



ASIC
Australian Securities &
Investments Commission

REGULATION IMPACT STATEMENT

Regulatory framework for foreign financial services providers

March 2020

About this Regulation Impact Statement

This Regulation Impact Statement (RIS) addresses ASIC's proposals for implementation of a new regulatory framework for foreign financial services providers (FFSPs) that wish to provide financial services to wholesale clients or professional investors in Australia.

What this Regulation Impact Statement is about

- 1 This Regulation Impact Statement (RIS) addresses ASIC's proposals for:
 - (a) repeal of relief from the requirement to hold Australian financial services (AFS) licence by some types of foreign financial services providers (FFSPs) that provide financial services to wholesale clients in Australia;
 - (b) introduction of a foreign AFS licensing regime for the provision of financial services to wholesale clients by FFSPs regulated by a sufficiently equivalent overseas regulatory authority; and
 - (c) providing relief to FFSPs from the requirement to hold an AFS licence where it is only carrying on a financial services business in Australia because it engages in conduct that induces or is likely to induce certain types of professional investors defined as 'eligible Australian users' to use the funds management financial services it provides or can provide.

- 2 In developing our final position, we have considered the regulatory and financial impact of our proposals. We are aiming to strike an appropriate taking into account:
 - (a) appropriate regulation of entities operating within the Australian financial system;
 - (b) minimising regulatory burden impacting FFSPs operating in both Australia and sufficiently equivalent jurisdictions;
 - (c) maintaining, facilitating and improving the performance of the financial system and entities in it;
 - (d) promoting confident and informed participation by investors and consumers in the financial system;
 - (e) administering the law effectively and with minimal procedural requirements; and
 - (f) ensuring the competitiveness of Australian financial services providers in the global marketplace.

- 3 This RIS sets out our assessment of the regulatory and financial impacts of our proposed policy for FFSPs and our achievement of this balance. It deals with:
 - (a) the likely compliance costs;
 - (b) our consideration of industry feedback on our proposals;
 - (c) the likely effect on competition; and
 - (d) other impacts, costs and benefits.

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A Introduction

Background

4 If you carry on a financial services business in Australia, you must hold an Australian financial services (AFS) licence, unless relief is granted by ASIC or an exemption applies.

See: [Regulatory Guide 121](#) *Doing financial services business in Australia* (RG 121) for further information about when you are carrying on a financial services business in Australia.

5 Under s911A(2)(h), 911A(2)(l) and 926B of the Corporations Act 2001 (Corporations Act), we can exempt an FFSP from the requirement to hold an AFS licence if it meets certain requirements.

6 Since 2003, ASIC has given two types of relief to foreign financial services providers (FFSPs) of financial services to wholesale clients in Australia:

- (a) ‘sufficient equivalence relief’; and
- (b) ‘limited connection relief’.

Note: In this paper, we refer to these two types of relief collectively as ‘the FFSP relief’.

Australian Financial Services Licensing Regime

7 If an entity is required to hold an AFS licence to provide financial services to Australian clients, they are required to comply with obligations under the Corporations Act and their licence conditions. An AFS licensee remains ultimately responsible for all the financial services provided under its AFS licence, regardless of how those services are provided.

8 AFS licensees must comply with the general obligations under s912A and 912B, including the following:

- (a) do all things necessary to ensure that the financial services covered by the AFS licence are provided efficiently, honestly and fairly;
- (b) have adequate arrangements in place to manage its conflicts of interest;
- (c) comply with AFS licence conditions;
- (d) comply with financial services laws; and
- (e) take reasonable steps to ensure that your representatives comply with the financial services laws.

9 AFS licensees are also required to comply with various conduct obligations, particularly in Part 7.6 of the Corporations Act, including:

- (a) notifying ASIC of significant breaches or likely breaches of certain AFS licensee obligations;
 - (b) assisting ASIC in our regulatory oversight of the licensee;
 - (c) complying with certain procedures when dealing with clients' money and other property; and
 - (d) keeping financial records and preparing and lodging financial statements.
- 10 AFS licensees that provide financial services or offer financial products to retail clients in Australia will also need to comply with additional disclosure obligations in the Corporations Act.

Sufficient equivalence relief

- 11 In 2003 and 2004, we made ASIC instruments that conditionally exempted FFSPs from the requirement to hold an AFS licence when providing specified financial services if:
- (a) the financial services are provided to wholesale clients only;
 - (b) the provision of the financial services by the FFSP is regulated by an overseas regulatory authority;
 - (c) the regulatory regime overseen by the overseas regulatory authority is sufficiently equivalent to the Australian regulatory regime;
 - (d) there are effective cooperation arrangements in place between the overseas regulatory authority and ASIC; and
 - (e) the FFSP meets all the relevant conditions of relief contained in the relevant ASIC instruments.
- 12 This relief is known as the 'sufficient equivalence relief'. Until recently, it was contained in seven different ASIC class orders:
- (a) [CO 03/1099] *UK regulated financial service providers*;
 - (b) [CO 03/1100] *US SEC regulated financial service providers*;
 - (c) [CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*;
 - (d) [CO 03/1102] *Singapore MAS regulated financial service providers*;
 - (e) [CO 03/1103] *Hong Kong SFC regulated financial service providers*;
 - (f) [CO 04/829] *US CFTC regulated financial services providers*; and
 - (g) [CO 04/1313] *German BaFin regulated financial service providers*.
- 13 In 2016, we also made ASIC Corporations (CSSF-Regulated Financial Services Providers) Instrument 2016/1109, which granted sufficient equivalence relief for entities regulated in Luxembourg.

- 14 These instruments were made with the aim of attracting additional investment and liquidity to Australian markets by addressing the potential duplicated regulatory burden arising from compliance with Australia’s regulatory regime where FFSPs were already subject to sufficiently equivalent regimes to the Australian regime in their home jurisdictions.
- 15 In September 2016, we made [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#), which temporarily extended the sufficient equivalence relief for FFSPs to allow us time to review the policy settings underlying the relief. This instrument sunsets on 31 March 2020.

Note: ASIC Corporations (Amendment) Instrument 2020/200 will preserve the effect of the [ASIC Corporations \(Repeal and Transitional\) Instrument 2016/396](#) for a further two years until 31 March 2022.

FFSP financial services permitted in Australia

- 16 Table 1 outlines the relevant financial services that FFSPs, that have notified ASIC of their reliance on one of the class orders above (sufficient equivalence FFSPs), are able to provide to wholesale clients in Australia without holding an AFS licence.

Table 1: Activities permitted in Australia under the sufficient equivalence relief

Sufficiently equivalent jurisdiction	ASIC instrument relief or individual relief	Financial service and/or product for which relief is available
Germany—where regulated by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)	Class Order [CO 04/1313] <i>German BaFin regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)	The relief applies to providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in respect of the following financial products: <ul style="list-style-type: none"> • derivatives; • foreign exchange contracts; • securities; • debentures, stocks or bonds issued by a government; • managed investment products; • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act; • deposit-taking facilities that are not deposit products; or • facilities through which a person makes non-cash payments.

Sufficiently equivalent jurisdiction	ASIC instrument relief or individual relief	Financial service and/or product for which relief is available
<p>Hong Kong—where regulated by the Securities and Futures Commission</p>	<p>Class Order [CO 03/1103] <i>Hong Kong SFC regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<p>The relief applies to providing financial product advice, dealing in a financial product or making a market for a financial product in respect of the following financial products:</p> <ul style="list-style-type: none"> • derivatives; • foreign exchange contracts; • securities; • debentures, stocks or bonds issued by a government; • managed investment products; or • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act.
<p>Luxembourg—where regulated by the Commission de Surveillance du Secteur Financier</p>	<p>For Luxembourg—ASIC Corporations (CSSF– Regulated Financial Services Providers) Instrument 2016/1109</p>	<p>The relief applies to providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in respect of the following financial products:</p>
<p>United Kingdom—where regulated by the Financial Conduct Authority</p>	<p>For the United Kingdom—Class Order [CO 03/1099] <i>UK regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<ul style="list-style-type: none"> • eligible deposit products; • derivatives; • foreign exchange contracts; • securities; • debentures, stocks or bonds issued by a government; • managed investment products; or • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act.
<p>Singapore—where regulated by the Monetary Authority of Singapore</p>	<p>For Singapore—Class Order [CO 03/1102] <i>Singapore MAS regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<p>The relief applies to providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in respect of the following financial products:</p>
<p>United States—where regulated by the Securities Exchange Commission</p>	<p>For the United States—Class Order [CO 03/1100] <i>US SEC regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<ul style="list-style-type: none"> • derivatives; • foreign exchange contracts; • securities; • debentures, stocks or bonds issued by a government; • managed investment products; or • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act.

Sufficiently equivalent jurisdiction	ASIC instrument relief or individual relief	Financial service and/or product for which relief is available
<p>United States—where regulated by:</p> <ul style="list-style-type: none"> – the Federal Reserve; and – the Office of the Comptroller of Currency 	<p>Class Order [CO 03/1101] <i>US Federal Reserve and OCC regulated financial service providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<p>The relief applies to providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in respect of the following financial products:</p> <ul style="list-style-type: none"> • eligible deposit products; • derivatives; • foreign exchange contracts; • securities; • facilities for making non-cash payments; • debentures, stocks or bonds issued by a government; • managed investment products; or • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act.
<p>United States—where regulated by the Commodity Futures Trading Commission</p>	<p>Class Order [CO 04/829] <i>US CFTC regulated financial services providers</i> (relief temporarily extended by ASIC Corporations (Repeal and Transitional) Instrument 2016/396)</p>	<p>The relief applies to providing financial product advice, dealing in a financial product, making a market for a financial product or providing a custodial or depository service in respect of the following financial products:</p> <ul style="list-style-type: none"> • derivatives; • foreign exchange contracts; • managed investment products; or • interests in a managed investment scheme that is not required to be registered under Ch 5C of the Corporations Act.
<p>Denmark</p> <p>Sweden, assessed as similar to the relief given to Luxembourg</p> <p>France</p> <p>Brazil</p>	<p>Individual relief</p>	<p>The relief is tailored for the individual applicant.</p>

17 If not for the sufficient equivalence relief, FFSPs that provide the financial services outlined in Column 3, Table 1 in a manner that would constitute carrying on a financial services business in Australia would have needed to hold an AFS licence, and thus be subject to fundamental licensing obligations to ensure services are provided efficiently, honestly and fairly and all the other obligations that apply to licensees.

Foreign AFS licensing regime

- 18 In [Consultation Paper 301](#) *Foreign financial services providers* (CP 301), we consulted on proposals to repeal the sufficient equivalence relief and implement a foreign AFS licensing regime for FFSPs that:
- (a) are authorised in a sufficiently equivalent overseas regulatory regime to provide financial services to wholesale clients; and
 - (b) wish to provide those financial services to wholesale clients in Australia.
- 19 A foreign AFS licensee is exempt from certain provisions in Ch 7 of the Corporations Act on the basis that it is subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the exempted provisions. This approach seeks to minimise regulatory burden associated with complying with two similar obligations. Table 2 sets out the exempted provisions.

