

MinterEllison

12 January 2022

Financial System Division
Treasury
Langton Crescent
PARKES ACT 2600

Email: FFSP@treasury.gov.au

Dear Sir/Madam

Exposure draft legislation: Relief for Foreign Financial Service Providers (FFSPs)

1. We appreciate the opportunity to make a submission on the Exposure Draft on the Treasury Laws Amendment (Measures for Consultation) Bill 2021: Licensing exemptions for foreign financial service providers released by Treasury on 20 December 2021 (**Exposure Draft**).
2. MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.
3. In the limited time available for making submissions on the Exposure Draft, we have not had an opportunity to consult with our clients on the measures proposed by the Exposure Draft. The comments in this submission therefore reflect only our views and should not be considered to be representative of the views of our clients.
4. We generally support the measures proposed in the Exposure Draft as they represent a significant improvement on the revised FFSP regime proposed by the Australian Securities and Investments Commission (**ASIC**). In particular, we support the following:
 - (a) the retention of the 'sufficient equivalence' relief referred to in the Exposure Draft as the 'comparable regulator' exemption;
 - (b) the extension of the 'comparable regulator' exemption to the additional regulators recognised by ASIC in its revised FFSP regime;
 - (c) the extension of the current professional investor exemption to all financial services and products; and
 - (d) the amelioration of the fit and proper requirements for licence applicants regulated by a comparable regulator to ASIC.
5. However, we do have some technical concerns regarding the Exposure Draft which are set out in the remainder of this submission.

Notice requirement

6. Requiring FFSPs to notify ASIC and each new client when they are relying on the professional investor exemption in proposed section 911A(2)(eo) of the *Corporations Act 2001* (Cth) (**Corporations Act**) imposes an unnecessary compliance constraint on the availability of the exemption. As noted in paragraph 2.1(e) of our submission dated 30 July 2021 on the Consultation Paper on Relief to Foreign Financial Service Providers (**Consultation Paper**), we understand that key comparable foreign financial service regimes, such as those in the UK,



Singapore and Hong Kong, do not impose notification obligations on foreign providers who provide services to wholesale clients in their market. While it is positive that the requirement to notify ASIC can be complied with after a service is provided and only needs to be provided once, that extension does not apply to clients and there remains a risk that FFSPs who only have limited engagement with Australia will not expect a need to notify ASIC and clients of their activities when they are only engaging with institutional clients and do not have any presence in Australia.

7. We submit that given the exemption is restricted to professional investors, there is very little reason for ASIC to be notified of the identity of foreign providers relying on the exemption. Equally, there is no need to notify institutional clients that the provider is not licensed in Australia. Institutional clients who are concerned about licensing status are in a position to ask their own questions and seek relevant assurances at the appropriate time. There is no need to impose a statutory requirement and the requirements simply create a regulatory trap for FFSPs and may also serve to create a disincentive for FFSPs to service the Australian market which would conflict with the goals for the FFSP regime set out in the Consultation Paper.

Marketing visits

8. We note that paragraph 1.51 of the Exposure Explanatory Memorandum released with the Exposure Draft states that the new professional investor exemption is not intended to prevent FFSPs from making infrequent marketing visits to Australia. While this is welcome, we submit that it is not consistent with the proposed exemption. The requirement to provide financial services from outside Australia does effectively prevent FFSPs from relying on the exemption as most marketing visits will involve FFSP representatives expressing opinions about their services and products. An opinion which is intended to or could reasonably be regarded as being intended to influence a decision in relation to a financial product or a class of financial products is financial product advice under section 766B(1) of the Corporations Act. Marketing visits may also involve FFSP representatives arranging for dealings to occur in relation to financial products and therefore often involve representatives providing financial services by giving financial product advice and/or dealing in financial products while in Australia.
9. Furthermore, it would be useful to provide a more specific safe harbour for FFSPs to engage in marketing visits to Australia as suggested in paragraph 4.3 of our previous submission. We therefore recommend replacing proposed section 911A(2)(eo)(ii) with the following:

'(ii) either:

*(A) the person provides the financial service from a place outside this jurisdiction;
or*

(B) all of the following requirements are met:

- (1) the financial service is the provision of financial product advice which is provided during a marketing visit to this jurisdiction by one or more representatives of the person;*
- (2) there has not been more than an average of one marketing visit by one or more representatives of the person per year over the three years immediately before the commencement of the marketing visit referred to in (1);*
- (3) the total length of the marketing visits in the year preceding the end of the marketing visit referred to in (1) does not exceed 45 days;'*

10. The purpose of requirements (2) and (3) above is to set a limit on the number and length of marketing visits that can occur under the exemption but also to provide some flexibility in scheduling marketing visits so that there could be more than one in a particular year provided there is only an average of one per year over a reasonable period and also to permit visits of varying lengths provided they do not exceed 45 days in total over the past year including the marketing visit in question.

