



21 May 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services
and Financial Technology
Parliament House
Canberra 2600 ACT

Via email: Senator.Hume@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
Shelby.Brinkley@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees)
Instrument 2020/198 [F2020L00237]**

**ASIC Corporations (Foreign Financial Services Providers—Funds Management
Financial Services) Instrument 2020/199 [F2020L00238]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Exemptions and modifications to primary legislation

Parliamentary oversight

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This includes where an instrument modifies or exempts persons or entities from the operation of primary legislation. In addition, Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight.

The instruments seek to give effect to a modified Australian Financial Services licensing regime for foreign financial services providers (FFSPs) by modifying the operation of specified provisions of the *Corporations Act 2001* (Corporations Act) for FFSPs. For

example, the instruments exempt FFSPs from the obligation to hold an Australian financial services license, subject to specified conditions.

The instruments were made under subsections 926A(2), 992B(1) and 1020F(1) of the Corporations Act. Those subsections allow ASIC to exempt persons, entities and classes of persons and entities from provisions of the Corporations Act, or to declare that certain provisions of that Act apply as if modified or varied.

Provisions that modify or exempt persons or entities from the operation of primary legislation may limit parliamentary oversight, and may subvert the appropriate relationship between Parliament and the executive. The committee considers that such measures should ordinarily be included in primary legislation, unless a sound justification for the use of delegated legislation is provided.

In this instance, the committee understands that the measures are considered suitable for delegated legislation because the measures are made under powers given by Parliament, and it may be necessary for ASIC to revise the measures at short notice to keep pace with developments in global wholesale markets. Further, the committee understands that it is considered that if the measures were to be included in primary legislation, this would result in additional cost and complexity for users of the Corporations Act.

However, the committee also understands that it is intended for the measures to remain in force for at least 10 years (until the instruments sunset under the *Legislation Act 2003*). Further, while the committee understands that ASIC intends to conduct a review of the instruments before that time, it is not clear when this review will take place. In this regard, the committee emphasises its longstanding view that provisions which modify or exempt persons or entities from the operation of primary legislation should cease to operate no more than three years after they commence. This is to ensure a minimum degree of regular parliamentary oversight.

The committee therefore considers that the instruments should be amended to specify that they cease to operate three years after they commence. If it becomes necessary to extend the operation of the instruments, this should be done via subsequent legislative instruments that are subject to disallowance and parliamentary scrutiny.

The committee therefore requests your advice whether the instruments could be amended to specify that they cease to operate three years after they commence.

The committee's expectation is to receive a response in time for it to consider and report on the instruments while they are still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-001028

11 JUN 2020

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Fierravanti-Wells~~

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I am writing in response to your letter of 21 May 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting further information relating to:

- the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*; and
- the *ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199* (the Foreign Financial Service Providers Instruments).

The Committee has requested further detailed advice as to whether these instruments could be amended to specify that they cease to operate three years after they commence. I have raised the Committee's concerns with the Australian Securities and Investments Commission (ASIC), and their advice has been incorporated into the following response.

Instruments to commence/become mandatory on 1 April 2022

The Foreign Financial Service Providers Instruments form a new regulatory framework for FFSPs. These instruments will replace existing ASIC instruments (*ASIC Corporations (Repeal and Transitional) Instrument 2016/396* and *ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182*) that provide licensing relief to Foreign Financial Service Providers (FFSPs) providing financial services to wholesale clients in Australia since 2003.

Compliance with the Foreign Financial Service Providers Instruments does not become mandatory until 1 April 2022. ASIC has provided a two-year transitional period for FFSPs to transition to the new regulatory framework. This is provided for through the *ASIC Corporations (Amendment) Instrument 2020/200*. As, for the past 17 years, FFSPs have been operating in Australia through licensing relief provided in the existing ASIC instruments.