Table 2: Corporations Act provisions that foreign AFS licensees are exempt from under ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198

Provision	Description of exempted provision
s912A(1)(b), to the extent it requires compliance with reg 7.6.04(1)(a) and (d)	Obligations about notifying ASIC of events that may cause a material adverse change to financial position and maintaining records of training for representatives
s912A(1)(d)	Have adequate resources
s912A(1)(e)	Maintain the competence to provide the financial services
s912A(1)(f)	Ensure that representatives are appropriately trained
s912AAC	Meet minimum standards for custodial or depository service providers
s912AAD	Have agreements with sub-custodians to hold custodial property
s912AC	Have adequate financial resources for custodial or depository service providers
All the provisions in Subdivs A and B, Div 2 of Pt 7.8, and Div 3 of Pt 7.8	Obligations about handling client money and client property when the sufficiently equivalent protections in the overseas regulatory regime apply to client money paid to, and client property held by, the foreign AFS licensee from a wholesale client in Australia relating to the exempt financial service
s991E	Obligations of licensees in relation to dealings with non-licensees (to the extent the financial product transaction is entered into or arranged outside Australia)
s991F	Dealings involving employees of licensees—if the foreign AFS licensee is only carrying on a financial services business in Australia because it carries on the business of providing eligible financial services under the instrument in Australia

Provision	Description of exempted provision
s1017E	Obligations about dealing with money received for a financial product before the product is issued when sufficiently equivalent protections in the overseas regulatory regime apply to the money received from wholesale clients in Australia relating to the exempt financial service

Note: Foreign AFS licensees may also have the benefit of relief from certain financial reporting and record-keeping obligations under [ASIC Corporations \(Financial Licensees and ADIs\) Instrument 2016/186](#).

- 20 Importantly, the foreign AFS licensing regime will apply fundamental conduct obligations in the Corporations Act to foreign AFS licensees, such as the requirement to provide financial services efficiently, honestly and fairly (see s912A(1)(a)).
- 21 It will also provide ASIC with a number of supervisory and enforcement tools to allow us to more adequately and effectively monitor and supervise the conduct of FFSPs in Australia and therefore to maintain market integrity and investor protection for Australian markets. These tools include a number of provisions in the Corporations Act, such as:
- (a) our directions power in s912C;
 - (b) the breach reporting requirements in s912D;
 - (c) the requirement to give us reasonable assistance during surveillance checks in s912E; and
 - (d) the remedies and penalties available to us against AFS licensees in ss 914A, 915A, 915B and 1311.
- 22 A streamlined application process will apply to applications for a foreign AFS licence. This recognises that foreign AFS licensees are authorised under a sufficiently equivalent overseas regulatory regime to provide the relevant financial services (or substantially equivalent financial services) and are expected to be complying with the relevant obligations imposed by the foreign regime for the financial services they provide.

Note: See [Regulatory Guide 176](#) *Foreign financial services providers* (RG 176) for further guidance about the assessment process.

Limited connection relief

- 23 In 2003, we made ASIC 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 when the person providing the financial services is:
- (a) not in this jurisdiction (i.e. Australia);
 - (b) dealing only with wholesale clients; and
 - (c) carrying on a financial services business only because the person is engaging in conduct that is intended to induce people in Australia to use

the financial services it provides or is likely to have that effect (see s911D(1)).

- 24 This relief is known as ‘limited connection relief’. The relief was granted to allow an FFSP only engaged in conduct that may induce or is likely to induce wholesale clients in Australia from holding an AFS licence.
- 25 The relief was made to ensure that infrequent, arms-length transactions by FFSPs with Australian wholesale clients would not require a licence where there is a limited connection between the FFSP and Australia. It was also largely made due to 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 limited connection relief, FFSPs 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.
- 26 In 2005 a regulation was introduced to explicitly exempt person outside Australia that provide financial services to professional investors in Australia from holding a licence when engaging in certain activities involving derivatives, foreign exchange contracts and certain products (see s911A(2A)–(2E) as inserted by reg 7.6.02AG).
- 27 Section 911D of the Corporations Act states that a person is considered to be carrying on a financial services business in this jurisdiction if, in the course of the person carrying on a business, the person engages in conduct that is:
- (a) intended to induce people in this jurisdiction to use the financial services the person provides; or
 - (b) likely to have that effect, whether or not conduct is intended, or is likely to have that effect in other places as well.
- 28 We made [ASIC Corporations \(Foreign Financial Services Providers—Limited Connection\) Instrument 2017/182](#) which temporarily extended the effect of the limited connection relief until 31 March 2020. FFSPs relying on the limited connection relief may be able to rely upon the funds management financial services in limited circumstances. This instrument will be extended again until 31 March 2022 to provide transitional relief to FFSPs.

Note: See ASIC Corporations (Amendment) Instrument 2020/200 which amends [ASIC Corporations \(Foreign Financial Services Providers—Limited Connection\) Instrument 2017/182](#) to preserve the effect of the limited connection relief for a further two years until 31 March 2022.

Activities permitted in Australia

- 29 Under the limited connection relief, FFSPs are exempt from the requirement to hold an AFS licence only to engage in conduct that is ‘intended to induce

people' in Australia (or if it engages in conduct that is likely to induce people in Australia) to use the financial services it provides.

- 30 Conduct that amounts to inducing includes attempts to persuade, influence or encourage a particular person to become a client. It could, for example, include mass marketing campaigns. See Table 2 in [RG 121](#) for further information on what may or may not constitute 'inducing'.

Funds management relief

- 31 In CP 315, we consulted on proposals to provide relief to an FFSP from the requirement to hold an AFS licence if the FFSP is only carrying on a financial services business in this jurisdiction because of the operation of s911D of the Corporations Act for the provision of 'funds management financial services' to certain types of professional investors in Australia.
- 32 The funds management relief may facilitate the provision of funds management financial services by FFSPs to certain types of professional investors in Australia by service providers not holding an AFS licence, where those financial services:
- (a) are not provided in this jurisdiction (i.e. they are provided offshore); or
 - (b) when considered together with the FFSP's other activities in Australia and disregarding the operation of s911D, do not constitute carrying on a financial services business in Australia.
- 33 An FFSP that seeks to have the benefit of the funds management relief is subject to the following requirements:
- (a) the FFSP must provide written confirmation to ASIC that:
 - (i) the FFSP intends to rely on the funds management relief;
 - (ii) the FFSP has identified its home jurisdiction and confirms that it would not contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide those funds management financial services in its home jurisdiction;
 - (iii) there is a regulator in the FFSP's home jurisdiction that is a signatory to the International Organisation of Securities Commission's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information;
 - (iv) if requested, the FFSP will assist ASIC in relation to the disclosure of information relating to the FFSP between ASIC and the overseas regulator in its home jurisdiction;
 - (v) if requested, the FFSP will provide a written statement to ASIC containing specific information about the financial services provided by the FFSP in Australia; and

- (vi) if requested, the FFSP will assist ASIC in relation to whether the FFSP is complying with the financial services laws and in relation to the performance of ASIC's other functions; and
- (vii) the FFSP has an agent for service appointed and includes the name and address of the agent for service; and
- (b) the FFSP does not have a place of business in this jurisdiction; and
- (c) if the FFSP's home jurisdiction changes, it has notified ASIC within 30 days after the day the home jurisdiction changes.

34 An FFSP that relies on the funds management relief must also:

- (a) not fail to have an agent for service for any consecutive period of 10 business days; and
- (b) provide ASIC with written details of an agent ceasing to be an agent for service within 10 business days and any change to the name or address of the agent for service within 10 business days of the change.

Note: See Section F of [RG 176](#) for further information on the funds management relief.

35 FFSPs that rely on the funds management relief to provide funds management financial services in Australia can only market their services to certain types of professional investors ('eligible Australian users'). Eligible Australian users are:

- (a) a responsible entity of a registered scheme;
- (b) a person in Australia who is a trustee of:
 - (i) a superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), with net assets of at least A\$10 million;
 - (ii) an approved deposit fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (iii) a pooled superannuation trust, within the meaning of the SIS Act, with net assets of at least A\$10 million;
 - (iv) a public-sector superannuation fund, within the meaning of the SIS Act, with net assets of at least A\$10 million;
- (c) a trustee of a wholesale trust who holds an AFS licence or would be required to hold an AFS licence but for ASIC Corporations (Wholesale Equity Scheme Trustees) Instrument 2017/849;
- (d) a body regulated by APRA other than a trustee referred to in paragraphs (b) and (c); and
- (e) an exempt public authority, as defined in s9 of the Corporations Act other than local councils.

Note: An exempt public authority is defined in s9 as a public authority or instrumentality or agency of the Crown in right of the Commonwealth, in right of a state

or in right of a territory, that is a body corporate incorporated in Australia or an external territory.

- 36 Table 3 outlines ASIC’s proposed regulatory framework for FFSPs, comprising of:
- (a) funds management relief, which will replace the limited connection relief; and
 - (b) foreign AFS licensing regime, which will replace the sufficient equivalence relief.

Table 3: The regulatory framework for FFSPs

Regulatory arrangement	Description	For more information
Funds management relief	An FFSP is exempt from the requirement to hold an AFS licence where the FFSP is only carrying on a financial services business in this jurisdiction because of the operation of s911D in relation to the provision of ‘funds management financial services’ to certain types of professional investors in Australia, subject to conditions that apply to the operation of the relief.	See Section F of RG 176 and ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199.
Foreign AFS licence	An FFSP that is licensed or authorised (as applicable) by an overseas regulatory authority that regulates the FFSP under a sufficiently equivalent regime (as assessed by ASIC) may be eligible to apply for a foreign AFS licence to provide specified financial services to wholesale clients in Australia. Foreign AFS licensees are exempt from certain provisions in Ch 7 of the Corporations Act on the basis that they are subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the Australian provisions from which we have issued an exemption.	See Sections B–D of RG 176 and ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198.
Standard AFS licence	This requires an FFSP to comply with all the general obligations under s912A, and all the applicable provisions of the Corporations Act and the Corporations Regulations. This would apply to an FFSP that is carrying on a financial services business in Australia and is not able to come within one of the other regulatory arrangements listed in this table or any other available exemption (e.g. the exemptions under reg 7.6.02AG).	See the AFS Licensing Kit and related regulatory guides.

Source: [RG 176](#)

Assessing the problem

- 37 During the temporary extension for the FFSP relief, we conducted a comprehensive review of the underlying policy settings for the relief.
- 38 The FFSP relief is based on our current guidance in [Regulatory Guide 54 Principles for cross-border financial regulation](#) (RG 54). Our policy in [RG 54](#) seeks to strike an appropriate balance between cross-border investment facilitation, market integrity and investor protection.
- 39 Recognising the approach we have outlined in [RG 54](#), we now consider the current relief framework for FFSPs no longer strikes the appropriate balance between cross-border investment facilitation, market integrity and investor protection, and have identified issues with the current relief framework set out below.

Misconduct in wholesale markets

- 40 ASIC investigates market misconduct and acts to ensure Australia's financial markets are fair and efficient. One of our focus areas that we have identified in ASIC's [Corporate Plan](#) as having the potential to cause the most significant harms include market misconduct that threatens to create uncertainty and erode investor confidence. Widespread misconduct may mean that market prices and activity may not be relied on to reflect genuine forces of supply and demand. Serious misconduct can also have the effect of undermining key objectives of financial regulation i.e. reducing potential systemic risk and securing fair and efficient markets.

Example: *ASIC v Westpac* ([18-341MR](#))

In 2016, ASIC commenced civil penalty proceedings in the Federal Court against Westpac Banking Corporation (Westpac), alleging that Westpac traded in an unconscionable manner between 2010 and 2012 and created an artificial price and a false appearance with respect to the market for certain financial products that were priced or valued off the Bank Bill Swap Rate (BBSW).

In November 2018, the Federal Court of Australia ordered Westpac pay a pecuniary penalty of \$3.3 million for contravening s12CC of the *Australian Securities and Investments Commission Act 2001* through its involvement in setting BBSW in 2010. This court order follows Justice Beach's judgment which was delivered on 24 May 2018.

His Honour found in his judgment that Westpac had inadequate procedures and training and contravened its financial services licensee obligations under section 912A(1)(a), (c), (ca) and (f) of the Corporations Act.

