Exclusive

ASIC warned Treasury about unlicensed foreign firms

Aleks Vickovich *Wealth editor*

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The Morrison government may allow international investment firms to operate without a licence despite the corporate regulator’s warning that the loophole has led to a spike in misconduct.

The government announced in May it was considering restoring an exemption for foreign services providers based in “jurisdictions with comparable rules” from obtaining an Australian Financial Services Licence (AFSL) to “reduce duplicate” regulations.

Senator Andrew Bragg's taskforce recommended restoring the licence exemption for foreign finance firms.
James Brickwood

But documents obtained by *The Australian Financial Review* under freedom of information laws reveal that Treasury was warned in March last year the licence exemption was creating a dangerous regulatory blind spot.

A letter from Australian Securities and Investments Commission strategic policy adviser Brittney Haryanto to Treasury officials on March 9, 2020, briefed the department on why the regulator sought to end the exemption and introduce a new licensing regime for foreign firms. The names of the Treasury public servants were redacted in copies of the letter provided to the *Financial Review*.

"Under the foreign AFSL regime, foreign providers will be subject to fundamental conduct obligations ... such as the requirement to provide financial services efficiently, honestly and fairly," Ms Haryanto wrote.

"It will also provide ASIC with the supervisory and enforcement tools to allow us to more adequately and effectively monitor and supervise the conduct of foreign providers in Australia and therefore to maintain market integrity and investor protection for Australian markets."

The ASIC official told her Treasury counterparts that bringing foreign-based firms under the licensing regime was necessary to trigger ASIC's directions powers and ability to dish out penalties.

Extract from ASIC's correspondence to Treasury

Update: ASIC's policy review on regulatory framework for foreign financial services providers [SEC=OFFICIAL]

from Brittney Haryanto — Mon March 9, 2020 3:39PM
to [redacted]@treasury.gov.au
cc Alan Worsley; Melissa Liu; Andrew Fawcett

Hi [redacted]

We have been instructed by our Commission to update Treasury on the policy update we are doing in relation to foreign financial services providers.

We have seen multiple instances of non-compliance by FFSPs with the conditions of the sufficient equivalence relief.

We have also observed some foreign providers avoiding the Australian licensing regime by claiming they are regulated by an overseas regulatory authority, for example the US SEC, when in fact they do not provide any financial services in the US and are therefore not subject to any regulatory oversight.

SOURCE: FINANCIAL REVIEW

Foreign providers avoiding regime

She said ASIC had detected "multiple instances" of non-compliance with the local rules and regulations by firms relying on a licence exemption.

"We have also observed some foreign providers avoiding the Australian licensing regime by claiming they are regulated by an overseas regulatory authority, for example the US SEC, when in fact they do not provide any financial services in the US and are therefore not subject to any regulatory oversight," Ms Haryanto wrote.

"Under the current relief framework, ASIC is unable to take the appropriate regulatory action in relation to misconduct by foreign providers relying on the sufficient equivalence relief."

But ASIC's plans to end the exemption were overruled by the measure, contained in the federal budget papers, to consider restoring that framework.

Treasury is conducting a public consultation on the licence exemption, open until July 30.

> **We believe that the system which ASIC announced in March 2020 is appropriate, balanced and should remain.**
>
> — Matthew Fletcher, MSC Group managing director

"The options being canvassed are aimed at reducing duplicate regulatory requirements but also proposes a number of safeguards to ensure there is appropriate oversight to ensure the efficient functioning of markets in Australia," a Treasury spokeswoman told the *Financial Review*.

"Foreign financial services providers (FFSPs) provide Australian investors with access to global investment opportunities and attract investment into Australia."

The decision acted on a recommendation of Coalition Senator Andrew Bragg's taskforce to attract financial services talent to Australia.

The report by the so-called Australia as a Financial & Technology Centre Advisory Group, led by Senator Bragg and made up on financial services and fintech industry executives, advised the government to scrap ASIC's plan.

'Frustration and uncertainty'

"It is currently proposed from April 2022 such FFSPs would require an Australian foreign [AFSL], which adds additional compliance, costs and process for application," the AFTCAG concluded in its January paper.

"It is therefore recommended that this change be revisited for any FFSP that is interacting only with professional investors (e.g. those with more than A$10 million in personal assets or that are already licensed themselves) that do not require extra protection."

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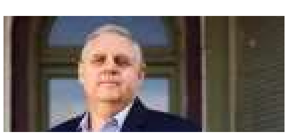

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But local financial services businesses have complained of a “double standard”, given being authorised under an Australian financial services licence, and the associated mandatory professional indemnity insurance premiums, are among the chief cost pressures pushing up the price of financial advice.

Matthew Fletcher, managing director of Melbourne-based MSC Group, a trustee and custodian to local and international fund managers, slammed the decision to reconsider ASIC’s closing of the loophole.

“We believe that the system which ASIC announced in March 2020 is appropriate, balanced and should remain,” Mr Fletcher said.

“The announcement has created frustration and uncertainty for many foreign financial service providers who have invested significant resources in applying for a foreign licence.”

Aleks Vickovich is the wealth editor. He writes about financial advice, funds management, superannuation and regulation, with a special interest in the next generation of investors. *Connect with Aleks on Twitter. Email Aleks at aleks.vickovich@afr.com*

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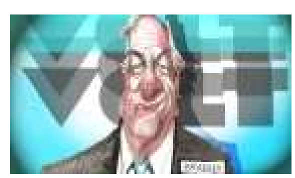

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