemption can be relied on.

The funds management relief also no longer references a 10% cap on the gross revenue generated from the provision of the funds management financial services in Australia or a requirement for the assets being managed to be located outside of Australia which were part of ASIC's original proposal.

Transition period

The transition period allows FFSPs to continue to rely on their existing sufficient equivalence relief for another two years (until 31 March 2022) provided that the FFSPs have notified ASIC of their reliance on the sufficient equivalence relief and was able to rely on the relief on 31 March 2020.

Next steps

• If you are relying on the sufficient equivalence relief, you have two years (until 31 March 2022) to transition into the new regime.
• Assess your activities (or intended activities) in Australia to confirm whether you are able to rely on the funds management relief or other licensing relief.
• Prepare to apply for a foreign AFS license. If you are considering applying for the foreign AFS license, we recommend you do so as soon as you can, given ASIC's service charter provides that ASIC aims to complete 70% of applications within 150 days, and 90% within 240 days. This means it may take up to 8 months or longer after the application is lodged for you to obtain the foreign AFS license.

Updated ASIC Regulatory Guide 97

In the last few years, ASIC has been making significant changes to the fees and costs disclosure for superannuation funds and managed investment schemes in the prescribed product disclosure statement (PDS) provided to retail clients.

On 29 November 2019, ASIC released an updated version of Regulatory Guide 97: Disclosing fees and costs in PDSs and periodic statements (RG 97), following an external independent review of the fees and costs disclosure regime.

The updated RG 97 makes major changes to the fees and cost disclosure regime for products distributed to retail clients. Australia is different to most other jurisdictions in that hedge funds can be offered to retail clients as well as wholesale clients. The changes to the fees and costs regime includes simplifying some of the previous complexities with the fees and costs disclosure. The new fees and costs disclosure requirements will apply to PDSs issued on or after 30 September 2020.

Key changes

• Re-formatting the fees and costs summary to distinguish between ongoing annual fees and costs and member activity related fees and costs.
• Removing the requirement to calculate and disclose property operating costs and borrowing costs.
• Specifying that all performance fees are to be calculated based on an average of the previous five financial years. Superannuation

funds and managed investment schemes are also required to disclose performance fees information for each of its underlying funds, however ASIC has indicated that it might revisit this given concerns around confidentiality.
• Clarifying that fees and costs in PDSs must be shown gross of tax and without adjustment in relation to any tax deduction available.

Considerations for global fund managers

Global fund managers will need to be aware that superannuation funds and responsible entities of registered managed investment schemes will need to implement the updated RG 97 fees and costs disclosure regime for all PDSs with an issue date that is on or after 30 September 2020.

Accordingly, fund managers may receive requests from superannuation funds and responsible entities for fees and costs information calculated under the previous RG 97 disclosure regime as well as the new RG 97 disclosure regime.

Design and distribution obligations

The Australian Government has passed new legislation introducing new design and distribution obligations (DDOs) as well as product intervention powers. The DDOs will come into force in April 2021 and will affect all managed fund products that target retail clients, while the product intervention powers are immediately effective.

The DDOs and the product intervention powers are aimed at ensuring that funds are targeted and sold to the right consumers, and where funds are inappropriately targeted or sold, ASIC will be empowered to intervene in the distribution of the fund to prevent harm to consumers.

The DDOs will require issuers to:
• Identify target markets for their funds and prepare target market determinations having regard to the features of funds and consumers in those markets.
• Select appropriate distribution channels.
• Periodically review distribution channel arrangements to ensure they continue to be appropriate.
In addition, distributors will be required to:
• Put in place reasonable controls to ensure funds are distributed in accordance with the identified target markets, and
• Comply with reasonable requests for information from the issuer in relation to the fund's review.

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