



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 40

# **Licensing: Discretionary powers—foreign financial services providers**

December 2002

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### **Your comments**

**We invite your comments on the *proposals and issues for consideration* in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.**

**Comments are due by Friday 28 February 2003 and should be sent to:**

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**You can also contact ASIC Infoline on 1300 300 630 for information and assistance.**

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# What this policy proposal is about

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**1** This policy proposal paper outlines when we will use our discretionary powers to provide exemptions from the requirement to hold an Australian financial services (AFS) licence for financial services providers who are regulated by overseas regulatory authorities. In this paper, we refer to these providers as “foreign financial services providers” (“FFSPs”).

**2** The proposals in this paper cover exemptions under the following sections of the *Corporations Act 2001* (“Corporations Act”):

- (a) s911A(2)(h), which, subject to certain conditions, exempts an FFSP that is regulated by an overseas regulatory authority approved by ASIC; or
- (b) s911A(2)(l), which deals with exemptions specified by ASIC. We intend to use our power under s911A(2)(l) to exempt certain FFSPs regulated by certain overseas regulatory authorities.

Note 1: We will also use our power under s911A(2)(l) in circumstances other than those covered by this policy proposal paper.

Note 2: Other exemptions for FFSPs are set out in the *Corporations Regulations 2001*: see s911A(2)(k) and reg 7.6.01(1)(f), (g) and (n).

**3** This paper discusses:

- (a) what exemptions are available (**Section A**);
- (b) what are the criteria for exemption under s911A(2)(h) (**Section B**);
- (c) what are the criteria and conditions for exemption under s911A(2)(l) (**Section C**); and
- (d) how to apply for an exemption (**Section D**).

**4** We have also included two Schedules:

- (a) **Schedule 1** sets out the questions we propose to ask an FFSP applying under s911A(2)(h) or s911A(2)(l); and
- (b) **Schedule 2** gives examples of the types of regulatory mechanisms that might achieve regulatory outcomes sufficiently equivalent to Australian regulation.

**5** The exemptions in this paper apply to financial services provided only to wholesale clients.

Note: From time to time, ASIC will consider whether we should produce policy on exemptions available to an FFSP who provides financial services to retail clients.

For example, see our policy proposal paper *Foreign collective investment schemes* (November 2002) at [www.asic.gov.au](http://www.asic.gov.au).

**6** This policy proposal paper only deals with applications for exemption by FFSPs. It does not deal with applications under s911A(2)(h) initiated by overseas regulatory authorities. If an overseas regulatory authority wishes to initiate an approval process for the purposes of exemption under s911A(2)(h), it should contact ASIC to express its interest in approval and discuss an appropriate process. In considering an application from an overseas regulatory authority, we will be guided by the proposed approach in this paper.

**7** Our approach in this policy proposal paper is based on our *Principles for cross border financial services regulation*: see “Related papers”. These principles guide our policy and decision-making on all aspects of cross border financial services regulation.

**8** During the second quarter of 2003, we plan to release final policy based on the proposals in this paper and the comments we receive. Until that final policy applies, we will grant interim exemptions on a case-by-case basis: see our FAQ “*What is ASIC’s policy on approving overseas regulatory authorities for the purposes of s911A(2)(h)?*” on our website at [www.asic.gov.au](http://www.asic.gov.au).

**Important note:** The proposals in this paper do not constitute legal advice. Potential applicants for exemption under s911A(2)(h) or s911A(2)(l) should seek their own legal advice. The policy and examples contained in this paper are at a preliminary stage only. There may be changes as a result of the comments we receive. This paper should be treated as an indication of how we are thinking at this stage.

This paper is based on the legislation and regulations as at 18 December 2002. We will take into account any changes in the legislation or regulations in the finalisation of this policy. In particular, we will review our proposals, if necessary, in the light of draft regulations published in the coming months. We may decide not to proceed with the exemptions proposed in this paper if regulations are made covering the same topics. We suggest that readers consider the draft regulations published by the Commonwealth Treasury (see [www.treasury.gov.au](http://www.treasury.gov.au)). A set of draft regulations was issued on 12 December 2003.

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# Policy proposals

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In this paper, there are four groups of policy proposals on foreign financial services providers. For each group, we set out the proposals and identify issues we would like you to comment on. When necessary, we have also included explanations of our proposals.

**Special note:** There may be other issues that you consider important. *We are keen to hear from you on our general approach, and what other issues you consider important, as well as your answers to our specific questions.*

# A What exemptions are available?

Policy proposal	Your feedback
<p><b>A1</b> We will use our power under both s911A(2)(h) and s911A(2)(l) to allow an FFSP to provide financial services in Australia without an AFS licence provided they satisfy the following criteria:</p> <ul style="list-style-type: none"> <li>(a) the financial services are provided in Australia only to wholesale clients;</li> <li>(b) regulation by the FFSP's overseas regulatory authority is sufficiently equivalent to ASIC's regulation;</li> <li>(c) ASIC has effective co-operation arrangements with the FFSP's overseas regulatory authority; and</li> <li>(d) certain other regulatory requirements outlined in this policy proposal paper are satisfied.</li> </ul>	<p><b>A1Q1</b> Should we use our power under s911A(2)(l) to provide exemptions for financial services provided by FFSPs to retail clients? If so:</p> <ul style="list-style-type: none"> <li>(a) when should we give such an exemption; and</li> <li>(b) what conditions should we impose on such an exemption?</li> </ul> <p>Note: Section C sets out the proposed criteria and conditions for exemption under s911A(2)(l).</p>
<p><b>Exemption under s911A(2)(h)</b></p> <p><b>A2</b> We will consider using our power under s911A(2)(h) if an FFSP:</p> <ul style="list-style-type: none"> <li>(a) approaches us for an exemption; and</li> <li>(b) is willing and able to provide <i>all</i> information we need to determine whether <i>all</i> financial services regulated by their overseas regulatory authority are subject to regulation that is sufficiently equivalent to Australian regulation.</li> </ul> <p>Note: Section B sets out the proposed criteria for exemption under s911A(2)(h). Section D sets out what information must accompany your application.</p>	

## Policy proposal

**A3** In general, we will only approve an overseas regulatory authority for the purposes of s911A(2)(h) where we receive an application from an FFSP.

Note: For our approach to applications from overseas regulatory authorities, see paragraph 6 of “What this policy proposal is about”.

## Exemption under s911A(2)(l)

**A4** We will consider using our power under s911A(2)(l) if:

- (a) an FFSP approaches us for an exemption; and
- (b) the FFSP is willing and able to provide *all* information we need to assess the *particular* financial services they intend to provide in Australia.

Note: Section C sets out the proposed criteria and conditions for exemption under s911A(2)(l). Section D sets out what information must accompany your application.

**A5** An exemption under s911A(2)(l) will be:

- (a) given to a particular FFSP; and
- (b) limited to the particular financial services provided by that FFSP in Australia.

**A6** We will consider making a class order exemption for certain FFSPs under s911A(2)(l) after we receive several applications that relate to a particular financial service that is regulated by a particular overseas regulatory authority.

## Your feedback

**A3Q1** Should we approve certain overseas regulatory authorities in the absence of an application? If so:

- (a) what overseas regulatory authorities should we approve; and
- (b) what information should we rely on when assessing them?