If the Foreign Financial Service Providers Instruments were to cease operation on 31 March 2023, the majority of FFSPs would have only had one full year of operating in Australia under the new regulatory framework. FFSPs, their legal representatives and industry associations have engaged in an extensive

consultation process, involving three opportunities to provide feedback on the proposals over the last three years, expending time and resources to engage in that process. To review the Foreign Financial Service Providers Instruments one year into its operations will create undue regulatory burden for industry and for ASIC, and introduce regulatory uncertainty for FFSPs and for Australian investors.

The policy of the relief is to assist Australian investors to have access to financial services provided by FFSPs and this is an important benefit for Australian users of FFSP services such as Australian fund managers and superannuation funds.

Extensive consultation over three years on the new framework for ASIC's oversight of FFSPs

As a result of market regulatory developments since the relief was first granted in 2003 and a number of ongoing international and domestic reviews affecting the cross-border provision of financial services, ASIC commenced a review of the relief framework. This review involved three major rounds of public consultation about the operation of the relief that had been in place since 2003 and its policy proposals. The consultation occurred across a period of three years and involved significant engagement with FFSPs, their legal representatives and industry associations. This extensive engagement over such a long period of time would be undermined if the Foreign Financial Service Providers Instruments were to cease operating after three years.

In September 2016, ASIC published Consultation Paper 268 seeking feedback on its proposal to repeal the limited connection relief (*ASIC Class Order 03/824*) as the law now provides extensive relief for services involving derivatives and foreign exchange contracts. Industry argued that the new provision was not a complete replacement of the limited connection relief as the limited connection relief covered a broader range of financial services and products. In 2017, ASIC extended the limited connection relief to allow time for ASIC to conduct a comprehensive review of the relief framework for FFSPs: see Instrument 2017/182.

In July 2018, ASIC published Consultation Paper 301 seeking feedback on its proposals to repeal the sufficient equivalence relief (*ASIC Corporations (Repeal and Transitional) Instrument 2016/396*) and the limited connection relief (*ASIC Corporations (Foreign Financial Services Providers—Limited Connection) Instrument 2017/182*) and implement a modified Australian Financial Service (AFS) licensing regime for FFSPs.

ASIC considered that entities that carry on a financial services business in Australia should be required to hold an AFS licence and be subject to fundamental conduct obligations in the *Corporations Act 2001* (the Corporations Act). The foreign AFS licensing regime ensures ASIC will have the full range of supervisory and enforcement tools to allow it to more adequately and effectively monitor and supervise the conduct of FFSPs in Australia.

ASIC's relief (*ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*) recognised that there is potential duplicative regulatory burden that may arise from FFSPs complying with two sufficiently equivalent regulatory regimes. ASIC was prepared to exempt FFSPs from some requirements in the Corporations Act where the FFSPs' compliance with the requirements of its home jurisdiction would achieve similar outcomes to compliance with the Australian requirements e.g. financial reporting requirements, client money provisions. Introducing the foreign AFS licensing regime also brings ASIC into step with the regulatory approaches adopted by its major peer regulators for equivalent types of financial services providers.

In relation to the limited connection relief, ASIC has observed that some FFSPs have taken a broad interpretation of the operation of the relief. However, having regard to the licensing exemptions available in subsections 911A(2A) to (2E) of the Corporations Act and taking into account the feedback to ASIC's Consultation Paper 301 on FFSPs, ASIC considered some relief to facilitate access by some types of Australian professional investors to funds management-related financial services provided by FFSPs was necessary. This consultation paper can be found on ASIC's website.

In July 2019, ASIC published Consultation Paper 315 proposing a narrower form of the limited connection relief available to FFSPs that provide funds management type financial services. Taking into account the feedback, ASIC has provided relief for entities that being required to hold an AFS licence for funds-

management related activities subject to some conditions that would allow ASIC to adequately monitor and supervise the FFSP's activities in Australia (*ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199*).

ASIC also provided a two-year transitional period consistent with the transition period it was providing for the foreign AFS licensing regime. This would allow industry time to review their business structures and make arrangements to ensure they can comply with the new requirements. To require the Foreign Financial Service Providers Instruments to be reviewed within three years would undermine the transitional arrangements that were introduced to allow a less disruptive move to the new arrangements.

