
TREASURY LAWS AMENDMENT (MEASURES FOR CONSULTATION) BILL
2021: LICENSING EXEMPTIONS FOR FOREIGN FINANCIAL SERVICE
PROVIDERS

EXPOSURE EXPLANATORY MEMORANDUM

Glossary

The following abbreviations and acronyms are used throughout this exposure explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investments Commission
Bill	<i>Treasury Laws Amendment (Measures for Consultation) Bill 2021: Licensing exemptions for foreign financial service providers</i>
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>

Chapter 1

Licensing exemptions for foreign financial service providers

Outline of chapter

1.1 The Bill provides relief to foreign financial service providers 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**).

Context of amendments

1.2 In the 2021-22 Budget, the Government announced that it would consult on options to:

- restore the former regulatory relief provided for foreign financial service providers that are licensed and regulated by regulatory authorities in foreign jurisdictions with comparable financial service rules and obligations; and
- create a fast-track licensing process for foreign companies that intend to establish more permanent operations in Australia to shorten application timeframes and reduce barriers to entering the Australian market where relief is not available.

1.3 Foreign financial service providers are overseas providers of financial services, including (and not limited to) banking, investment funding, wealth management, insurance, and financial advisory services. Foreign financial service providers provide investors with access to global investment opportunities and increase competition in the Australian market.

Current law

Need for an Australian financial services licence

1.4 In accordance with subsection 911A(1) of the Corporations Act, a person who carries on a financial services business in Australia must hold an Australian financial services licence covering the provision of the financial services. Unless exempt, the provision of a financial service in Australia without a licence is a contravention of a civil penalty provision under subsection 911A(5B) of the Corporations Act.

1.5 Please note that, in accordance with section 2C of the *Acts Interpretation Act 1901*, when the word ‘person’ is used in this document, it is intended to include a body corporate as well as an individual.

Exemption for services provided to professional investors

1.6 Sub-section 911A(2) of the Corporations Act sets out the circumstances in which the requirement to hold an Australian financial services licence does not apply.

1.7 One such exemption (the professional investor exemption) provides that a person is not required to hold an Australian financial services licence if the person:

- is not in this jurisdiction;
- provides financial services to a professional investor (as defined in section 9 of the Corporations Act);
- deals in, advises on, or makes a market in, derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emission units.

1.8 The professional investor exemption is located in sub-regulation 7.6.02AG(2E) of the Corporations Regulations and applies as if section 911A of the Corporations Act was modified by inserting sub-regulation 7.6.02AG(2E) into subsection 911A(2) of the Corporations Act.

ASIC relief for foreign financial service providers

1.9 Since 2003, ASIC has also provided two other types of licensing relief for foreign financial service providers in the form of ‘sufficient equivalence’ relief and ‘limited connection’ relief for the provision of financial services to wholesale clients. Both forms of relief allowed foreign financial service providers to conduct a financial services business in Australia without an Australian financial services licence.

Sufficient equivalence relief

1.10 The purpose of the sufficient equivalence relief was to strike an appropriate balance between cross-border financial services facilitation, market integrity and investor protection.

1.11 The sufficient equivalence relief applied in the following circumstances:

- the financial services were only provided to wholesale clients;
- the financial services provided by the foreign company were regulated by an overseas regulatory authority;
- the regulatory regime overseen by the overseas regulatory authority was deemed by ASIC as being sufficiently equivalent to Australia’s regulatory regime;
- there was an effective cooperation arrangement in place between the overseas regulatory authority and ASIC; and
- the foreign company met all of the relevant conditions for using the relief.

1.12 The sufficient equivalence relief applied to foreign companies regulated by the following overseas regulatory authorities:

- Securities and Exchange Commission (US SEC);
- US Federal Reserve and Office of the Comptroller of the Currency (OCC);
- Commodity Futures Trading Commission (US CFTC);
- Monetary Authority of Singapore (Singapore MAS);
- 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);

1.13 On 31 March 2020, ASIC replaced the sufficient equivalence relief with a foreign financial services licensing regime, which is set out in the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licence) Instrument 2020/198*.

1.14 Since 1 April 2020, foreign companies that were no longer able to rely on the sufficient equivalence relief have been required to obtain an Australian financial service licence to carry on a financial services business in Australia.

1.15 Under transitional arrangements, foreign companies that were able to rely on the sufficient equivalence relief as at 31 March 2020 have until 31 March 2023 to obtain an Australian financial services licence.

Limited connection relief

1.16 ASIC’s limited connection relief provided an exemption from the requirement for foreign companies to hold an Australian financial services licence for the provision of a financial service and applied in the following circumstances:

- the person providing the financial services was not in Australia;
- the financial service was only provided to wholesale clients;
- the person was only taken to be carrying on a financial services business because the person engaged in conduct that was:
 - intended to induce people in Australia to use the financial services the person provided; or
 - was likely to have that effect.

1.17 As for the sufficient equivalence relief, on 31 March 2020, ASIC replaced the limited connection relief with a narrower funds management relief.

1.18 Under transitional arrangements, the limited connection relief continues to apply until 31 March 2023. From 1 April 2023, foreign companies that engage in conduct that is intended to, or likely to, induce Australian consumers to use the financial services provided, need to hold an Australian financial services licence if they are not eligible for another type of relief.

Fit and proper person test

1.19 Section 913B of the Corporations Act provides that if a person applies to ASIC for an Australian financial services licence under section 913A of the Corporations Act, ASIC must grant the licence if (and must not grant a licence unless):

- the application was made in accordance with the relevant requirements;
- ASIC has no reason to believe that the applicant is likely to contravene the general obligations that apply to a financial services licensee under section 912A of the Corporations Act, if the licence is granted;
- the fit and proper person test in section 913BA of the Corporations Act is satisfied in relation to the applicant and the licence applied for; and
- the applicant meets any other requirements prescribed by regulations.

1.20 Similarly, if a person makes an application for the imposition, variation or revocation of licence conditions under section 914B of the Corporations Act, ASIC may refuse the application if the fit and proper person test in section 913BA of the Corporations Act is not satisfied in relation to the applicant and the licence as proposed to be varied.

1.21 In accordance with section 913BA of the Corporations Act, the fit and proper person test requires ASIC to be satisfied that there is no reason to believe that any of the following persons are not fit and proper to provide the financial services covered by the licence:

- the applicant; or
- if the applicant is a body corporate— an officer of the applicant; or
- if the applicant is a partnership or the multiple trustees of a trust - the partners, the trustees or the senior managers of the partnership or the trust; and
- if the applicant is controlled by another person:
 - the controller; or
 - if the controller is a body corporate—an officer of the controller; or
 - if the controller is a partnership or the multiple trustees of a trust - the partners, the trustees or the senior managers of the partnership or the trust.