- 41 We recognise that poor conduct in wholesale markets can have far reaching impact throughout the financial system, passing on risks and detriment to retail consumers and eroding trust and confidence in Australia's financial markets.
- 42 Risks cause by misconduct in wholesale markets may feed through to retail consumers who rely on products and services originating or sold in wholesale markets. For example, the way a bank deals with a professional investor in the wholesale market such as a superannuation fund could ultimately impact on the retail consumers whose funds and savings comprise the investment funds of those professional clients.
- 43 Some of the characteristics of wholesale markets such as its decentralised nature and the size and organisational complexity of participants may present a number of challenges in terms of deterring, identifying and sanctioning misconduct. For example, the [IOSCO task force report on wholesale market conduct \(June 2017\)](#) found that there is a risk that anti-competitive behaviour and collusive behaviour is heightened in wholesale markets with a small number of large providers and no centralised oversight.
- 44 Decentralised market structures mean that ASIC, as a market regulator cannot necessarily rely on a central exchange to obtain market data or undertake regulatory surveillance or other regulatory functions. We therefore need the regulatory tools to oversee the activities of these participants when engaging with clients in Australia to be able to effectively oversee their activities in Australia in the same way that we oversee the activities of AFS licensees providing financial services to Australian clients.
- 45 Wholesale markets are often opaque to other market participants. Market participants may face difficulties in obtaining relevant information and data on trading interests and prices. A lack of transparency can increase misconduct risk by creating opportunities for dishonest market participants to engage in abusive practices. For example, it could facilitate abuses such as front running and the inappropriate disclosure of client trading information by individuals. ASIC has seen firsthand in our investigations into the manipulation of foreign exchange benchmarks in the wholesale markets that poor practices may undermine confidence in the market price discovery process and increase execution costs.
- Note: See ASIC [Report 525](#) *Promoting better behaviour: Spot FX* (May 2017) and [Report 652](#) *Wholesale FX practices in Australia* (December 2019) for further information on ASIC's observations about conduct in wholesale markets.
- 46 The general approach in the past to wholesale conduct was, broadly, to assume that wholesale clients were sufficiently sophisticated to be able to protect their own interests. ASIC's investigations and regulatory action including those taken in the Goldsky matter below have highlighted that less sophisticated wholesale investors are exposed to potential financial losses

and where FFSPs are not holding an AFS licence, there are limited options to take enforcement action against their conduct.

Note: There are various tests in the Corporations Act to determine whether a person is a wholesale client, resulting in a wide range of different types of wholesale clients. On one end of the spectrum, is a person or entity that has obtained a qualified accountant's certificate stating they have net assets of at least \$2.5 million or a gross income for each of the last two financial years of at least \$250,000 are treated as wholesale clients. On the other, are AFS licensees and large, sophisticated financial services firms such as global investment banks.

- 47 This is also why ASIC in the funds management relief has limited access to funds management financial services provided to a subset category of professional investors which we have termed 'eligible Australian users'. This ensures that those requiring funds management financial services are limited to more sophisticated investors that are directly in need of funds management financial services. These people are able to protect their own interests when they are provided services from FFSPs that do not hold an AFS licence.
- 48 ASIC's revised approach to the regulation of FFSPs is to ensure that we are equipped with the full range of tools and powers afforded to us by the Corporations Act so that we may intervene in wholesale markets not just where risks may be transferred to retail consumers, but also if there is conduct which could undermine trust and confidence of the integrity of the Australian financial markets.

Misuse of the sufficient equivalence relief

- 49 We have observed that some FFSPs apply to rely or use the sufficient equivalence relief to avoid the AFS licensing regime to carry on a financial services business in Australia without the appropriate level of supervision. The sufficient equivalence relief, as currently drafted, allows an Australian-based 'FFSP' to obtain an authorisation as a service provider from a sufficiently equivalent overseas regulatory authority even though it does not carry on a financial services business in that overseas jurisdiction.
- 50 One of the conditions of the sufficient equivalence relief requires the FFSP to provide each of the financial services in Australia in a manner which would comply, so far as is possible, with the home jurisdictions' regulatory requirements if the financial service were provided in the home jurisdiction in like circumstances.
- 51 The condition acts as a proxy to ensure that FFSPs that carry on a financial services business in their home jurisdiction are subject to some kind of regulatory oversight.
- 52 In 2018 and 2019, ASIC excluded two FFSPs from relying on the sufficient equivalence relief because we were not satisfied that the FFSP applicant was

providing financial services in the US (home jurisdiction) that were subject to any kind of overseas regulatory oversight based upon the information and documents provided to ASIC in support of the application.

- 53 These entities sought to exploit regulatory arbitrage by registering as a service provider in the US to avoid the Australian licensing regime. Without the sufficient equivalence relief, these entities would be required to obtain a full AFS licence if they wanted to provide financial services in Australia.

Example: *ASIC v Goldsky (19-109MR)*

Goldsky Asset Management LLC, a US-incorporated company, relied on the sufficient equivalence relief to provide financial services in Australia without a licence on the basis they were subject to equivalent regulation by the SEC. While relying on the sufficient equivalence relief, Goldsky and its related entities operated an unregistered managed investment scheme that raised more than \$16 million from more than 50 wholesale investors. A sole director and shareholder of the Goldsky-related entities used those funds for his own personal use.

The SEC filed charges against Goldsky for making false and misleading statements about its business in filings with the Commission and on its website.

Wholesale investors in the Goldsky funds have been unable to recover their money to date. Approximately \$25 million of investor funds is outstanding.

ASIC action under the current relief

In June 2018, ASIC excluded Goldsky Asset Management LLC from relying on the sufficient equivalence relief for breaching a condition of the relief i.e. failing to notify ASIC of a significant enforcement action brought against it by the SEC. In addition, ASIC has also:

- obtained orders placing several Goldsky-related entities into liquidation and freezing the assets of the sole director Mr Kenneth Grace; and
- obtained declarations that several Goldsky-related entities breached s911A of the Corporations Act by holding investor funds.

Liquidators of the Goldsky-related entities have publicly examined Mr Grace to potentially identify and recover assets for investors. ASIC is continuing its investigation into the affairs of Mr Grace.

ASIC's approach if under the foreign AFS licensing regime

Under the foreign AFS licensing regime, the Goldsky-related entities would have been required to hold a foreign AFS licence to carry on a financial services business in Australia. The foreign AFS licence would exempt

Goldsky from certain provisions of Chapter 7 of the Corporations Act on the basis that they were subject to similar regulatory requirements in the US.

Had Goldsky been a foreign AFS licensee, ASIC would have approached the matter differently, and it is likely that a referral to ASIC's enforcement team for criminal investigation would have occurred earlier. For example, as a foreign AFS licensee:

- Goldsky would have been subject to the fundamental licensing obligations under s912A. ASIC became aware very early in the course of our surveillance that Goldsky's conduct would (if it had been committed by a foreign licensee rather than an FFSP) have constituted a breach s912A(1)(a) i.e. that the licensee must take all steps necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly, and a breach of s912A(1)(c), i.e. compliance with financial services laws. This would have led to an earlier investigation, and earlier use of our injunctive powers under s1323 of the Corporations Act and investigation powers under s19 of the *ASIC Act*.
- Goldsky would have been subject to the requirement to respond to notices under s912C of the Corporations Act and would have been subject to prosecution as well as a licence suspension or cancellation if it had not complied. If ASIC had access to this power, we would have used them earlier in the course of our surveillance. As Goldsky was an FFSP, we had to rely on the largely untested notice powers set out in the sufficient equivalence relief instruments, and the only penalty available for non-compliance was loss of relief.
- Goldsky would have been subject to the requirement to provide reasonable assistance to ASIC under section 912E of the Corporations Act. If ASIC had access to this power, we would have been able to obtain documents from Goldsky directly.

If Goldsky held the appropriate AFS licence to carry on a financial services business in Australia, and ASIC had access to the powers it would have had against a licensee, investor losses may potentially have been much more limited.

ASIC may have been able to prevent Goldsky and its related entities from fundraising at an earlier stage and we would have been able to freeze existing investor funds held by Goldsky at an earlier stage.

Non-compliance with conditions of the sufficient equivalence relief by FFSPs

- 54 ASIC has also encountered non-compliance with the sufficient equivalence relief by FFSPs providing investment banking services and we only had limited powers to address the effect of the non-compliance. In 2015 and 2017 respectively, we accepted enforceable undertakings from three JP Morgan FFSPs and three Barclays FFSPs following concerns about significant and repeated failures to comply with the conditions of the sufficient equivalence relief.

Note: See [Media Release \(15-339MR\)](#) ASIC accepts enforceable undertaking from JP Morgan entities (19 November 2015) and [Media Release \(17-077MR\)](#) ASIC accepts enforceable undertaking from Barclays entities (23 March 2017).

- 55 Under the sufficient equivalence relief, among other obligations, the FFSP must provide written disclosure (disclosure requirement) to all persons to whom the financial services are provided in this jurisdiction (before the financial services are provided) containing prominent statements to the effect that:
- (a) the FFSP is exempt from the requirement to hold an AFS licence under the Corporations Act in respect of the financial services; and
 - (b) the FFSP is authorised and regulated by the relevant regulatory authority under the relevant foreign laws, which differ from Australian laws.

J.P. Morgan FFSPs

- 56 In 2015, ASIC entered into a [court enforceable undertaking](#) with three J.P. Morgan FFSPs—J.P. Morgan Securities PLC, J.P. Morgan Securities (Asia Pacific) Ltd, and J.P. Morgan Securities LLC—due to breaches of the disclosure requirement affecting a large number of wholesale clients over an extended period of time.
- 57 Between 2005 and 2014, J.P. Morgan and its related entities reported seven instances of breaches of the disclosure requirement outlined in paragraph 55, affecting a range of 16 wholesale clients to 518 wholesale clients in each instance. The last breach reported in 2014, which affected 518 wholesale clients demonstrated a material and systemic weakness in the controls that J.P. Morgan had in place to ensure compliance with the disclosure requirement.
- 58 The J.P. Morgan FFSPs have complied with the terms of the court enforceable undertakings that ASIC obtained from those entities.

Barclays FFSPs

- 59 In 2017, ASIC entered into a [court enforceable undertaking](#) with three Barclays FFSPs—Barclays Capital Inc., Barclays Capital Asia Limited, and Barclays Capital Securities Limited—for breaches of the disclosure requirement under the sufficient equivalence relief affecting a large number of wholesale clients over an extended period of time.
- 60 In late 2013, each of the Barclays FFSPs became aware of a breach of the disclosure requirement. These breaches were not reported to ASIC and a remediation program was initiated in 2014. The remediation program was ineffective resulting in continued non-compliance with the disclosure requirement.

- 61 In December 2015, the Barclays FFSPs reported to ASIC a breach of the disclosure requirement. Further, these entities were not able to confirm from its internal systems and records whether the disclosure requirement had been met and consequently were unable to demonstrate compliance with the disclosure requirement since each entity commenced reliance on the sufficient equivalence relief.
- (a) Barclays Capital Inc reported a breach estimated to affect 827 Australian wholesale clients.
 - (b) Barclays Capital Asia Limited reported a breach estimated to affect 46 Australian wholesale clients.
 - (c) Barclays Capital Securities Limited reported a breach estimated to affect 80 Australian wholesale clients.
- 62 ASIC considered that the breaches reported by the Barclays FFSPs exposed material and systemic weaknesses in the controls that the Barclays FFSPs had in place to ensure compliance with the disclosure requirement.
- 63 We consider the Barclays FFSPs' failure to notify ASIC within the required timeframe after they became aware (or should reasonably have become aware) of breaches of the disclosure requirement in late 2013, to be a material breach of their respective obligations and excluded the Barclays FFSPs from continued reliance on the sufficient equivalence relief.
- 64 The Barclays FFSPs have complied with the terms of the court enforceable undertaking and have subsequently withdrawn from the Australian market.
- 65 These breaches may, if the entity was an AFS licensee, suggest that the entity has not conducted its activities efficiently, honestly and fairly as required under s912A(1)(a) and so ASIC would have been able to seek remedies such as injunctions and civil penalties. These additional remedies and the direct responsibility of the entities to ASIC for its activities involving Australian clients will assist ASIC in maintaining market integrity and protecting consumers.

