



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 176

Licensing: Discretionary powers—wholesale foreign financial services providers

Related instruments [CO 03/1099], [CO 03/1100], [CO 03/1101], [CO 03/1102], [CO 03/1103], [CO 04/100], [CO 04/213], [CO 04/829], [CO 04/1313]

Part 7.6—Licensing of providers of financial services

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From 5 July 2007, this document may be referred to as Regulatory Guide 176 (RG 176) or Policy Statement 176 (PS 176). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 176.1) or their policy statement number (e.g. PS 176.1).

What this guide is about

RG 176.1 This guide outlines when we will grant exemptions under s911A(2)(h) of the *Corporations Act 2001* (Corporations Act) from the requirement to hold an Australian financial services (AFS) licence to financial services providers where they:

- (a) provide services only to wholesale clients; and
- (b) are regulated by overseas regulatory authorities.

In this guide, we refer to these providers as “foreign financial services providers” (FFSPs).

Note: Other exemptions for FFSPs are set out in the *Corporations Regulations 2001*: see s911A(2)(k) and reg 7.6.01(1)(f), (fa), (g), (ma), (n) and (na).

RG 176.2 This guide discusses:

- A our general approach to granting exemptions
see RG 176.7–RG 176.40
- B what exemptions are available
see RG 176.41–RG 176.65
- C how to apply for an exemption
see RG 176.66–RG 176.77

RG 176.3 We have also included two Schedules:

- (a) **Schedule 1** sets out the type of information we need from an FFSP to assess an application for exemption; and
- (b) **Schedule 2** gives examples of the types of regulatory mechanisms that might achieve regulatory outcomes sufficiently equivalent to Australian regulation.

RG 176.4 The exemptions in this guide apply to FFSPs who provide financial services only to wholesale clients.

Note: From time to time, ASIC will consider producing policy on exemptions for FFSPs that provide financial services to retail clients. For example, see Regulatory Guide 178 *Foreign collective investment schemes* (RG 178).

RG 176.5 This guide deals only with applications for exemption from FFSPs or their industry associations.

RG 176.6 If an overseas regulatory authority wishes to initiate an approval process for the purposes of exemption under this guide, it should contact us to express its interest in approval and discuss an appropriate process. In considering an application from an overseas regulatory authority, we will be guided by the approach in this guide.

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Important note: The contents of this guide are based on the law as at 13 May 2005. Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements. This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act applies to you.

A Our general approach to granting an exemption

Our policy

RG 176.7 Under this policy we will use our exemption powers so that an FFSP can provide particular financial services in Australia without an AFS licence *only* if:

- (a) the particular financial services are provided in Australia only to wholesale clients (see RG 176.11);
- (b) the particular financial services are regulated by an overseas regulatory authority (see RG 176.12–RG 176.20);
- (c) regulation by that overseas regulatory authority is sufficiently equivalent to regulation by ASIC (see RG 176.21–RG 176.32);
- (d) there are effective co-operation arrangements between the overseas regulatory authority and ASIC (see RG 176.33–RG 176.40); and
- (e) the FFSP meets all the requirements of the relevant exemption (see Section B).

Underlying principles

RG 176.8 We consider that an FFSP should only be exempted from the obligation to hold an AFS licence if:

- (a) regulation of the FFSP by their overseas regulatory authority is sufficiently equivalent to regulation by ASIC (see RG 176.21–RG 176.32); and
- (b) there are effective co-operation arrangements between the FFSP’s overseas regulatory authority and ASIC (see RG 176.33–RG 176.40).

RG 176.9 In assessing whether regulation by an overseas regulatory authority is sufficiently equivalent to regulation by ASIC for the purposes of granting an exemption under this policy, we will be guided by Regulatory Guide 54 *Principles for cross border financial services regulation* (RG 54): see “Related information”.

RG 176.10 Because the exemptions under this policy are for services only to wholesale clients, we will consider the equivalence of regulatory outcomes from the point of view of market integrity and systemic risk. We will *not* focus on consumer protection issues.

Explanations

Financial services are provided in Australia only to wholesale clients

RG 176.11 Exemptions granted under this policy are available for financial services provided in Australia only to wholesale clients. Wholesale clients are in a position to look after their own interests and, therefore, we do not need to determine whether the relevant overseas regulatory authority protects the interests of these clients. As a result, this policy does *not* focus on consumer protection outcomes, or outcomes intended to protect a specific client.

FFSP is regulated by an overseas regulatory authority

RG 176.12 Generally, an FFSP will be regulated by one regulatory authority in its home jurisdiction. Generally this home regulator will be the “relevant overseas regulator” and we will:

- (a) assess this home regulator against our “equivalence test”; and
- (b) only require effective cooperation arrangements with this home regulator.

What if more than one regulator regulates the FFSP?

RG 176.13 In some cases, more than one overseas regulatory authority may regulate an FFSP, either within its home jurisdiction, or in another jurisdiction (host jurisdiction).

RG 176.14 Where an FFSP is regulated by more than one overseas regulatory authority (whether within its home jurisdiction or elsewhere) we regard the relevant overseas regulator as the regulator which, in our view, has the most responsibility for monitoring and enforcing compliance by the FFSP with its regulatory obligations for financial services similar to those for which an exemption is sought under this policy. This may be a regulator in a host jurisdiction where the FFSP is authorised to operate. In such circumstances we will:

- (a) assess the relevant overseas regulator against our equivalence test; and
- (b) only require effective co-operation arrangements with the relevant overseas regulator.

Example A: An FFSP trading in securities is overseen by Home Regulator A for its trading activities and Home Regulator B for its risk management and financial requirements. In these circumstances, we consider that Home Regulator A would be the relevant overseas regulator for our purposes.

Example B: An FFSP trading in both derivative and equity based products is regulated by different regulators for the two categories of product. The FFSP proposes to offer derivative products in Australia. The regulator with oversight of its derivatives business would be the relevant overseas regulator for our purposes.

Example C: An FFSP is incorporated in Country A, but only offers financial services in Country B and such financial services are only regulated by Regulator B in Country B. Regulator B would be the relevant overseas regulator for our purposes.

RG 176.15 However, we recognise that occasions will arise in which there may be more than one relevant overseas regulator for the purposes of this policy. In these circumstances we will assess the collective regulation of all the relevant overseas regulators and will require effective co-operation arrangements with each relevant overseas regulator.

Example D: An FFSP that is established in one European country (where its home regulator is situated) takes advantage of the European Union passporting regime to establish a branch office to offer financial services in another European country (under the supervision of a host regulator). The branch office provides financial services in Australia from the host European country. We would generally assess the regulatory authorities in both the home and host countries for the purposes of our policy.

RG 176.16 If it is not clear which regulator is “relevant”, or whether several regulators will need to be assessed, we encourage FFSPs to discuss their application with ASIC staff before lodging it.

Note: For contact details, see RG 176.72. Applicants should bear in mind that preliminary discussions with ASIC staff are not a substitute for legal advice and the views of individual ASIC officers on policy issues do not bind ASIC.

Why must we rely on overseas regulatory authorities?

RG 176.17 Regulation involves more than the imposition of legal obligations and requirements. A person is only regulated by a body that has the ability to monitor compliance with legal obligations and requirements, conduct investigations through the use of compulsory powers, and enforce compliance with legal obligations and requirements. Generally, an overseas regulatory authority has this power over persons present in its jurisdiction.

Note: Generally, under our policy we will require all financial services to be provided in Australia by an FFSP to be authorised under the relevant overseas regulatory regime. However, in certain situations we will allow some services to be provided in Australia under our relief where some services are authorised and other services are permitted in the overseas regulatory regime without direct authorisation. In any case, the FFSP must comply with all overseas regulatory requirements (including prohibitions) as if the financial services provided in Australia were provided in the overseas regime in like circumstances.

What is our approach to SROs?

RG 176.18 When considering if there is “sufficiently equivalent regulation” by an overseas regulatory authority, we will take into account the role of a self-regulatory organisation (SRO) that has delegated responsibilities from an overseas regulatory authority. We note that in some jurisdictions, SROs often have authority delegated to them by a statutory authority.

RG 176.19 In our view, an “overseas regulatory authority” is a body established by or for the purpose of a foreign government, and therefore, we consider that this term does not include overseas SROs.

RG 176.20 If an overseas regulatory authority delegates its responsibilities to an SRO, the overseas regulatory authority remains the statutory authority. However, as stated in RG 176.18, we will recognise the role played by SROs with delegated authority from a statutory authority.

Regulation by overseas regulatory authority is “sufficiently equivalent”

RG 176.21 Exemption under this policy may, in part, transfer the responsibility for ensuring the integrity of Australian markets and the stability of the Australian financial system to the relevant overseas regulator. To minimise regulatory and enforcement gaps, it is essential that we assess the nature of the regulation by that relevant overseas regulator before we grant an exemption.

RG 176.22 Regulation by an overseas regulatory authority is sufficiently equivalent to regulation by ASIC if the regulatory regime under which that authority operates:

- (a) is clear, transparent and certain (see RG 176.23–RG 176.25);
- (b) is consistent with the *IOSCO Objectives and Principles of Securities Regulation* (see RG 176.26–RG 176.27);
- (c) is adequately enforced (see RG 176.28–RG 176.30 and paragraphs (h) and (i) of question 3.4 in Schedule 1); and
- (d) achieves sufficiently equivalent outcomes as the Australian regime achieves for the regulation of wholesale financial services (see RG 176.31–RG 176.32, paragraphs (a)–(g) of question 3.4 in Schedule 1, and Schedule 2).

These criteria form our “equivalence test”.

“Clear, transparent and certain”

RG 176.23 The outcome-focused equivalence test involves an assessment of the outcomes of the overseas regulatory authority’s regulatory regime against those of our regulatory regime. This includes testing against the following criteria:

- (a) a “clear” regulatory regime, being one that is easily understood;
- (b) a “transparent” regulatory regime, being one whose rules, policies and practices are readily available to, and known by, all relevant persons; and
- (c) a “certain” regulatory regime, being one that is consistently applied and is not subject to indiscriminate application or changes.

Note: See Principle 7 of RG 54.

RG 176.24 We will not regard an overseas regulatory regime that fails to meet these minimum standards as sufficiently equivalent to the Australian regulatory regime because it may not be consistently or reliably applied or enforced and we may not be able to obtain sufficient information to assess how it works in practice.

RG 176.25 Therefore, at a minimum, a sufficiently equivalent regulatory regime must be available in written form and must not be subject to arbitrary discretion. Further, to facilitate our assessment of a regime we may require either:

- (a) independent verification of any English translation of any relevant parts of the regime; or
- (b) independent verification of the relevant details of the regulatory regime (ie where an English translation is impractical).

Note: If we seek verification of any English translation or other relevant details of an overseas regulatory regime, we will require the applicant to meet the costs of such verification.

“Consistent with IOSCO Principles”

RG 176.26 An overseas regulatory authority’s regulatory regime is consistent with the *IOSCO Objectives and Principles of Securities Regulation* if it:

- (a) assesses its regulatory regime against those objectives and principles; and
- (b) reasonably determines that its regulatory regime is broadly compliant with those objectives and principles.

RG 176.27 The Australian regime is measured against, and compliant with, the *IOSCO Objectives and Principles of Securities Regulation*. An overseas regulatory authority would need to share a similar regulatory philosophy. Adherence to these objectives and principles would be an indication, at least at a high level, of equivalence.

Note: See Principle 8 of RG 54.

“Adequately enforced”

RG 176.28 A regulatory regime is adequately enforced if the regulatory authority:

- (a) has sufficient powers of investigation and enforcement;
- (b) has sufficient resources to use those powers;
- (c) uses those powers and resources consistently to promote compliance with its regulatory regime; and
- (d) operates within a legal framework that is independent and has a reputation for integrity.

RG 176.29 We will assess the adequacy of an overseas regulatory authority’s enforcement capability with reference to:

- (a) the international reputation of that overseas regulatory authority;
- (b) any IOSCO assessments of the overseas regulatory authority, including self-assessments or assessments by other IOSCO members; and
- (c) any generally available assessments of the overseas regulatory regime by international financial institutions or other international organisations, such as the IMF and World Bank *Financial Sector Assessment Program* (FSAP) reports.

RG 176.30 It is unlikely that a regulatory regime that is frequently ignored or inconsistently applied will provide sufficiently equivalent regulatory outcomes to the Australian regulatory regime. An inadequately enforced regulatory regime will not reliably protect market integrity.

Note: See Principle 9 of RG 54.

“Sufficiently equivalent regulatory outcomes”

RG 176.31 Whatever its regulatory mechanisms, a sufficiently equivalent regulatory regime must achieve regulatory *outcomes* that are assessed as sufficiently equivalent to our regulatory regime. We will assess whether these outcomes are sufficiently equivalent from the perspective of Australian markets and the Australian financial system. As

noted earlier, consumer protection outcomes are not assessed because an exemption under this policy will apply only to services provided to wholesale clients.

RG 176.32 The outcomes that our regulatory regime achieves for wholesale financial services are set out in paragraph 4.14 of RG 54. That is, an overseas regulatory regime will be assessed as sufficiently equivalent to our own if it achieves regulation that ensures that financial services are provided by persons who:

- (a) are fair and honest;
- (b) are competent to provide financial services;
- (c) have adequate resources; and
- (d) have adequate risk management processes.

Note: For some examples of the mechanisms that might achieve regulatory outcomes sufficiently equivalent to Australian regulation, see Schedule 2.

Effective co-operation arrangements

RG 176.33 We will grant an exemption under this policy only if we are satisfied that there are effective co-operation arrangements between the relevant overseas regulator and ASIC. This is a matter for ASIC to decide, in consultation with the relevant overseas regulator. It cannot be dealt with by FFSPs in an application for relief.

RG 176.34 Effective co-operation arrangements will usually be in the form of a Memorandum of Understanding (MOU) or some other documented understanding, although they may be established by more informal arrangements.

RG 176.35 Effective co-operation arrangements will provide for:

- (a) prompt sharing of information by the relevant overseas regulator; and
- (b) effective co-operation on:
 - (i) supervision and investigation; and
 - (ii) enforcement.

RG 176.36 We will also rely on effective co-operation arrangements with the relevant overseas regulator to help us monitor:

- (a) significant changes to the authorisation, licence or registration of an FFSP or class of FFSP;

- (b) significant exemptions or other relief an FFSP or class of FFSP may obtain from the overseas regulatory regime;
- (c) significant changes to the relevant overseas regulatory regime; and
- (d) enforcement or other disciplinary activity against an FFSP operating in Australia with the benefit of an exemption under this policy.

Note: Under this policy, we will also require the FFSP itself to notify us of significant changes to the relevant overseas regulatory regime (or regimes) and enforcement and other disciplinary action against them: see RG 176.53–RG 176.57.

RG 176.37 Effective co-operation arrangements ensure that the relevant overseas regulator will, if we request, take appropriate action to protect Australian market integrity and reduce systemic risk in the Australian financial system. That action should be as effective as action the relevant overseas regulator would take to protect the integrity of markets and reduce systemic risk in its own jurisdiction.

RG 176.38 We consider that, particularly in the area of supervision of FFSPs, effective co-operation arrangements with an overseas regulatory authority will mean that we have access to direct and continuing contact with the relevant officers of that authority, so as to enable prompt exchanges of information and effective co-operation: see paragraph 3.19 of RG 54.

RG 176.39 Generally, effective co-operation arrangements will not be possible unless the overseas regulatory authority has power under its regulatory regime to co-operate with us in these ways.

RG 176.40 When deciding whether we have effective co-operation arrangements with an overseas regulatory authority, we will take into account whether it is a signatory to the *IOSCO Multilateral MOU Concerning Consultation and Cooperation and the Exchange of Information*.

Note: This multilateral MOU was promulgated by IOSCO in May 2002. In order to become a signatory, a securities regulator must have legal authority to meet its provisions and be approved by IOSCO's "screening" procedure. ASIC is a signatory to the multilateral MOU.

B What exemptions are available under this policy?

Our policy

RG 176.41 We may provide either an individual or class order exemption to an FFSP.

RG 176.42 An individual exemption will be:

- (a) linked to a particular FFSP; and
- (b) limited to the particular financial services provided by that FFSP in Australia.

RG 176.43 We will consider providing class order relief if:

- (a) we receive several applications for a particular financial service that is regulated by a particular overseas regulatory authority; or
- (b) we receive a joint application or an application through an industry association for a group of FFSPs who are regulated by a particular overseas regulatory authority and who will offer a particular financial service (or services) in Australia.

Note: FFSPs relying on class order relief must meet our requirements for this relief (see RG 176.46), including the requirements to notify us of its reliance on the class order exemption (see RG 176.65), to submit to the non-exclusive jurisdiction of the Australian courts and to comply with any order of an Australian court (see RG 176.62).

RG 176.44 We may provide applicants with further guidance (eg through our website at www.asic.gov.au) indicating:

- (a) the nature of any exemptions that have been granted under our policy; and
- (b) whether the exemption is granted by individual or class order relief.

RG 176.45 To be considered for an exemption, an FFSP must:

- (a) approach us for an exemption (either individually or as part of a joint application); and
- (b) be willing and able to provide *all* the information we need to assess the *particular* financial services they intend to provide in Australia.

Note: For details of what information must accompany an application, see Section C and Schedule 1.

What requirements must exempt FFSPs meet?

RG 176.46 FFSPs that are granted exemptions under this policy will be subject to certain requirements as set out in the following table.

Standard requirements	Tailored requirements	Class order requirements
<p>All FFSPs must comply with requirements dealing with:</p> <p>(a) conduct and status (see RG 176.52);</p> <p>(b) notifications (see RG 176.53–RG 176.57);</p> <p>(c) disclosure (see RG 176.58–RG 176.60); and</p> <p>(d) enforcement actions in Australia (see RG 176.61–RG 176.64).</p>	<p>May be imposed, as appropriate, for particular FFSP or class of FFSP.</p>	<p>FFSPs taking advantage of any class order exemption under this policy must generally:</p> <p>(a) lodge a notice with us stating the exemption they are relying on (see RG 176.65);</p> <p>(b) comply with our standard requirements, including the requirement to submit to the non-exclusive jurisdiction of the Australian courts (see paragraph (b) of RG 176.62); and</p> <p>(c) comply with any tailored requirements under the class order, as appropriate.</p>

What happens if the requirements are breached or no longer satisfied?

RG 176.47 We may remove the benefit of an FFSP's exemption, for example, if their relevant overseas regulatory regime is no longer sufficiently equivalent to our own regime: see paragraph (d) of RG 176.52. We will notify the FFSP before doing so.

RG 176.48 If an FFSP breaches one of the class order obligations described in paragraph (b) of RG176.52, RG 176.53 and RG 176.58, they have 15 business days from the date they knew or should have known of the breach to inform us of it. If we decide that the FFSP should continue to have the benefit of relief, we will notify them of this decision within 30 business days after we receive their notification. If we do not respond to the FFSP's notification, the relief will lapse. If an FFSP fails to inform us of a breach of one of the class order obligations described in paragraph (b) of RG176.52, RG 176.53 and RG 176.58, their relief will lapse. If the FFSP fails to meet any of the other class order requirements, the class order will not apply.

Underlying principles

RG 176.49 We will generally impose requirements on any FFSPs obtaining either class order or individual relief under this policy. The standard requirements we will impose on all exemptions are intended to:

- (a) ensure that the FFSP's conduct and status is such that they remain entitled to an exemption;
- (b) give us sufficient information to enable us to assess whether:
 - (i) the FFSP is complying with their relevant (whether home or host) overseas regulatory regime; and
 - (ii) the relevant overseas regulatory regime continues to satisfy our "equivalence test";
- (c) inform wholesale clients that an FFSP is relying on an exemption under this policy; and
- (d) enable us to enforce the law and the requirements of the exemption.

RG 176.50 We will use class order relief where possible in the interest of efficiency. FFSPs taking advantage of class order relief must notify us of the class order they are relying on, as well as meeting our standard requirements (and any tailored requirements): see RG 176.46.

Explanations

What requirements must exempt FFSPs meet?

RG 176.51 Our approach to the requirements we impose on exempted FFSPs is guided by RG 54.

Conduct and status

RG 176.52 For all exemptions granted under this policy:

- (a) the financial services must be provided in Australia only to wholesale clients;
- (b) the financial services provided in Australia must comply with the requirements of the FFSP's relevant overseas regulatory regime;
- (c) the FFSP must remain authorised under their relevant overseas regulatory regime; and
- (d) the relevant overseas regulatory regime must continue to be sufficiently equivalent to our own regime.

Note: The precise wording of these requirements may be modified in an ASIC instrument to meet the circumstances of a particular overseas regulatory regime.

Notifications

RG 176.53 As a requirement of all FFSPs obtaining an exemption under this policy, the FFSP must notify us as soon as practicable of each significant change to the authorisation of the FFSP relevant to the financial services the FFSP provides or intends to provide in Australia, including:

- (a) any termination of part or all of the FFSP's authorisation; and
- (b) each significant exemption or other relief the FFSP may obtain from the relevant overseas regulatory regime.

RG 176.54 Additionally, all FFSPs with an exemption under this policy must notify us on 31 March and 30 September of each year of the details of:

- (a) each significant change to the relevant overseas regulatory regime in the six months prior to 15 March and 15 September respectively, relevant to the financial services the FFSP provides or intends to provide in Australia (unless ASIC has stated in writing the notification of a particular change is not required); and
- (b) each enforcement or disciplinary action taken by the relevant overseas regulator or any other overseas regulatory authority against the FFSP in the six months prior to 15 March and 15 September respectively.

If there have been no significant changes to the relevant overseas regulatory regime or no enforcement or disciplinary actions in the notification period, the FFSP must still notify us of that fact (that is, in these circumstances the FFSP must file a “nil return”).

Note 1: These notifications may be provided to us by an entity (such as an industry association or legal representative) on behalf of an FFSP or a number of FFSPs, provided each such FFSP is identified in the notice.

Note 2: This requirement will help us to monitor changes to the relevant overseas regulatory regime and to assess the FFSP's compliance with the relevant overseas regulatory regime: see also RG 176.36.

Note 3: For a discussion of what we mean by “significant changes”, see RG 176.55–RG 176.57.

How to send notices to ASIC

An FFSP must send us notices:

- by email addressed to **FFSP@asic.gov.au**, or
- in writing addressed to **The Manager—Applications, Applications & Advice: Financial Services, Regulation**.

You can also contact ASIC Infoline on 1300 300 630 for general information and assistance.

What do we mean by “significant changes”?

RG 176.55 The requirement in paragraph (a) of RG 176.54 is designed to ensure that we are aware of any significant changes to the relevant overseas regulatory regime. The significance of a regulatory change will depend on the nature of the financial services offered in Australia by the FFSP. In determining whether a regulatory change is significant, FFSPs may consider whether the change is sufficiently important that it may affect our assessment that the relevant overseas regulatory regime is sufficiently equivalent to the Australian regulatory regime. If you are not sure whether a regulatory change is significant, we encourage you to notify us of it.

RG 166.56 If the overseas regulatory regime ceases to be sufficiently equivalent, we may remove the benefit of an exemption. We do not anticipate that significant changes that are relevant to the financial services the FFSP provides or intends to provide in Australia are likely to occur frequently.

RG 176.57 The types of changes that may mean the overseas regulatory regime will cease to be sufficiently equivalent include changes to:

- (a) the regulatory structure in the overseas regulatory regime;
- (b) the supervisory arrangements for FFSPs as they operate under the overseas regulatory authority;
- (c) the obligations or requirements imposed on FFSPs in the overseas regulatory regime, particularly obligations or requirements relating to:
 - (i) honesty and fairness;
 - (ii) competence;
 - (iii) financial resources; and
 - (iv) risk assessment; and
- (d) the overseas regulatory authority’s supervision or legislative responsibility for activities of the FFSP in Australia, or in relation to wholesale clients.

This list is not exhaustive.

Disclosure

RG 176.58 We will require all FFSPs exempted under this policy to disclose to any person to whom financial services are provided with the benefit of the exemption that:

- (a) the FFSP is exempt from the obligation to hold an AFS licence for the financial services; and
- (b) the FFSP is regulated under the relevant overseas regulatory regime and this regulatory regime differs from the Australian regulatory regime.

RG 176.59 Disclosure by the FFSP needs only to be made once to each person to whom financial services are provided under the exemption. Disclosure must be given before the financial services are first provided.

RG 176.60 The requirement in RG 176.58 is consistent with RG 54: see paragraph 3.40 of Principle 6. It ensures that those who deal with an FFSP are aware of that FFSP's regulatory status in Australia and of our exemption. In our view, market integrity requires transparency of this kind.

Enforcement actions

RG 176.61 To ensure that an exempted FFSP complies with the requirements of their exemption and any other Australian law that applies to an FFSP operating in Australia with an exemption under this policy, we may need to commence legal proceedings in an Australian court.

RG 176.62 To facilitate enforcement actions in Australia, the FFSP must give us a deed that sets out certain provisions. This deed is for the benefit of and enforceable by ASIC (and other persons referred to in s659B(1) of the Corporations Act), and continues to apply even if the FFSP has ceased to rely on an exemption. The deed must specify that:

- (a) it is irrevocable except with the prior written consent of ASIC;
 - (b) the FFSP will submit to the non-exclusive jurisdiction of the Australian courts in legal proceedings (whether brought in the name of ASIC or the Crown or otherwise) conducted:
 - (i) by ASIC (including under s50 of the *Australian Securities and Investments Commission Act 2001*); and
 - (ii) for proceedings relating to a financial services law, by any Commonwealth, State or Territory entity, as referred to in s659B(1) of the Corporations Act;
- Note: The entities referred to in s659B(1) (which refers to persons commencing court proceedings in relation to Takeover Panel proceedings) are Commonwealth, State and Territory entities. We have referred to s659B(1) solely because it contains this list of appropriate entities.
- (c) the FFSP will comply with any order of an Australian court for any matter relating to the provision of financial services;
 - (d) if the FFSP is not registered under Div 2 of Part 5B.2 of the Corporations Act, papers relating to legal proceedings under paragraph (b) can be served on the FFSP's local agent (see RG 176.63–RG 176.64); and

- (e) on written request of their relevant overseas regulator or ASIC, the FFSP will give or vary written consent and take all other practicable steps to enable and assist the relevant overseas regulator to disclose to ASIC (and ASIC to disclose to the relevant overseas regulator) any information or document that the relevant overseas regulator or ASIC has that relates to the FFSP.

Note: If we require the consent to be in a specific form (in addition to written), we will specify this in our written request.

Registration as a foreign company

RG 176.63 If the FFSP is required under the Corporations Act to be registered as a foreign company under Div 2 of Part 5B.2 of that Act, it must ensure that it is so registered.

RG 176.64 If an FFSP is not required to be registered under Div 2 of Part 5B.2, the FFSP must appoint a local agent for service to facilitate the commencement of proceedings in Australia.

Reliance on class order

RG 176.65 If you are taking advantage of a class order exemption, in addition to the other requirements listed above you must lodge a notice with us, telling us which class order you are relying on.

How to notify ASIC of reliance on a class order exemption

An FFSP must notify ASIC that they are relying on a particular class order exemption:

- as soon as practicable; and
- in writing addressed to **The Manager—Applications, Application & Advice: Financial Services, Regulation**. For further guidance on notifying ASIC of your reliance on the class order, see Information Release [IR 04/04] *Practical guidance for wholesale foreign financial services providers seeking licensing relief*.

You can also contact ASIC Infoline on 1300 300 630 for general information and assistance.

C How to apply for an exemption

Note: This section only applies to FFSPs that are applying for individual relief or to FFSPs or groups making a joint application for class order relief on behalf of a number of FFSPs. If you are an individual FFSP that can rely on an existing class order for relief, then you do not need to apply for an individual exemption. For more information about class order relief, see RG 176.43, RG 176.72 and RG 176.81.

Our policy

What information will we require?

RG 176.66 There is no prescribed application form for exemption under this policy. However, applicants must provide us with the relevant information and documents we need to assess their application (other than information about whether we have effective co-operation arrangements with the relevant overseas regulator).

Note: See RG 176.72 for a checklist of what you must include in your application and how to lodge it.

RG 176.67 In particular, an applicant must provide information about:

- (a) themselves;
- (b) the particular financial service they intend to provide in Australia; and
- (c) the equivalence of the relevant overseas regulatory regime (this will usually be the home regulatory regime).

Note: See RG 176.13–RG 176.16 if you are subject to more than one regulatory regime.

RG 176.68 Schedule 1 sets out the type of information we need to assess an application. These questions do not limit the information or documents applicants should provide, nor should they be regarded as an exhaustive indication of the matters we may need to consider. We may need to seek additional information from an applicant, if necessary. However, if an applicant fully answers these questions, they will generally have provided us with most of the information we need from an applicant to assess their application.

RG 176.69 In assessing an application, we may also seek:

- (a) information from the relevant overseas regulator; and
- (b) independent verification from overseas lawyers.

Note: If we seek verification from overseas lawyers, the applicant will need to meet the costs of such verification.

RG 176.70 An application under this guide should include a declaration signed by the applicant or, if the applicant is a corporate entity, a statement authorised by the board, that to the best of their knowledge and after making proper inquiries, the information and

documents provided in response to the questions in Schedule 1 and in support of the application are true, correct and complete.

Note: In the case of a joint application made by an industry association, we will discuss with that association the form and sign-off required for the application.

RG 176.71 We may require relevant information to be made available in English or an independent verification to help us make an independent assessment of the overseas regulatory authority and regulatory regime.

Note: If we seek verification of any English translation or other relevant details of an overseas regulatory regime, the applicant will need to meet the costs of such verification.

RG 176.72

How to apply for an exemption

- Check to see if you are already covered by an existing class order exemption. Go to the "Instruments and class orders" page on our website at www.asic.gov.au/co.
- If you are already covered by a class order, you must notify us of the class order you are relying on: see RG 176.65. By relying on a class order exemption, you are agreeing to comply with:
 - our standard requirements (see RG 176.51–RG 176.64), particularly the requirement to submit to the non-exclusive jurisdiction of the Australian courts (see paragraph (b) of RG 176.62); and
 - any tailored requirements that may apply under the class order, as appropriate.

See also Information Release [IR 04/04].

- If you are not already covered by a class order, contact **The Manager—Applications, Applications & Advice: Financial Services, Regulation** for advice on whether you can make an application for relief under this policy. You can do this by email addressed to FFSP@asic.gov.au.
- We will not be able to give you relief if your overseas regulator does not have effective co-operation arrangements with us. You can check with us whether we have such arrangements. To do so contact **The Manager—Applications, Applications & Advice: Financial Services, Regulation** by email addressed to FFSP@asic.gov.au.
- Lodge your application in writing addressed to **The Manager—Applications, Applications & Advice: Financial Services, Regulation**.
- Make sure your application includes *all* the information in RG 176.66–RG 176.68 and the declaration in RG 176.70.
- Make sure your application complies with Regulatory Guide 51 *Applications for relief* (RG 51).
- In the case of an individual application, include the prescribed fee with your application (see the *Corporations Regulations 2001*).

You can also contact ASIC Infoline on 1300 300 630 for general information and assistance.

Timing

RG 176.73 The time it will take us to process an application will vary depending on:

- (a) the complexity of the application and the related difficulty of assessing the equivalence of the relevant overseas regulatory regime to the Australian regime;
- (b) the amount of material we must assess; and
- (c) whether we have dealt with a similar application before.

Notifying your overseas regulator

RG 176.74 If an application is made for an individual exemption, we will ask for the applicant's consent to notify its relevant overseas regulator of the application. In notifying the relevant overseas regulator, we may:

- (a) inform the relevant overseas regulator about the content of the application; and
- (b) ask the relevant overseas regulator questions about the applicant.

Underlying principles

RG 176.75 In order to properly assess an application under this guide, we need to understand how the particular financial services to be provided in Australia are regulated by the applicant's relevant overseas regulator. In dealing with applications, we seek to be flexible. However, there are certain minimum requirements that we think are necessary for us to adequately consider an application.

Explanations

Timing

RG 176.76 For an application for relief by an FFSP or an industry association, we will aim to decide applications within 16 weeks of receiving all the information and documents required.

RG 176.77 It may take us longer to deal with an application if:

- (a) the application is particularly complex;
- (b) we experience delays in obtaining the information we require from the applicant, the relevant overseas regulator or an independent overseas expert; or
- (c) we are waiting for a response to a request for clarification.

Schedule 1: Questions for applicants

RG 176.78 The questions in this Schedule relate to the regulatory regimes of FFSPs who seek to apply for an exemption under this guide. While the answers to these questions will help us assess applications and provide most of the information we require, they should not be regarded as exhaustive and we may seek additional information.

Applicants should provide evidence of any assertions about their regulatory regime, such as references to legislation, regulations and policy. We will regard an application that does not provide such evidence as incomplete.

Note: In this Schedule we generally refer to the relevant overseas regulator as “your regulator” and the relevant overseas regulatory regime as “your regulatory regime”.

Part A: Applicant’s details

- Q1.1** What is your Australian Company Number (ACN) or Australian Registered Body Number (ARBN)? If you do not have an ACN or ARBN, are you applying for one? If not, what is your current “business form”?

Note: If an FFSP should be registered as a foreign company under Div 2 of Part 5B.2 of the Corporations Act, it must ensure it is so registered.

- Q1.2** If you are a member of a corporate group, describe the structure of that group.

- Q1.3** Name the overseas regulatory authority or authorities that regulate you.

Note: Under this policy, we will only consider regulation by your relevant overseas regulator (usually your home regulator) when deciding whether to grant an exemption: see RG 176.12. You should name your home regulators, but only mention overseas regulatory authorities in host jurisdictions if they are relevant: see RG 176.13–RG 176.16.

Part B: What financial services do you provide?

- Q2.1** Describe each financial service (within the meaning of Div 4 of Part 7.1 of the Corporations Act) that you intend to provide or continue to provide in Australia. If the financial service is described in different terminology in your regulatory regime, please also describe how it would translate into Australian terminology. You may wish to consult Chapter 7 of the Corporations Act, and identify in your response which of the financial services you propose to offer in Australia are covered by Chapter 7.

- Q2.2** Explain clearly how you will provide this service in Australia. For example, provide detailed information on the following:

- (a) Will you use local representatives or employees? If so, how many local representatives do you expect to use and what are their functions and reporting?
- (b) How will you monitor and supervise those people who will provide the financial service in Australia?
- (c) Will you have a permanent place of business in Australia?

Part B: What financial services do you provide? (cont.)

- Q2.3** How will you ensure that the financial service provided in Australia is provided only to wholesale clients (within the meaning of s761G of the Corporations Act)? For example:
- What practical controls or processes apply to ensure that the financial service is provided only to wholesale clients?
 - Will your regulator monitor your provision of a financial service in Australia to ensure it is provided only to wholesale clients?
- Q2.4** Do you provide the same financial service in your home or host jurisdiction?

Part C: The overseas regulatory regime

- Q3.1** Provide proof of the authorisation/ registration/ licence issued by your regulator that:
- entitles you to provide the financial service; and
 - demonstrates that your provision of the financial service is regulated by your regulator.

If you have authorisations/ registrations/ licences from any other overseas regulatory authority in your home jurisdiction, (or in another relevant overseas jurisdiction: see RG 176.13–RG 176.16) provide proof of all such authorisations/ registrations/ licences. Copies should be certified and accompanied by an explanation and other relevant regulatory references.

- Q3.2** For services you intend to provide in Australia, do you have any exemptions from your regulator in relation to the financial services that are regulated by your regulator? If so, what are those exemptions and what relevance do they have to the financial service you will provide in Australia?
- Q3.3** What is the jurisdictional reach of your regulator? Does it regulate, supervise and monitor services provided by you in Australia?
- Q3.4** Describe how your regulator regulates the financial service you will provide in Australia. For example:
- What broad criteria have you satisfied to be authorised/ registered/ licensed to provide financial services? For example, does your regulator require satisfaction of probity, competency or resource requirements?
 - How does your regulatory regime ensure you act fairly and honestly in your provision of financial services to clients? For example, does your regulatory regime impose any obligation on you to act fairly and honestly? Does your regulatory regime prohibit you from acting dishonestly?
 - How does your regulatory regime ensure you are competent to provide the financial service you will provide in Australia? For example, does your regulator impose on you any obligations to be competent in your provision of financial services to clients? Does your regulatory regime prohibit you from acting incompetently in your provision of financial services to clients? Does your regulatory regime prescribe minimum educational or other qualifications?

Part C: The overseas regulatory regime (cont.)

- (d) How does your regulatory regime ensure you monitor and supervise employees and/or representatives who provide financial services on your behalf in Australia?
- (e) How does your regulatory regime ensure you have sufficient resources to provide the service you will provide in Australia? For example, does your regulatory regime impose any obligations on you to meet:
 - (i) specified financial requirements; or
 - (ii) other resource requirements?Provide detailed descriptions of all such requirements.
- (f) How does your regulatory regime ensure you have adequate risk management processes? For example, does your regulatory regime impose any obligations on you to meet requirements for adequate risk management processes, either specifically or as part of your broader obligations? Does your regulatory regime require you to have adequate internal controls or compliance arrangements?
- (g) To what extent does your regulator regulate your provision of financial services to wholesale clients?
- (h) How does your regulator monitor and enforce compliance with each of the obligations or prohibitions in paragraphs (a)–(f)?
- (i) Does your regulator have the power to enforce the financial services regulations and rules of your regulatory regime for your provision of financial services in other jurisdictions, such as Australia? Give details of those powers.

If you are regulated by more than one relevant overseas regulator, describe the roles and powers of each regulator for each of these matters.

Where appropriate, provide copies of relevant legislative provisions and policies.

Schedule 2: Regulatory mechanisms and outcomes

RG 176.79 This Schedule sets out some examples of regulatory mechanisms that we consider might achieve regulatory outcomes that are sufficiently equivalent to our own for the purposes of an exemption under this guide.

In most regulatory regimes, the relevant outcome is achieved by a combination of regulatory mechanisms. Generally, no single regulatory mechanism is sufficient to achieve the relevant outcome by itself.

While the examples in this Schedule will help in an assessment of whether the regulatory outcomes are sufficiently equivalent, they should not be regarded as exhaustive and we may consider additional factors.

Key outcome	Examples of regulatory mechanisms
FFSPs are fair and honest	<ul style="list-style-type: none"> • Licences or other approvals are only granted to FFSPs who are of good reputation and character or, if the FFSP is not a natural person, to FFSPs whose officers, partners or controllers are persons of good reputation and character. • A statutory obligation to act fairly and honestly is imposed on FFSPs. • FFSPs are subject to fiduciary or contractual obligations to act fairly and honestly in their dealings with clients. • The FFSP's regulator licenses or otherwise approves key employees and representatives of the FFSP by reference to their good reputation and character.
FFSPs are competent	<ul style="list-style-type: none"> • Licences or other approvals are only granted to FFSPs who are competent to provide the financial services they wish to provide. • A statutory obligation to maintain competence is imposed on FFSPs. • A statutory obligation is imposed on FFSPs to ensure that their employees and representatives are adequately trained and competent. • FFSPs are subject to obligations to ensure they and their employees and representatives are competent. (Such general law obligations may, for example, arise under contract or the laws of negligence.) • The FFSP's employees and representatives must meet specified minimum educational and other qualification requirements. • The FFSP's regulator licenses or otherwise approves key employees or representatives by reference to competence criteria.

Key outcome	Examples of regulatory mechanisms
FFSPs have adequate resources	<ul style="list-style-type: none"> • Licences or other approvals are only granted to FFSPs who establish that they have adequate resources (including financial, technological and human resources) to provide the financial services they wish to provide. • A statutory obligation is imposed on FFSPs to have adequate resources to provide the financial services. • FFSPs or their boards are required to periodically certify that they have adequate resources. • FFSPs must meet specified minimum resource requirements. • FFSPs are subject to prudential supervision by an independent regulator.
FFSPs have adequate risk management processes	<ul style="list-style-type: none"> • Licences or other approvals are only granted to FFSPs who establish that they have adequate risk management systems to provide the financial services they wish to provide. • A statutory obligation to have adequate risk management systems is imposed on FFSPs. • A statutory obligation to have adequate internal controls is imposed on FFSPs. • A statutory obligation to have adequate compliance arrangements is imposed on FFSPs. • FFSPs or their boards are required to periodically certify that they have adequate risk management processes. • The FFSP's risk management processes are periodically reviewed and approved by an independent auditor. • FFSPs are required to comply with specific obligations to ensure that client funds are properly dealt with. • FFSPs are required to comply with specific obligations to ensure they keep financial records that correctly record and explain the transactions and financial position of the financial services business carried on by the FFSP.

Key terms

RG 176.80 In this guide, a reference to:

“AFS licence” means an Australian financial services licence under s913B that authorises a person who carries on a financial services business to provide financial services

Note: This is a definition contained in s761A.

“ASIC” means the Australian Securities and Investments Commission

“Corporations Act” means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

“equivalence test” means the criteria set out in RG 176.22 by which we will assess the equivalence of a relevant overseas regulator’s regime to the Australian regulatory regime

“financial services law” means financial services law as defined in s761A of the Corporations Act.

“foreign financial service provider” (FFSP) means a provider of financial services who wishes to provide their wholesale financial services in Australia

“home jurisdiction” means the jurisdiction from which the FFSP originates and in which it is regulated

“home regulator” means the overseas regulatory authority of the FFSP in their home jurisdiction

“home regulatory regime” means the regulatory regime in the FFSP’s home jurisdiction

“host jurisdiction” means a jurisdiction where the FFSP is authorised to operate and in which it is regulated other than its home jurisdiction

“host regulator” means the overseas regulatory authority of the FFSP in their host jurisdiction

“host regulatory regime” means the regulatory regime in the FFSP’s host jurisdiction

“IOSCO” means the International Organization of Securities Commissions

“*IOSCO Objectives and Principles of Securities Regulation*” means the *Objectives and Principles of Securities Regulation*, originally

adopted by IOSCO in September 1998 and as amended from time to time

“overseas regulatory authority” means a body established by or for the purposes of a foreign government to regulate financial services and includes an FFSP’s relevant overseas regulator

“*Principles for cross border financial services regulation*” means the principles in Regulatory Guide 54 *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment* (RG 54)

“reg 7.6.01” (for example) means a regulation under the *Corporations Regulations 2001* (in this example numbered 7.6.01)

“regulatory regime” means the rules that govern a financial facility, service or product and may include legislation, the rules, policies and practices of a regulator

“relevant overseas regulator” means the overseas regulatory authority which, in our view, has the most responsibility for monitoring and enforcing compliance of the FFSP with its regulatory obligations in relation to the financial services which it provides or intends to provide in Australia with the benefit of relief under this policy

Note: For some examples of how we identify the relevant overseas regulator, see the notes under RG 176.14–RG 176.15.

“relevant overseas regulatory regime” means the regulatory regime supervised and administered by the relevant overseas regulator

“RG 51” (for example) means an ASIC regulatory guide (in this example numbered 51)

“s911A(2)(h)” (for example) means a section of the Corporations Act (in this example numbered 911A(2)(h))

“self-regulatory organisation” (SRO) means a non-government entity that has authority to create, amend, implement and enforce rules of conduct and resolve disputes through arbitration or other means

“wholesale client” means a wholesale client as defined in s761G of the Corporations Act

Related information

RG 176.81

Headnotes

Licensing, exemption, foreign financial services providers, overseas regulatory authorities, sufficiently equivalent regulation, effective co-operation arrangements and wholesale clients.

Legislation

Corporations Act 2001 Part 5B.2, s911A(2)(h), 911A(2)(g),
Corporations Regulations 2001 reg 7.6.01(1)(f), (fa), (g), (ma), (n) and
(na), *Australian Securities and Investments Commission Act 2001* s50

Class orders

[CO 03/1099] *UK FSA regulated financial service providers*

[CO 03/1100] *US SEC regulated financial service providers*

[CO 03/1101] *US Federal Reserve and OCC regulated financial service providers*

[CO 03/1102] *Singapore MAS regulated financial service providers*

[CO 03/1103] *Hong Kong SFC regulated financial service providers*

[CO 04/100] *Foreign financial services providers: Licensing relief—amendment*

[CO 04/213] *US Federal Reserve and OCC regulated financial services providers—amendment*

[CO 04/829] *US CFTC regulated financial services providers*

[CO 04/1313] *German BaFin regulated financial services providers*

[CO 05/308] *Foreign financial services providers: Licensing relief—amendment*

Regulatory guides

RG 54 *Principles for cross border financial services regulation*

RG 177 *Australian market licences: Overseas operators*

RG 178 *Foreign collective investment schemes*

Consultation papers

CP 40 *Licensing: Discretionary powers—Foreign financial services providers* (December 2002)

Information releases

[IR 03/22] *Policy Statement 176: Discretionary powers—wholesale foreign financial service providers* (September 2003)

[IR 03/28] *ASIC provides limited relief for certain foreign financial services* (October 2003)

[IR 03/41] *ASIC issues licensing relief for certain foreign financial services providers* (December 2003)

[IR 04/04] *Practical guidance for wholesale financial services providers seeking licensing relief* (February 2004)

[IR 04/52] *ASIC issues licensing relief for wholesale foreign financial services providers regulated by the US Commodity Futures Trading Commission* (October 2004)

[IR 04/55] *ASIC issues licensing relief for wholesale foreign financial services providers regulated by the German BaFin* (October 2004)