1.22 In determining whether a person is a fit and proper person under section 913BA of the Corporations Act, ASIC must have regard to the matters in section 913BB of the Corporations Act. These matters include (but are not limited to) whether the applicant has ever had their Australian financial service licence or Australian credit licence suspended or cancelled; whether a banning order or a disqualification order has ever been made against the applicant; whether the person has ever been a Chapter 5 body corporate or an insolvent under administration; or has been convicted of an offence within the last ten years.

Summary of new law

1.23 The Bill implements the outcomes from the Government's consultation on the options for providing licensing relief to foreign financial service providers and to create a fast-tracking licensing process for foreign companies who intend to establish more permanent operations in Australia.

1.24 The object of the Bill is to reduce barriers of entry and encourage greater engagement by foreign financial service providers in the Australian market. As a result, this will allow Australian professional and wholesale investors to diversify their investment opportunities and attract additional investment and liquidity to Australian markets.

1.25 The Bill achieves this object by providing for three licensing exemptions for foreign financial service providers.

Professional investor exemption

1.26 The new professional investor exemption provides an exemption from the requirement to hold an Australian financial services licence for persons that provide financial services from outside Australia to professional investors.

1.27 This exemption will replace the existing professional investor exemption, which is located in sub-regulation 7.6.02AG(2E) of the Corporations Regulations.

1.28 The professional investor exemption is only available in the following circumstances:

- the financial service is provided only to professional investors;
- the person provides the financial service from a place outside Australia;
- the person's head office and principal place of business are located at one or more places outside Australia; and

- the person reasonably believes that the provision of the financial service does not contravene any laws that apply in the person's principal place of business, head office or the place from where the financial services are provided.

1.29 The Bill also provides that regulations may prescribe particular kinds of financial services or products and professional investors in relation to which the professional investor exemption does not apply.

1.30 A person that uses the professional investor exemption to provide financial services to professional investors must comply with certain conditions. This includes (but is not limited to) notifying ASIC of the person's intention to rely on the exemption, submitting to the non-exclusive jurisdiction of Australian courts and complying with reasonable requests for assistance from ASIC.

1.31 If a person fails to comply with a condition, ASIC may cancel the person's exemption (after giving the person a notice of the proposed decision and an opportunity to appear at a hearing or make a submission), impose additional conditions on the person's use of the exemption, or apply to the court for a civil penalty and pecuniary penalty order.

Comparable regulator exemption

1.32 The new comparable regulator exemption provides an exemption from the requirement to hold an Australian financial services licence for foreign companies that provide financial services to wholesale clients.

1.33 The comparable regulator exemption is only available where the foreign company is authorised, registered or licensed to provide the same financial service by a regulator in a foreign jurisdiction and the Minister has determined that the regulator administers a comparable regulatory regime.

1.34 A foreign company that uses this exemption to provide financial services to wholesale clients must comply with certain conditions. These are mostly the same as the conditions applicable to the professional investor exemption, but also include consenting to information sharing between ASIC and the foreign company's home regulator; notifying ASIC of any significant enforcement or disciplinary actions taken against the foreign company in any place outside Australia; appointing an agent in Australia; and maintaining sufficient oversight over its representatives.

1.35 As with the professional investor exemption, a failure to comply with the conditions may result in ASIC cancelling the foreign company's exemption, imposing additional conditions, or applying to the court for a civil penalty and pecuniary penalty order being sought.

Fit and proper person test exemption

1.36 Foreign companies that are authorised, registered or licensed by a comparable regulator and only provide financial services to wholesale clients are 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.

1.37 The fit and proper test exemption also applies when an eligible foreign company makes an application to impose, vary or revoke a condition on an existing Australian financial services licence under section 914B of the Corporations Act.

Minister's power to determine comparable regulators

1.38 The Bill provides that the Minister may, by legislative instrument, determine regulators that administer comparable regulatory regimes. The comparable regulators determined by the Minister are applicable to both the comparable regulator exemption and the fit and proper person test exemption.

1.39 In making such a determination, the Minister must have regard to specified matters and consider whether the regulatory regime that the regulator administers produces comparable outcomes to Australia in regulating and improving the performance of the relevant financial services system and financial services providers in that system.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Professional investor exemption	
<p>The new professional investor exemption applies in the following circumstances:</p> <ul style="list-style-type: none">• the financial service is provided only to professional investors;• the financial service is provided from a place outside Australia;• the person's head office and principal place of business are located at one or more places outside Australia; and• the person reasonably believes that the provision of the financial service does not contravene any laws in the places where the person's head office and	<p>The existing professional investor exemption applies in the following circumstances:</p> <ul style="list-style-type: none">• the person is not in this jurisdiction;• the financial service is provided to a professional investor; and• the financial service involves dealing in, advising on, or making a market in, derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emission units.

<p>principal place of business are located, or the place from which the financial service is provided.</p> <p>Unlike the existing professional investor exemption, the new exemption does not limit the types of financial products or services that may be provided. However, regulations may be made that prescribe that the exemption does not apply in relation to particular kinds of financial products, financial services or professional investors.</p>	
<p>A person relying on the professional investor exemption must comply with specified conditions.</p> <p>A failure to comply with one or more conditions may result in the exemption being cancelled, additional conditions being imposed or ASIC applying to the court for a civil penalty provision.</p>	<p>No conditions are specified.</p>
<p>Comparable regulator exemption</p>	
<p>The comparable regulator exemption applies in the following circumstances:</p> <ul style="list-style-type: none"> • the financial service is provided only to wholesale clients; • the person is a foreign company; • the person has and maintains all authorisations, registrations or licences necessary to legally provide the same financial service in a place that is outside this jurisdiction; and • the Minister has determined that the regulator administering those authorisations, registrations or licences for that place is a comparable regulator. <p>Foreign companies using this exemption must comply with specified conditions. However, these are not the same conditions applicable under the sufficient equivalence relief.</p>	<p>The sufficient equivalence relief provided for foreign companies regulated under sufficiently equivalent regulatory regimes to provide financial services to wholesale clients for specified financial products or services.</p> <p>Foreign companies using this exemption must comply with specified conditions.</p>

Fit and proper person test exemption	
<p>A foreign company regulated by a comparable foreign regulator and that provides financial services to wholesale clients is exempt from the fit and proper person test when making an application for:</p> <ul style="list-style-type: none"> • an Australian financial services licence; or • the imposition, variation or revocation of conditions on an existing licence. 	<p>Anyone that makes an application for an Australian financial services licence (or for the imposition, variation or revocation of licence conditions) must satisfy the fit and proper person test in relation to the applicant and the licence applied for.</p>

Detailed explanation of new law

1.40 The Bill comprises of three elements, each with the objective of diversifying investment opportunities for Australian investors and attracting additional 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 (the **fit and proper person test exemption**).

Professional investor exemption

1.41 The Bill extends the existing professional investor exemption, which is located in subsection 911A(2) of the Corporations Act (as modified by sub-regulation 7.6.02AG(2E) of the Corporations Regulations) and applies in the following circumstances:

- the person is not in this jurisdiction;
- the person provides financial services to a professional investor;

- the financial service consists of any or all of the following:
 - dealing in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units;
 - providing advice on derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units; and
 - making a market in derivatives, foreign exchange contracts, carbon units, Australian carbon credit units or eligible international emissions units.