ASIC's concerns unaddressed by additional relief conditions

- 66 The sufficient equivalence relief granted to an FFSP is conditional upon compliance with conditions of the relief. Conditions on the sufficient equivalence relief are intended to:
- (a) ensure that the FFSP's conduct and status are such that it remains entitled to relief;
 - (b) give us sufficient information to enable us to assess whether:
 - (i) the FFSP is complying with its relevant overseas regulatory regime; and

- (ii) the relevant overseas regulatory regime continues to satisfy our ‘equivalence test’;
- (c) inform wholesale clients that the FFSP is relying on relief; and
- (d) enable us to enforce the law and the conditions of relief.

67 While ASIC have become aware of breaches of the disclosure requirement by some FFSPs, we are concerned that there are other breaches of the conditions of the relief that have not been notified to ASIC, such as breach of the enforcement reporting condition. The enforcement reporting condition requires the FFSP notify ASIC the details of each significant investigation, enforcement or disciplinary action against the FFSP in a foreign jurisdiction. FFSPs’ involvement in the LIBOR-rigging scandal and manipulation of foreign exchange benchmarks in foreign jurisdictions, should arguably have been notified to ASIC. We think FFSPs did not report to us of breaches of the enforcement condition because FFSPs have interpreted the condition narrowly.

68 Our experience in the J.P. Morgan and Barclays matters show that FFSPs may not be monitoring their compliance with the relief conditions as much as they should have given the large number of wholesale clients serviced in Australia. ASIC has limited recourse in these circumstances, i.e. restricted to accepting enforceable undertakings and excluding FFSPs from future reliance on the relief. We could impose additional conditions; however the effectiveness of additional conditions will be limited without the ability impose effective remedies for non-compliance.

69 By requiring FFSPs to be directly responsible for compliance with its licensing obligations imposed by the Corporations Act and allowing entities to rely on all the remedies that apply to misconduct by a licensee, we are more effectively able to directly regulate FFSPs than by the imposition of additional licence conditions.

70 As demonstrated in the Goldsky example, we consider the foreign AFS licensing regime will provide ASIC with a fuller range of regulatory tools to change behaviours, for example, we may impose additional licence conditions and there is a legal obligation in s912A(b) to comply with those conditions to drive good consumer and investor outcomes and act against misconduct to maintain trust and integrity in the Australian financial system.

71 Entities holding a licence will also be able to rely on the administrative rights that are expressly available to licensees, which includes a hearing if a licence is suspended or cancelled as required under s915C.

Competitive advantage over AFS licensees

- 72 ASIC considers that the foreign AFS licensing regime will create a more level playing field where all financial services providers are treated substantively the same in Australia and in a non-discriminatory manner based on the level of financial services business carried out in Australia, particularly in terms of regulatory engagement with ASIC.
- 73 In our consultations, respondents have suggested that replacing the sufficient equivalence relief could impact on competition in Australia by reducing the number of financial services providers if FFSPs exit the market. However, we consider that requiring FFSPs to be licensed to provide financial services in Australia would enhance competition, by placing FFSPs on the same level playing field that standard AFS licence holders are on.
- 74 Further, we consider FFSPs that have established a significant physical presence in Australia to provide financial services to Australian wholesale clients are unlikely to withdraw from the Australian market if required to hold an AFS licence because the cost of obtaining a licence will not be the determinative factor in maintaining a physical presence in Australia. Based on our cost impact analysis, we think the cost of obtaining a foreign AFS licence to be \$160,000 (one-off cost). The cost of maintaining a foreign AFS licence is \$25,000 per annum.
- 75 If some FFSPs were however to withdraw from the Australian market rather than obtain a foreign licence, other licensees may also be motivated to provide financial services that were provided by FFSPs.
- 76 The current relief framework is broader than the exemptions provided by our peer regulators. For example:
- (a) the Hong Kong Securities and Futures Commission provides temporary licences to persons regulated by a relevant overseas regulatory body to provide certain financial services in Hong Kong for a period of three months. Such persons are prohibited from holding a temporary licence for more than six months within any two-year period (see Part V of the Securities and Futures Ordinance);
 - (b) the UK FCA provides licensing exemption to overseas persons that provide financial services where the nature of the regulated activity requires the direct involvement of another person and that person in FCA-authorized or exempt, or the provision of the financial service is as a result of ‘reverse solicitation’ (see [PERG 2.9.17](#)); and
 - (c) the German BaFin may provide individual licensing exemption to foreign entities that provide banking and financial services to ‘institutional investors’ provided that the entity does not require supervision by BaFin due to effective supervision in their home country (see section 2(4) of the *Kreditwesengesetz*).

- 77 We consider that levelling the playing field to require all financial services providers carrying on a financial services business in Australia to apply for and hold either a standard AFS licence or a foreign AFS licence will also minimise opportunities for regulatory arbitrage as we have seen in the case of Goldsky, where the entity registered as a service provider in the US to avoid the Australian licensing regime. The compliance costs associated with the foreign AFS licence is also proportional to the size of activities carried out in Australia.
- 78 Australian providers of financial services to wholesale clients in jurisdictions covered by sufficient equivalence relief, must comply with both Australian financial services laws and the financial services laws of the relevant jurisdiction in relation to those cross-border services, subject to some limited exemptions. None of the regulators in the jurisdictions covered within the scope of sufficient equivalence relief would appear to offer Australian entities regulatory exemptions as broad as the sufficient equivalence relief or the limited connection relief.
- 79 It follows that the current relief framework may be lowering compliance costs for FFSPs relying on the relief to provide financial services in Australia, without AFS licensees obtaining a comparative reduction in compliance costs for the financial services they provide in key overseas markets. We are concerned that the unilateral nature of the current relief framework may place AFS licensees at a possible competitive disadvantage in the global marketplace. This is of particular importance for wholesale markets that may involve a significant degree of cross-border activity.

Concerns about the limited connection relief

- 80 As stated in paragraph 25, the limited connection relief was granted to ensure that financial services provided on an infrequent, arms-length basis by FFSPs to Australian wholesale clients would not require a licence where there is a limited connection between the FFSP and Australia.
- 81 Through our engagement with industry over the years, we have observed in some cases FFSPs have taken a broad interpretation of the limited connection relief. Some FFSPs rely on the limited connection relief because they do not qualify for the sufficient equivalence relief because they are not regulated by a sufficiently equivalent overseas regulatory authority or because they are unable to rely on other exemptions from the AFS licensing requirements (e.g. under s911A(2A) , 911A(2B), 911A(2C), 911A(2D), and 911A(2E)).
- 82 Some of the information provided by FFSPs suggest strongly that entities may be carrying on a business in Australia and thus should be required to be registered as a foreign company and hold an AFS licence to provide those financial services.

- 83 As part of ASIC’s review of the regulation of FFSPs we have repeatedly asked for information from FFSPs about the types of financial services provided to Australian wholesale clients or activities conducted in Australia in reliance on the limited connection relief so that we may justify maintaining the relief settings for FFSPs.
- 84 Respondents have stated that the limited connection relief was useful in addressing the extensive and far-reaching scope of s911D when they are not otherwise carrying on a financial services business in Australia.
- 85 FFSPs have declined to identify themselves and to provide information on the types of activities they carry out in reliance on this relief. However, we did receive information from the funds management industry that the limited connection relief has facilitated relationship management visits of wholesale clients in Australia by overseas fund managers.
- 86 Without any further practical information from FFSPs about other activities that can be carried out in Australia in sole reliance on the limited connection relief, we have narrowed the terms of the limited connection relief to the proposed funds management relief outlined in paragraphs 32–35.
- 87 Our concerns are further heightened for FFSPs relying on the limited connection relief because these FFSPs are not required to:
- (a) notify ASIC of their reliance on the relief;
 - (b) submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings; or
 - (c) comply with a written notice from ASIC directing the FFSP to provide ASIC with specified information about the financial services business operated by the person in this jurisdiction.

Supervisory and enforcement concerns

- 88 In addition to encountering non-compliance by FFSPs with the FFSP relief, we have identified a number of supervisory and enforcement concerns when dealing with entities that have the benefit of the relief.

Restricted monitoring and supervision arrangements

- 89 In RG 54.50, we observe that ASIC’s ability to conduct compulsory supervision or investigations outside Australia may be restricted without assistance from the relevant overseas regulatory authority. It is important that effective cooperation arrangements are in place between ASIC and the overseas regulatory authority.
- 90 We have entered into non-binding, bilateral cooperation arrangements with a range of regulators in some key jurisdictions: see our [Memoranda of understanding and other international agreements](#). However, we have

observed a number of practical challenges that limit each overseas regulator's ability to monitor and supervise the conduct of FFSPs in Australia, operating from their home jurisdiction, and our ability to monitor and supervise the conduct of FFSPs in Australia.

91 We have also observed some limitations such as prioritisation, risk decisions and application of law issues that overseas regulators face like ASIC particularly for activities that occur outside the regulator's home jurisdiction, which suggest that in some cases they may look to ASIC to more extensively monitor and supervise the conduct of FFSPs in Australia.

92 We have also identified that we may have limited supervisory and enforcement powers under the relief to regulate the activities of the FFSP in Australia as evidenced by the Goldsky matter discussed above. Our powers under this relief, may not reflect the degree to which wholesale clients in Australia and overseas regulators expect us to be monitoring and supervising the conduct of FFSPs in Australia.

Limitations on enforcing overseas regulatory requirements

93 Under Schedule C, item 1 of the original sufficient equivalence class orders, it is stated that:

The [foreign] body must provide each of the financial services in this jurisdiction in a manner which would comply, so far as is possible, with the [foreign jurisdiction's] regulatory requirements if the financial services were provided in the [foreign jurisdiction] in like circumstances (the substituted compliance condition).

94 In practice, it is challenging for ASIC to enforce this substituted compliance condition without substantial knowledge of the overseas regulatory regime in the relevant jurisdiction.

95 Overseas regulators would also have difficulty enforcing such a condition on our behalf in their home jurisdiction.

Why is ASIC action needed?

96 ASIC investigates market misconduct and acts to ensure Australia's financial markets are fair and efficient. We recognise that poor conduct in wholesale markets can have far reaching impact throughout the financial system, passing on risks and detriment to retail consumers and eroding trust and confidence in Australia's financial markets.

97 Without trust and confidence, investors and others may be discouraged from participating in the wholesale markets. Serious misconduct, if undetected and inadequately addressed due to lack of supervisory and enforcement powers for the market regulator, can have the effect of undermining key

objectives of financial regulation: reducing potential systemic risk and securing fair and efficient markets.

- 98 ASIC is in the invidious position that if two entities engaged in the same misconduct such as not acting efficiently, honestly or fairly involving Australian clients and the activity occurred in Australia and one held an AFS licence and the other did not, there would be two different regulatory responses to the misconduct. For example, ASIC does not have the ability to apply the same regulatory response such as seeking a civil penalty for the misconduct by an FFSP. We would generally be reliant on the overseas regulator to take the relevant regulatory action for such misconduct by the FFSP under its regime. This may mean we may not achieve the intended deterrent effect when addressing misconduct by an FFSP as we would when addressing misconduct by an AFS licensee. Without an FFSP holding an AFS licence we cannot achieve parity in our regulatory response to any misconduct done by an FFSP if the same conduct was done by an AFS licensee.
- 99 The approach we are proposing to sufficient equivalence recognises that for some obligations, in particular under s912A, we are prepared to rely on the overseas regulator except for fundamental conduct obligations that ensures an FFSP acts efficiently, honestly and fairly. In relation to those fundamental conduct obligations, we must be able to ensure that we have effective oversight and the appropriate regulatory response if there is a breach of those obligations affecting Australian investors.
- 100 The concerns we have identified in paragraphs 40–95 have arisen due to a licensing relief framework that was originally granted in 2003 but needs to be enhanced to ensure ASIC has all the appropriate tools to supervise activities by FFSPs affecting Australian users of those financial services who have significant engagement with Australian wholesale clients and may be acting on behalf of Australian retail clients. Due to developments in cross-border financial regulation, ASIC action is needed to bring the Australian regulatory framework more in line with the approaches adopted by our peer regulators, particularly for the regulation of wholesale markets.
- 101 In improving the regulatory framework for FFSPs as recommended under Option 1 below, ASIC would ensure:
- (a) financial services providers carrying on a financial services business in Australia hold a form of AFS licence as required under the law, unless an exemption applies;
 - (b) foreign service providers are subject to fundamental conduct obligations under the Corporations Act, such as the obligation to provide services efficiently, honestly and fairly, as is required of Australian service providers but otherwise we will recognise compliance with relevant overseas requirements to minimise regulatory burden;

- (c) we have adequate and effective oversight and supervision of the conduct of FFSPs servicing Australian-based clients, regardless of where they are located and do not have to rely on our peer regulators for activities that may adversely affect Australian wholesale clients, where limitations such as prioritisation, risk decisions and application of law issues may arise; and
- (d) it can have a similar Australian regulatory response where an obligation affecting an Australian wholesale investor is breached, whether the breach be by an Australian based entity or an FFSP.

