

LEGISLATION TO AMEND THE FOREIGN FINANCIAL SERVICE PROVIDER LICENSING EXEMPTIONS IS INTRODUCED INTO PARLIAMENT

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Legal Briefings - By **Fiona Smedley, Ewan MacDonald and Tori Pearson**

On 17 February 2022, the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* (**Bill**) was introduced into Parliament with a first reading in the House of Representatives.

Schedule 1 to this Bill gives effect to legislative reforms to the exemptions for foreign financial service providers (**FFSPs**) from the need to hold an Australian financial services licence (**AFSL**), as discussed in our earlier article [Consultation paper released on financial services licensing exemptions for foreign financial service providers](#). These reforms introduce:

1. the new 'professional investor exemption' - to replace the limited connection exemption;
2. the new 'comparable regulator exemption' - to replace the passporting exemptions; and
3. an exemption from the fit and proper person test for FFSPs applying for a wholesale AFSL, to fast track their application.

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.

WHAT HAS CHANGED?

The Bill has evolved from the exposure draft of the legislation released for consultation on 20 December 2021 (which we reported in our [previous update](#) and it may be amended further while it is considered by Parliament.

The key changes to the draft legislation from the exposure draft are set out in the table below:

28 days presence in Australia permitted under the professional investor exemption	<p>The professional investor exemption now allows the FFSP to visit Australia on marketing trips for up to 28 days per financial year.</p> <ul style="list-style-type: none">• 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 (ie it's still one day, whether one representative or four attends the client meetings).
Limited partnerships	<p>The comparable regulator exemption now extends to foreign partnerships (it is no longer limited to foreign companies).</p>
FFSPs' representatives	<ul style="list-style-type: none">• Representatives of the FFSP providing financial services under the comparable regulator exemption will need to provide financial services to Australian wholesale clients from either the comparable regulator jurisdiction or from Australia (ie they cannot provide services from other jurisdictions where they may be located, which may be 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 the financial services.
ASIC notifications	<p>The ASIC notification period (for notifying ASIC in relation to the use of the exemption and providing certain supporting documents) has been expanded. Helpfully:</p> <ul style="list-style-type: none">• the notification period now commences 15 business days before the intended first use and ends 15 business days after the first use; and• it is clear that only one notification is needed, which can be for a range of kinds of financial services.
Client notification	<p>The client notification provisions have been clarified so that it is clear that one notice can be given upfront in relation to all the kinds of financial services to be provided to the client and that multiple notifications are not needed in relation to different financial services.</p>
Information requests	<p>ASIC still has the right to request information from a FFSP but the right to request information from a FFSP about its business is now limited to the financial services business 'related to' the kinds of financial services they provide under the exemption. A similar limitation has not been applied in relation to the obligation to give assistance to ASIC in relation to the performance of ASIC's functions or the exercise of ASIC's powers, including showing ASIC the FFSP's books.</p>
Breach reporting	<p>The legislation is now clear that FFSPs using these exemptions are subject to a breach reporting regime (within 15 business days of becoming aware or when they would reasonably have been aware of a breach). The December 2021 exposure draft legislation had merely provided that there could be consequences for failing to breach report, in the form of additional conditions on, or cancellation of, the exemption.</p>

WHAT IS NEW?

The initial list of the Minister's 'comparable regulators' for the purposes of the comparable regulator exemption are set out in the table below:

Comparable overseas regulator	Previously approved by ASIC for:
1. US Securities and Exchange Commission (US SEC)	A passporting exemption and the foreign AFSL regime
2. US Federal Reserve and Office of the Comptroller of the Currency (OCC)	
3. US Commodity Futures Trading Commission (US CFTC)	
4. Monetary Authority of Singapore (Singapore MAS)	
5. Hong Kong Securities and Futures Commission (Hong Kong SFC)	
6. Bundesanstalt für Finanzdienstleistungsaufsicht of Germany (German BaFin)	
7. Luxembourg Commission de Surveillance du Secteur Financier (CSSF)	
8. UK Financial Conduct Authority or Prudential Regulatory Authority (UK FCA or PRA)	
9. Danish Financial Supervisory Authority (Danish FSA)	The foreign AFSL regime
10. Finansinspektionen (Swedish FI)	
11. Autorité des Marchés Financiers of France (French AMF)	
12. Ontario Securities Commission (Ontario OSC)	

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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