Article Information

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The exposure draft legislation for Foreign Financial Service Providers (FFSPs) has dropped – just in time for Christmas. Thank you, Treasury

The draft Bill is available here:
https://treasury.gov.au/sites/default/files/2021-12/c2021-231877-exposure_draft_legislation.pdf

The draft Explanatory Memorandum is available here:
https://treasury.gov.au/sites/default/files/2021-12/c2021-231877-explanatory_memorandum.pdf

The exposure draft claims the Bill provides relief to FFSPs to promote diversified investment opportunities for Australian investors and attract investment and liquidity to Australian markets by:

- providing an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services from outside Australia to professional investors (the **professional investor exemption**);
- providing an exemption from the requirement to hold an Australian financial services licence for foreign companies regulated by comparable regulators and that provide financial services to wholesale clients (the **comparable regulator exemption**); and
- fast-tracking the licensing process for foreign companies seeking to establish more permanent operations in Australia by providing an exemption for foreign companies regulated by comparable regulators from the fit and proper person test when applying for an Australian financial services licence to provide financial services to wholesale clients (the **fit and proper person test exemption**).

Hopefully these new rules will achieve a better balance between giving sophisticated Australian investors simpler access to high quality FFSPs, whilst protecting vulnerable Australian investors from poorer quality foreign service providers.

Piper Alderman will be making a submission to Treasury on this latest attempt at reform by the deadline of 12 January.

At first glance:

- Treasury seems not to have taken the opportunity to clarify the ***jurisdictional nexus*** between the Act and foreign financial service providers. That nexus remains a test of whether the foreign financial service provider is "***carrying on a financial service business in Australia***". In the internet age, applying that nexus is an unreasonable approach to regulating the financial services sector that leaves FFSPs not knowing when the AFSL provisions do and do not apply to them.
- The proposed new exemptions are ***opt-in regimes***. That means foreign financial service providers only get the benefit of the exemptions if they actually know about the Australian licensing regime and the "carrying on a financial service business in Australia" nexus concerns and then take the steps required to bring themselves within the exemptions.
- The proposed new ***professional investor exemption*** does seem to be wider than the old and difficult to use professional investor exemption.
- The proposed new ***comparable regulator exemption*** seems to be a reactivation of the previous "passport exemption" (or "sufficient equivalence exemptions") contained in the old ASIC class orders. At time of writing, it is important to note that the ASIC freeze on allowing foreign financial service providers to opt-in to those old class order exemptions remains in place. Only those FFSPs who have previously opted-in may rely on those exemptions.
- Treasury appears to think that FFSPs will want to apply for AFSLs. If Treasury is correct, the exposure drafts

provide that FFSPs will not have to comply with the “fit and proper person test” in order to obtain an AFSL.