ASIC needs flexibility to respond if developments or a problem emerges in the relevant overseas market or arrangements under the relief. However, ASIC advises that they do not anticipate any developments in the next 3 years that would cause it to review the Foreign Financial Service Providers Instruments, particularly in view of the two-year transitional period it is providing. ASIC will monitor the operation of the instruments continuously and respond if necessary. ASIC also notes that under the *Legislation Act 2003* all legislative instruments sunset after 10 years which is considered the appropriate period of time to prevent the persistence of antiquated or unnecessary legislative instruments.

Given the work involved in commencing a review of sunseting legislative instruments, ASIC considers 10 years to be the appropriate sunseting period. This view was most recently affirmed in the 2017 Review of the Sunseting Framework under the *Legislation Act 2003*.

Implications of disallowance on FFSPs and Australian investors

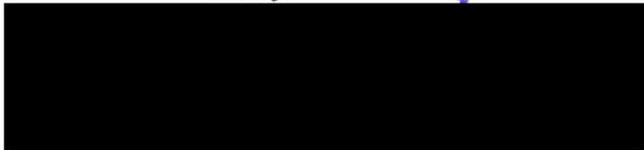
ASIC has advised that the Foreign Financial Service Providers Instruments facilitates the provision of financial services to Australian wholesale clients, including financial services that may not otherwise be available from Australian service providers.

Therefore, ASIC considers that disallowance of the Foreign Financial Service Providers Instruments would mean that for FFSPs that are regulated by a sufficiently equivalent jurisdiction (e.g. UK, Canada, US), these FFSPs will be required to apply for and hold a standard AFS licence, and comply with all the requirements of Chapter 7 of the Corporations Act. ASIC has advised that compliance with the Australian requirements may in some cases conflict with the requirements of the FFSP's home jurisdiction, for example, client money provisions. In such a case, ASIC has advised that it anticipates it will be required to provide relief to these FFSPs, which will result in an inconsistent approach to the regulation of FFSPs adding further costs and complexity to industry and ASIC. Through ASIC's extensive consultation with industry, it identified that the cost of complying with two sets of obligations may result in many FFSPs considering it is no longer economic to provide the relevant financial service to Australian wholesale clients.

For FFSPs that are engaging in inducing conduct, these FFSPs would only be required to hold a standard AFS licence. This would be irrespective of whether the FFSP eventually provides the financial service to the person in Australia. ASIC considers the regulatory burden outweighs the benefit of requiring these types of FFSPs to hold an AFS licence. Industry have indicated that many FFSPs may retreat from the Australian market if they were required to hold an AFS licence to engage in inducing conduct to detriment of Australian investors. Australian investors, particularly our superannuation funds require access to a diverse range of financial products and services, which may only be available from FFSPs.

I trust this information will be of assistance to you.

Yours sincerely



Senator the Hon Jane Hume



AUSTRALIAN
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27 August 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services
and Financial Technology
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CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au

CC: tsrdlos@aph.gov.au; committeescrutiny@treasury.gov.au;
Shelby.Brinkley@treasury.gov.au


Dear Assistant Minister,

**ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees)
Instrument 2020/198 [F2020L00237]**

**ASIC Corporations (Foreign Financial Services Providers—Funds Management
Financial Services) Instrument 2020/199 [F2020L00238]**

Thank you for your response of 11 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instruments, and for your willingness to engage constructively with the committee on this matter.

The committee considered your response at its private meeting on 26 August 2020, and, on the basis of your response, has resolved to seek your further advice about the issues outlined below.

Exemptions from primary legislation

Modification of primary legislation

Parliamentary oversight

Your response indicates that the Australian Securities and Investments Commission (ASIC) has provided a two year transition period for Foreign Financial Service Providers (FFSPs) to transition to the new regulatory framework provided for in the instruments. As such, you have advised that, if the instruments were to cease operation after three years, the majority of FFSPs would have only had one full year of operation in Australia under the new framework. You stated that this may undermine the extensive consultation that was undertaken in the development of the instruments, and will create undue regulatory burden for industry and for ASIC. You further advised that ASIC considers the standard sunset period of 10 years to be appropriate for the instruments.