Policy options considered and the likely net benefit of each option

102 To address the issues we identified in our comprehensive review of the FFSP policy, we have considered three regulatory options to improve the regulatory framework of FFSPs carrying on a financial services business in Australia.

Option 1—Foreign AFS licensing regime and funds management relief

103 Under Option 1 ASIC would:

- (a) repeal the FFSP relief;
- (b) implement a foreign AFS licensing regime to enable eligible FFSPs to apply for and maintain a foreign AFS licence where they are from a sufficiently equivalent jurisdiction; and
- (c) provide licensing relief to FFSPs carrying on a financial services business only because of the operation of s911D of the Corporations Act in relation to the provision of ‘funds management financial services’.

104 We consider this option strikes the most appropriate balance between, cross-border investment facilitation, market integrity and investor protection while ensuring that we have adequate powers and tools to address our regulatory and supervisory concerns. It also minimises the regulatory burden for foreign AFS licensees arising out of compliance with duplicate provisions.

Option 2—Standard AFS licence for all FFSPs

105 Under Option 2 ASIC would:

- (a) repeal the FFSP relief; and
- (b) require FFSPs to apply for and hold a standard AFS licence to provide financial services to wholesale clients in Australia.

106 ASIC would have supervisory and enforcement tools to allow us to more adequately monitor and supervise the conduct of FFSPs in Australia. However, it would come at a cost of imposing additional regulatory burden on FFSPs by requiring them to comply with provisions in the Corporations Act where they are required to comply with equivalent obligations in their home regulatory regime that achieves similar regulatory outcomes.

107 We consider we can achieve the same regulatory outcomes while minimising regulatory duplication through adopting Option 1.

Option 3—Maintain the status quo

108 This option involves remaking the sufficient equivalence relief and limited connection relief without amendments before the instrument ceases on 31 March 2020.

109 ASIC would continue to have the regulatory framework for FFSPs that we now consider does not have the appropriate balance between cross-border investment facilitation, market integrity and investor protection, particularly following on from the changes in the international approach to the regulation of wholesale markets.

110 We will continue to have limited supervisory and enforcement tools to adequately monitor and supervise the conduct of FFSPs in Australia.

B Options and impact analysis

- 111 We have considered three options:
- (a) **Option 1**—Foreign AFS licensing regime and funds management relief;
 - (b) **Option 2**—Standard AFS licensing regime for all FFSPs; or
 - (c) **Option 3**: Maintain the status quo. This involves remaking the FFSP relief in their current forms, without amendment.
- 112 In assessing the likely impact of changes to the existing relief regime, we have made assumptions about the anticipated population size of both cohorts used to segment the total population of FFSPs based on feedback to CP301 and the expected behaviour of FFSPs under the regulatory framework proposed under Option 1. These are summarised for each option below.
- 113 Further, due to the paucity of data available for the purposes of calculating the cost associated with individual FFSP compliance with the options proposed in this document, we have been required to estimate individual entity cost of compliance associated with costs noted in paragraph 139 above and the effect that each option will have on the population of FFSPs participating in the Australian financial services marketplace.
- 114 Where possible, we have used respondent feedback to CP301 and CP315 as directional guidance on the specific costs arising in relation to each scenario.
- 115 In calculating the ‘impact’ of each scenario, we have compared the likely population and cost values that would exist under each scenario, with the Option 3 status quo costs as a baseline. Impact values represent the variance in projected costs from the status quo.
- 116 As Option 3 costs (including individual, total and aggregate) are used as a baseline for the current status quo, the cost impact of Option 3 (which represents a continuation of the status quo) is assumed to be \$0.

Option 1: Foreign AFS licensing regime and ‘funds management’ relief (*recommended*)

- 117 ASIC considers this option strikes the most appropriate balance between, cross-border investment facilitation, market integrity and investor protection while ensuring that we have adequate powers and tools to address our regulatory and supervisory concerns.

Foreign AFS licensing regime

- 118 The foreign AFS licensing regime replaces the sufficient equivalence relief. FFSPs that carry on a financial services business in Australia will now be required to hold a foreign AFS licence if they wish to continue carrying on a financial services business in Australia.
- 119 The stronger civil penalties that apply to AFS licensees that have breached the AFS licensing obligations will deter corporate wrongdoing in Australia. The licensing regime and civil penalties that apply will ensure ASIC has appropriate oversight of the conduct of FFSPs in Australia and can apply the appropriate remedy to address any potential misconduct that could impact wholesale clients and the integrity of the Australian markets.
- 120 In encountering misuse of the sufficient equivalence relief and non-compliance with conditions of the sufficient equivalence relief by some FFSPs, this is the best option in ensuring we have appropriate regulatory tools to change behaviours to drive good consumer and investor outcomes and act against misconduct to maintain trust and integrity in the financial system. It also means that we can have a similar regulatory response to similar misconduct which occurs in Australia involving financial service providers engaging with Australian clients wherever they are located.
- 121 As outlined in paragraph 20, FFSPs that apply to hold a foreign AFS licence will be subject to fundamental conduct obligations in Chapter 7 of the Corporations Act. Importantly, they will be required to:
- (a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (see s912A(1)(a));
 - (b) have in place adequate arrangements for managing conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative (see s912A(1)(aa));
 - (c) comply with the conditions on the licence (see s912A(1)(b));
 - (d) comply with the financial services laws (see s912A(1)(c));
 - (e) take reasonable steps to ensure that representatives comply with the financial services laws (see s912A(1)(ca)); and
 - (f) have adequate risk management systems (see s912A(1)(h)).
- 122 Feedback to previous consultation suggest that these obligations are similar, or equivalent, to the obligations that apply to the FFSP in their home jurisdiction.

- 123 We recognise that foreign AFS licensees are required to comply with the requirements of their home regulation. To minimise duplication without foregoing our ability to monitor and supervise the conduct of FFSPs in Australia, foreign AFS licensees will be exempt from provisions, such as:
- (a) the obligation to have adequate resources to provide the financial services covered by the licence and to carry out supervisory arrangements in s912A(1)(d);
 - (b) the obligation to maintain the competence to provide those financial services in s912A(1)(e);
 - (c) the obligation to ensure that representatives are adequately trained and are competent to provide those financial services in s912A(1)(f); and
 - (d) other requirements, when:
 - (i) the overseas regulator will monitor or enforce the foreign AFS licensee's compliance with the overseas regulatory regime as they apply to the licensee's business activities; and
 - (ii) the regulatory regime in the foreign AFS licensee's home jurisdiction produces similar regulatory outcomes to the Australian regime.

Funds management relief

- 124 The funds management relief is a new type of relief available to any FFSP that meet the conditions of this relief. It was introduced in recognition of the access that Australian funds seek to overseas funds, particularly with an investment objective directed at exposure to foreign markets.
- 125 FFSPs currently relying on the sufficient equivalence relief to conduct limited activities such as marketing or inducing may choose to rely on the funds management relief. Feedback to our consultation suggest that the cost of applying for a foreign AFS licence to conduct limited business outweighs the revenue derived from Australia.
- 126 Many of the conditions of the funds management relief were modelled after the conditions of the sufficient equivalence relief. We think these FFSPs will experience limited difficulty in complying with the conditions of the funds management relief as evidenced by the feedback we received to CP 315.
- 127 FFSPs that have previously taken a broad interpretation of the limited connection relief will now be required to consider their activities in Australia more closely to ensure they are only engaging in inducing conduct. They will also be subject to some conditions of the relief that previously did not apply to the limited connection relief. However, these conditions were suggested by the respondents to our consultations to ensure ASIC has appropriate oversight of the activities of FFSPs in Australia.

- 128 One of the conditions that will apply to the funds management relief is the requirement that the regulator of the FFSP must be a signatory to the IOSCO MMOU. This is to facilitate cooperation between ASIC and the FFSP's home regulator for the purpose of enforcement activities.
- 129 FFSPs relying on the limited connection relief will have a 24-month transitional period until 31 March 2022. The transitional period will allow:
- (a) FFSPs to ensure they comply with the conditions of the funds management relief in order to provide funds management financial services to eligible Australian users.
 - (b) FFSPs to take steps to apply for a foreign AFS licence (if they are from a sufficiently equivalent jurisdiction) or a standard AFS licence or seek to rely on other licensing exemptions available in the law to carry on a financial services business in Australia.

Cost impact analysis

- 130 Population sizes for each cohort are estimated using the following sources of information:
- (a) Cohort 1—an internal ASIC register of FFSPs currently relying upon the sufficient equivalence relief or individual relief issued on similar terms;
 - (b) Cohort 2—qualitative estimates of the relative number of FFSPs relying upon 'limited connection' relief based on ASIC's engagement with entities within that cohort; and
 - (c) assumptions relating to variation in the population of each cohort based upon the expected impact of increased regulatory compliance costs and observations from industry on the possible responses to the proposal.
- 131 In estimating the FFSP population under Option 1, we have assumed that:
- (a) the population of Cohort 1 would decline by approximately 100 entities, from the status quo mean value of 800 to 700 (-13%). We expect that some FFSPs that do not carry on significant activities in Australia and do not have a presence in Australia may seek to rely upon the funds management relief available under Option 1, or alternatively arrange their activities in Australia to rely on other exemptions in the Corporations Act; and
 - (b) the population of Cohort 2 would decline from 400 to 200 (-50%), being the net position following a decline of 300 (-75%) entities from the existing population of FFSPs, and the addition of 100 (+25%) new entities from Cohort 1. We assume that these entities will exit the market if required to bear increased compliance cost due to the limited nature of their operations.

132 See Table 4 for a breakdown of the impact of Option 1 on the FFSP population.

Table 4: Segmented FFSP population impact of Option 1

Market Segment	Status Quo (Option 3)	Option 1	Impact
Cohort 1	800	700	(100)
Cohort 2	400	200	(200)
Total	1200	900	(300)

Source: Cohort 1 population estimates for Option 3 are derived from internal ASIC FFSP register, and Option 3 Cohort 2 population figures are based on internal estimates. Option 1 population figures for both cohorts have been estimated based on a qualitative assessment of the likely effect of proposed regulatory changes to FFSP cohort populations.

133 The cost of compliance borne by individual FFSPs under Option 1 have been estimated based on the indicative cost categories and service values discussed at paragraph 139 below and are summarised for each cohort in the following table.

Table 5: Option 1 Individual entity cost impact per annum

Market Segment	Status Quo (Option 3)	Option 1	Impact Increase
Cohort 1 – Year 0	\$0	\$160,000	\$160,000
Cohort 1 – Maintenance	\$15,000	\$25,000	\$10,000
Cohort 2 – Year 0	\$0.00	\$80,000	\$80,000
Cohort 2 - Maintenance	\$0.00	\$15,000	\$15,000

Source: ASIC assessment based on directional stakeholder feedback in CP301 and internal estimates

134 Under both Options 1 and 3, relief is offered to entities from Cohort 1 on the understanding that those entities are subject to a regulatory regime which is assessed to be sufficiently equivalent to the Australian regulatory regime. For this reason, individual entity costs assume only a marginal increase for each individual entity.

