

## Current Situation in Relation to Foreign Financial Service Providers (FFSPs) in Australia (March 2022)

### A. ORIGINAL CONSULTATION PAPER AND 2021 CHANGES

On 11 March 2020, after several years of consultation, Australian Securities and Investments Commission (ASIC) confirmed Foreign Financial Service Providers (FFSP) licencing reforms to take effect from 31 March 2022. These reforms essentially include:

- the termination of the 'limited connection' and 'passporting' exemptions for FFSPs, with effect from 31 March 2022;
- the introduction of a new funds management exemption to effectively replace the limited connection exemption; and
- the introduction of the new foreign Australian Financial Services Licence (foreign AFSL) framework for FFSPs regulated overseas in a 'sufficiently equivalent' manner to enable them to provide financial services to wholesale clients in Australia. FFSPs regulated by certain regulators in the U.S., Singapore, Hong Kong, Germany, Luxembourg, the UK, Denmark, Sweden, France and Canada were eligible to apply for a foreign AFSL, and others were to be considered on a case-by-case basis.

ASIC subsequently published an updated *Regulatory Guide 176: Foreign financial services providers* (RG 176) and during 2020, a number of FFSPs started preparing for the 31 March 2022 changes, including preparing applications to apply for a foreign AFSL.

### Treasury Announcement May 2021

In the Federal Treasury budget delivered on 11 May 2021, the Federal Government announced a complete change in relation to the proposed cessation of existing licensing exemptions for FFSP and announced that there would be new consultation on:

- options to restore previously well-established regulatory exemptions from holding an ASFL for FFSPs who are licensed and regulated in jurisdictions with comparable financial service rules and obligations or have a limited connection to Australia and deal with wholesale clients, in order to reduce duplicate regulatory requirements; and
- options to create a fast-track licensing process for FFSPs who wish to establish more permanent operations in Australia, with the intention of shortening application timeframes and reducing barriers to entering the Australian market.

### ASIC Extension

On 11 June 2021, ASIC announced a welcome 12 month extension (from 31 March 2022 to 31 March 2023) to the passporting exemptions and limited connection exemption for FFSPs.

It also announced:-

- The commencement of the new funds management exemption is delayed until 1 April 2023.

- The assessment of foreign AFSL applications lodged by FFSPs at date would be paused (unless the foreign AFSL applicant specifically requests otherwise). ASIC would only accept new applications for individual temporary licensing exemptions or new standard or foreign AFSL applications from entities that cannot rely on the existing passporting exemptions or limited connection exemption pending any legislative changes arising from Treasury's upcoming consultation.

## 2021 Consultation Paper

The consultation paper set out various in relation to FFSP AFSL exemptions:

### Option 1

This options is to restore the previous exemptions. This option has two sub-components:

- restore the passporting and limited connection exemptions as they applied before their repeal on 31 March 2020. The passporting exemptions would re-apply to FFSPs regulated by the United Kingdom, United States, Hong Kong, Singapore, Germany and Luxembourg.
- restore the passporting exemptions as they applied before their repeal on 31 March 2020 and continue the funds management exemption in place of the limited connection exemption for eligible FFSPs.

### Option 2

This option is to provide an exemption to FFSPs providing the following four financial services to wholesale clients (provided that the FFSP is licensed to provide these services in its home jurisdiction):

- providing financial product advice;
- dealing in a financial product;
- making a market for a financial product; and/or
- providing a custodial or depository service.

Option 2 would require FFSPs to notify ASIC of their reliance on the exemption and to be from one of the following jurisdictions and regulated by one of the following authorities (which have been assessed as being sufficiently equivalent to the Australian regulatory regime for the regulation of financial services):

### Option 3

This is the same as Option 2 but wider, providing an exemption to FFSPs for any financial services provided to wholesale clients (i.e., not limited to the four financial services specified under Option 2).

## **Option 4**

This option amends the fit and proper person test. ASIC would be given the discretion to determine whether a fit and proper person test is required for every relevant person listed in section 913BA of the Corporations Act (e.g., the directors of the controllers of the applicant).

This would enable ASIC to rely on similar assessments by other regulators rather than be required by law to form its own assessment, recognising that some jurisdictions do not require fit and proper assessments or that they impose different requirements for FFSPs providing financial services to Australian wholesale clients.

## **Option 5**

This option introduces a modified licensing regime for FFSPs that:

- are regulated by an overseas regulatory authority that is a signatory to the IOSCO multilateral MOU; and
- provide financial services to wholesale clients in Australia.