While acknowledging this advice, the committee reiterates its longstanding scrutiny view that exemptions from, or modifications to, the operation of primary legislation should generally be set out on the face of the relevant primary legislation. However, where such matters are nevertheless included in delegated legislation, the relevant instruments should at least be subject to more regular parliamentary oversight than other legislative instruments. In this regard, the committee generally considers that such instruments should cease to operate no more than three years after they commence.

In this instance, in light of your advice, the committee considers that the instruments should be amended to specify that they cease to operate five years after they commence. Amendments to this effect would ensure that the instruments would be able to operate for three years beyond the transitional period.

The committee therefore requests your further advice as to whether the instruments could be amended to specify that they cease to operate five years after they commence.

The committee's expectation is to receive ministerial responses in time for it to consider and report on instruments while they are still subject to disallowance. As the disallowance periods for these instruments expire on 27 August 2020, the committee has resolved to give a notice of motion to disallow the instruments as a precautionary measure to allow additional time for the committee to consider the further information received.

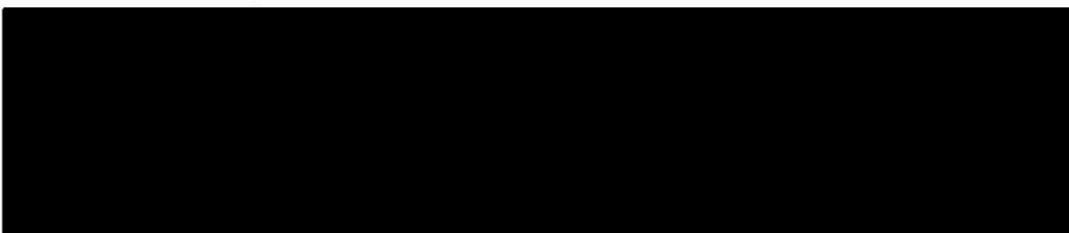
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **10 September 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS20-001852

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite S1.111
Parliament House
CANBERRA ACT 2600

7 SEP 2020

Dear Senator Fierravanti-Wells

I am writing in response to your letter of 27 August 2020, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation, requesting further information in relation to:

- the *ASIC Corporations (Foreign Financial Services Providers – Foreign AFS Licensees) Instrument 2020/198*; and
- the *ASIC Corporations (Foreign Financial Services Providers – Funds Management Financial Services) Instrument 2020/199* (the FFSP Instruments).

The Committee has requested further detailed advice as to whether these instruments could be amended to specify that they cease to operate five years after they commence. I have again raised the Committee's concerns with the Australian Securities and Investments Commission (ASIC), and their advice has been incorporated into this response.

ASIC'S response to the Committee

ASIC remains of the view that the standard 10-year sunset period for legislative instruments provided for under the *Legislation Act 2003* is appropriate for the FFSP instruments, considering:

- the two-year transition period under the instruments; and
- the three major rounds of public consultation on the instruments undertaken over three years.

Early sunset of these instruments will likely create undue regulatory burden for industry. ASIC proposes to review the operation of the FFSP instruments prior to the 10-year sunset if regulatory developments in overseas jurisdictions or market developments suggest a review is required.

Benefits for Australian wholesale clients from the relief

ASIC considers that if the FFSP instruments were to sunset in less than 10 years, some entities would consider leaving the Australian market altogether to the detriment of Australian wholesale clients who access the services and financial products from these foreign entities. ASIC considers that this may have particular implications for superannuation funds and other wholesale Australian clients such as larger corporates involved in fundraising activities.

In relation to Instrument 2020/198, ASIC understands that there are often circumstances where Australian wholesale clients have built long-term relationships with foreign entities that rely on ASIC relief. ASIC advised that maintaining these ongoing relationships assists Australian wholesale clients to effectively manage their investments and risk management strategies, particularly for longer term strategies that may have been developed between the foreign service provider and the Australian wholesale client.