Compliance with foreign laws

11. Proposed section 911A(2)(eo)(iv) provides that it is a requirement of the professional investor exemption that the FFSP reasonably believes that providing the service does not contravene any law applying where the service is provided from or in the FFSPs home jurisdiction. However, given the service will be provided to an Australian client, it is quite likely that such laws would not apply to the service in any case. We therefore suggest replacing this provision with the following:

'(iv) the person reasonably believes that providing the financial service would comply with the laws applying in each of the places referred to in subparagraph (ii) or (iii) if the financial service was provided in each of those places other than any obligation which it is not reasonably practical to comply with because the service is provided to an Australian client;

12. The qualification is needed because some legal obligations in the home jurisdiction may not be possible to comply with for an Australian client, for example if the home jurisdiction required the FFSP to obtain a certain form of document from the client that is not available in Australia.
13. It is also not clear to us why this requirement does not apply to the comparable regulator exemption as is currently the case for the sufficient equivalence exemption.

Cancellation

14. While the Exposure Draft contains detailed provisions relating to ASIC's power to cancel the availability of the exemptions, there is nothing relating to the ability of an FFSP to cancel its notification of reliance on either of the exemptions. We submit that this should be expressly permitted and that cancellation should take effect immediately on ASIC being notified. Cancellation of reliance by an FFSP should not preclude the FFSP from relying on one of the exemptions at a future date by complying with the requirements at that time, for example by notifying ASIC of reliance once again.

Conditions

15. We have the following comments in relation to the conditions that will apply to the exemptions.

Proposed section	Description	Submissions
911G(4)	assisting ASIC	We submit that the requirement to show books or other information to ASIC and to notify ASIC should be subject to: <ul style="list-style-type: none"> any overriding secrecy obligations applying to the FFSP (similar to the restriction in proposed section 911L(4)); and a qualification that the FFSP is only required to show ASIC books that are or are reasonably likely to be relevant to any financial services provided to Australian clients.
911G(5)(c)	submitting to Australian courts	We submit that the requirement to comply with an Australian court order should be subject not only to any contrary court order in the FFSP's home jurisdiction, but also should not apply if the Australian court order is contrary to any legal obligation of the FFSP in their home jurisdiction.
911G(6) 911H(3) 911K(2) 911L(2) 911L(3) 911M(3)	approved forms	We submit that ASIC should not have an unfettered power to require FFSPs to provide information when determining the form of notices or information given to ASIC. The requirements should be kept to a minimum so as not to be a barrier to entry and should be specified in the legislation.
911L(3)	notifying ASIC of enforcement action, etc	The subheading for proposed section 911L(3) is confusing as it refers to notifying ASIC of breaches but that is not in fact required by the provision.

Proposed section	Description	Submissions
911L(5)	agent	Proposed section 911L(5) requires an FFSP relying on the comparable regulator exemption to have an 'agent' in Australia. It is not stated what the role of this agent is to be or why it is required. We submit that this is an outdated concept which has now current relevance. However, if there is perceived to be a need to have a person in Australia who is authorised to accept service of legal process in Australia on behalf of the FFSP, then this should be stated as the requirement. The Explanatory Memorandum refers to the local agent provisions in Division 2 of Part 5B.2 of the Corporations Act. However, there is in fact no link to these provisions in the proposed amendments. There is also a concern that requiring FFSPs to have an 'agent' in Australia may cause tax difficulties for FFSPs that do not otherwise have a permanent establishment in Australia.
911M(3)	breach reporting	Proposed section 911M(3) gives ASIC the right to cancel reliance on an exemption if the FFSP has not reported a breach of the exemption conditions. There is however no separate breach reporting obligation. We submit that this should first be imposed as a positive breach reporting obligation if that is the intention to make that intention clear. Furthermore, we submit that any breach reporting obligation should be subject to a significance or materiality test. Minor or technical breaches should not be required to be reported. It should also be clear that this obligation should be subject to any contrary legal obligation in relation to disclosing the matter arising under the FFSP's home jurisdiction law, similar to proposed section 911L(4).

Fit and proper exemption

16. As noted above, the exemption from the fit and proper person requirements for foreign licensees is welcome. However, we note that it only applies to the foreign licensee itself. Given most foreign licensees which seek a licence in Australia are more likely to set up an Australian subsidiary for this purpose, we recommend that this exemption be extended to related bodies corporate of foreign licensees to make it more useful.

Interim reopening of current equivalence exemption

17. The timing of the commencement of the new regime is also unclear. We submit that pending its commencement FFSPs which are not currently relying on the sufficient equivalence exemption should be able to do so. Currently that is not permitted by ASIC meaning that there is no ability for new FFSPs to provide financial services to Australian wholesale clients under that exemption. This does not seem a sensible outcome given the proposals in the Exposure Draft.

Public register

18. If notice is required to be given to ASIC of reliance on the professional investor or comparable regulator exemption, we submit it is appropriate to require ASIC to maintain a public register of the entities relying on the exemptions so clients and providers can easily confirm their status which is not currently possible. The register should include basic details of the FFSP, including the identity of their local agent where applicable.

We look forward to continuing to engage with Treasury in the development of the new FFSP regime. Please contact us if you have any questions about any aspect of our submission. We would be very happy to participate in any discussions on proposals for FFSP relief.

Yours faithfully
MinterEllison

A handwritten signature in black ink, appearing to read 'R. Batten', with a long, sweeping underline that extends to the right.

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