**A6Q1** What practical problems might arise if we provide a class order exemption under s911A(2)(l)?



Policy proposal	Your feedback
<p><b>Guiding principles</b></p> <p><b>A7</b> In considering whether to approve an overseas regulatory authority for the purposes of s911A(2)(h) or to grant an exemption under s911A(2)(l), we will be guided by our <i>Principles for cross border financial services regulation</i>: see “Related papers”. In particular, we consider that an FFSP should only be exempted from the requirement to hold an AFS licence if:</p> <ul style="list-style-type: none"> <li>(a) regulation of the FFSP by their overseas regulatory authority is sufficiently equivalent to regulation by ASIC (see policy proposal paragraphs A8–A11); and</li> <li>(b) there are effective co-operation arrangements between the FFSP’s overseas regulatory authority and ASIC (see policy proposal paragraphs A12–A15).</li> </ul> <p><b>What is “sufficiently equivalent regulation”?</b></p> <p><b>A8</b> Regulation by an overseas regulatory authority is sufficiently equivalent to regulation by ASIC if the regulatory regime under which that authority operates:</p> <ul style="list-style-type: none"> <li>(a) is clear, transparent and certain;</li> <li>(b) is consistent with the <i>IOSCO Objectives and Principles of Securities Regulation</i>;</li> <li>(c) is adequately enforced in the home jurisdiction; and</li> <li>(d) achieves the same outcomes as the Australian regime achieves in relation to the regulation of wholesale financial services.</li> </ul> <p>These criteria form our “equivalence test”.</p>	<p><b>A8Q1</b> Are there any limitations to applying the <i>IOSCO Objectives and Principles of Securities Regulation</i> to overseas regulatory regimes that regulate non-securities financial services? Please explain your answer.</p> <p><b>A8Q2</b> Are there other criteria that we should include in our “equivalence test”? If so, what are they and why should they be included?</p>

Policy proposal	Your feedback
<p><b>A9</b> An overseas regulatory regime will achieve the same outcomes as the Australian regime achieves, in relation to the regulation of wholesale financial services, if it promotes the provision of efficient, honest and fair financial services by ensuring that financial services are provided by persons who:</p> <ul style="list-style-type: none"> <li>(a) are fair and honest;</li> <li>(b) are competent to provide the financial services;</li> <li>(c) have adequate resources; and</li> <li>(d) have adequate risk management processes, including in relation to the maintenance of financial records.</li> </ul> <p>Note: See Schedule 2 for examples of regulatory mechanisms that achieve these outcomes.</p> <p><b>A10</b> We will consider the equivalence of regulatory outcomes from the point of view of market integrity and systemic risk. We will <i>not</i> focus on consumer protection issues.</p> <p><b>A11</b> We will <i>not</i> require that the overseas regulatory regime impose regulatory burdens comparable with the Australian regulatory regime.</p> <p><b><i>What are “effective co-operation arrangements”?</i></b></p> <p><b>A12</b> We will assess whether our co-operation arrangements with an overseas regulatory authority are effective using the criteria in our <i>Principles for cross border financial services regulation</i>: see “Related papers”.</p>	<p><b>A9Q1</b> Are there any other relevant outcomes? If so, what are they and why should they be considered?</p>

Policy proposal	Your feedback
<p><b>A13</b> Effective co-operation arrangements will usually be in the form of a Memorandum of Understanding (MOU) or some other documented arrangement, although they may be supplemented by more informal arrangements.</p> <p><b>A14</b> Effective co-operation arrangements will provide for timely:</p> <ul style="list-style-type: none"> <li>(a) sharing of information about the overseas regulatory regime; and</li> <li>(b) co-operation in relation to: <ul style="list-style-type: none"> <li>(i) supervision and investigation; and</li> <li>(ii) enforcement.</li> </ul> </li> </ul> <p><b>A15</b> In addition, for exemptions under s911A(2)(h), we will rely on effective co-operation arrangements with an overseas regulatory authority to provide us with assistance to monitor:</p> <ul style="list-style-type: none"> <li>(a) changes to the overseas regulatory regime; and</li> <li>(b) enforcement or other disciplinary activity against an FFSP operating in Australia with the benefit of an exemption under s911A(2)(h).</li> </ul> <p>Note: Where an FFSP is exempted under s911A(2)(l), we will impose conditions on the FFSP itself to ensure that they will notify us of changes to their home regulatory regime and enforcement and other disciplinary action against them: see Section C.</p>	<p><b>A14Q1</b> Are there any other matters the effective co-operation arrangements should cover? If so, what are they and why should they be covered?</p> <p><b>A15Q1</b> For an FFSP operating in Australia with an exemption under s911A(2)(h), are there other ways in which we could monitor:</p> <ul style="list-style-type: none"> <li>(a) changes to the overseas regulatory regime; or</li> <li>(b) enforcement and other disciplinary activity against the FFSP?</li> </ul> <p>If so, what are they, and how would they be effective?</p>

# Explanation

## Exemption under s911A(2)(h)

**1** Section 911A(2)(h) provides that a person does not require an AFS licence if:

“all of the following apply:

- (i) the person is regulated by an overseas regulatory authority;
- (ii) the regulatory authority is approved by ASIC in writing for the purposes of this paragraph;
- (iii) the service is provided in the course of carrying on the business or undertaking which causes that regulation to be required;
- (iv) the service is provided only to wholesale clients”.

**2** When an overseas regulatory authority is approved by ASIC for the purposes of s911A(2)(h), *any* wholesale financial services provider who is regulated by the approved overseas regulatory authority can operate in Australia with the benefit of an exemption. We cannot limit the exemption under s911A(2)(h) to a particular financial service or FFSP.

**3** Therefore, when deciding whether to approve an overseas regulatory authority for the purposes of s911A(2)(h), we must ensure that the way it regulates *all* financial services and financial services providers under its responsibility is sufficiently equivalent to Australian regulation. For example, we could not approve an overseas regulatory authority for the purposes of s911A(2)(h) if its regulation of dealing in a financial product, making a market for a financial product and providing financial product advice was sufficiently equivalent, but its regulation of custodial or depository services was not. This rigorous approach is essential to ensure the integrity of Australian markets.

**4** We will accept applications under s911A(2)(h) from applicants able to supply us with *all* information relevant to this assessment.

**5** In general, we do not intend to approve an overseas regulatory authority for the purposes of s911A(2)(h) unless we receive an application from an FFSP, because:

- (a) it will be very difficult for us to assess the overseas regulatory regime in the absence of an application; and

- (b) it may be a considerable waste of our resources to undertake the assessment needed to approve an overseas regulatory authority if no FFSP regulated by that authority wishes to operate in Australia.

Note: For a discussion of our approach to applications from overseas regulatory authorities see paragraph 6 in ‘What this policy proposal is about?’

## Exemption under s911A(2)(l)

6 Many FFSPs will not be able to take advantage of an exemption under s911A(2)(h) because their overseas regulatory authority may not satisfy our equivalence test in relation to *all* financial service providers and financial services it regulates. To facilitate entry into the Australian marketplace for these FFSPs, we have decided to use our general power under s911A(2)(l) to provide a more tailored exemption. Under s911A(2)(l), we will grant an exemption to a particular FFSP, provided that the regulation of the FFSP by their home regulator meets certain criteria: see Section C. When deciding whether to give such an exemption, we will only need to assess the home regulator’s regulation of the *particular* FFSP and financial services that the FFSP wishes to provide in Australia.

## Guiding principles

7 ASIC’s *Principles for cross border financial services regulation* set out high level principles that guide all of ASIC’s policy and decision-making about cross border financial services, including how we should use our discretionary power under s911A(2)(h) or s911A(2)(l).

### ***What is “sufficiently equivalent regulation”?***

Why have we developed an equivalence test?

8 Exemption under s911A(2)(h) or s911A(2)(l), will, in part, transfer the responsibility for ensuring the integrity of Australian markets and the stability of the Australian financial system to the relevant overseas regulatory authority. Therefore, to prevent regulatory and enforcement gaps, it is essential that we assess the nature of the regulation by that overseas regulatory authority before we give an approval under s911A(2)(h) or an exemption under s911A(2)(l).

9 Consistent with our *Principles for cross border financial services regulation*, we have decided to assess the nature of the regulation by the relevant overseas regulatory authority using an equivalence test: see Principles 1 and 7–10.

10 We have also used an equivalence test in our policy proposal papers on *Foreign collective investment schemes* and *Australian market*

*licences: Overseas operators.* However, the equivalence test in this policy proposal paper focuses on ensuring market integrity and protecting against systemic risk. It does *not* focus on consumer protection outcomes, or outcomes intended to protect a specific client. This is because an exemption under s911A(2)(h) or s911A(2)(l) (for the purposes of this policy proposal paper) will only apply to financial services provided in Australia to wholesale clients. Wholesale clients are in a position to look after their own interests and, therefore, ASIC does not need to determine whether the relevant overseas regulatory authority protects the interests of these clients.

### “Clear, transparent and certain”

**11** The outcome-focused equivalence test involves an assessment of the outcomes of the overseas regulatory authority’s regulatory regime against ASIC’s regulatory regime. This includes testing against the following criteria:

- (a) a “clear” regulatory regime, being one that is easily understood;
- (b) a “transparent” regulatory regime, being one whose rules, policies and practices are readily available to, and known by, all relevant persons; and
- (c) a “certain” regulatory regime, being one that is consistently applied and is not subject to indiscriminate change.