## **Option 6**

This option automatically grant an AFSL to a FFSP that provides appropriate evidence to demonstrate that they:

- are regulated by an overseas regulatory authority that is an IOSCO board member;
- hold an existing licence and are specifically authorised to provide the financial services intended to be provided in Australia; and
- will only provide financial services to wholesale clients in Australia.

Potential conditions that could apply for each option were set out in the consultation paper.

## B. EXPOSURE DRAFT LEGISLATION

Following this consultation which closed in July 2021, the Treasury released Exposure Draft Legislation and an explanatory memorandum.

### Limited Connection Exemption Converts to Professional Investor Exemption

The limited connection exemption will be replaced by the ‘professional investor exemption’.

This exemption is limited to providing financial services to professional investors, which is a subset of wholesale clients, so its scope is narrower.

FFSPs using the ‘professional investor exemption’ will be more regulated than they were under the limited connection exemption and will need to give notice to ASIC and to comply with ongoing conditions.

#### Comparison Table

Requirement	Old Limited Connection Exemption	New Professional Investor Exemption
<b>Type of Australian Client</b>	Wholesale clients	Professional investors (a subset of wholesale clients).  This category does not include investors who hold a ‘qualifying accounting certificate’.
<b>Connection to Australia</b>	The FFSP was not able to provide services or products ‘while in Australia’.	The FFSP must provide the financial service ‘from a place outside Australia’.  The FFSP may have a presence in Australia and appoint local representatives and may send representatives on infrequent visits to Australia.
<b>Notification to ASIC</b>	Not required	The FFSP must notify ASIC as soon as practicable (and before the 15th business day) after the first time that it starts to use the exemption.
<b>Contents of Notice</b>	Not required	This notice must state the FFSP’s intention to rely on the exemption and include the FFSP’s agreement: <ul style="list-style-type: none"> <li>• that legal proceedings relating to the provision of the financial services may be brought in an Australian court;</li> <li>• that such proceedings would be subject to Australian law; and</li> <li>• to comply with any order of a court from such proceedings, to the extent that the order does not conflict with an order made by a court in the FFSP’s home jurisdiction.</li> </ul>

		<p>The notice must be in writing and in a form that is approved by ASIC but may be submitted electronically.</p> <p>It must include the FFSP's contact details, and any information, statements, explanations, or other matters required by ASIC and be accompanied by any other material specified by ASIC.</p>
<b>Ongoing Requirements</b>	Nil	<p>The FFSP must:</p> <ul style="list-style-type: none"> <li>• reasonably believe that the provision of the financial services does not contravene any laws that apply in its principal place of business, head office or the place from where the financial services are provided;</li> <li>• give reasonable assistance to ASIC in relation to the performance of ASIC's functions or the exercise of ASIC's powers (including giving ASIC a copy of the FFSP's books which FFSPs may find problematic);</li> <li>• comply with a direction given by ASIC to provide information (within the time specified or a reasonable time) about the FFSP's financial services or financial services business;</li> <li>• give a written notice to each new professional investor client stating that the FFSP is exempt from the requirement to hold an AFSL before providing a financial product or service to them or if that is not practicable (e.g., because the service is provided at the request of the client), then as soon as practicable after the product or service is provided to them; and</li> <li>• notify ASIC of any changes to the person's contact details as soon as practicable after the change happens.</li> </ul>
<b>Consequences of failing to comply</b>	None	<p>If a FFSP fails to comply with a condition to the exemption ASIC may:</p> <ul style="list-style-type: none"> <li>• cancel their exemption (after giving notice of the proposed decision and an opportunity to appear at a hearing or make a submission);</li> <li>• impose additional conditions on their use of the exemption; or</li> <li>• apply to the court for a civil penalty and pecuniary penalty order.</li> </ul>

		<p>ASIC also has the power to cancel a FFSP's exemption if:</p> <ul style="list-style-type: none"> <li>• it reasonably believes that an officer of the FFSP or a controlling entity of the FFSP is not a fit and proper person to provide financial services or products; or</li> <li>• the FFSP fails to provide details of a contravention of the exemption within 15 business days from when the FFSP would reasonably have been expected to have become aware of the contravention, after having made reasonable enquiries.</li> </ul>
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### Passporting Exemption Becomes Comparable Regulator Exemption

The passporting exemptions will be replaced by the 'comparable regulator exemption'.