1.42 The new professional investor exemption, which will be located in the Corporations Act, replaces the existing exemption, clarifies the requirements relating to the person's location, expands the scope of financial products and services that may be provided and requires compliance with relevant local laws in relation to the provision of those financial services.

1.43 A person that uses the new professional investor exemption must comply with specified conditions. These conditions are intended to ensure that ASIC has access to the necessary information and jurisdiction to monitor and enforce the use of the exemption.

Who is eligible to use the professional investor exemption?

1.44 A person is exempt from the requirement to hold an Australian financial services licence under subsection 911A(1) of the Corporations Act if the person satisfies all of the following requirements:

- the financial service is provided only to professional investors;
- the person provides the financial services from a place outside this jurisdiction;
- the person's head office and principal place of business are located at one or more places outside this jurisdiction; and
- the person reasonably believes that providing the financial service does not contravene any law applying in the places where the person's head office and principal place of business are located, or the place from which the financial service is provided.

[Schedule 1, items 2 and 3, paragraph 911A(2)(eo) of the Corporations Act]

Professional investor

1.45 The professional investor exemption adopts the existing definition of ‘professional investor’ in section 9 of the Corporations Act (as modified by regulation 7.6.02AE of the Corporations Regulations). This definition provides that a professional investor:

- is an Australian financial services licence-holder;
- is a body regulated by the Australian Prudential Regulatory Authority (other than trustee within the meaning of the *Superannuation Industry (Supervision) Act 1993*);
 - This category generally includes banks, general insurance companies and credit unions etc.
- is a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*;
- is a trustee of certain superannuation trusts or schemes within the meaning of the *Superannuation Industry (Supervision) Act 1993* that have assets of at least \$10 million;
- has or controls gross assets of at least \$10 million (including any assets held by an associate or under a trust that the person manages);
- is a listed entity or a related body corporate of a listed entity;
- is an exempt public authority;
- is an investment company that is a body corporate or unincorporated body that carries on a business of investment in financial products, interests in land or other investments or invests funds received following an offer or invitation to the public; or
- is a foreign entity that, if established or incorporated in Australia, would be covered by one of these categories.

1.46 While, in accordance with subsection 761G(7) of the Corporations Act, a professional investor is a type of wholesale client, the professional investor exemption does not apply more broadly to wholesale clients who are not professional investors.

Outside this jurisdiction

1.47 The professional investor exemption is only available to persons that provide the financial service from a place outside this jurisdiction.

1.48 ‘This jurisdiction’ is defined in section 9 of the Corporations Act as meaning the geographical area that consists of:

- each referring State (including its coastal sea); and

- each Territory (including its coastal sea, if any); and
- for the purposes of a provision of Chapter 7—any external Territory prescribed in a regulation.

1.49 In accordance with subsection 102B(2) of the Corporations Act, ‘outside this jurisdiction’ includes places outside Australia.

1.50 The requirement that the financial service be provided from a place ‘outside this jurisdiction’ replaces the requirement in the existing professional investor exemption that the person is ‘not in this jurisdiction’. This change is intended to address uncertainty regarding the meaning of the phrase “not in this jurisdiction”. In particular whether ‘not in this jurisdiction’ provides for foreign financial service providers to have any presence in Australia, such as local representatives or permits representatives to make infrequent marketing visits to Australia.

1.51 The new professional investor exemption seeks to clarify that while the exemption is only available to financial services provided from outside Australia, this does not preclude foreign financial service providers from appointing local representatives or making infrequent marketing visits to Australia.

Principal place of business and head office

1.52 The professional investor exemption requires the person’s head office and principal place of business to be located at one or more places outside this jurisdiction.

1.53 This requirement is intended to ensure that the professional investor exemption is only used by persons genuinely operating from outside Australia.

1.54 If the location of the person’s head office is not also the location of the person’s principal place of business, then both of these locations must be in a place outside Australia.

Compliance with foreign laws

1.55 Finally, person providing the financial service must reasonably believe that providing the financial service does not contravene any law applying in any of the following places:

- the person’s head office; and
- the person’s principal place of business; and
- the place from which the person provides the financial service.

1.56 This may require the person to form a reasonable belief that the provision of the financial service complies with the laws of up to three different jurisdictions.

1.57 For the purposes of this requirement, a person would be taken to contravene a law of a relevant place if the person fails to comply with a duty imposed under the law, even if the provision imposing the duty is not itself an offence provision or a civil penalty provision (or equivalent).

1.58 While provision of the financial service must not be in contravention of the laws of the relevant place(s), this requirement is not intended to prevent the provision of financial services not regulated in a relevant jurisdiction.

1.59 The requirement for a person to ‘reasonably believe’ requires the existence of facts sufficient to create such a belief in a reasonable person in the person’s position. This requires the person to rely on objective facts, rather than just mere suspicion.

1.60 A person who relies on professional investor exemption to provide financial services, but who does not satisfy the requirements to use this exemption, contravenes a civil penalty provision under subsection 911A(5B) of the Corporations Act.

Exceptions to the professional investor exemption

1.61 Unlike the existing professional investor exemption, the new exemption in the Bill does not restrict the types of financial products or services that may be provided to professional investors.

1.62 However, to address potential market risks, the Bill provides for regulations to be made prescribing that the professional investor exemption does not apply to:

- a particular kind of financial service;
- a particular kind of financial service in relation to a particular kind of financial product;
- a particular kind of financial product; or
- a particular kind of professional investor.

[Schedule 1, item 4, section 911E of the Corporations Act]

1.63 If regulations are made prescribing a kind of financial product or service, the provision of these kinds of financial products or services would require the person to hold an Australian financial services licence covering the provision of this financial product or service. A failure to hold an Australian financial services licence in these circumstances would be a contravention of the civil penalty provision in subsection 911A(5B) of the Corporations Act.

1.64 Similarly, if regulations are made prescribing a kind of professional investor, the provision of any financial product or service to a professional investor in that class would require the provider to hold an Australian financial services licence.

1.65 The regulation-making power to exclude certain kinds of financial products, financial services or professional investors is intended to provide the Government with the necessary flexibility to ensure the effective operation of the professional investor exemption and to respond to emerging risks and changes in global financial markets. Regulations made under this provision would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.

Comparable regulator exemption

1.66 The Bill provides an exemption from the requirement to hold an Australian financial services licence for foreign companies regulated by comparable regulators that only provide financial services to wholesale clients.

1.67 While the new comparable regulator exemption is similar to the sufficient equivalence relief, the new exemption expands the list of applicable regulatory authorities and also provides for the Minister to determine foreign regulators that administer a comparable regulatory regime.