135 To assess the aggregate (whole market) total cost associated with Option 1, we have applied a single instance of Year 0 (upfront assessment) costs and 9 years of maintenance for each individual entity multiplied by the relevant population sizes assumed for Option 3.

136 For the purposes of determining the cost impact of Options 1 and 2, Year 0 costs associated with the status quo (Option 3) have been indicated as \$0 to

reflect the fact that the estimated population of FFSP entities are already compliant with the existing regime and would bear no additional costs in initiating compliance with Option 3.

Table 6: Option 1 Total Cost Impact by Cohort over policy application range (\$m)

Market Segment	Status Quo (Option 3)	Option 1	Impact Increase
Cohort 1 – Total Cost	\$101	\$275	\$174
Cohort 2 – Total Cost	\$0	\$51	\$51
Aggregate Total Cost	\$101	\$326	\$225 (increase)

Source: ASIC assessment based on directional stakeholder feedback in CP301 and internal estimates.

137 We estimate the aggregate total industry cost impact of Option 1 to be \$225 million over ten years.

138 The estimated aggregate total cost impact will largely affect Cohort 1 FFSPs currently relying upon sufficient equivalence relief, who will see an increased aggregate total cost of \$174 million over ten years. Cohort 2 would experience an aggregate total cost impact of \$51 million over ten years.

Impact on industry

139 Industry has indicated that there may be the following impacts for them:

- (a) costs involved in obtaining external advice to manage legal and regulatory implications of becoming a foreign AFS licensee.
- (b) an increase in compliance costs for FFSPs that apply for and hold a foreign AFS licence. FFSPs will need to monitor their compliance with the requirements of the foreign AFS licensing regime.
- (c) costs involved in complying with the conditions of the funds management relief.
- (d) costs involved in scaling back their activities in Australia if they choose to exit the Australian market.

140 In accordance with OBPR requirements for estimating the regulatory impact of our proposed changes to the existing regulatory regime affecting FFSPs, we have estimated aggregate costs over a ten-year period assuming the application of the regime proposed for each option.

Table 7: Costs of complying with the foreign AFS licensing regime

Item	One-off costs	Annual costs
External advisory costs	\$110,000	N/A
Compliance monitoring and system development (set up and ongoing maintenance)	\$50,000	\$25,000
Total cost per entity	\$160,000	\$25,000

Source: Industry responses to CP 301 and CP 315.

141 We estimate the aggregate total cost impact over ten years from the introduction of the foreign AFS licensing regime to be \$103 million (based on a population size of 700 FFSPs).

Table 8: Costs of complying with the conditions of the funds management relief

Item	One-off costs	Annual costs
External advisory costs	\$55,000	N/A
Compliance monitoring and system development (set up and ongoing maintenance)	\$25,000	\$15,000
Total cost per entity	\$80,000	\$15,000

Source: industry responses to CP 301 and 315.

142 We estimate the aggregate total cost impact of compliance with the terms of the funds management relief over ten years to be \$51 million (based on a population size of 200 FFSPs).

143 In assessing the impact of Option 1, we have also considered the impact that changes to the regulatory regime affecting FFSPs is likely to have on competition in the Australian Funds Management industry due to a projected decline in the population of FFSPs that are currently relying upon Limited Connection relief.

144 In considering this impact, ASIC notes the availability of IBIS World industry research report *Funds Management Services in Australia* (Yeoh, 2019), which indicates:

- (a) the existing rate of competition in the Australian funds management industry is classified as being 'High';
- (b) the industry has a moderate rate of globalisation set to increase with improvements to telecommunications technology and improving conditions in global financial markets;

- (c) the industry has a moderate and increasing rate of market-concentration, with the four largest funds expected to account for around 60% of industry revenue in 2018-19. Consolidation is expected to continue as firms attempt to maximise profitability through economies of scale;
- (d) industry structure is made up of large institutional fund managers and smaller boutique investment managers, with their size typically classified by their value of funds under management. Smaller fund managers manage between \$300 million and \$2 billion, while larger fund managers manage over \$200 billion; and
- (e) total industry revenue in 2019 was forecast to achieve \$10.9 billion with a profit margin of 24.4%, with revenue projected to grow by 2.7% p.a. over the 5-year period to the 2023-24 financial year.

145 ASIC considers that the cost of compliance with the regime proposed under Option 1 is unlikely to significantly deter new market entrants, and that population impact estimates assessed in this document represent conservative estimates for both the total number of FFSPs, and likely variance from the status quo under Option 1.

146 Further and in relation to the potential impact to the population of FFSPs under Option 1, ASIC considers that the new form of funds management relief will enable competition for the Australian funds management industry for those funds with sufficient scale/scope of operations to materially affect competition within the Australian funds management industry.

Impact on wholesale clients

Sufficient equivalence relief/Foreign AFS licensing regime

147 Feedback to CP 301 indicate that:

- (a) there may be a modest decline in the population of FFSPs servicing Australian wholesale clients with the introduction of the foreign AFS licence. It is expected this decline will come predominantly from international fund managers currently relying upon limited connection relief due to the small-scale operation of their activities.
- (b) wholesale clients may experience reduced competition among service providers due to fewer service providers available.
- (c) there may also be a possible increase to the cost of financial services provided by FFSPs that apply for a foreign AFS licence that bear additional costs of compliance associated with maintaining the foreign AFS licence.

148 ASIC considers FFSPs that carry on a financial services business in Australia in reliance on the sufficient equivalence relief with an established presence in Australia are unlikely to withdraw from the Australian market if

required to apply for and hold a foreign AFS licence. FFSPs that choose to withdraw from the Australian market will most likely be driven by commercial factors and contribute to market share in a manner that makes their withdrawal from the Australian market and consequent effect on competition limited in nature.

149 Further, consumers will enjoy the added protection when engaging FFSPs that they are dealing with licensed service providers. The FFSPs will be subject to fundamental conduct obligations under Chapter 7 of the Corporations Act such as the obligation to provide services efficiently, honestly and fairly.

150 There will be similar remedies and enforcement tools available for misconduct whether the entity is an Australian entity or an FFSP which will promote greater investor confidence and preserve market integrity.

Limited connection relief/Funds management relief

151 Replacing the limited connection relief with the funds management relief may result in fewer FFSPs:

- (a) inducing wholesale clients in Australia to use the financial services the FFSP provides; and
- (b) being able to provide ad hoc financial services (e.g. from outside Australia) to wholesale clients without holding a licence (where there is an element of inducing).

152 We consider the overall impact of introducing the funds management relief on wholesale clients to be minimal as it applies to inducing conduct.

153 Eligible Australian users will have the benefit of maintaining access to FFSPs providing funds management financial services. Other types of wholesale clients such as listed companies will not have the benefit of this relief. Australian users that are not eligible Australian users will be restricted to dealing with licensed service providers or FFSPs relying on other exemptions in the law, for example reg 7.6.02AG.

Option 2: Standard AFS licensing regime

154 The benefits of moving to a standard AFS licensing regime for all FFSPs are similar to those outlined under Option 1, i.e. that the licensing obligations will help drive good consumer and investor outcomes. The availability of stronger civil penalties for licensee misconduct will help to deter corporate misconduct so that trust and integrity in the financial system can be better maintained.

- 155 In addition, ASIC will ensure that it has the appropriate regulatory tools to ensure it is able to intervene as appropriate.
- 156 However, feedback to consultation suggest that repealing the limited connection relief and requiring FFSPs that engage in inducing conduct only to apply for a standard AFS licence would impose an unnecessary or excessive regulatory burden because often these FFSPs do not provide a significant volume of financial services to clients in Australia each year that does not justify bearing the costs of applying for and maintaining a licence.
- 157 If ASIC were to proceed with requiring all FFSPs to apply for a standard AFS licence without consideration of their level of activities in Australia that would justify bearing the costs of applying for and maintain a licence, we would be imposing additional regulatory burden that would not outweigh the regulatory benefit that we would derive from the proposal.

Cost impact analysis

- 158 In estimating the FFSP population under Option 2, we have assumed that:
- (a) The population of Cohort 1 would decline by approximately 100 entities, from the status quo mean value of 800 to 700 (-13%). We expect that these entities will exit the Australian financial services market if required to comply with a full AFS licence; and
 - (b) The population of Cohort 2 would decline from 400 to 0 (-100%), being a net loss of 400 entities from the existing population of FFSPs. We assume that a significant portion of entities would exit the market if required to bear any compliance cost due to the limited nature of their operations.
- 159 Population sizes for each cohort are estimated using the following sources of information:
- (a) Cohort 1 - an internal ASIC register of FFSPs currently relying upon individual or class relief for ‘sufficient equivalence’;
 - (b) Cohort 2 - Qualitative estimates of the relative number of FFSPs relying upon ‘limited connection’ relief based on ASIC’s engagement with entities within that cohort;
 - (c) Assumptions relating to variation in the population of each cohort based upon the expected impact of increased regulatory compliance costs.

Table 9: Segmented FFSP population impact of Option 2

Market Segment	Status Quo (Option 3)	Option 2	Impact
Cohort 1	800	700	(100)

Market Segment	Status Quo (Option 3)	Option 2	Impact
Cohort 2	400	0	(400)
Total	1200	700	(500)

Source: Cohort 1 population estimates for Option 3 are derived from internal ASIC FFSP register, and Option 3 Cohort 2 population figures are based on internal estimates. Option 2 population figures for both cohorts have been estimated based on a qualitative assessment of the likely effect of proposed regulatory changes to FFSP cohort populations.

160 The cost of compliance borne by individual FFSPs under option 1 have been estimated based on the indicative cost categories and service values discussed at paragraph 139 above and are summarised for each cohort in the following table.

Table 10: Option 2 Individual Entity Cost Impact per annum

Market Segment	Status Quo (Option 3)	Option 2	Impact Increase
Cohort 1 – Year 0	\$0.00	\$340,000	\$340,000
Cohort 1 – Maintenance	\$20,000	\$70,000	\$50,000
Cohort 2 – Year 0	\$0.00	(\$0)	(\$0)
Cohort 2 – Maintenance	\$0.00	\$0	(\$0)

Source: ASIC assessment based on directional stakeholder feedback in CP301 and internal estimates

161 Unlike Option 1, Option 3 does not assume FFSPs will be able to rely upon existing compliance programs established to meet the terms of the regulatory regime in their home jurisdiction. On that basis, individual entity costs assume a more significant cost impact arising from cost items such as dedicated compliance employees, and the development and maintenance of systems to monitor an entities compliance.

162 Under Option 2, we consider Cohort 2 entities currently relying upon limited connection relief will exit the market given their limited activities in Australia.

163 To assess the aggregate (whole market) total cost associated with Option 2, we have applied a single instance of Year 0 (upfront assessment) costs and 9 years of maintenance for each individual entity multiplied by the relevant population size and compared to same aggregate total cost for Option 3.

164 For the purposes of determining the cost impact of Options 1 and 2, Year 0 costs associated with the status quo (Option 3) have been indicated as \$0 to

reflect the fact that the estimated population of FFSP entities are already compliant with the exiting regime and would bear no additional costs in initiating compliance with Option 3.

Table 11: Option 2 Total Cost Impact by Cohort over policy application range (\$m)

Market Segment	Status Quo (Option 3)	Option 2	Impact Increase
Cohort 1 – Total Cost	\$101m	\$650m	\$549m
Cohort 2 – Total Cost	\$0	\$0	\$0
Aggregate Total Cost	\$101m	\$650m	\$549m (increase)

Source: ASIC assessment based on directional stakeholder feedback in CP301 and internal estimates

- 165 We estimate the aggregate total industry impact of Option 2 to be \$549 million over ten years.
- 166 The estimated aggregate total cost impact will largely affect Cohort 1 FFSPs currently relying upon sufficient equivalence relief, who will see an increased aggregate total cost of \$549 million over ten years. Under this option, Cohort 2 would experience an aggregate total cost impact of \$0 over ten years, due to the population of this cohort declining to zero.

