



FINANCIAL
SERVICES
COUNCIL

Treasury Laws Amendment (Measures for Consultation) Bill 2021: Licensing exemptions for foreign financial services providers

FSC Submission

14 January 2022



1. Contents

1. About the Financial Services Council	3
2. Executive Summary	4
3. Conditions about notifying or assisting ASIC	5
3.1. Notifying ASIC.....	5
4. Comparable regulator exemption	6
4.1. Additional jurisdictions.....	6
5. Fit and proper person test exemption	7
6. Transitional provisions.....	8
6.1. Existing licence applications.....	8
6.2. Effective dates and notification requirements	8
6.3. Professional investor exemption.....	8

1. About the Financial Services Council

The FSC is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advice licensees. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing \$3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

2. Executive Summary

The FSC welcomes the opportunity to provide a submission to Treasury on the exposure draft legislation (**Bill**) and explanatory memorandum (**EM**) regarding providing regulatory relief for Foreign Financial Service Providers (**FFSPs**).

As an overall comment, the FSC is broadly supportive of Treasury's proposals in the Bill and EM.

However, we encourage Treasury to consider the following key issues which are of concern to our members:

- 1 There is a lack of clarity at this stage regarding the practicalities of how the new regime will operate in terms of the notification process and the content of the approved form to provide (see section 3)
- 2 The initial list of comparable jurisdictions could be lengthened to include some additional jurisdictions such as Japan, China and Switzerland (see section 4)
- 3 The fit and proper person test exemption should be broadened to include controlled entities of the applicant and consideration given to making the fit and proper person test materially less burdensome for APRA-regulated entities (see section 5)
- 4 More clarity should be given with regards to the transition process (see section 6)

3. Conditions about notifying or assisting ASIC

3.1. Notifying ASIC

The FSC notes that the Bill sets out at 911G certain conditions for a person that proposes to rely on the exemption under paragraph 911A(2)(eo) or (ep) in relation to a financial service.

The Bill states that a person that proposes to rely on the exemption under paragraph 911A(2)(eo) or (ep) in relation to a financial service must notify ASIC that the person intends to rely on the exemption:

(a) *as soon as practicable, and before the 15th business day, after the first time (the start time) after the commencement of this section that the person starts to provide the financial service.*

This raises the question, what constitutes “starting to provide” the financial service. Some examples would be useful in this context.

The Bill then goes on to provide in 911G(2)(b) that an FFSP must provide a notice to ASIC in a form that:

- (i) *is approved by ASIC; and*
- (ii) *includes the person’s contact details; and*
- (iii) *includes the information, statements, explanations or other matters required by the approved form; and*
- (iv) *is accompanied by any other material required by the approved form; and*
- (v) *is given in a manner required by the approved form (including in electronic form).*

This provision raises several material practical questions regarding the form and content of the approved form and the way it is envisaged it can be delivered to ASIC. The FSC recommends that further details be provided in this regard.

4. Comparable regulator exemption

4.1. Additional jurisdictions

The FSC agrees that the initial list of recognised regulators should be the jurisdictions that have already been assessed by ASIC as being sufficiently equivalent to the Australian regulatory regime for the regulation of financial services, namely: a) Denmark (regulated by the Danish Financial Supervisory Authority); b) France (regulated by the Autorité des marchés financiers of France or the Autorité de contrôle prudentiel et de resolution of France); c) Germany (regulated by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)); d) Hong Kong (regulated by the Securities and Futures Commission); e) Luxembourg (regulated by the Commission de Surveillance du Secteur Financier); f) Canada (regulated by the Ontario Securities Commission); g) Singapore (regulated by the Monetary Authority of Singapore); h) Sweden (regulated by the Finansinspektionen); i) United Kingdom (regulated by the Financial Conduct Authority); j) United States (regulated by the Commodity Futures Trading Commission, the Federal Reserve and the Office of the Comptroller of the Currency or the US Securities Exchange Commission).

The FSC in addition also recommends sufficient equivalence be extended to

- a) Swiss entities which are banks or securities brokers regulated by the Swiss Financial Markets Supervisory Authority (FINMA)
- b) Chinese entities which are registered as private investment fund managers with the Asset Management Association of China (AMAC), and
- c) Japanese entities which are overseen by the Financial Services Agency of Japan.

We understand that all of these jurisdictions are Board members of IOSCO (not just members of IOSCO) and we also note that Japan is also part of the Asian Regional Funds Passport.

5. Fit and proper person test exemption

The FSC agrees with the proposal that FFSPs that are authorised, registered or licensed by a comparable regulator and only provide financial services to wholesale clients should be exempt from the requirement to satisfy the fit and proper test requirement when applying for an Australian financial services licence under section 913A of the Corporations Act.

However, we also suggest that the Bill extend this exemption to controlled persons of the FFSPs, given that often the relevant financial business will comprise several group entities and it would not make sense to exempt only the “person” applying when in fact several other subsidiaries of the group may be providing financial services and employing relevant personnel that would need to provide extensive documentation which continues to be very time consuming and costly to obtain.

More generally, the FSC recommends that appropriate consideration be given to materially reducing the impact of the fit and proper test on APRA-regulated entities to ensure a level playing field between FFSPs and Australian APRA-regulated businesses. Our concern is that Australian businesses regulated by APRA will be required to comply with a time consuming - and at times very difficult and inefficient process - in circumstances where competitors regulated outside Australia would not.

6. Transitional provisions

6.1. Existing licence applications

The FSC considers that more certainty should be provided regarding transition with regard to those FFSPs that have already begun the application process for a foreign financial services license.

6.2. Effective dates and notification requirements

In addition, the FSC recommends that some indication of the anticipated effective dates for the implementation of the new regime be provided, as well as confirmation that FFSPs who already benefit from class order relief are expected to renotify ASIC under the relevant provisions of the Bill of their intention to rely on the relevant exemptions under the Bill.

6.3. Professional investor exemption

The FSC submits that if the current professional investor exemption (s.911A(2E), which relates to derivatives, FX and carbon credits) is to be replaced with the new professional investor exemption, it is critical that appropriate transitional arrangements are put in place. This is because those FFSPs relying on the current exemption will no longer be exempt unless they take the significant steps required to have the benefit of the new professional investor exemption (lodging a notice with ASIC, notifying clients, etc).