This is similar to the passporting exemption but more conditions will apply including giving assistance to ASIC, complying with directions and maintaining oversight of representatives.

The fast tracking of wholesale AFSL applications for FFSPs authorised to provide financial services in comparable regulatory regimes will take the form of an exemption from the fit and proper person test.

This exemption will remove the need to obtain solvency checks and criminal history checks for officers of the applicant and its controlling entities, which is a welcome development for foreign entities who have many overseas resident officers who would otherwise in scope for these checks.

The exemption does not apply to AFSL applications more generally

### Comparable Regulators

The initial list of the Minister's 'comparable regulators' for the purposes of the comparable regulator exemption are:-

- US Securities and Exchange Commission (US SEC)
- US Federal Reserve and Office of the Comptroller of the Currency (OCC)
- US Commodity Futures Trading Commission (US CFTC)
- Monetary Authority of Singapore (Singapore MAS)
- Hong Kong Securities and Futures Commission (Hong Kong SFC)
- Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (German BaFin)
- Luxembourg Commission de Surveillance du Secteur Financier (CSSF)
- UK Financial Conduct Authority or Prudential Regulatory Authority (UK FCA or PRA)
- Danish Financial Supervisory Authority (Danish FSA)
- Finansinspektionen (Swedish FI)

- Autorité des Marchés Financiers of France (French AMF)
- Ontario Securities Commission (Ontario OSC)

## Eligibility

The FFSP must meet the definition of 'foreign company. A 'foreign company' is:

- a body corporate incorporated in an external territory, or outside Australia and the external territories, and is not a corporation sole, or an exempt public authority; or
- an unincorporated body that (is formed in an external territory or outside Australia and the external territories and) *may sue or be sued or may hold property in the name of its secretary or of an appointed officer of the FFSP* and does not have its head office or principal place of business in Australia.

The FFSP's home regulator must have been determined to be comparable which broadly means those countries where the regulatory regime is clear, transparent, certain, adequately enforced and broadly consistent with the Objectives and Principles of Securities Regulation, developed by IOSCO and the overseas regulator is either a signatory to the MoU on Consultation and Cooperation and the Exchange of Information, developed by IOSCO or has an effective cooperation arrangement with ASIC.

The FFSP must have and maintain the foreign regulator's licence covering the financial services and products it provides in Australia under the exemption. Analysis may be needed to confirm that the scope of an overseas licence covers the Australian activity which the FFSP undertakes.

## Notification to ASIC

The FFSP must notify ASIC as soon as practicable (and before the 15th business day) after the first time that it starts to use the exemption.

Passported FFSPs will need to re-apply to ASIC in order to use this exemption – their passporting exemption will not automatically roll over.

This notice must state the FFSP's intention to rely on the exemption and include the FFSP's agreement:

- that legal proceedings relating to the provision of the financial services may be brought in an Australian court;
- that such proceedings would be subject to Australian law; and
- to comply with any order of a court from such proceedings, to the extent that the order does not conflict with an order made by a court in the FFSP's home jurisdiction.

## Ongoing Requirements

The FFSP must comply with a number of conditions similar to the passporting exemption conditions:



- notify ASIC that the FFSP consents to ASIC and the FFSP's home regulator sharing information about the FFSP;
- notify ASIC of any significant enforcement action, disciplinary action or significant investigation undertaken against the FFSP in any place outside Australia (note, not just in the home jurisdiction) unless giving that notice would be contrary to a law overseas as soon as practicable but before 15 business days after the day on which the FFSP becomes aware (or would reasonably be expected to have become aware) of the matter; and
- appoint an agent in Australia and not be without an agent for ten or more consecutive days while using the exemption,
- and comply with new conditions:
- give reasonable assistance to ASIC in relation to the performance of ASIC's functions or the exercise of ASIC's powers (including giving ASIC a copy of the FFSP's books which FFSPs might find problematic);
- comply with a direction given by ASIC to provide information (within the time specified or a reasonable time) about the FFSP's financial services or financial services business;
- give a written notice to each new wholesale client that the FFSP is exempt from the requirement to hold an AFSL before providing a financial product or service to them or if that is not practicable (e.g., because the service is provided at the request of the client), then as soon as practicable after the product or service is provided to them<sup>1</sup>; and
- maintain sufficient oversight over the FFSP's representatives who provide the financial products or services in Australia and take reasonable steps to ensure that those representatives comply with financial service laws. This includes ensuring that the representatives are appropriately trained.