Impact on industry

- 167 This option would require FFSPs to comply with all the provisions of Chapter 7 of the Corporations Act and the Corporations Regulations 2001, despite being regulated by a sufficiently equivalent overseas regulatory authority and only engaging in ‘inducing’ conduct involving funds management financial services.
- 168 This would have the effect of imposing additional regulatory burden on FFSPs by requiring them to comply with provisions in the Corporations Act where they are required to comply with similar provisions in their home regulatory regime that achieves similar regulatory outcomes and translate to the activities of the FFSP in Australia.
- 169 Further, in some instances, compliance with both the Australian requirements and the requirements of their home regulatory regime may not be possible, for example, compliance with both Australia and the home jurisdiction’s client money and asset protection rules.

Table 12: Costs of complying with the standard AFS licensing regime

Item	One-off costs	Annual costs
External advisory costs	\$110,000	N/A
Compliance monitoring and system development (set up and ongoing maintenance)	\$230,000	\$70,000
Total cost per entity	\$340,000	\$70,000

Source: Industry responses to CP 301 and CP 315.

170 We estimate the aggregate total industry impact of Option 2 to be \$478M over ten years.

171 ASIC anticipates the most significant impact on industry under Option 2 would be to those FFSPs that have extremely limited operations within Australia, and who rely exclusively on limited connection relief for inducing Australian customers to participate in international funds management services offered by FFSPs. In relation to the effect that increased regulatory costs will have on FFSP populations, and the consequent effect that these changes will have on competition, ASIC repeats the comments made at paragraphs 145–146.

Impact on wholesale clients

172 Wholesale clients may experience an increase in the cost for services provided by FFSPs in the event FFSPs pass the cost of holding a standard AFS licence to consumers. However, ASIC anticipates that the FFSPs primarily affected by Option 2 would be those providing services to a limited number of consumers within the Australian funds management industry and that those consumers affected by any population decline would obtain access to those services through other providers.

173 Under this option, FFSPs may apply for a standard AFS licence to provide financial services to retail clients. As an aggregate group, the benefits retail clients gain from increased competition amongst service providers will offset the increase in costs experienced by wholesale clients.

Option 3: Maintaining the status quo

174 ASIC also considered the option of maintaining the status quo i.e. to remake the FFSP relief without amendments before the instrument ceases on 31 March 2020.

175 Under this approach we will continue to be restricted in monitoring and supervising the conduct of FFSPs providing financial services to Australian wholesale clients.

176 Australia will continue to adopt a more permissive approach to cross-border regulation compared to the approaches adopted by our peer regulators if this option is adopted. This may have the effect of increasing the number of FFSPs relying on the sufficient equivalence relief, but also elevating the risk of entities misusing the sufficient equivalence relief as outlined in paragraphs 49–52.

Impact on industry

177 If the current sufficient equivalence relief was remade, FFSPs can continue to carry on a financial services business in this jurisdiction without an AFS licence. They will not be subject to fundamental conduct obligations imposed by Australian law, such as the obligation to provide services efficiently, honestly and fairly.

178 If the current limited connection relief was remade, a service provider may induce or likely to induce for all types of financial services provided to wholesale investors in Australia.

179 However, this proposal would be detrimental to service providers that hold an AFS licence to provide financial services to wholesale clients in Australia as they would be competing with service providers that are able to operate in Australia who continue to benefit from lower operating costs and a lower standard of regulatory oversight.

180 There is also a disparity in the regulatory response by ASIC due to the different powers that apply to a licensee and a person who is operating in Australia without a licence.

Impact on wholesale clients

181 Consumers would not benefit from additional investor protection and market integrity measures that the AFS licensing regime could provide. However, they would have greater access to FFSPs that provide financial services relying on the FFSP relief.

182 ASIC would continue to have limited powers to take regulatory and enforcement actions against FFSPs relying on the relief.

C Consultation

183 ASIC has conducted three major rounds of consultation.

Consultation Paper 268

184 In September 2016, ASIC published [Consultation Paper 268](#) *Licensing relief for foreign financial services providers with a limited connection to Australia* (CP 268) seeking feedback on our proposal to repeal the limited connection relief, previously known as Class Order [CO 03/824].

185 It also provided an update for FFSPs and other relevant stakeholders on:

- (a) the recent temporary extension of our relief for FFSPs from the United Kingdom, United States of America, Germany, France, Singapore and Hong Kong that provide a range of financial services to Australian wholesale clients; and
- (b) our plans to comprehensively review our relief for FFSPs during the extension period, which will involve us engaging with stakeholders about the terms of any relief.

186 We received very little information on costs in response to CP 268, with most submissions focusing on the proposed repeal of the limited connection relief. The 12 responses to CP 268 we did receive (including eight confidential responses) represented the views from industry bodies, law firms, investment managers and foreign banks.

187 Our report on stakeholder feedback to CP 268 is published in [Report 519](#) *Response to submissions on CP 268 Licensing relief for FFSPs with a limited connection to Australia* (REP 519).

188 Key themes outlined in REP 519 were:

- (a) Respondents strongly supported the continuation of the limited connection relief because s911A(2E) is not a complete replacement for the limited connection relief due to that section's limited scope as to the financial services and financial products it applies to. Respondents suggested that there were no viable alternatives that would allow entities relying on the limited connection relief to continue their Australian activities without an AFS licence.
- (b) Respondents noted that, in the absence of relief, the cost of getting an AFS licence to continue the limited engagement with clients in Australia would far outweigh the benefits and would be likely to lead to a withdrawal from the Australian market.
- (c) Respondents unanimously stated that a one-year transitional period would not be sufficient for entities relying on the limited connection

relief to make alternative arrangements to continue their activities in Australia. Most respondents suggested that two years would be a more appropriate timeframe in which foreign entities could restructure their businesses (including compliance controls) to ensure that they can legally continue to service existing clients in Australia.

189 In CP 268, we sought feedback on the costs associated with a requirement to notify ASIC when relying on the relief. We did not get any specific information about the costs associated with a notification requirement.

190 Generally, there was mixed feedback in response to the notification proposal. Several respondents noted the difficulty of a notification requirement given the great number of counterparties that could be involved in any cross-border transaction. Others were supportive of a notification requirement when the foreign entity commences relying on [CO 03/824] and potentially another notification requirement when it ceases reliance on the relief.

191 ASIC acknowledged the feedback that industry relies on this relief and that s911A(2)E is not a complete replacement for the limited connection relief. However, we also note that feedback to CP 268 did not provide ASIC with sufficient information about:

- (a) the costs that a repeal of the limited connection relief would impose on entities and the broader economy;
- (b) how industry viewed the relationship between the limited connection relief and the sufficient equivalence relief;
- (c) the types of products and services offered in reliance on the limited connection relief;
- (d) the jurisdictions that might be affected by a repeal of the limited connection relief; or
- (e) the number of clients that would be affected by a repeal of the limited connection relief.

192 ASIC extended the limited connection relief to conduct a comprehensive review of the relief framework for FFSPs providing financial services to wholesale clients in Australia. This review came as a result of market and regulatory developments since the relief was first granted and a number of ongoing international and domestic reviews affecting the cross-border provision of financial services.

193 There was a lack of visibility relating to who was relying on the limited connection relief, which makes it difficult to assess whether the relief is operating efficiently and effectively.

Consultation Paper 301

- 194 In June 2018, ASIC published [CP 301](#) which sought feedback on our proposals to:
- (a) repeal ASIC Corporations (Repeal and Transitional) Instrument 2016/396 and any individual relief granted on similar terms (sufficient equivalence relief);
 - (b) repeal ASIC Corporations (Foreign Financial Services Providers – Limited Connection) Instrument 2017/182 (limited connection relief); and
 - (c) implement a modified AFS licensing regime for FFSPs to enable FFSPs to apply for and maintain a modified form of AFS licence (foreign AFS licence).
- 195 It also provided an update on the results of our comprehensive review of our relief for FFSPs—following the temporary extension of the relief for a further two years—from the requirement to hold an AFSL when providing financial services to wholesale clients in Australia.
- 196 We received feedback from 14 confidential and 22 non-confidential responses to [CP 301](#).
- 197 Key themes indicated in respondent submissions to [CP 301](#) were:
- (a) FFSPs may exit the market due to the cost of obtaining and maintaining a foreign AFS licence, which may limit the range of FFSPs and financial services provided by FFSPs accessible to Australian wholesale investors;
 - (b) ASIC could achieve greater oversight over the activities of FFSPs by imposing additional conditions under the sufficient equivalence relief instead; and
 - (c) FFSPs relying on the sufficient equivalence relief are already highly regulated in their home jurisdictions and requiring them to obtain a foreign AFS licence to provide financial services to wholesale investors is an unnecessary regulatory burden.
- 198 ASIC considers that entities that carry on a financial services business in Australia should be required to hold an AFS licence, unless relief is granted by ASIC or an exemption applies. The foreign AFS licensing regime ensures FFSPs that carry on a financial services business in Australia are subject to fundamental conduct obligations in the Corporations Act.
- 199 The foreign AFS licensing regime ensures that ASIC will have the full range of supervisory and enforcement tools to allow us to more adequately and effectively monitor and supervise the conduct of FFSPs in Australia. These include a number of provisions in the Corporations Act, such as:

- (a) our directions power in s912C;
- (b) the breach reporting requirements in s912D;
- (c) the requirements to give us reasonable assistance during surveillance checks in s912E; and
- (d) the remedies and penalties available to us against AFS licensees in s914A, 915B, 915B and 1311.

200 We consider requiring FFSPs to hold a foreign AFS licence will more effectively address our supervisory and enforcement concerns than imposing additional conditions under the sufficient equivalence relief. For example, the foreign AFS licensing regime will provide us with a more graduated range of enforcement options, such as the ability to impose licence conditions and seek civil penalties for relevant breaches of Chapter 7 of the Corporations Act.

201 We also note that the foreign AFS licensing regime and the supervisory and enforcement tools that ASIC may use in relation to a licensee, will bring us into step with the regulatory approaches taken by our major peer regulators for equivalent types of financial services providers: see paragraph 76.

202 In relation to the limited connection relief, ASIC holds the view that some FFSPs have taken a broad interpretation of the operation of the limited connection relief. However, having regard to the licensing exemptions available in s911A(2A)–(2E) as inserted by reg 7.6.02AG, which includes a licensing exemption for derivatives and foreign exchange contracts and taking into account the feedback received in response to [CP 301](#), we proposed the funds management relief to facilitate access by some types of professional investors in Australia to funds management-related financial services provided by FFSPs.

203 We consider that the funds management relief, together with the exemptions in s911A(2A)–(2E) in particular, will facilitate access by professional investors in Australia to offshore services in a way that provides the appropriate balance between cross-border facilitation, market integrity and investor protection.

Consultation Paper 315

204 In July 2019, we published [Consultation Paper 315](#) *Foreign financial service providers: Further consultation* (CP 315), which sought feedback on our proposals to:

- (a) give AFS licensing relief for FFSPs providing funds management financial services to professional investors in Australia (funds management relief);

- (b) not give AFS licensing relief for FFSPs providing financial services to professional investors in Australia on a reverse solicitation basis (reverse solicitation relief); and
- (c) provide updated guidance in RG 176 on the foreign AFS licensing relief and proposed funds management relief.

205 We received feedback from six confidential and 18 non-confidential responses to [CP 315](#).

206 Key themes indicated in respondent submissions to [CP 315](#) were as follows:

- (a) the limited connection relief should be maintained to assist FFSPs in addressing the extensive and far-reaching scope of s911D when they are not otherwise carrying on a financial services business in Australia;
- (b) the scope of the funds management relief should be drafted more broadly to:
 - (i) cover limited partnership arrangements;
 - (ii) extend beyond activities that are only caught because of the operation of s911D (i.e. inducing conduct); and
 - (iii) apply at a group level, rather than each FFSP having to comply with the conditions of the relief individually;
- (c) the revenue cap proposed was onerous, complex and impractical to implement;
- (d) a number of the proposed conditions impose significant and unnecessary limitations on the scope of the funds management relief;
- (e) a transition period of at 18–24 months would be more appropriate for the transition from limited connection relief to funds management relief.