Note: See Principle 7 of *Principles for cross border financial services regulation*.

**12** Therefore, at a minimum, a sufficiently equivalent regulatory regime is available in written form and is not subject to arbitrary discretion. Relevant parts of the regime must also be available in English. We will not regard an overseas regulatory regime that fails to meet these minimum conditions as sufficiently equivalent to the Australian regulatory regime because it may not be consistently or reliably applied or enforced, and/or we will not be able to obtain sufficient information to assess how it works in practice.

### “Consistent with IOSCO Principles”

**13** An overseas regulatory authority’s regulatory regime is consistent with the *IOSCO Objectives and Principles of Securities Regulation* if it:

- (a) assesses its regulatory regime against those objectives and principles; and
- (b) reasonably determines that its regulatory regime is broadly compliant with those objectives and principles.

**14** The Australian regime is measured against, and compliant with, the *IOSCO Objectives and Principles of Securities Regulation*. An overseas regulatory authority would need to share a similar regulatory philosophy. Adherence to these objectives and principles would be an indication, at least at a high level, of equivalence.

Note: See Principle 8 of *Principles for cross border financial services regulation*.

### “Adequately enforced”

**15** A regulatory regime is adequately enforced if the regulatory authority:

- (a) has sufficient powers of investigation and enforcement;
- (b) has sufficient resources to use those powers;
- (c) uses those powers and resources consistently to promote compliance with its regulatory regime; and
- (d) operates within a legal framework that is independent and has a reputation for integrity.

**16** We will assess the adequacy of an overseas regulatory authority’s enforcement capability with reference to:

- (a) the international reputation of that overseas regulatory authority;
- (b) any self-assessments by the overseas regulatory authority, in particular IOSCO self-assessments; and
- (c) any generally available assessments of the overseas regulatory regime by international financial institutions or other international organisations, such as the IMF and World Bank *Financial Sector Assessment Program* (FSAP) reports.

**17** It is unlikely that a regulatory regime that is frequently ignored or inconsistently applied will provide sufficiently equivalent regulatory outcomes to the Australian regulatory regime. An inadequately enforced regulatory regime will not reliably protect market integrity.

Note: See Principle 9 of *Principles for cross border financial services regulation*.

### “Comparable regulatory outcomes”

**18** Whatever its regulatory mechanisms, a sufficiently equivalent regulatory regime must achieve regulatory outcomes that are assessed as sufficiently equivalent to our regulatory regime. We will assess whether these outcomes are sufficiently equivalent from the perspective of Australian markets and the Australian financial system. As noted earlier, consumer protection outcomes are less important because the exemptions under s911A(2)(h) or s911A(2)(l) (for the purposes of this

policy proposal paper) will apply to services provided to wholesale clients only.

**19** The outcomes that our regulatory regime achieves in the area of wholesale financial services are set out in paragraph 4.14 of our *Principles for cross border financial services regulation*. That is, an overseas regulatory regime will be assessed as sufficiently equivalent to our own if it achieves regulation that ensures that financial services are provided by persons who:

- (a) are fair and honest;
- (b) are competent to provide financial services;
- (c) have adequate resources; and
- (d) have adequate risk management processes.

### ***What are “effective co-operation arrangements”?***

#### **Our general approach**

**20** We will only approve an overseas regulatory authority for the purposes of s911A(2)(h) or grant an exemption under s911A(2)(l) if we are satisfied that there are effective co-operation arrangements between the relevant overseas regulatory authority and ASIC.

**21** Our approach to effective co-operation arrangements (between ourselves and an overseas regulatory authority) is strongly influenced and guided by our *Principles for cross border financial services regulation*: see Principle 3.

**22** We have adopted the same approach in our policy proposal papers on *Foreign collective investment schemes* (November 2002) and *Australian market licences: Overseas operators* (November 2002).

**23** Effective co-operation arrangements are an important mechanism to reduce and accommodate regulatory and enforcement gaps. We may need to rely on effective co-operation arrangements to:

- (a) access information about an FFSP that is only available from an overseas regulatory authority;
- (b) ask the overseas regulatory authority to:
  - (i) supervise or investigate activities of FFSPs in their jurisdiction; and
  - (ii) take enforcement action in relation to FFSPs in their jurisdiction.

**24** In our policy proposals for exemptions under s911A(2)(h) and s911A(2)(l), we do not focus on consumer remedies. Effective co-



operation arrangements for the purposes of these exemptions are only intended to allow us to request that the overseas regulatory authority take enforcement action in the interest of Australian wholesale clients.

**25** Where we approve an overseas regulatory authority under s911A(2)(h), we will also rely on our effective co-operation arrangements to help us monitor:

- (a) relevant changes to foreign laws that may have a material effect on their approval status; and
- (b) foreign enforcement activity against those FFSPs operating in Australia with the benefit of exemption under s911A(2)(h).

Note: Where an FFSP is exempted under s911A(2)(l), we will impose conditions on the FFSP itself to ensure that they will notify us of changes to their home regulatory regime and enforcement and other disciplinary action against them: see Section C.

### What do we mean by “effective”?

**26** Generally, effective co-operation arrangements with us will be in the form of a Memorandum of Understanding (MOU). However, they may be supplemented by some other more informal arrangements.

**27** Effective co-operation arrangements ensure that the overseas regulatory authority will, if we request, take appropriate actions to protect Australian market integrity and reduce systemic risk in the Australian financial system. Those actions should be as effective as actions the overseas regulatory authority would take to protect the integrity of markets and reduce systemic risk in its own jurisdiction.

**28** We consider that, particularly in the area of supervision of FFSPs, effective co-operation arrangements with an overseas regulatory authority will mean that we have access to direct and continuing contact with the relevant officers of that authority, so as to enable prompt exchanges of information and effective co-operation: see paragraph 3.19 of the *Principles for cross border financial services regulation*.

**29** Generally, effective co-operation arrangements will not be possible unless the overseas regulatory authority has power under its regulatory regime to co-operate with ASIC in these ways.

**30** Most of our existing MOUs with overseas regulatory authorities satisfy our test of effective co-operation arrangements.

## B Exemption under s911A(2)(h)

Policy proposal	Your feedback
<p><b>Who can apply?</b></p> <p><b>B1</b> You can apply under s911A(2)(h) for approval of your overseas regulatory authority if:</p> <ul style="list-style-type: none"> <li>(a) you are an FFSP seeking an exemption from the requirement to hold an AFS licence; and</li> <li>(b) you would satisfy the other criteria in s911A(2)(h) if your overseas regulatory authority were approved by ASIC, that is: <ul style="list-style-type: none"> <li>(i) you are regulated by an overseas regulatory authority (s911A(2)(h)(i));</li> <li>(ii) the financial service you will provide in Australia will be provided in the course of carrying on the business or undertaking which causes the regulation by the overseas regulatory authority to be required (s911A(2)(h)(iii)); and</li> <li>(iii) you will provide the financial service in Australia only to wholesale clients (s911A(2)(h)(iv)).</li> </ul> </li> </ul> <p>Note: See policy proposal paragraphs B3–B9.</p> <p><b>What are the criteria for approval?</b></p> <p><b>B2</b> We will approve an overseas regulatory authority for the purposes of s911A(2)(h) if we are satisfied that:</p> <ul style="list-style-type: none"> <li>(a) <i>all</i> regulation of financial services by that overseas regulatory authority is</li> </ul>	<p><b>B2Q1</b> Are there any other criteria we should consider when assessing applications for approval for the purposes of</p>

## Policy proposal

sufficiently equivalent to regulation by ASIC; and

- (b) there are effective co-operation arrangements between the overseas regulatory authority and ASIC.

Note: For a discussion of what we mean by “sufficiently equivalent regulation” and “effective co-operation arrangements”, see Section A.

## Our interpretation of s911A(2)(h)(i)

### *What does “regulated” mean?*

- B3** We consider that, in general, an FFSP is only “regulated” by an overseas regulatory authority in their home jurisdiction (“home regulator”).

Example: An FFSP originates from country A and is:

- (a) regulated in country A by regulator X; and  
(b) authorised to operate in country B by regulator Y (the overseas regulatory authority in country B).

In general, the FFSP is only “regulated” by regulator X.

### *What is an “overseas regulatory authority”?*

- B4** We consider that an “overseas regulatory authority” is a body established by or for the purposes of a foreign government. We consider that the term “overseas regulatory authority” does not include overseas self-regulatory organisations (SRO).

Note: When considering what is “sufficiently equivalent regulation” (see Section A), we may take into account regulation by an SRO where such regulation is approved by the overseas regulatory authority.

## Your feedback

s911A(2)(h)? If so, what are they and why should we consider them?

- B3Q1** Are there any circumstances in which an FFSP should be exempted under s911A(2)(h) if an overseas regulatory authority, other than their home regulator, is approved? If so, what are those circumstances?

- B4Q1** What practical problems might arise if SROs are not treated as “overseas regulatory authorities” for the purposes of s911A(2)(h)? Please briefly explain your answer.

## Policy proposal

## Your feedback

### ***What if you are regulated by more than one regulator?***

**B5** In limited circumstances, an FFSP may be regulated by more than one overseas regulatory authority. In general, we consider that such an FFSP will only be exempted under s911A(2)(h) if each such overseas regulatory authority is approved by ASIC. This means that each overseas regulatory authority that regulates the FFSP must satisfy our criteria for approval under s911A(2)(h)(ii): see policy proposal paragraph B2.

Example 1: An FFSP originates from country A and is regulated in that country by:

- (a) regulator X; and
- (b) regulator Y.

In general, the FFSP will only be exempted under s911A(2)(h) if both regulator X and Y are approved by ASIC. (See policy proposal paragraph B6 for a description of the situation in which the FFSP will be exempted if only one of these regulators is approved.)

Example 2: An FFSP originates from country A and:

- (a) is regulated in country A by regulator X; and
- (b) authorised to operate in country B by regulator Y (the overseas regulatory authority in country B).

In general, the FFSP will be exempted under s911A(2)(h) if regulator X is approved by ASIC. It is unlikely that regulator Y “regulates” the FFSP: see policy proposal paragraph B3. Therefore, it is likely that the FFSP can take advantage of the exemption even if regulator Y is not approved by ASIC.

**B6** Where one of the overseas regulatory authorities (the “primary regulator”) has supervisory responsibility for, and monitors the performance of other overseas regulatory authorities, we consider that the FFSP will be exempted under s911A(2)(h) if the primary regulator only is approved. In this situation,

**B5Q1** What practical problems might arise if more than one overseas regulatory authority regulates an FFSP? Please briefly explain your answer.

**B6Q1** What practical problems might arise if an FFSP is regulated by a primary regulator? Please briefly explain your answer.

Policy proposal	Your feedback
<p>we will:</p> <ul style="list-style-type: none"> <li>(a) assess the primary regulator against our equivalence test; and</li> <li>(b) only require effective co-operation arrangements with the primary regulator.</li> </ul> <p><b>Our interpretation of s911A(2)(h)(iii)</b></p> <p><b>B7</b> The overseas regulatory authority must itself regulate all the financial services provided by an FFSP in Australia for the services to be considered services “provided in the course of carrying on the business or undertaking which causes that regulation [by the overseas regulatory authority] to be required”.</p> <p><b>Our interpretation of s911A(2)(h)(iv)</b></p> <p><b>B8</b> Exemption under s911A(2)(h) applies to financial services provided only to wholesale clients. An FFSP seeking to use this exemption can offer the same financial services to retail clients, but it will need an AFS licence for any financial services provided in Australia to retail clients (unless those services are covered by an exemption other than s911A(2)(h)).</p> <p><b><i>What does “providing a financial service in Australia” mean?</i></b></p> <p><b>B9</b> A financial service may be provided in Australia even if it is not provided to an Australian client.</p>	<p><b>B7Q1</b> Are there any reasons why we should not interpret s911A(2)(h)(iii) in this way? Please briefly explain your answer.</p> <p><b>B9Q1</b> What practical problems might arise from this interpretation?</p>

# Explanation

## What are the criteria for approval?

1 For a detailed discussion of our criteria for approval and why we have adopted these criteria, see Section A.

## Our interpretation of s911A(2)(h)(i)

### *What does “regulated” mean?*

2 We consider that, in most circumstances, an FFSP is only “regulated” by their home regulator. Regulation involves more than the imposition of legal obligations and requirements. A person is only regulated by a body that has the ability to monitor compliance with legal obligations and requirements, conduct investigations through the use of compulsory powers, and enforce compliance with legal obligations and requirements. Generally, an overseas regulatory authority only has this power over persons present in its jurisdiction.

3 This means that exemption under s911A(2)(h) is not available to an FFSP solely because an overseas regulatory authority from a jurisdiction other than the FFSP’s home jurisdiction is:

- (a) approved by ASIC for the purposes of s911A(2)(h); and
- (b) has given some form of authorisation to the FFSP.

### *What is an “overseas regulatory authority”?*

4 An “authority” is generally a governmental agency or corporation. Therefore, the use of the word “authority” in the phrase “overseas regulatory authority” indicates that it is intended that s911A(2)(h) should only apply to a government regulator and that a self regulatory authority (SRO) is not an overseas regulatory authority for the purposes of s911A(2)(h).

### *What if you are regulated by more than one regulator?*

5 In rare circumstances, an FFSP may be regulated by two or more overseas regulatory authorities. We will accept applications from such FFSPs. In general, such an FFSP will only be exempted from the requirement to hold an AFS licence under s911A(2)(h) if each overseas regulatory authority is approved by ASIC under s911A(2)(h)(ii).

6 However, if a “primary regulator” supervises and monitors the other overseas regulatory authorities, the FFSP can take advantage of the exemption in s911A(2)(h) if only the primary regulator is approved by

ASIC. We believe that this approach is justified as a matter of statutory interpretation because, in such a situation, only the primary regulator “regulates” the FFSP for the purposes of s911A(2)(h)(i).

**7** If an FFSP is:

- (a) regulated by their home regulator; but
- (b) authorised in some way by a regulatory authority in a jurisdiction other than its home jurisdiction,

they can take advantage of the exemption in s911A(2)(h) if only their home regulator is approved. The overseas regulatory authorities in other jurisdictions need not be approved: see our interpretation of “regulated” in policy proposal paragraph B3.

### **Our interpretation of s911A(2)(h)(iii)**

**8** The service the FFSP intends to provide in Australia must itself be regulated by the overseas regulatory authority. If, under the overseas regulatory regime, the service to be provided in Australia is not regulated by the approved overseas regulatory authority, then the FFSP will not be exempted under s911A(2)(h).

### **Our interpretation of s911A(2)(h)(iv)**

**9** An FFSP whose overseas regulatory authority is approved by ASIC can rely on the exemption under s911A(2)(h) for the provision of wholesale financial services only. An FFSP seeking to use this exemption can offer the same service to retail clients but they must have an AFS licence in relation to those financial services (unless those financial services are covered by an exemption other than s911A(2)(h)).

### ***What does “providing a financial service in Australia” mean?***

**10** Generally, the service an FFSP provides in Australia will be provided only to Australian clients: s911D(1). However, in limited circumstances, a financial service provided in Australia could be provided to overseas clients: see, generally, s911D(2), 761C and 21(2). For example, the effect of s21(2)(b) and reg 7.6.01(g) means that a foreign dealer who deals in securities listed on a Australian licensed market on behalf of non-Australian clients would be carrying on a financial services business in Australia, and would therefore need an exemption to provide the service without an AFS licence.

## C Exemption under s911A(2)(I)

Policy proposal	Your feedback
<p><b>Who can apply?</b></p> <p><b>C1</b> If you are an FFSP, under our proposed policy in Section A you can apply for exemption under s911A(2)(I) if:</p> <ul style="list-style-type: none"> <li>(a) you are regulated by a home regulator;</li> <li>(b) that home regulator regulates the particular financial service you will provide in Australia; and</li> <li>(c) you will provide the financial service in Australia only to wholesale clients.</li> </ul> <p>Note: See policy proposal paragraphs A1 and A4–A6.</p>	<p><b>C1Q1</b> Should we accept applications for exemption from an FFSP who wishes to issue financial products to an acquirer under a custodial arrangement defined in s1012IA, where the regulated acquisition that results in the issue is made on the instructions of a retail client? Is so, on what basis?</p> <p><b>C1Q2</b> Should we accept applications for exemption from an FFSP who wishes to make a market by stating prices at which they propose to acquire or dispose of financial products to the acquirer under a custodial arrangement defined in s1012IA, where the regulated acquisition that results is made on the instructions of a retail client? Is so, on what basis?</p>



Policy proposal	Your feedback
<p><b>What are the criteria for exemption?</b></p> <p><b>C2</b> We will exempt an FFSP under s911A(2)(1) from the requirement to hold an AFS licence for particular financial services provided in Australia if we are satisfied that:</p> <ul style="list-style-type: none"> <li>(a) the particular financial services are regulated by a home regulator;</li> <li>(b) regulation by that home regulator is sufficiently equivalent to regulation by ASIC;</li> <li>(c) there are effective co-operation arrangements between the home regulator and ASIC; and</li> <li>(d) the particular financial services are provided only to wholesale clients in Australia.</li> </ul> <p>Note: For a discussion of what we mean by “sufficiently equivalent regulation” and “effective co-operation arrangements”, see Section A.</p>	<p><b>C2Q1</b> Are there other criteria we should consider when assessing applications for exemption under s911A(2)(1)? If so, what are those criteria and why should we consider them?</p>
<p><b>What is our approach to SROs?</b></p> <p><b>C3</b> In general, we will not treat a self-regulatory organisation (SRO) as an FFSP’s home regulator when deciding whether to grant an exemption under s911A(2)(1): see also policy proposal B4.</p> <p>Note: When considering what is “sufficiently equivalent regulation” (see Section A), we may take into account regulation by an SRO where such regulation is approved by the home regulator.</p>	<p><b>C3Q1</b> Are there circumstances in which we should consider granting an exemption under s911A(2)(1) where the home regulator is an SRO? If so, what are those circumstances? Please briefly explain your answer.</p>

Policy proposal	Your feedback
<p><b>What if you are regulated by more than one regulator?</b></p> <p><b>C4</b> In limited circumstances, an FFSP may be regulated by more than one home regulator. In general, under s911A(2)(l), we will only exempt such an FFSP if we have effective co-operation arrangements with each home regulator. However, we may assess the regulation of these home regulators authorities collectively.</p> <p><b>C5</b> Where one of the home regulators (the “primary regulator”) has supervisory responsibility for, and monitors the performance of other home regulators, we will only:</p> <ul style="list-style-type: none"> <li>(a) assess the primary regulator against our equivalence test; and</li> <li>(b) require effective co-operation arrangements with the primary regulator.</li> </ul> <p><b>What are the conditions on an exemption?</b></p> <p><b>C6</b> Exemptions under s911A(2)(l) will be subject to certain conditions:</p> <ul style="list-style-type: none"> <li>(a) standard conditions that apply to all exemptions (see policy proposal paragraphs C7 to C13);</li> <li>(b) tailored conditions that may apply to a particular exemption (see policy proposal paragraph C14); and</li> <li>(c) an additional condition that would apply to any class order exemptions (see policy proposal paragraph C15).</li> </ul>	<p><b>C4Q1</b> What practical problems might arise if more than one home regulator regulates an FFSP? Please briefly explain your answer.</p>

Policy proposal	Your feedback
<p><b>Standard conditions</b></p> <p><b>C7</b> We will impose standard conditions on all exemptions granted under s911A(2)(l). These conditions relate to:</p> <ul style="list-style-type: none"> <li>(a) the conduct and status of the FFSP (see policy proposal paragraph C8);</li> <li>(b) notification of certain matters (see policy proposal paragraphs C9–C10); and</li> <li>(c) enforcement actions in Australia (see policy proposal paragraphs C11–C13).</li> </ul> <p><b>Conduct and status</b></p> <p><b>C8</b> We will impose conditions on all exemptions under s911A(2)(l) to ensure that the FFSP is exempted only if:</p> <ul style="list-style-type: none"> <li>(a) financial services covered by the exemption are provided in Australia only to wholesale clients;</li> <li>(b) the FFSP provides the financial services covered by the exemption in accordance with the requirements of their home regulatory regime;</li> <li>(c) the FFSP remains authorised under their home regulatory regime, which we have assessed as sufficiently equivalent to the Australian regulatory regime; and</li> <li>(d) the home regulatory regime continues to be sufficiently equivalent to our own regime.</li> </ul>	<p><b>C7Q1</b> Should we impose additional standard conditions? If so, what are they and why should we impose them?</p> <p><b>C8Q1</b> Are there any reasons why we should grant interim exemptions for specific transactions for a limited time? Please briefly explain your answer.</p>

Policy proposal	Your feedback
<p><b>Notification requirements</b></p> <p><b>C9</b> We will impose conditions on all exemptions under s911A(2)(l) requiring the FFSP to notify us of:</p> <ul style="list-style-type: none"> <li>(a) any significant changes to the home regulatory regime applying to the FFSP;</li> <li>(b) any enforcement or disciplinary activity against the FFSP in a foreign jurisdiction. This includes any events in the FFSP’s home jurisdiction leading to disciplinary or enforcement action by the home regulator against the FFSP; and</li> <li>(c) any changes to the authorisation granted by the home regulator to the FFSP, including any exemptions granted to the FFSP under the home regulatory regime.</li> </ul> <p><b>C10</b> We will impose a further condition on all exemptions under s911A(2)(l) requiring the FFSP to disclose to any person to whom financial services are provided with the benefit of the exemption that:</p> <ul style="list-style-type: none"> <li>(a) the FFSP is exempt from the requirement to hold an AFS licence in respect of the financial services; and</li> <li>(b) the financial services are regulated by the home regulator under the home regulatory regime and that regulatory regime differs from the Australian regulatory regime.</li> </ul>	<p><b>C9Q1</b> Do you agree that we should seek notification of “significant” changes to the relevant overseas regulatory regime?</p> <p><b>C9Q2</b> If you answered “yes” to C9Q1, how should we define “significant” changes?</p> <p><b>C9Q3</b> If you answered “no” to C9Q1, how should we monitor changes to the home regulatory regime if we do not seek notification of significant changes to that regime?</p> <p><b>C10Q1</b> Is this condition necessary? Please briefly explain your answer.</p> <p><b>C10Q2</b> Will this condition create any practical problems for FFSPs?</p>

Policy proposal	Your feedback
<p><b>Enforcement actions</b></p> <p><b>C11</b> To facilitate enforcement actions in Australia, we will impose the following conditions on all exemptions under s911A(2)(1):</p> <ul style="list-style-type: none"> <li>(a) the FFSP must submit to the non-exclusive jurisdiction of the Australian courts; and</li> <li>(b) the FFSP must comply with any order of an Australian court in respect of the financial services they provide.</li> </ul> <p><b>C12</b> If the FFSP is registrable as a foreign company, they must be registered as a foreign company under Div 2 of Part 5B.2 of the Corporations Act.</p> <p><b>C13</b> If the FFSP is not or will not be registered under Div 2 of Part 5B.2, they must appoint a local agent for service. That local agent must:</p> <ul style="list-style-type: none"> <li>(a) lodge with us the annual financial statements of the FFSP; and</li> <li>(b) be jointly liable for doing all things that the FFSP must do under the Corporations Act and for any penalty imposed on the FFSP.</li> </ul>	<p><b>C13Q1</b> Will this condition create any practical problems for FFSPs? Please briefly explain your answer.</p>
<p><b><i>Tailored conditions</i></b></p> <p><b>C14</b> We may also, as appropriate, impose other tailored conditions on an exemption under s911A(2)(1).</p>	<p><b>C14Q1</b> Are there any typical circumstances in which we should consider imposing specific kinds of tailored conditions? If so, what are those circumstances and kinds of conditions?</p>

Policy proposal	Your feedback
<p><b><i>Class order conditions</i></b></p> <p><b>C15</b> Where we provide a class order exemption under s911A(2)(1), we will impose conditions similar to those in policy proposal paragraphs C8–C14. In addition, we will require an FFSP taking advantage of a class order exemption to lodge a notice with us stating which exemption they are relying on.</p> <p>Note: For a discussion of class order exemptions under s911A(2)(1), see policy proposal paragraph A6.</p> <p><b>What will happen if the conditions are breached or no longer satisfied?</b></p> <p><b>C16</b> We will revoke an FFSP’s exemption if:</p> <ul style="list-style-type: none"> <li>(a) they do not provide the financial services covered by the exemption in accordance with the requirements of their home regulatory regime (see subparagraph (b) of policy proposal paragraph C8)</li> <li>(b) their home regulatory regime is no longer sufficiently equivalent to our own regime (see subparagraph (d) of policy proposal paragraph C8); or</li> <li>(c) they fail to notify us of any significant changes to their home regulatory regime (see subparagraph (a) of policy proposal paragraph C9).</li> </ul> <p><b>C17</b> We will notify an FFSP before revoking their exemption in the circumstances described in policy proposal paragraph C16.</p> <p><b>C18</b> If an FFSP breaches a condition of their exemption, other than a condition described in policy proposal paragraph C16, the exemption will lapse.</p>	<p><b>C15Q1</b> Are there other conditions that should be imposed on class order exemptions? If so, what are they and why should we impose them?</p> <p><b>C15Q2</b> Should we impose a condition requiring an FFSP to notify us when it no longer wishes to rely on a class order exemption? If not, why not?</p>

# Explanation

## What are the criteria for exemption?

1 Under s911A(2)(l), a person who provides a financial service in Australia may be exempted from the requirement to hold an AFS licence where “*the provision of the service is covered by an exemption specified by ASIC in writing and published in the Gazette.*” We will use this power to provide exemptions for FFSPs who provide financial services to wholesale clients in Australia: see policy proposal paragraphs A1 and A4–A6, and paragraph 6 of the Explanation in Section A.

2 For a discussion of our criteria for approval and why we have adopted these criteria, see Section A.

## What if you are regulated by more than one regulator?

3 The issue of more than one home regulator does not arise under s911A(2)(l) in the same way as it does for an exemption under s911A(2)(h). An exemption under s911A(2)(l) is granted to an individual FFSP and can be tailored to its circumstances. The exemption does not automatically create exemptions for other FFSPs. Therefore, under s911A(2)(l), our assessment of whether the FFSP is subject to “sufficiently equivalent regulation” can be more flexible. Under s911A(2)(l), if there is more than one home regulator, we will generally:

- (a) assess the regulation of all home regulators collectively, unless there is a primary regulator, in which case we will only seek to assess the regulation of that primary regulator; and
- (b) require effective co-operation with each home regulator, unless there is a primary regulator, in which case we will only require co-operation arrangements with the primary regulator.

## What are the conditions on an exemption?

### *Standard conditions*

4 An exemption granted under s911A(2)(l) may be unconditional or subject to conditions: s911A(5). Our approach to conditions on exemptions granted to FFSPs under s911A(2)(l) is guided by our *Principles for cross border financial services regulation*. The

conditions are intended to:

- (a) ensure that the FFSP's conduct and status is such that they continue to be entitled to an exemption under the policy in this policy proposal paper;
- (b) give us sufficient information to enable us to assess whether the FFSP is complying with their home regulatory regime;
- (c) give us sufficient information to enable us to assess whether the relevant overseas regulatory regime continues to achieve sufficiently equivalent regulatory outcomes; and
- (d) enable us to enforce the law and our own conditions on the exemption, under our own power and in co-operation with the home regulator.

### Notification requirements

**5** The conditions in policy proposal paragraph C9 are designed to ensure that we are aware of any changes that may mean that the home regulatory regime is no longer sufficiently equivalent to the Australian regulatory regime. If the home regulatory regime ceases to be sufficiently equivalent, we may revoke an exemption under s911A(2)(1).

**6** The types of changes that may mean the overseas regulatory regime will cease to be sufficiently equivalent include changes to:

- (a) the regulatory structure in the home jurisdiction;
- (b) the supervisory arrangements for FFSPs as they operate under the home regulator;
- (c) the obligations or requirements imposed on FFSPs in the home jurisdiction, particularly obligations or requirements that relate to:
  - (i) honesty and integrity;
  - (ii) competence;
  - (iii) financial resources; and
  - (iv) risk assessment.
- (d) the overseas regulatory authority's supervision or legislative responsibility for activities of the FFSP in Australia, or in relation to wholesale clients.

This list is not exhaustive.

**7** The condition in policy proposal paragraph C10 is consistent with our *Principles for cross border financial services regulation*: see Principle



6 and paragraph 3.40 of that paper. It ensures that clients of the exempted FFSPs are able to make an assessment of the consequences for them of any differences between the home regulatory regime and the Australian regulatory regime.

### Enforcement actions

**8** To ensure that an FFSP complies with the conditions of their exemption and any other Australian law that applies to an FFSP operating in Australia with an exemption under s911A(2)(1), we may need to commence legal proceedings in an Australian court. Where an FFSP is not or will not be registered under Div 2 of Part 5B.2, a local agent for service facilitates the commencement of such proceedings in Australia. The requirement to have a local agent will also assist us when we seek to enforce Australian judgments against the FFSP.

## D How to apply for an exemption

Policy proposal	Your feedback
<p><b>What should you do before you apply?</b></p> <p><b>D1</b> An FFSP seeking approval of their overseas regulatory authority for the purposes of s911A(2)(h) should first contact ASIC to see if ASIC has effective co-operation arrangements with their overseas regulatory authority.</p> <p><b>D2</b> An FFSP seeking an exemption under s911A(2)(l) should first:</p> <ul style="list-style-type: none"> <li>(a) check the <i>ASIC Gazette</i> to see if they are covered by an existing class order exemption made under s911A(2)(l); and</li> <li>(b) contact ASIC to see if ASIC has effective co-operation arrangements with their home regulator.</li> </ul> <p>Note: To access the <i>ASIC Gazette</i>, go to our website at <a href="http://www.asic.gov.au">www.asic.gov.au</a>, click on “Publications”, then “ASIC Gazette”.</p>	
<p><b>What information will we require?</b></p> <p><b><i>Applications under s911A(2)(h)</i></b></p> <p><b>D3</b> An applicant under s911A(2)(h) must provide us with information and documents that will help us assess their application. In particular, they must provide us with information and documents demonstrating that the regulatory regime under which their overseas regulatory authority operates is sufficiently equivalent to the Australian regulatory regime.</p> <p>Note: For our policy proposals on “sufficiently equivalent regulation”, see Section A.</p>	<p><b>D3Q1</b> Are there questions, other than those in Schedule 1, that we should ask to elicit relevant information from an FFSP? If so what are they and why should we ask them?</p>

Policy proposal	Your feedback
<p><b>D4</b> An applicant must provide information and documents about the regulation of <i>all</i> financial services within their overseas regulatory authority's area of responsibility, not just the financial services they intend to offer in Australia.</p> <p>Note: See Schedule 1 for more guidance on the type of information we will require.</p> <p><b>Applications under s911A(2)(1)</b></p> <p><b>D5</b> An applicant under s911A(2)(1) must provide us with:</p> <ul style="list-style-type: none"> <li>(a) information and documents that will help us assess their application. In particular, they must provide us with information about: <ul style="list-style-type: none"> <li>(i) the applicant;</li> <li>(ii) the particular financial service they intend to provide in Australia; and</li> <li>(iii) the equivalence of their home regulatory regime; and</li> </ul> </li> </ul> <p>Note: See Schedule 1 for more guidance on the type of information we will require.</p> <ul style="list-style-type: none"> <li>(b) the relevant application fee: see paragraph 3 of the Explanation in this section.</li> </ul> <p><b>General requirements</b></p> <p><b>D6</b> We may also seek:</p> <ul style="list-style-type: none"> <li>(a) additional information from the applicant;</li> <li>(b) information from the home regulator; and</li> <li>(c) independent verification from overseas lawyers.</li> </ul> <p>Note: If we seek verification from overseas lawyers, the applicant will be required to pay for such verification.</p>	<p><b>D5Q1</b> Are there questions other than those in Schedule 1 that we should ask to elicit relevant information from an FFSP? If so, what are they and why should we ask them?</p>

## Policy proposal

- D7** An application under either s911A(2)(h) or s911A(2)(l) should include a declaration signed by the applicant or – if the applicant is a corporate entity – a resolution by the board, that to the best of their knowledge and after making proper inquiries, the information and documents provided in response to the questions in Schedule 1 and in support of the application are true, correct and complete.
- D8** The relevant information must be available in English to help us make an independent assessment of the overseas regulatory authority and regulatory regime.

