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Briefing note | November 2016

ASIC to repeal licensing exemption for foreign financial services providers and temporary extension of passport relief

The Australian Securities and Investments Commission (ASIC) has proposed changes to key Australian financial services (AFS) licensing exemptions relied upon by certain foreign financial services providers (FFSPs) that only provide financial services to Australian wholesale clients:

1. Where the FFSP has a very limited connection with Australia; and
2. Where the FFSP is able to be rely on the passport relief available for FFSPs regulated by certain foreign regulators.

Repeal of exemption for FFSPs with a limited connection with Australia – Class Order 03/824

ASIC proposes to repeal Class Order [CO 03/824] (CO 03/824). CO 03/824 provides an exemption from the requirement to hold an AFS licence that can be relied upon where a FFSP:

- only provides financial services to wholesale clients; and
- does not carry on a financial services business in Australia under the usual Corporations Act and general law tests.

The effect of this exemption is that the deeming provision that gives the AFS licensing provisions a very broad geographical reach does not apply. Under that deeming provision, a person is taken to carry on a financial services business in Australia if their conduct is intended, or likely to have the effect of, inducing people in Australia to use the financial services. Accordingly, a person can require an AFS licence although they would not be carrying on a business in Australia under the general law and Corporations Act tests.

CO 03/824 provides an important exemption to FFSPs that are operated wholly offshore, particularly where they cannot rely on passport relief. CO 03/824 is particularly relevant for fund managers promoting offshore funds to Australians.

ASIC's consultation

ASIC has released a consultation paper (CP 268) seeking feedback on its proposal to repeal CO 03/824. CO 03/824 is due to expire on 1 April 2017. However, ASIC is proposing a one year transitional period in the event that it repeals the class order to allow FFSPs relying on this exemption time to otherwise comply with the Corporations Act.

ASIC's rationale for repealing CO 03/824 is that it is substantially similar to the exemption provided under section 911A(2E) of the Act. However the scope of the section

Key issues

- If you have been relying on CO 03/824 you may need to take steps to rely on another exception if it is repealed in 2017 as ASIC proposes.
- Passport relief has only been extended for 2 years until 1 October 2018.
- ASIC has not indicated what conditions will apply to passport relief if it is continued at that time (which is not certain).

911A(2E) exemption is substantially narrower, applying only to:

- services provided to professional investors; and
- in relation to specific financial products, being derivatives, foreign exchange and certain carbon products; and
- where the financial services provided are financial product advice, dealing and market making.

By way of contrast, C0 03/824 applies to wholesale clients (which is broader than professional investors) and to the provision of any financial products and services.

What you need to know/do

ASIC believes that section 911A(2E) covers the major types of financial products and services where relief is needed and has stated that it will use the consultation process to confirm the extent to which CO 03/824 is relied upon. The difficulty with this is that CO 03/824 is often used for financial services provided to Australian wholesale clients on a "one off" basis.

If it is established that only a small number of FFSPs rely on CO 03/824 who cannot instead rely upon 911A(2E) ASIC has said it will consider repealing CO 03/824 and granting case-by-case relief. However, it remains to be seen in what circumstances ASIC would be inclined to grant this relief.

As a result, FFSPs relying on CO 03/824, who cannot rely on the narrower exemption in section 911A(2E), should consider making a submission before the consultation process closes on 2 December 2016.

Also, FFSPs currently relying on CO 03/824 should consider whether alternative exemptions are available in the case that it is repealed.

Temporary extension of passport relief

ASIC has also issued ASIC Corporations (Repeal and Transitional) Instrument 2016/396 (Temporary Extension), which has the effect of temporarily extending the operation of the "passport relief" Class Order for 2 years, ending 1 October 2018. During this 2 year period ASIC will undertake a review of the exemption to decide whether it should continue long-term.

Background

Passport relief is available to FFSPs that are licence holders in certain foreign jurisdictions where ASIC is satisfied that the regulatory regime is substantially equivalent to Australia's (the United States, United Kingdom, Singapore, Hong Kong, Germany and Luxembourg).

With a broader scope than other AFS licence exemptions, passport relief is very popular and widely adopted by FFSPs to provide a range of products and services to Australian wholesale clients.

ASIC's consultation

ASIC has said that its review of the passport relief exemption will consider incidences of FFSPs non-compliance and whether the class order provides a sufficient oversight mechanism to adequately supervise entities' activities in the Australian market.

Following the review, ASIC plans to release a consultation paper containing its proposals for remaking this relief in January 2018.

What you need to do/know

Under the Temporary Extension FFSPs currently relying on passport relief have their exemptions automatically extended for a two year period, and are not required take any action at this stage. In addition, passport relief remains available for FFSPs entering the Australian market during this period.

However, FFSPs currently relying upon, or considering reliance upon this exemption, should be aware that the Temporary Extension gives ASIC an additional information gathering power. It requires FFSPs, on a request from ASIC, to provide ASIC with a written statement containing information about the financial services business operated by the FFSP in Australia.

Further, if ASIC further extends the passport relief at the end of the review it may impose additional conditions to those currently imposed. Alternatively, ASIC may allow passport relief to expire at the end of the two year Temporary Extension. Accordingly, in case either of these circumstances eventuates, FFSPs that rely on this exemption may wish to consider whether any alternatives are available.

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