1.68 A foreign company that relies on the comparable regulator exemptions must comply with certain conditions.

Who is eligible to use the comparable regulator exemption?

1.69 A person is exempt from the requirement to hold an Australian financial services licence if the person satisfies all of the following requirements:

- the financial service is provided only to wholesale clients;
- the person is a foreign company;
- the person has and maintains all authorisations, registrations, or licences necessary to legally provide the same financial service in a place (the person's home jurisdiction) that is outside this jurisdiction;
- the regulator administering those authorisations, registrations or licences for that place (the person's home regulator) is a regulator determined by the Minister.

[Schedule 1, items 1 to 3, section 910A and paragraph 911A(2)(ep) of the Corporations Act]

Wholesale clients

1.70 The comparable regulator exemption may be used when the financial service is provided only to wholesale clients.

1.71 In accordance with the existing definition of ‘wholesale client’ in sections 761G and 761GA of the Corporations Act (and regulations made for the purposes of these provisions), a person is a wholesale client if:

- the price for the provision of the financial product, or the value of the financial product to which the financial service relates, is equal to, or greater than, \$500,000;
- the financial product or service, is provided for use in connection with a business that is not a small business;
 - A "small business" is defined as a business that has less than 20 employees, or, if it is a manufacturing business, has less than 100 employees;
- the financial product or service is not provided for use in connection with a business, and the person acquiring the financial product or service provides a certificate from a qualified accountant that the person:
 - has net assets of at least \$2.5 million; or
 - has a gross income for each of the past two financial years of at least \$250,000;
- the investor is a "professional investor" or a "sophisticated investor; or
 - ‘Professional investor’ is defined in section 9 of the Corporations Act.
 - ‘Sophisticated investor’ is described in section 761GA of the Corporations Act.
- the person is controlled by a person who is a wholesale client.

1.72 Section 761G of the Corporations Act provides that a financial product or service is provided to, or acquired by, a wholesale client, if it is not provided to, or acquired by a retail client. The provision of financial products or services to retail clients is not covered by the comparable regulator exemption. This means that persons who provide financial products or services to retail clients must obtain an Australian financial services licence covering the provision of those products or services under section 911A of the Corporations Act. This reflects the stronger consumer protections in place for retail clients under Part 7.6 of the Corporations Act.

Foreign company

1.73 The comparable regulator exemption only applies to foreign companies.

1.74 'Foreign company' is defined in section 9 of the Corporations Act as either:

- 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 body and does not have its head office or principal place of business in Australia.

1.75 The requirement to be a foreign company ensures that companies incorporated in Australia, but which are also regulated by a comparable overseas regulator, are not exempt from the requirement to hold an Australian financial services licence.

Authorisation in the home jurisdiction

1.76 To be eligible to use the comparable regulator exemption, a foreign company must be authorised, registered or licensed (however such a requirement is described) to legally provide the same financial service in the person's home jurisdiction.

1.77 A foreign company's 'home jurisdiction' is a place outside this jurisdiction where the foreign company holds a relevant authorisation, registration or licence to provide the financial service that it provides, or intends to provide, under the comparable regulator exemption.

1.78 This requirement ensures that, while the financial services provided to wholesale clients are exempt from the need to be provided under an Australian financial services licence, they are subject to regulation in the person's home jurisdiction. This has the effect of limiting the financial services provided under this exemption to those which the foreign company is authorised, registered or licenced to provide in their home jurisdiction. This means that the foreign company may not provide financial services under this exemption that are:

- not regulated by the person's home regulator; or
- regulated by the person's home regulator, but for which the person is not authorised, registered or licensed to provide in their home jurisdiction.

1.79 To add further protection for wholesale clients, foreign companies intending to rely on this exemption must not only hold, but also maintain that relevant authorisation, registration or licence in their home jurisdiction while they continue relying on the exemption. This means that a foreign company that loses (or gives up) its relevant authorisation (for any reason) to legally provide a financial service in its

home jurisdiction will no longer be able to rely on the comparable regulator exemption and (unless another exemption applies) would need to obtain an Australian financial services licence covering the provision of that financial service.

Home regulator must be determined as a comparable regulator

1.80 Finally, the comparable regulator exemption also requires that the person’s authorisation, registration, or licence to be administered by a foreign regulator (‘home regulator’) that is determined by the Minister.

1.81 The Minister’s power to determine regulators is described below (see paragraphs 1.160 to 1.166).

1.82 As for the professional investor exemption, a foreign company that relies on the comparable regulator exemption to provide financial services but does not satisfy the requirements to use this exemption, contravenes a civil penalty provision under subsection 911A(5B) of the Corporations Act.

Conditions – professional investor and comparable regulator exemption

1.83 A person that uses, or intends to use, either the professional investor exemption or the comparable regulator exemption must comply with certain conditions.

1.84 Many (but not all) of the conditions apply to both exemptions. The application of these conditions to the professional investor exemption and the comparable regulator exemption are set out in the table below.

Table 1.1– Conditions for the professional investor and comparable regulator exemptions

<i>Provision</i>	<i>Condition</i>	<i>Professional investor exemption</i>	<i>Comparable Regulator exemption</i>
Subsection 911G(2)	Notify ASIC that the person has used, or intends to use, the exemption	Applies	Applies
Subsection 911G(3)	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 person’s books)	Applies	Applies
Subsection 911G(5)	Notify ASIC that the person agrees: <ul style="list-style-type: none"> to legal proceedings being brought in a Court; 	Applies	Applies

	<ul style="list-style-type: none"> that the law relevant to the provision of the financial service(s) under the exemption is the law in force in Australia; and to comply with any order of a court resulting from such proceedings, except to the extent that such an order conflicts with an order made by a court in the person's home jurisdiction 		
Section 911H	Comply with a direction given by ASIC to provide information about the person's financial service or financial service business	Applies	Applies
Section 911J	Notify each new recipient of a financial service that the person is exempt from the requirement to hold an Australian financial services licence	Applies	Applies
Section 911K	Notify ASIC of any changes to the person's contact details as soon as practicable after the change happens	Applies	Does not apply
Subsection 911L(2)	Notify ASIC that the person consents to ASIC and the person's home regulator sharing information about the person	Does not apply	Applies
Subsection 911L(3)	Notify ASIC of any significant enforcement action, disciplinary action or investigation undertaken against the person in any place outside Australia	Does not apply	Applies
Subsection 911L(5)	Appoint an agent in Australia	Does not apply	Applies
Subsection 911L(6)	The person must maintain sufficient oversight over representatives who provide the financial service and take reasonable steps to ensure that those representatives comply with the financial service laws	Does not apply	Applies

[Schedule 1, item 4, subsections 911F(1), 911F(2) and 911G(2) to 911G(5), sections 911H, 911J and 911K, and subsections 911L(2), 911L(3), 911L(5) and 911L(6) of the Corporations Act]

Professional investor and comparable regulator exemptions - conditions

Initial notice to ASIC

1.85 A person or foreign company that uses the professional investor exemption or the comparable regulator exemption must notify ASIC as soon as practicable (but before 15 business days) after the first time that the person starts to provide the financial service under the exemption. This notice must include:

- that the person intends to rely on either the professional investor or the comparable regulator exemption;
- the person's agreement:
 - that legal proceedings relating to the provision of the financial service may be brought in a court;
 - that such proceedings would be subject to the law in force in this jurisdiction; 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 person's home jurisdiction.

[Schedule 1, item 4, subsections 911G(1), 911G(2), 911G(4) and 911G(5) of the Corporations Act]

1.86 Legal proceedings may be initiated by ASIC and the recipients of the financial service (i.e. professional investors or wholesale clients) in relation to the financial product and services provided.

1.87 This notice requirement applies to first-time users of the exemptions, as well as to persons who have previously used the existing professional investor exemption or sufficient equivalence relief (prior to the commencement of the Bill). This will ensure ASIC is aware of all of the persons using the new professional investor and comparable regulator exemptions.

1.88 This notice is required to be given in writing and in a form that is approved by ASIC. This form must include the person's contact details, and any information, statements, explanations, or other matters required, and be accompanied by any other material specified. The manner in which the notice is given may be specified by ASIC and may include submission in electronic form. *[Schedule 1, item 4, paragraph 911G(2)(b) and subsection 911G(6) of the Corporations Act]*

Notice to recipients

1.89 Before providing the financial service to a recipient (professional investor or wholesale client), the person or foreign company must give the recipient of the financial service a written notice including a

statement to the effect that the person is exempt under the Corporations Act from the requirement to hold an Australian financial services licence covering the provision of the financial service. *[Schedule 1, item 4, section 911J of the Corporations Act]*

1.90 If it is not practicable to give the notice before providing the financial service (for example, because the service is provided at the request of the client), then the notice must be given to the recipient of the financial service as soon as practicable after the product or service is provided to that recipient. *[Schedule 1, item 4, paragraph 911J(2)(b) of the Corporations Act]*

1.91 Such a notice is only required to be given once to each recipient. This notice is only required to be given before (or as soon as practicable after) the first time a financial service is provided to the recipient after the commencement of the Bill. A notice is not required to be given in relation to every subsequent financial service provided to that recipient. This requirement aims to achieve a balance between ensuring that clients (or potential clients) are adequately informed and reducing regulatory burden for foreign financial service providers.

Give ASIC reasonable assistance

1.92 ASIC may require the person or foreign company to provide it with reasonable assistance in relation to the performance of ASIC's functions, or the exercise of ASIC's powers. *[Schedule 1, item 4, subsection 911G(3) of the Corporations Act]*

1.93 Reasonable assistance may require the person to show ASIC the person's books, give ASIC a copy of the person's books, or give ASIC other information relevant to the performance and exercise of ASIC's functions and powers. *[Schedule 1, item 4, subsection 911G(4) of the Corporations Act]*

Comply with an ASIC direction

1.94 ASIC may also direct a person or foreign company to provide it with a statement containing specified information on the financial service, or the person's financial services business of which the financial service is a part. *[Schedule 1, item 4, subsections 911H(1) and (2) of the Corporations Act]*

1.95 ASIC may give such a direction at any time and may also require specific information to be provided on a periodic basis, or each time a particular event or circumstance takes place, without having to give a separate direction on each occasion. *[Schedule 1, item 4, subsection 911H(3) of the Corporations Act]*

1.96 A person who receives a written direction from ASIC must comply with the direction within the time specified in the direction (if that is a reasonable time) or otherwise within a reasonable time. If required, ASIC may also extend the time within which the person must comply with

the direction by giving the person a written notice to this effect. *[Schedule 1, item 4, subsection 911H(4) of the Corporations Act]*

1.97 In response to a written direction given by ASIC, the person must provide ASIC with a statement in a written form that is approved by ASIC. This response must include any information, statements, explanations, or other matters required, and be accompanied by any other material specified. The manner in which the notice is given may be specified by ASIC and may be in electronic form. *[Schedule 1, item 4, subsection 911H(3) of the Corporations Act]*

Other conditions – professional investor exemption only

1.98 A person that uses, or intends to use, the professional investor exemption must also comply with the following additional condition.

Notify ASIC of changes to contact details

1.99 A person relying on the professional investor exemption must notify ASIC of any change to the person’s contact details as soon as practicable after the change. *[Schedule 1, item 4, section 911K of the Corporations Act]*

1.100 This requires the person to notify ASIC as and when the person’s contact details change.

1.101 As for the other notice requirements, a notice of changes to contact details must be provided in writing, be in the manner and form (including electronic form) specified by ASIC and include any information, statements, explanations, other matters or accompanying material specified by ASIC. *[Schedule 1, item 4, subsection 911K(2) of the Corporations Act]*

1.102 This requirement is essential for the professional investor exemption to ensure that ASIC is able to perform its functions and exercise its powers efficiently and effectively.

1.103 This condition does not apply to the comparable regulator exemption, which requires the foreign company to appoint a local agent.

Other conditions – comparable regulator exemption only

1.104 A foreign company that uses, or intends to use, the comparable regulator exemption must also comply with the following additional conditions. *[Schedule 1, item 4, subsection 911L(1) of the Corporations Act]*

Consent to information sharing

1.105 A foreign company that uses, or intends to use, the comparable regulator exemption must notify ASIC as soon as practicable (but before 15 business days) after the first time that the person starts to provide the financial service under this exemption, that they consent to ASIC and the person’s home regulator sharing information about the person. *[Schedule 1, item 4, subsection 911L(2) of the Corporations Act]*

1.106 Appropriate information sharing arrangements between ASIC and the foreign company's home regulator is necessary to enable timely and effective communication between the regulators about the foreign company.

1.107 This information sharing requirement is consistent with the requirement that the foreign regulator be a party to an effective cooperation arrangement with ASIC, which is a requirement for being determined (by the Minister) as a comparable regulator.

1.108 As for the other notice requirements, this notice is required to be given in writing, be in a manner and form (including electronic form) approved by ASIC and include the information, explanation, statements, other matters and accompanying material specified by ASIC. *[Schedule 1, item 4, paragraph 911L(2)(b) of the Corporations Act]*

Notifying ASIC of breaches or investigations in other jurisdictions

1.109 A foreign company that uses the comparable regulator exemption must notify ASIC of any significant enforcement action, disciplinary action or investigation undertaken against the company in any place outside this jurisdiction. *[Schedule 1, item 4, subsection 911L(3) of the Corporations Act]*

1.110 However, this requirement does not apply if giving such a notice would be contrary to a law in force in another jurisdiction (such as a secrecy provision prohibiting the sharing of this information). *[Schedule 1, item 4, subsection 911L(4) of the Corporations Act]*

1.111 This condition is not limited to notification about enforcement action, disciplinary action or investigations undertaken by the foreign company's home regulator. Rather, the foreign company must notify ASIC of each significant enforcement action, disciplinary action or investigation taken against the foreign company by any foreign regulator in any jurisdiction other than Australia.

1.112 In determining whether an enforcement action, disciplinary action or investigation is 'significant', the foreign company may consider a number of factors including (but not limited to):

- whether the action relates to the provision of the financial service under the comparable regulator exemption;
- the extent to which the relevant conduct indicates that the foreign company's arrangements to ensure compliance with their obligations under the financial services laws are inadequate;
- the number and frequency of breaches; and
- the size (severity) of the penalty (if applicable).

1.113 The foreign company must provide this notice as soon as practicable (but before 15 business days) after the day on which the company becomes aware (or would reasonably be expected to have become aware) of such an action. *[Schedule 1, item 4, paragraph 911L(3)(a) of the Corporations Act]*

1.114 As for the other notice requirements, this notice is required to be given in writing, be in a manner and form (including electronic form) approved by ASIC and include the information, explanation, statements, other matters and accompanying material specified by ASIC. *[Schedule 1, item 4, paragraph 911L(3)(b) of the Corporations Act]*

Local agent

1.115 A foreign company that uses the comparable regulator exemption must have an agent in Australia. *[Schedule 1, item 4, subsection 911L(5) of the Corporations Act]*

1.116 The foreign company must not be without an agent for ten or more consecutive days during which the company provides financial services under this exemption. *[Schedule 1, item 4, subsection 911L(5) of the Corporations Act]*

1.117 Requirements for appointing a local agent are set out in section 601CG of the Corporations Act. Where it is appropriate to do so, an agent appointed for the purposes of registering a foreign company under section 601CF of the Corporations Act may also act as the agent for the purposes of the comparable regulator exemption.

Sufficient oversight over representatives

1.118 A foreign company that uses the comparable regulator exemption must maintain sufficient oversight over all of its representatives that provide financial services provided under this exemption. Further, the foreign company must also take reasonable steps to ensure that those representatives comply with the financial services laws, in relation to the financial services provided. *[Schedule 1, item 4, subsection 911L(6) of the Corporations Act]*

1.119 In accordance with section 910A of the Corporations Act, for the purposes of the comparable regulator exemption, ‘representative’ means any of the following persons:

- an employee or director of the foreign company; or
- an employee or director of a related body corporate of the foreign company; or
- any other person acting on behalf of the foreign company.

1.120 ‘Financial services laws’ is defined in section 761A of the Corporations Act and includes (but is not limited to):

- a provision of Chapter 7 of the Corporations Act which relates to requirements and regulation of financial services and markets;
- a provision of Division 2 of Part 2 of the *Australian Securities Investments Commission Act 2001* which relates to unconscionable conduct and consumer protection in relation to financial services; and
- any other Commonwealth, state or territory legislation that covers conduct relating to the provision of financial services.

1.121 The requirement to maintain sufficient oversight over its representatives includes ensuring that the foreign company's representatives are appropriately trained and supervised to provide the financial services.

1.122 This requirement is consistent with the obligation on Australian financial service licence-holders, under section 912A of the Corporations Act, which requires financial services licensees to take reasonable steps to ensure that its representatives comply with the financial services laws.

Consequences of failing to comply with a condition

1.123 A failure to comply with any of the conditions for either the professional investor exemption or the comparable regulator exemption may result in the following consequences:

- ASIC cancelling the person's exemption;
- ASIC imposing additional conditions on the person's use of the exemption; or
- ASIC applying to the court for a declaration of contravention of a civil penalty provision and a pecuniary penalty order.

[Schedule 1, item 4 and 9, subsection 911F(3), sections 911M and 911Q and Schedule 3 of the Corporations Act]

Cancelling an exemption

1.124 ASIC may cancel the exemption of a person or foreign company that uses the professional investor exemption or the comparable regulator exemption in relation to a financial service in the following circumstances:

- the person fails to comply with one or more conditions for using the exemption;
- the person fails to comply with a condition and does not provide ASIC with full particulars of the failure to comply as soon as practicable (but before 15 business days) after the

day on which the person would reasonably be expected to have become aware of the failure after having made reasonable enquiries;

- ASIC reasonably believes that a person mentioned in section 913BA of the Corporations Act, is not a fit and proper person to provide the financial services.
 - The fit and proper person test applies to the foreign financial service provider (the person or foreign company), the controller of the foreign financial service provider (if applicable), and an officer, partner, trustee or senior manager of the foreign financial services provider or the controller of the foreign financial service provider;
 - In determining whether a relevant person is a fit and proper person, ASIC must have regard to the matters specified in section 913BB of the Corporations Act; or
- the person fails to comply with an additional condition imposed by ASIC on the person for failing to comply with a condition.

[Schedule 1, item 4, sections 911M, 911N and 911Q of the Corporations Act]

1.125 Before cancelling a person's exemption, ASIC must take reasonable steps to give the person a written notice of the proposed cancellation along with the reasons for it. *[Schedule 1, item 4, subsection 911P(1) of the Corporations Act]*

1.126 ASIC must also give the person an opportunity to appear (or be represented) at a private hearing before ASIC and to make submissions to ASIC on that matter. *[Schedule 1, item 4, subsection 911P(1) of the Corporations Act]*

1.127 If a hearing is held or submissions are made, ASIC must take into account any information given to it at the hearing or in the submissions. *[Schedule 1, item 4, paragraph 911P(1)(b) of the Corporations Act]*

1.128 Hearings are not required to be held in person. To facilitate hearings involving persons (or representatives) located outside Australia, hearings can be conducted using any technology that allows the person (or the person's representative) to participate in the hearing without being physically present at all or part of the hearing. *[Schedule 1, item 4, section 911S of the Corporations Act]*

1.129 The purpose of a hearing is to provide a person with an opportunity to provide information or an explanation of events, which may assist ASIC to decide whether or not to cancel the exemption. While a person is not required to appear at a hearing or make a submission,

having the opportunity to do so ensures that the foreign financial service providers have access to adequate procedural safeguards.

1.130 Following a hearing or consideration of submissions, if ASIC decides to cancel a person's exemption, ASIC must take reasonable steps to provide the person with a written notice of the cancellation and its reasons for the decision. [*Schedule 1, item 4, subsection 911P(2) of the Corporations Act*]

1.131 The cancellation notice must also include the date from which the cancellation is to take effect (which must not be before the day the notice is given to the person) and may also be used to inform the person of their right to apply to the Administrative Appeals Tribunal for a merits review of ASIC's decision to cancel the exemption. [*Schedule 1, item 4, subsection 911P(2) of the Corporations Act*]

1.132 The cancellation of an exemption by ASIC is not a legislative instrument within the meaning of a legislative instrument in section 8(1) of the *Legislation Act 2003*. Cancellations are administrative in character as they do not determine or alter the law, but rather they apply the law to specific persons.

1.133 If ASIC takes reasonable steps but is unable to notify the person of its proposed and/or final decision to cancel the person's exemption, for example, because the person has failed to keep their contact details up-to-date, ASIC's decision to cancel the person's exemption is still valid. This requirement for ASIC to take reasonable steps to give notices to the person is intended to achieve a balance between the need for legislative and administrative certainty and the need to maintain adequate safeguards of natural justice for the person.

1.134 If the person's exemption is cancelled by ASIC, the person may not carry on a financial services business in Australia without an Australian financial services licence (unless eligible to use another exemption or relief). The provision of financial services without an Australian financial services licence (or a valid exemption from the requirement to hold a licence) is a contravention of the civil penalty provision in subsection 911A(5B) of the Corporations Act.

Additional conditions

1.135 If a person fails to comply with a condition under either the professional investor exemption or the comparable regulator exemption, instead of cancelling the person's exemption, ASIC may impose one or more additional conditions on the person's future use of the relevant exemption. [*Schedule 1, item 4, section 911Q of the Corporations Act*]

1.136 Examples of possible additional conditions could include strengthening disclosure obligations to investors, requiring the person to provide regular reports (e.g. quarterly) to ASIC on the financial services provided under the exemption or limiting the types of financial products

or services that may be provided under the exemption. The additional condition imposed will be determined at the discretion of ASIC.

1.137 Providing ASIC with the power to impose additional conditions is appropriate to ensure that ASIC is able to take appropriate and effective action to promote compliance with the regulatory regime, without unnecessarily disrupting the provision of financial products and services by cancelling the person's an exemption.

1.138 As for the procedure for cancelling a person's exemption, before ASIC can impose additional conditions, ASIC must take reasonable steps to give the person with a written notice of its proposed decision to impose an additional condition along with the reasons for it and provide the person an opportunity to appear (or be represented) at a private hearing before ASIC and to make submissions to ASIC on that matter. *[Schedule 1, item 4, paragraph 911R(2)(a) of the Corporations Act]*

1.139 If a hearing is held or submissions are made, ASIC must take into account any information given to ASIC at the hearing or in the submissions. *[Schedule 1, item 4, paragraph 911R(2)(b) of the Corporations Act]*

1.140 If ASIC decides to impose additional conditions, ASIC must take reasonable steps to notify the person in writing of the decision and the reasons for it and to specify the date on which this decision takes effect (which must not be before the day the notice is given to the person). *[Schedule 1, item 4, subsection 911R(3) of the Corporations Act]*

1.141 ASIC's decision to impose one or more additional conditions is a reviewable decision. A person may apply to the Administrative Appeals Tribunal for a merits review of this decision.

1.142 If ASIC imposes one or more additional conditions on a person, ASIC may vary or revoke those additional conditions. *[Schedule 1, item 4, subsection 911Q(2) of the Corporations Act]*

1.143 A person may apply to ASIC to vary or revoke additional conditions imposed on their use of the professional investor or comparable regulator exemptions. This application is required to be in writing, be in a manner and form (including electronic form) specified by ASIC and include the information, statements, explanation, other matters and accompanying material specified by ASIC. *[Schedule 1, item 4, subsection 911Q(3) of the Corporations Act]*

1.144 Conditions may also be varied or revoked on ASIC's own initiative. *[Schedule 1, item 4, subsection 911Q(2) of the Corporations Act]*

1.145 If ASIC proposes to make one of the following decisions, it must take reasonable steps to provide the person with notice of its proposed decision, and an opportunity to appear (or be represented) at a hearing or make submissions:

- vary an additional condition on ASIC's own initiative; or

- refuse to grant a person’s application to vary or revoke an additional condition.

[Schedule 1, item 4, subsections 911R(1) and (2) of the Corporations Act]

1.146 If ASIC makes the proposed decision, it must take reasonable steps to provide the person with notice of its decision, and the reasons for it, the day that the decision is to take effect. *[Schedule 1, item 4, subsection 911R(3) of the Corporations Act]*

1.147 Decisions by ASIC to vary a condition on its own initiative, or to refuse an application to vary or revoke a condition, are reviewable decisions and subject to review by the Administrative Appeals Tribunal.

Civil penalty

1.148 If a person fails to comply with a condition on the professional investor exemption or the comparable regulator exemption, ASIC may apply to the court for a declaration of contravention of a civil penalty provision. *[Schedule 1, items 4 and 9, subsection 911F(3) and Schedule 3 of the Corporations Act]*

1.149 If ASIC makes an application to the court, and the court is satisfied that the person has contravened a civil penalty provision for failing to comply with one or more conditions, the court must make a declaration of contravention and may order the person to pay a financial sanction, known as a pecuniary penalty order.

1.150 In accordance with section 1317G of the Corporations Act, the maximum financial sanction that the court may order for a contravention of a civil penalty provision is the greater of 5,000 penalty units and three times the benefit derived, and detriment avoided because of the contravention, if this can be determined by the court.

1.151 The value of a penalty unit is prescribed in the *Crimes Act 1914*.

1.152 The process and penalty for contravening a new civil penalty provision created by the Bill are the same as for existing civil penalty provisions under the Corporations Act.

1.153 The civil penalty provisions in this Bill are considered necessary and proportionate to promote compliance and strengthen integrity measures for the new professional investor and comparable regulator exemptions.

Fit and proper person test exemption

1.154 The Bill provides an exemption for foreign companies regulated by comparable regulators from being required to satisfy the fit and proper person test in section 913BA of the Corporations Act when applying to ASIC for:

- an Australian financial services licence under section 913A of the Corporations Act; or
- the imposition of conditions, or additional conditions, on the licence, or the variation or revocation of conditions imposed on the licence under section 914B of the Corporations Act.

1.155 The purpose of the fit and proper person test exemption is to fast-track the licensing process and reduce the administrative burden for persons that hold a relevant authorisation, registration, or licence from a foreign regulator that the Minister determines as overseeing a comparable regulatory regime.

Exemption from the fit and proper person test

1.156 The fit and proper person test exemption for applications for an Australian financial services licences made under section 913A of the Corporations Act applies to applications made on or after the commencement of the Bill. *[Schedule 1, item 10, subsection 1694(1) of the Corporations Act]*

1.157 The fit and proper person test exemption for applications to impose, vary or revoke a condition on an existing licence made under section 914B of the Corporations Act apply to applications made on or after the commencement of the Bill. The exemption applies whether the licence was granted before, on, or after the commencement of the Bill. *[Schedule 1, item 10, subsection 1694(2) of the Corporations Act]*

1.158 The fit and proper person test exemption only applies at the time an application is made under sections 913A or 914B of the Corporations Act. At all other times, ASIC may take appropriate enforcement action against an Australian financial services licence holder, such as by suspending or cancelling the licence, if ASIC has reason to believe that a relevant person (i.e. the licensee, an officer, partner, trustee or senior manager of the licensee or the controller of the licensee) is not a fit and proper person to provide the financial services covered by the licence.