207 Based on the feedback received, ASIC has:

- (a) amended the scope of the funds management relief to apply to ‘a person’ rather than ‘a foreign company’ to cover a wider range of business structures and arrangements and so includes partnerships;
- (b) retained the scope of the funds management relief to apply to FFSPs carrying on a financial services business in Australia only because of inducing conduct. We consider that FFSPs that are otherwise carrying on a financial services business in Australia are engaging in a level of activity in Australia that indicates they should be required to hold an AFS licence;
- (c) not amended the scope of the funds management relief to apply at a group level, rather than on an entity level, because the focus of the relief (and our regulatory framework more broadly) is on the FFSP that induces the eligible Australian user;

- (d) not imposed a revenue cap in the funds management relief. We consider that the conditions on the relief will adequately limit the scale of activities undertaken in Australia by FFSPs relying on the relief and allow ASIC to adequately monitor and supervise those activities;
- (e) removed some of the conditions, but retained those that would allow ASIC to adequately monitor and supervise the FFSP's activities in Australia and ensure that there are existing cooperation arrangements between ASIC and the FFSP's home regulator for the purpose of enforcement activities; and
- (f) provided a 24-month transitional period for the limited connection relief.

208 Our report on stakeholder feedback to [CP 301](#) and [CP 315](#) and our responses to that feedback is set out in Report XXX *Response to submissions on CP 301 Foreign financial services providers & CP 315 Foreign financial services providers: Further consultation* (REP XXX).

D Conclusion and recommended option

209 ASIC recommends Option 1, which would enable FFSPs to provide financial services in Australia through a foreign AFS licence or reliance on another exemption, such as funds management relief or reg 7.6.02AG.

210 Option 1 is ASIC's preferred option because:

- (a) requiring FFSPs to hold a foreign AFS licence will ensure that we have appropriate regulatory tools to change behaviours to drive good consumer and investor outcomes and act against misconduct to maintain trust and integrity in the financial system;
- (b) requiring FFSPs to hold a foreign AFS licence will provide ASIC with a graduated range of enforcement options to address misconduct by FFSPs that are proportionate to the level of their business activities in Australia; and
- (c) the funds management relief will facilitate access by certain professional investors in Australia to offshore services in a way that provides the appropriate balance between cross-border facilitation, market integrity and investor protection.

211 Industry has indicated that repealing the current relief framework may lead to some FFSPs exiting the Australian market. We think that entities that provide financial services on more than a limited basis will continue to provide those services, even if required to hold a foreign AFS licence.

212 We acknowledge that in the event some FFSPs decide to exit the market, this may reduce competition in the Australian market to a small extent which may result in increased costs to consumers. This is because the activity that is exempt is only inducing about the financial services. Under the current relief as well as the fund management relief when the service are provided the entity providing the services has to determine whether it is then carrying on a financial service business in Australian and so need to hold an AFS licence if it is doing so, We also consider standard AFS licence holders in the Australian market may also step in to produce financial services to wholesale clients previously serviced by FFSPs that may exit the market.

213 The revised regulatory framework for FFSPs comprising of the foreign AFS licensing regime and the funds management relief will ensure that Australian clients whether dealing with an FFSP or Australian-based financial services providers are adequately protected by the law when receiving financial services from offshore providers.

E Implementation and review

- 214 In developing this RIS we have submitted the RIS to the OBPR for final assessment on 6 March 2020 and it has been assessed by the OBPR.
- 215 The recommended option will be implemented through the publication of:
- (a) ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198 (Foreign AFS licence instrument);
 - (b) ASIC Corporations (Foreign Financial Services Providers—Funds Management Financial Services) Instrument 2020/199 (Funds management instrument);
 - (c) ASIC Corporations (Amendment) Instrument 2020/200 which provides transitional relief to FFSPs relying on the FFSP relief until 31 March 2022; and
 - (d) revised RG 176.
- 216 FFSPs relying on the current relief framework will have a 24-month transitional period until 31 March 2022. This transitional period will provide FFSPs with sufficient time to take the following actions:
- (a) **Comply with the foreign AFS licensing regime:** apply for and hold a foreign AFS licence to continue servicing wholesale clients in Australia. This means that a foreign AFS licensee is exempt from certain provisions in Ch 7 of the Corporations Act on the basis that it is subject to sufficiently equivalent overseas regulatory requirements that would achieve similar regulatory outcomes to the exempted Ch 7 provisions.
 - (b) **Comply with the funds management relief:** reduce their operations in Australia so they are able to rely on the funds management relief, which allows FFSPs to induce a person to use the funds management financial services they are able to provide from outside this jurisdiction to certain types of professional investors in Australia.
 - (c) **Comply with the standard AFS licensing regime:** apply for a standard AFS licensing regime. While FFSPs will not enjoy exemptions from certain provision in Ch 7 of the Corporations Act, FFSPs may be able to service retail clients as well as wholesale clients if their licence is granted.
 - (d) **Comply with other licensing exemptions:** reduce their operations to rely on other exemptions available in the law, for example reg 7.6.02AG.
 - (e) **Exit the market:** cease carrying on a financial services business in Australia.

- 217 Following the transition period, review of the regulatory framework for FFSPs will form part of ASIC's business as usual activities.
- 218 ASIC continues to enhance our supervision model for the most complex and high-risk market participants, which will involve broader engagement across each entity. ASIC will continue to monitor the industry for misconduct and activities that may undermine market integrity and erode investor confidence.
- 219 We will also continue to monitor and conduct risk-based surveillance of compliance by FFSPs with their licence obligations or conditions of relief, as applicable and take the appropriate regulatory action.

F Regulatory Burden and Cost Offset (RBCO) Estimate Table

220 To assess the impact on industry under each option considered, we have segmented the population of FFSPs providing financial services in Australia into two separate cohorts. Each cohort is defined based on the licensing relief it relies upon to provide services to wholesale clients in Australia.

Cohort 1 – Sufficient equivalence FFSPs

221 To rely on the sufficient equivalence relief, the conditions of the legislative instrument require FFSPs to:

- (a) notify ASIC of their reliance on the relief;
- (b) submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings; and
- (c) comply with a written notice from us directing the FFSP to provide ASIC with specific information about the financial services business operated by the person in Australia.

222 Since commencement of the sufficient equivalence relief, ASIC has received notifications from 1,195 FFSPs about their reliance on the relief. Of these notifications:

- (a) 192 entities have notified us of their cessation of reliance on the relief; and
- (b) 929 entities are recorded as currently relying on the sufficient equivalence relief.

223 FFSPs are not required to notify ASIC if they cease to rely upon the sufficient equivalence relief offered by Class Orders mentioned in paragraph 12, and we estimate that the number of FFSPs currently relying upon that relief is actually lower than the numbers currently recorded in our register.

224 For the purposes of estimating the population size and aggregate regulatory burden incurred by Cohort 1, we have used a population range estimate of 700 to 900 entities as the status quo.

Cohort 2 – Limited connection FFSPs

225 Unlike the sufficient equivalence relief, FFSPs that rely on the limited connection relief are not required to notify ASIC of their reliance on the relief. In CP 268, 301 and 315 we sought the details of:

- (a) the type of entities that rely on the limited connection relief;

- (b) the type of activities entities engaged in under the relief; and
- (c) the volume of business for entities that rely on the relief.

- 226 We did not receive detailed information from industry in response to this request. We do not have an indication of how many FFSPs are currently relying on the FFSP relief.
- 227 The submissions, particularly in response to CP 268 illustrated that in practice, some FFSPs used the limited connection relief to provide financial services to wholesale clients in Australia as a precursor to an FFSP applying for and relying on the sufficient equivalence relief.
- 228 FFSPs relying on the limited connection relief will have a 24-month transitional period until 31 March 2022. This will allow FFSPs to make the necessary arrangements to either apply for and hold a foreign AFS licence or a standard AFS licence or rely on another exemption in the law to provide financial services to Australian clients.

Cost of compliance

- 229 In CP 301 and CP 315, we asked FFSPs relying on the sufficient equivalence relief and limited connection relief for feedback on:
- (a) the impact of introducing a modified AFS licensing regime, specifically projected costs (per annum) for applying for and maintaining a standard AFS licence or a foreign AFS licence; and
 - (b) the costs associated with implementing systems and processes to monitor compliance with the conditions of the funds management relief (the CP 315 proposal included a requirement to maintain compliance with a revenue cap on the scale of activities that FFSPs may undertake under the funds management relief).
- 230 Out of 36 responses to CP 301 and 24 responses to CP 315, we received only 10 responses providing information about the costs associated with implementing a foreign AFS licensing regime and compliance with the conditions of the funds management relief. Of these 10 responses, only 3 were from FFSPs. Other responses were submitted by legal firms and industry associations representing FFSPs.
- 231 To the extent we can, we have adopted the costs submitted by respondents. However, we have had to adopt some assumptions to determine the appropriate costs that would be incurred at the entity level to comply with the requirements of the foreign AFS licensing regime, standard AFS licensing regime and the funds management relief.

- 232 When assessing the regulatory impact arising with the AFS licensing regime requirements, we have assessed individual entity costs across the following categories:
- (a) external advisory costs, including legal and accounting fees;
 - (b) internal compliance and monitoring costs; and
 - (c) costs associated with development and maintenance of systems to aid in monitoring compliance (or the cost of adapting existing systems to correspond to the requirements of the prevailing regime).
- 233 Each of the tables below estimate the Regulatory Burden arising under the relevant option proposed in this document. Note that average annual costs for each option represent both one-off and maintenance costs for the entire FFSP population for the

Option 1—Foreign AFS licensing regime and funds management relief

Table 13: Average annual costs and cost offsets of implementing Option 1

Costs (\$m)	Business	Community Organisations	Individuals	Total cost
Total by sector	\$22.5 million	\$ -	\$ -	\$22.5 million
Agency	\$ -	\$ -	\$ -	\$ -
Within portfolio	\$ -	\$ -	\$ -	\$ -
Outside portfolio	\$ -	\$ -	\$ -	\$ -

Table 14 Average annual compliance savings of implementing Option 1

Proposal is cost neutral?	No
Proposal is deregulatory?	No
Balance of cost offsets?	\$10.1 million (cost of compliance with status quo)

Option 2—Standard AFS licence for all FFSPs

Table 15: Average annual costs and cost offsets of implementing Option 2

Costs (\$m)	Business	Community Organisations	Individuals	Total cost
Total by sector	\$54.9 million	\$ -	\$ -	\$54.9 million
Agency	\$ -	\$ -	\$ -	\$ -

Costs (\$m)	Business	Community Organisations	Individuals	Total cost
Within portfolio	\$ -	\$ -	\$ -	\$ -
Outside portfolio	\$ -	\$ -	\$ -	\$ -

Table 16: Average annual compliance savings of implementing Option 2

Proposal is cost neutral?	No
Proposal is deregulatory?	No
Balance of cost offsets?	\$10.1 million (cost of compliance with status quo)

Option 3—Status quo

Table 17: Average annual costs and cost offsets of implementing Option 3

Costs (\$m)	Business	Community Organisations	Individuals	Total cost
Total by sector	\$0 million	\$ -	\$ -	\$0 million
Agency	\$ -	\$ -	\$ -	\$ -
Within portfolio	\$ -	\$ -	\$ -	\$ -
Outside portfolio	\$ -	\$ -	\$ -	\$ -

Table 18: Average annual compliance savings of implementing Option 3

Proposal is cost neutral?	Yes
Proposal is deregulatory?	Yes
Balance of cost offsets?	\$10.1 (cost of compliance with status quo)