## How long will it take to process your application?

- D9** The time it will take us to process an application under s911A(2)(h) or s911A(2)(l) will vary depending on:
- (a) the complexity of the application;
  - (b) the amount of material we must assess; and
  - (c) whether we have dealt with a similar application before.
- D10** In general, it will take us longer to deal with an application under s911A(2)(h) than one under s911A(2)(l).

Note: See paragraphs 1–5 of the Explanation in Section A.

## ***Applications under s911A(2)(h)***

- D11** We will aim to process applications under s911A(2)(h) within 16 weeks of receiving *all* the required information and documents.
- D12** However, it may take us longer to deal with these applications if:
- (a) the overseas regulatory authority

## Your feedback

- D7Q1** Are there any other means we should adopt to ensure the accuracy and completeness of applications? Please briefly explain your answer.

Policy proposal	Your feedback
<p>regulates a large number of financial services;</p> <p>(b) we experience delays in obtaining relevant information from either:</p> <p>(i) the applicant;</p> <p>(ii) the overseas regulatory authority; or</p> <p>(iii) the independent overseas lawyer; or</p> <p>(c) we are waiting for a response to a request for clarification.</p> <p><b><i>Applications under s911A(2)(l)</i></b></p> <p><b>D13</b> We will aim to process applications under s911A(2)(l) within 8 weeks of receiving <i>all</i> the required information and documents.</p> <p><b>D14</b> However, delays in processing these applications may still arise: see subparagraphs (b) and (c) of policy proposal paragraph D12.</p> <p><b>How will we assess your application?</b></p> <p><b>D15</b> In reviewing applications under s911A(2)(h) or s911A(2)(l), we will assess whether:</p> <p>(a) the regulatory regime under which the applicant operates achieves sufficiently equivalent regulatory outcomes to our own regime; and</p> <p>(b) there are effective co-operation arrangements between us and the relevant overseas regulatory authority.</p> <p>Note: For a discussion of what we mean by “sufficiently equivalent regulatory outcomes” and “effective co-operation arrangements”, see Section A.</p>	

Policy proposal	Your feedback
<p><b>D16</b> For applications under s911A(2)(l), we will also consider a limited number of matters relevant to the individual applicant and the financial services they will provide in Australia. However, our main focus will be on the nature of the regulation by the relevant home regulator.</p> <p><b>D17</b> Whenever we receive an application under s911A(2)(h) or s911A(2)(l), we will notify the relevant overseas regulatory authority. We may:</p> <ul style="list-style-type: none"><li>(a) inform the overseas regulatory authority about the content of the application; and</li><li>(b) ask the overseas regulatory authority questions about the applicant.</li></ul>	

# Explanation

## What information will we require?

**1** There is no prescribed application form for exemption under s911A(2)(h) or s911A(2)(l). Applicants will have to provide us with all the relevant information and documents we need to assess their application, other than information about whether ASIC has effective co-operation arrangements with the relevant overseas regulatory authority.

**2** The questions in Schedule 1 cover the type of information we need to assess an application. These questions do not limit the information or documents applicants should provide, nor should they be regarded as a definitive indication of the matters we will consider. However, if an applicant fully answers these questions, they will generally have provided us with most of the information we need from an applicant to assess their application.

**3** Application fees for an exemption under s911A(2)(l) are set out in the *Corporate (Fees) Regulations 2001*. There is currently no fee for an application under s911A(2)(h).

**4** Also, we suggest that applicants consider Policy Statement 51 *Applications for relief* [PS 51], which provides guidance to persons who apply to us for relief and exemptions from the Corporations Act.

## How long will it take to process your application?

**5** We will only approve overseas regulatory authorities for the purposes of s911A(2)(h) after we have undertaken a principled analysis of the nature of its regulation for *all* financial services. Therefore, applications under s911A(2)(h) will generally be more complex and take significantly longer to process than applications under s911A(2)(l), which only require us to assess the way the relevant overseas regulatory authority regulates the particular financial service the applicant intends to provide in Australia.

## How will we assess an application?

**6** For a discussion of our proposed approach to “sufficiently equivalent regulation” and “effective co-operation arrangements”: see Section A. Our *Principles of cross border financial services regulation* provide further explanation of these concepts: see “Related papers”.

# Schedule 1: Questions for applicants

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The questions in this Schedule relate to the regulatory regimes of FFSPs who seek to apply for:

- (a) approval of their overseas regulatory authority for the purposes of s911A(2)(h) (see Section B of this paper); or
- (b) an exemption under s911A(2)(l) (see Section C of this paper).

While the answers to these questions will help us assess applications, they should not be regarded as exhaustive and we may seek additional information.

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## Your feedback

**S1Q1** Is there any other information that we should require to assess an application? If so, please describe and give reasons.

**S1Q2** Is any of this information impractical to include in an application? If so, why?



## Part A: Applicant’s details

<b>Q1.1</b>	<p>What is your ACN or ARBN? If you do not have an ACN or ARBN, are you applying for one? If not, what is your current “business form”?</p> <p>Note: We consider that a foreign company carrying on a financial services business in Australia must register under Div 2 of Part 5B.2 of the Corporations Act.</p>
<b>Q1.2</b>	<p>If you are a member of a corporate group, describe the structure of that group?</p>
<b>Q1.3</b>	<p>Name the overseas regulatory authority or authorities that regulate you.</p> <p>Note 1: If you are applying for approval of your overseas regulatory authority for the purposes of s911A(2)(h), you will generally be regulated by your home regulator: see policy proposal paragraph B3.</p> <p>Note 2: If you are applying for an exemption under s911A(2)(l), we will only consider regulation by your home regulator when deciding whether to grant an exemption: see subparagraph (b) of policy proposal paragraph C2. Therefore, you only need to name your home regulators.</p>

## Part B: What financial service do you provide?

<b>Q2.1</b>	Describe the financial service (within the meaning of Div 4 of Part 7.1 of the Corporations Act) you intend to provide or continue to provide in Australia.
<b>Q2.2</b>	<p>Explain clearly how you will provide this service in Australia. For example, provide detailed information on the following:</p> <ul style="list-style-type: none"> <li>(a) Will you use local representatives or employees? If so, how many local representatives will you use and what are their functions and reporting?</li> <li>(b) How will you monitor and supervise those who will provide the financial service in Australia?</li> <li>(c) Will you have a permanent place of business in Australia?</li> </ul>
<b>Q2.3</b>	<p>How will you ensure that the financial service provided in Australia is provided only to wholesale clients (within the meaning of s766G of the Corporations Act)? For example:</p> <ul style="list-style-type: none"> <li>(a) What practical controls or processes apply to ensure that the financial service is provided only to wholesale clients?</li> <li>(b) Will your home regulator monitor your provision of a financial service in Australia to ensure it is provided only to wholesale clients?</li> </ul>
<b>Q2.4</b>	Do you provide the same financial service in your home jurisdiction?

## Part C: The overseas regulatory regime

<b>Q3.1</b>	<p>Please provide proof of the authorisation/registration/licence issued by the overseas regulatory authority that:</p> <ul style="list-style-type: none"> <li>(a) entitles you to provide the financial service; and</li> <li>(b) demonstrates that your provision of the financial service is regulated by the overseas regulatory authority.</li> </ul> <p>If you have authorisations/registrations/licences from more than one overseas regulatory authority, please provide proof of all such authorisations/registrations/licences. Copies should be certified and accompanied by an explanation and other relevant regulatory references.</p>
<b>Q3.2</b>	<p>Do you have any exemptions from your regulatory regime in relation to the financial services that are regulated by the overseas regulatory authority? If so, what are those exemptions and what relevance do they have to the financial service you will provide in Australia?</p>
<b>Q3.3</b>	<p>What is the jurisdictional reach of your overseas regulatory authority? Does it regulate, supervise and monitor services provided by you in Australia?</p>
<b>Q3.4</b>	<p>Please describe how your overseas regulatory authority regulates the financial service you will provide in Australia. For example:</p> <ul style="list-style-type: none"> <li>(a) How does your regulatory regime ensure you act fairly and honestly in your provision of financial services to clients? For example, does your regulatory regime impose any obligation on you to act fairly and honestly? Does your regulatory regime prohibit you from acting dishonestly?</li> <li>(b) How does your regulatory regime ensure you are competent to provide the financial service you will provide in Australia? For example, does your overseas regulatory authority impose on you any positive obligations to be competent in relation to your provision of financial services to clients? Does your regulatory regime prohibit you from acting incompetently in relation to your provision of financial services to clients? Does your regulatory regime prescribe minimum education or other qualifications?</li> <li>(c) How does your regulatory regime ensure you monitor and supervise employees and/or representatives who provide financial services on your behalf in Australia?</li> </ul>

(d) How does your regulatory regime ensure you have sufficient resources to provide the service you will provide in Australia? For example, does your regulatory regime impose any obligations on you to meet:

- (i) specified financial requirements; or
- (ii) other resource requirements?