In relation to Instrument 2020/199, ASIC advises that Australian investors may not be able to access more diversified investment holdings if some FFSPs providing services to Australian entities involved in funds management activity, were to withdraw from the Australian market. This is particularly relevant for Australian superannuation funds that are increasingly looking at diversified investments, including offshore investments to generate appropriate returns for Australian investors in order to manage investment risk associated with their investment portfolios.

In facilitating the provision of these financial services to Australian clients, the instruments are deregulatory in nature.

ASIC considers that a large exodus of these foreign entities from the Australian market may also negatively affect competition in Australia's financial services industry. Australian wholesale clients are in effect at a price and product disadvantage compared to the global markets. The ability to readily access financial products and services in a competitive environment is valuable. Uncertainty about how the Australian regulatory regime applies would mean fewer products or services may be made available to Australian wholesale clients. This could result in increased costs of financial services for Australian wholesale clients.

Regulatory uncertainty if instruments were to sunset after five years for Australian clients and foreign entities

ASIC have provided an extensive transition period of two years to allow foreign entities providing services to Australian clients to conduct a holistic assessment of their global and Australian business arrangements and if appropriate, to apply for a licence, have the application assessed and issued by ASIC. These foreign entities require regulatory certainty about whether to continue their operations in Australia and how they can structure their services to Australian clients.

Relevant to this issue of certainty is ASIC's statutory objective requiring them to 'maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs and the efficiency and development of the economy' under paragraph 1(2)(a) of the *Australian Securities and Investments Commission Act 2001*.

If the FFSP instruments were required to sunset five years after commencing, ASIC believes that some foreign entities may consider it uneconomic to review their operations or to make substantial changes to their business for a regulatory framework that would last only three years after the transition period. Uncertainty about what follows at the end of the 5-year period may push these entities to consider withdrawing from the Australian market.

Industry has highlighted to ASIC the significance of cost benefit considerations in deciding whether to continue to provide services into Australia. Some foreign entities are taking active steps now to apply for a foreign AFS licence e.g. obtaining legal advice, building IT systems and processes and developing compliance frameworks. This assessment generally requires a significant investment.

Given the nature of the exemptions ASIC is providing through the FFSP instruments and the need for regulatory certainty for foreign entities and Australian wholesale clients, ASIC considers the exemptions will be necessary for the maximum 10-year period.

Disallowance could disrupt Australian markets

If the FFSP instruments were disallowed, ASIC anticipates that some FFSPs would use the two-year transition period to wind down their Australian operations instead of maintaining or increasing their activity in Australia. ASIC advises that this could cause significant disruption to our financial markets and add a possible impediment to Australia's path to economic recovery from the effects of the coronavirus.

Some entities, including a number of the global investment banks, have established significant onshore operations, employ a substantial number of Australian employees and use Australian infrastructure.

The Australian market and economy also use some of these large financial institutions and their balance sheets to underwrite equity and debt capital market activity for Australian entities. Another example of an important activity undertaken in Australia is market making. Market makers quote prices and provide depth and liquidity to Australian markets. A number of foreign market makers rely on ASIC's relief to operate in Australia. These market makers could exit the Australian market if the FFSP instruments were disallowed. This could lead to potentially increasing volatility and greater spreads in pricing of traded financial products. The overall effect is that Australian markets have the potential to become more inefficient if foreign entities were to withdraw.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume



AUSTRALIAN
SENATE

**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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8 October 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
Parliament House
CANBERRA ACT 2600

Via email: Senator.Hume@aph.gov.au
CC: shelby.brinkley@treasury.gov.au

Dear Assistant Minister,

**ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees)
Instrument 2020/198 [F2020L00237]**

**ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial
Services) Instrument 2020/199 [F2020L00238]**

Thank you for your response of 7 September 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instruments.

The committee considered your response at its private meeting on 7 October 2020. On the basis of your advice, the committee has concluded its examination of the instruments.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation