FINANCIAL SERVICES REGULATORY UPDATE

True Oak develops and distributes a monthly overview of current and proposed regulatory changes in the Australian financial services industry that we think might be of interest to our CAR clients and Trustee Services clients.

FEATURE ARTICLES

Similar to March, April has been a quiet month for relevant regulatory updates. So, we've taken the opportunity to highlight two feature articles which we believe will be of interest to many of our CAR clients.

Certified Wholesale: The Complexities of Wholesale Client Status for SMSFs

David Court, FS Super, April 2025. Find the complete article here.

In March 2025, we wrote to all CAR Clients to provide guidance on better compliance practices in respect of identifying Wholesale Clients. The letter included specific guidance on using the Wealth Tests to classify SMSFs as Wholesale Clients. This article supports and expands on the position we took in our correspondence.

When is it permissible to treat an SMSF client as wholesale?

An SMSF must have one of two trustee structures:
- Corporate trustee: Each member must be a director of the corporate trustee. A single member SMSF may have either one or two directors, the second director being either a relative or person who is not an employer of the member.
- Individual trustees: Each member must be an individual trustee. For a single member SMSF there must be two individual trustees, the second trustee being either a relative or person who is not an employer of the member.

At law, the SMSF trust fund itself is not a legal entity and the status of the fund's trustee/s as a wholesale client needs to be looked at rather than the trust itself. Where an SMSF has a corporate trustee, the company is the client, and it is the status of the company that needs to be considered. Where the SMSF has individual trustees, then the client is the joint individual trustees, and in this situation, the individual trustees must be considered as a joint entity and not as the sum of their individual circumstances.

(That said, recent AFCA determinations have cast doubt on whether the trustees of an SMSF with less than $10 million in assets can be treated as a wholesale client under any of the tests. This contrasts with the long-standing position taken by ASIC in this regard.)

The individual wealth tests for wholesale client status (and the impact of including controlled entities)

The individual wealth tests require a person to have either (a) net assets of at least $2.5M, or (b) gross income for each of the last two financial years of at least $250,000; and (c) for both (a) and (b) status certified by an accountant.

As noted above, individual trustees must be considered as a joint entity and not as a sum of their individual circumstances. Therefore, only assets or income that the individual trustees jointly own can be counted towards the individual wealth tests.

The individual wealth tests have an extended operation in relation to controlled entities, such that:
- In determining the net assets or gross income of a person, the net assets or gross income of a company or trustee controlled by that person can be included. This has obvious application in relation to an SMSF given that such funds are established as trusts.
- If a person is eligible to be a wholesale client (under any of the eligibility tests) then a company or trust controlled by that person is also a wholesale client, even if they do not otherwise qualify.

Note: 'Control' is defined as the capacity of one entity to determine the outcome of decisions about another entity's financial and operating policies. *Continued over the page.*

Who can control an SMSF?

The trustees of an SMSF legally own, and therefore control, the assets of the SMSF, which means that the income and assets of the fund can be included for the purpose of determining whether the individual themselves meets the individual wealth test.

But, due to the nature of superannuation law, for a SMSF with an individual trustee structure, an individual trustee of the SMSF is unlikely to control the SMSF as there must always be another individual trustee of the SMSF. As the individual trustees must act unanimously, none of them would have individual control of the SMSF. They would always require the other trustees to agree to any course of action that was proposed in relation to the SMSF.

A similar lack of control would exist between the multiple directors of an SMSF with a corporate trustee, unless it is a single member SMSF with a corporate trustee that had that member as sole director and shareholder would be controlled by the member.

So, what does this all mean? In short, where an SMSF has a corporate trustee, the company is the client, and it is the status of the company that needs to be considered, and so whilst the Net Wealth or Income Test will not be appropriate, there are other tests – the Price or Value Test or the Professional Investor Test – which can be relied on. However, where the SMSF has individual trustees, the jury is still out in respect of using the Net Wealth or Income Test to identify an SMSF as a wholesale client. We're not recommending any change in processes right now, but continue to watch this space.

Reversing into a regulator – reverse solicitation pitfalls

Liam Hennessy, Thomson Geer Lawyers, 1 April 2025. Find the original article here.

Entities operating under an AFSL must exercise caution when interacting with clients located outside of Australia.

ASIC has previously indicated in Consultation Paper 315 and Report 656 that it does not support licensing relief based solely on reverse solicitation, citing concerns about monitoring, investor protection, and regulatory enforcement. The same is broadly true for other advanced markets AFSL-holders may interact with.

This issue is more prevalent than ever with the globalisation of financial markets, particularly in the digital assets space.

Reverse solicitation

Reverse solicitation remains a limited and complicated basis for engaging non-Australian clients, particularly in highly regulated jurisdictions such as the United Kingdom or European Union, where financial promotions and cross-border financial services laws are actively enforced.

Reverse solicitation refers to circumstances in which a client initiates contact with a financial services provider entirely of their own accord, without any prior advertising, marketing, solicitation, or inducement. If properly documented, reverse solicitation *may* reduce regulatory risk in jurisdictions where the provider is not licensed. However, it is not a safe harbour under Australian law, nor under the majority of international regimes. At best, it provides some evidentiary value in demonstrating that the provider did not actively offer or promote services into the foreign jurisdiction in seeking to avoid regulatory consequences.

Flipping FFSP guidance

ASIC made its position clear in CP 315, stating that it did not consider there to be sufficient justification for licensing relief based on reverse solicitation i.e. to Australian investors. This was reaffirmed in Report 656, which noted that no such relief would be granted to FFSPs servicing Australian professional investors, and that the risks to Australian investors and the integrity of the regulatory framework were too great. This approach reflects ASIC's broader concerns about compliance oversight in cross-border service provision. *Continued next page.*

The position taken by ASIC aligns with the approach of other regulators, such as the UK's Financial Conduct Authority (FCA). Under the UK financial promotions regime, governed by the *Financial Services and Markets Act 2000* (FSMA), any invitation or inducement to engage in investment activity must be issued or approved by a UK-authorised person. Reverse solicitation is not a formal exemption in the UK, and the FCA applies a broad interpretation of what constitutes a "promotion" of a financial product, including websites, social media content, and responses to inbound inquiries where the initial contact was indirectly driven by advertising.

In the European Union, reverse solicitation is governed by MiFID II, specifically Article 42, which permits third-country firms to provide services at the exclusive initiative of the client. However, the European Securities and Markets Authority (ESMA) has repeatedly cautioned against the abuse of this exemption. In particular, ESMA has emphasised that the mere acceptance of EU-based clients following any form of marketing or general outreach — even indirectly — may disqualify a firm from relying on reverse solicitation. Post-Brexit, scrutiny has intensified, with several EU national regulators issuing warnings against firms allegedly circumventing local licensing regimes under the guise of client-initiated contact.

For AFSL holders, this creates significant legal and reputational risk. Even when a prospective offshore investor appears to initiate contact, if that interaction was prompted by general advertising, content marketing, or any other form of indirect inducement, the client relationship may still be considered a "promotion" in many jurisdictions. "Indirect inducement" is notoriously factually difficult. Even if a prospective offshore client initiates contact, that enquiry may be invalidated if it was influenced — however subtly — by earlier promotional efforts. This includes general advertising, SEO-driven content, social media posts, or third-party referrals that mention the firm's services.

Australian firms must take care to assess the full marketing and distribution journey that may have led to an enquiry and avoid relying on reverse solicitation where there is a risk that indirect outreach has occurred, even unintentionally. Missteps in this area can expose a firm to enforcement action, fines, or bans on operating in certain markets.

Practical guidance

To mitigate these risks, AFSL holders should take a proactive and structured approach when engaging with offshore clients. Ideally, this begins with a jurisdictional risk assessment — identifying the countries in which prospective clients are located and understanding the regulatory regimes that apply to the provision of financial services and the making of financial promotions in each.

Marketing and client acquisition strategies should be carefully reviewed to avoid unlawful cross-border promotion. Firms should avoid sending promotional materials, advertisements, deal invitations, or newsletters to individuals or entities in jurisdictions where they are not authorised. Public-facing websites and platforms should include clear disclaimers and geo-blocking where feasible, to limit access from high-risk jurisdictions.

Where reverse solicitation is relied upon, the risks must be properly appreciated, and it must be properly documented in risk frameworks, policies, procedures and controls. AFSL holders should implement onboarding flows that require prospective clients to acknowledge, in writing or via digital click-through, that they initiated contact without any prior promotion or inducement. The acknowledgment should also make clear that the firm is licensed under Australian law only, that the services are not offered under the investor's local laws, and that the investor may not benefit from local consumer or investor protections. Records of these acknowledgments, along with supporting metadata such as IP addresses, timestamps, and user logs, should be retained for audit and regulatory purposes.

In some cases, where a firm's business model involves regular or substantial engagement with offshore clients, it may be advisable to establish a locally licensed affiliate or partner with a regulated local entity to ensure full compliance. Additionally, care should be taken to separate "on-platform" and "off-platform" activity if they involve different regulatory risks — for instance, connecting foreign counterparties in off-platform securities transactions may require further structuring or disclaimers. *Continued next page.*

Conclusion

While reverse solicitation may assist in reducing legal exposure when servicing offshore clients, it should not be used in isolation / carries clear legal and compliance risk which should be tested. If adopted, it must form part of a broader compliance strategy that includes onboarding controls, jurisdictional analysis, tailored disclaimers, and robust documentation. Regulators in Australia and overseas are increasingly vigilant in the cross-border financial services space, and AFSL holders must ensure they are operating within the law wherever their clients reside.

Firms that are planning international growth, expanding digital platforms, or engaging in off-platform intermediary activity should seek legal advice to confirm their approach is compliant with both Australian and foreign regulations.

ASIC

1. Issues Fine for Misrepresenting Financial Outcomes

ASIC has issued two infringement notices totalling $37,560 to debt management company Chapter Two Holdings Pty Ltd for alleged misleading statements made on its website.

Between 1 August 2023 and 14 March 2024, Chapter Two's website included statements that the company had wiped $80 million in debt and saved consumers $30 million in interest, statements which ASIC alleges are misleading.

ASIC alleges that these statements were false or misleading as Chapter Two was not able to substantiate the figures, nor was there a reasonable or evidence-based justification for the statements.

ASIC seeks to enhance public confidence by ensuring that financial services providers accurately represent their services and do not mislead prospective clients.

ACTION: Please ensure that all statements on your website and other public facing marketing collateral in respect of financial products and services can be substantiated.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

Sophie Grace Compliance Videos

Consultancy Sophie Grace has released a number of compliance-based videos that can be purchased separately. Consider, in particular, AFSL Wholesale Client Qualification and What Things Must Not Be On Your Website.

Carbon Market Institute Courses

a. **Carbon Market Fundamentals Training**: e-learning course provides participants with an overview of the scientific and economic basis for carbon markets. More info here.

b. **Carbon Farming Banker Training**: This finance sector-focused module builds capacity and knowledge of carbon farming in Australia from the perspective of bankers and agri-lenders. More info here.

May 2025

a. Carbon Market Institute – **Carbon Farming Industry Forum** (Lennox Head, NSW – 6-8 May) – more info here.

b. FINSIA – **2025 Australia and New Zealand Economic Update** (Webinar – 13 May) – more info here.

c. Holley Nethercote Lawyers - **No Advice v General Advice v Personal Advice Training** (Webinar – 15 May) – more info here.

d. Stockbrokers and Investment Advisers Association (SIAA) – **SIAA 2025: Creating Confidence** (Sydney – 19-20 May) – more info here.

e. Holley Nethercote Lawyers - **Don't Drown in the Privacy, Cyber & Scams Legislation** (Webinar – 21 May) – more info here.

f. Holley Nethercote Lawyers - **AML/CTF Training on Risk Awareness and Pending Reforms Workshop** (Online Workshop – 27 May) – more info here.

g. Australian Investment Council – **Australian Venture Summit 2025** (Sydney – 29 May) – more info here.

June 2025

a. International Business Review – **Investment Performance Measurement, Attribution and Risk Management 2025 Conference** (Sydney – 18-19 June) – more info here.

b. Australian Investment Council – **Principles of Venture Capital** (Melbourne – 26 June) – more info here.

July 2025

a. Investor Daily – **Australian Wealth Management Summit** (Sydney – 31 July) – more info to come.

August 2025

a. Carbon Market Institute – **12th AER Summit** (Melbourne – 13-14 August) – more info here.

September 2025

a. Australian Investment Council – **Australian Investment Conference** (Gold Coast – 3-4 September – more info to come.

November 2025

a. ASIC – **Annual Forum** (Melbourne – 12-13 November) – more info to come.

INTERESTING READS

Links to interesting blogs and articles I've recently read:

a. Carbon Market Institute – International Carbon Market Update: Market Brief (Q1 2025).

b. Investment Magazine – What a proof-of-concept taught us about AI implementation.

c. Investor Daily – Wealth managers flag super fund dominance as threat to capital access for small firms.

d. Financial Standard – Finfluencer failed to disclose paid promotions, says regulator.

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