Who is eligible for the fit and proper test exemption?

1.159 The fit and proper person test exemption is only available if an applicant (under section 913A or section 914B of the Corporations Act) meets all of the following requirements:

- the applicant is a foreign company;
 - The requirement to be a foreign company ensures that companies incorporated in Australia, but which are also regulated overseas, are not exempt from the fit and proper person test to be granted an Australian financial services licence. ‘Foreign company’ is defined in section 9 of the Corporations Act.

- the licence, if granted, would be restricted to the provision of financial services to wholesale clients; and
 - ‘Wholesale client’ is defined in sections 761G and 761GA of the Corporations Act and regulations made for the purposes of these provisions.
- the applicant holds one or more authorisations, registrations, or licences (as applicable) for the provision of financial services in a foreign jurisdiction from a regulator determined by the Minister.
 - The regulators determined by the Minister for the purposes of the fit and proper person test exemption are the same as the regulators determined for the purposes of the comparable regulator exemption.

[Schedule 1, items 5 to 8, subsections 913B(1), 913B(2A), 914B(2) and 914B(2A) of the Corporations Act]

Minister’s power to determine regulators - comparable regulator exemption and fit and proper person test exemption

1.160 The Bill provides that the Minister may, by legislative instrument, determine regulators for the purpose of the comparable regulator exemption and the fit and proper person test exemption.
[Schedule 1, item 4, subsection 911T(1) of the Corporations Act]

1.161 In making such a determination, the Minister must have regard to whether the regulatory regime that the regulator administers produces comparable outcomes to Australia’s regulatory regime in regulating and improving the performance of the relevant financial services system and the financial services providers in that system. *[Schedule 1, item 4, paragraph 911T(2)(a) of the Corporations Act]*

1.162 Specifically, the Minister must have regard to:

- whether the regulatory regime is clear, transparent, certain, and adequately enforced;
- whether the regulatory regime is broadly consistent with the Objectives and Principles of Securities Regulation, developed by the International Organization of Securities Commissions and as in force from time to time;
 - In assessing whether a regulatory regime is broadly consistent with this standard, the Minister may consider whether the regulator of that regime (or another international organisation) have undertaken a reasonable assessment that has resulted in the regulatory regime being found to broadly comply with standard.

- The requirement that the regulatory regime be broadly consistent with the standard as in force from time to time is necessary to ensure that the requirements are flexible and responsive to changes in international standards and requirements.
- A copy of the latest standard (published in May 2017) is available from:
<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf>.
- whether the overseas regulator is either a signatory to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, developed by the International Organization of Securities Commissions or is otherwise a party to any other effective cooperation arrangement with ASIC;
- any relevant submissions received in relation to the foreign regulator or that foreign regulatory regime;
- any relevant advice (or assessment) received from ASIC;
 - ASIC may, on its own initiative or upon request from the Minister, give the Minister advice and/or an assessment on whether a foreign regulatory regime satisfies the requirements to be determined as administering a comparable regulatory regime.
- any other matters prescribed by the regulations for the purposes of this paragraph; and
- any other matter that the Minister considers relevant.

[Schedule 1, item 4, subsections 911T(2) and (3) of the Corporations Act]

1.163 The requirement for the Minister to have regard to these factors is intended to provide assurance that the foreign companies regulated by these foreign regulatory regimes are subject to similar regulatory oversight as Australian financial services licensees.

1.164 Once the Minister makes a determination that a regulator is a comparable regulator, foreign companies regulated by these regulators are eligible for the comparable regulator and fit and proper person test exemptions, subject to satisfying the other requirements for each of these exemptions.

1.165 The Minister's power to make a legislative instrument determining comparable regulators is considered appropriate and necessary to ensure the list of regulators can be updated over time, as and when a foreign regulator is determined as administering a comparable regulatory regime to the regulatory regime administered by ASIC. The

legislative instrument is disallowable and subject to sunseting and will therefore be subject to appropriate parliamentary scrutiny and periodic review.

1.166 The regulation-making power to prescribe other matters to which the Minister must have regard is also appropriate and necessary to take into account, and be flexible and responsive to, changes in global financial systems, regulatory regimes and international standards. The regulations are subject to disallowance and therefore subject to appropriate parliamentary scrutiny.

Application and transitional provisions

1.167 The professional investor and the comparable regulator exemptions apply in relation to financial services provided on or after the day the Bill commences. *[Schedule 1, item 10, section 1693 of the Corporations Act]*

1.168 The Bill commences the day after it receives the Royal Assent.

1.169 The fit and proper person test exemption for an application for an Australian financial services licence made under section 913A of the Corporations Act applies to applications made on or after the commencement of the Bill. *[Schedule 1, item 10, subsection 1694(1) of the Corporations Act]*

1.170 Applications for an Australian financial services licence made prior to commencement of the Bill, including applications that remain on foot (which have yet to be decided as at commencement), are subject to the existing requirements and must satisfy the fit and proper person test in accordance with the requirements in section 913BA of the Corporations Act.

1.171 The fit and proper person test exemption for an application to impose, vary or revoke a condition on an existing licence made under section 914B of the Corporations Act apply to applications made on or after the commencement of the Bill. The exemption applies whether the licence was granted before, on or after the commencement of the Bill. Applications on foot at the time Bill commences are subject to the requirements that were in force at the time the application was made. *[Schedule 1, item 10, subsection 1694(2) of the Corporations Act]*

1.172 The Bill provides that the Minister may, by legislative instrument, determine regulators that administer comparable regulatory regimes for the purposes of the comparable regulator exemption and the fit and proper person test exemption.

1.173 For administrative efficiency, regulators that have already been assessed by ASIC as having comparable regulatory regimes by a similar

process, prior to the commencement of the Bill, will be taken to be comparable regulators for the purposes of the first legislative instrument made under subsection 911T(1) of the Corporations Act, if the Minister is satisfied that:

- the regulator can be identified from a legislative instrument made by ASIC and in force immediately before the commencement of this section; and
- the regulator is responsible for regulating the provision of financial services by providers in a place outside this jurisdiction; and
- the legislative instrument exempted those providers from certain provisions of Part 7.6 in relation to the provision of financial services.

[Schedule 1, item 10, section 1695 of the Corporations Act]

1.174 Subject to the Minister's decision, this may result in the following regulatory authorities, which are specified in the *ASIC Corporations (Foreign Financial Services Providers—Foreign AFS Licensees) Instrument 2020/198*, being taken to be comparable regulators for the purposes of the first legislative instrument to be made by the Minister:

- Securities and Exchange Commission (US SEC);
- US Federal Reserve and Office of the Comptroller of the Currency (OCC);
- Commodity Futures Trading Commission (US CFTC);
- Monetary Authority of Singapore (Singapore MAS);
- 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);
- Autorité de contrôle prudentiel et de résolution of France (French ACPR); and
- Ontario Securities Commission (Ontario OSC).