## **Consequences of Failing to Comply**

ASIC has the power to cancel a FFSP's exemption if:

- it reasonably believes that an officer of the FFSP or a controlling entity of the FFSP is not a fit and proper person to provide financial services or products;
- the FFSP fails to provide details of a contravention of the exemption within 15 business days from when the FFSP would reasonably have been expected to have become aware of the contravention, after having made reasonable enquiries; or
- the FFSP fails to comply with a condition to the exemption.

Additionally, ASIC can impose additional conditions on the FFSP's use of the exemption and may apply to the court for a civil penalty and pecuniary penalty order.

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<sup>1</sup> There is more flexibility in the timing of this notice now and the content of this notice is no longer prescribed and is not required to be prominent



## Fast Tracking

The fast tracking of wholesale AFSL applications for FFSPs authorised to provide financial services in comparable regulatory regimes will take the form of an exemption from the fit and proper person test.

This exemption will remove the need to obtain solvency checks and criminal history checks for officers of the applicant and its controlling entities, which is a welcome development for foreign entities who have many overseas resident officers who would otherwise in scope for these checks.

This exemption applies when the FFSP is a foreign company and applies for a wholesale AFSL. This exemption does not apply to AFSL applications more generally.

The exemption does not apply to AFSL applications submitted before the commencement of the new laws or if the FFSP applies to vary its AFSL to remove or amend a condition.

## **C. TREASURY LAWS AMENDMENT (STREAMLINING AND IMPROVING ECONOMIC OUTCOMES FOR AUSTRALIANS) BILL 2022 BILL**

On 17 February 2022, the Bill had a first reading in the Federal House of Representatives. If the Bill passes through the House of Representatives it will then be read and debated in the Senate and if the legislation is passed it will take effect on 1 April 2023.

However there have been some changes from the Exposure Draft and more changes may be introduced in Parliament. The key changes from the exposure draft to the draft legislation are summarised below.

### **28 Day Marketing Trips under Professional Investor Exemption**

- The professional investor exemption now allows the FFSP to visit Australia on marketing trips for up to 28 days per financial year.
- This amendment builds upon the oblique reference to permitted 'infrequent marketing trips' in the December 2021 exposure draft explanatory memorandum by providing the clarity of a 28 day exemption in section 911E.
- This is a step change compared to the limited connection exemption and for many FFSPs this means that the professional investor exemption will provide significantly more utility, as a more viable alternative to the comparable regulator exemption.
- When calculating the 28 days, every day of the marketing trip counts, even days when the FFSP has no client meetings, but helpfully the number of representatives on the marketing trip does not affect the calculation of days (i.e., it's still one day, whether one representative or four attends the client meetings).

### **LPs under the Comparable Regulator Exemption**

The comparable regulators exemption now applies to foreign partnerships and is no longer limited to foreign entities.

### **FFSPs' Representatives under the Comparable Regulator Exemption**

- FFSP Representatives providing financial services under the comparable regulator exemption must provide financial services to Australian wholesale clients either from the comparable regulator jurisdiction or from Australia (i.e., they cannot provide services from other jurisdictions where they may be located that are less regulated than the comparable regulator jurisdiction).
- FFSPs using the comparable regulator exemption are no longer required to take reasonable steps to ensure that their representatives comply with Australian financial services laws. Instead, they must now ensure that their representatives are adequately trained and competent to provide financial services.

## ASIC Notifications for Either Exemption

- The ASIC notification deadline for claiming the exemption and submitting certain supporting documentation has been extended.
- The notification period now begins 15 business days before the intended first use and ends 15 business days after the first use.
- Only one notification is now required, which can be for a range of financial services.

## Single Client Notification

The client notification provisions have been clarified so that it is clear that a single notification can be made in advance for all types of financial services to be provided to the client and that multiple notifications are not required for different financial services.

## ASIC Information Requests

ASIC still has the right to request information from an FFSP, but the right to request information from an FFSP about its business is now limited to financial services business that is “connected” to the types of financial services it provides under the exemption.

A similar limitation does not apply to the obligation to provide assistance to ASIC in the performance of its functions or the exercise of its powers, including showing ASIC the FFSP’s books.

## Breach Reporting

FFSPs using these exemptions are required to report violations within 15 business days after becoming aware of a breach or when they reasonably should have become aware of a breach.

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## About ComplianceAsia

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