Please provide detailed descriptions of all such requirements.

(e) How does your regulatory regime ensure you have adequate risk management processes? For example, does your regulatory regime impose any positive obligations on you to meet requirements regarding adequate risk management processes, either specifically or as part of your broader obligations? Does your regulatory regime require you to have adequate internal controls or compliance arrangements?

(f) How does your overseas regulatory authority monitor and enforce compliance with each of the obligations or prohibitions referred to in subparagraphs (a)–(e)?

(g) To what extent does your overseas regulatory authority regulate your provision of financial services to wholesale clients?

(h) Does your overseas regulatory authority have the power to enforce the financial services regulations and rules of its regulatory regime in relation to your provision of financial services in other jurisdictions, such as Australia? Please give details of those powers.

If you are regulated by more than one overseas regulatory authority, please describe the relevant roles and powers of each authority for each of these matters.

Where appropriate, please provide copies of relevant legislative provisions and policies.

## Schedule 2: Regulatory mechanisms and outcomes

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This Schedule sets out some examples of regulatory mechanisms that we consider might achieve regulatory outcomes that are sufficiently equivalent to our own for the purposes of an exemption under s911A(2)(h) or s911A(2)(l) of the Corporations Act.

In most regulatory regimes, the relevant outcome is achieved by a combination of regulatory mechanisms. Generally, no single regulatory mechanism is sufficient to achieve the relevant outcome by itself.

While the examples in this Schedule will help in an assessment of whether the regulatory outcomes are sufficiently equivalent, they should not be regarded as exhaustive and we may consider additional factors.

Key outcome	Example of regulatory mechanisms that might achieve this outcome
FFSPs are fair and honest	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs who are of good fame and character or, if the FFSP is not a natural person, to FFSPs whose officers, partners or controllers are persons of good fame and character.</li> <li>• A statutory obligation to act fairly and honestly is imposed on FFSPs.</li> <li>• FFSPs are subject to fiduciary or contractual obligations to act fairly and honestly in their dealings with clients.</li> <li>• The FFSP's regulator licences or otherwise approves key employees and representatives of the FFSP by reference to their good fame and character.</li> </ul>

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<b>Key outcome</b>	<b>Example of regulatory mechanisms that might achieve this outcome</b>
FFSPs are competent	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs who are competent to provide the financial services they wish to provide.</li> <li>• A statutory obligation to maintain competence is imposed on FFSPs.</li> <li>• A statutory obligation is imposed on FFSPs to ensure that their employees and representatives are adequately trained and competent.</li> <li>• FFSPs are subject to general law obligations to ensure they and their employees and representatives are competent. (Such general law obligations may, for example, arise under contract or the laws of negligence.)</li> <li>• Employees and representatives of the FFSP must meet specified minimum educational and other qualification requirements.</li> <li>• The FFSP's regulator licences or otherwise approves key employees or representatives by reference to competence criteria.</li> </ul>
FFSPs have adequate resources	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs who establish that they have adequate resources (including financial, technological and human resources) to provide the financial services they wish to provide.</li> <li>• A statutory obligation is imposed on FFSPs to have adequate resources to provide the financial services.</li> <li>• FFSPs or their boards are required to periodically certify that they have adequate resources.</li> <li>• FFSPs must meet specified minimum resource requirements.</li> <li>• FFSPs are subject to prudential supervision by an independent regulator.</li> </ul>

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Key outcome	Example of regulatory mechanisms that might achieve this outcome
FFSPs have adequate risk management processes	<ul style="list-style-type: none"> <li>• Licences or other approvals are only granted to FFSPs who establish that they have adequate risk management systems to provide the financial services they wish to provide.</li> <li>• A statutory obligation to have adequate risk management systems is imposed on FFSPs.</li> <li>• A statutory obligation to have adequate internal controls is imposed on FFSPs.</li> <li>• A statutory obligation to have adequate compliance arrangements is imposed on FFSPs.</li> <li>• FFSPs or their boards are required to periodically certify that they have adequate risk management processes.</li> <li>• The FFSP's risk management processes are periodically reviewed and approved by an independent auditor.</li> <li>• FFSPs are required to comply with specific obligations to ensure that client funds are properly dealt with.</li> <li>• FFSPs are required to comply with specific obligations to ensure they keep financial records that correctly record and explain the transactions and financial position of the financial services business carried on by the FFSP.</li> </ul>

# Regulatory and financial impact

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We have considered the likely regulatory and financial impact of the policy proposals in this paper. Based on the information that we currently have, we believe that our proposals strike an appropriate balance between facilitating financial services activity and ensuring market integrity and protecting against systemic risk. To ensure that we have achieved an appropriate balance, we are also developing a Regulatory and Financial Impact Statement (RIS).

The RIS will address the following seven key elements:

## 1 Issue/problem

Our policy proposal paper *Licensing: Discretionary powers – Foreign financial services providers* outlines how we intend to use our discretionary powers to provide exemptions from the requirements to hold an AFS licence for foreign financial service providers (FFSPs) who are regulated by overseas regulatory authorities. The proposals cover exemptions under s911A(2)(h) and s911A(2)(l) of the Corporations Act.

## 2 Objective(s)/analysis of the problem

The objective(s), or the outcome sought in relation to the identified issue / problem, will be addressed.

## 3 Options / solutions

We will identify all the alternative options that could achieve the objective(s) stated above for dealing with the issue being considered (eg no specific action; ASIC policy proposal; media release; information statement; self regulation/quasi regulation; codes of conduct; and co-regulation, compliance and enforcement strategies).

## 4 Impact analysis (costs and benefits) of each option

Impact analysis will include:

- (a) analysis of the benefits and costs of the options, including any restriction on competition for different persons affected;
- (b) identification of persons or bodies affected by the problem; and those that will be affected by the solutions or options identified (ie applicant/proponent of issue; other interested parties, investors, business and government);



- (c) a consideration of how each of the proposed options will affect existing Act, regulations or policies;
- (d) identification and categorisation of the expected impacts of the proposed options as likely benefits or likely costs against each of the person/bodies identified as likely to be affected;

We will try to quantify these effects where possible (for example, will there be any restriction on competition as a result of the proposed regulation?)

Costs to businesses affected by a regulatory initiative might include: administrative costs; complying with new regulatory standards; licence fees; delays etc.

Costs to investors affected could also include higher prices for goods and services; reduced utility of goods and services; delays and more difficult or expensive options for seeking redress.

- (e) benefits of the options will also be identified (even where they are not quantifiable); and
- (f) the data sources used and assumptions made in making these assessments will be identified.

## **5 Consultation**

The consultation undertaken in the policy process will be detailed.

## **6 Conclusions and recommended option**

The preferred option(s) will be given, and reasons why.

## **7 Implementation and review**

We will discuss how the proposed option will be administered, implemented, or enforced (eg instrument of relief, policy statement, practice note, no action letter).

## **8 Important details sought from you**

In order for us to fully assess the financial and regulatory impact of our proposals, we invite you to consider possible options that would achieve our objectives, comment on the impact that these policy proposals might have, and in particular, give consideration to the costs and benefits of these proposals. Where possible, we are seeking both quantitative and qualitative data.

Any comments that we receive will be taken into account when preparing our final RIS.

# Development of policy proposal

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We have developed this policy proposal paper by considering:

- (a) legislative facilitation for the provision of wholesale financial services to Australians without the need for an AFS licence as otherwise required by the Corporations Act;
- (b) *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment*, November 2002 (see “Related papers”);
- (c) Parliamentary Joint Committee on Corporations and Financial Services (*Report on the Regulations and ASIC policy statements made under the Financial Services Reform Act 2001*), October 2002;
- (d) submissions of the Parliamentary Joint Committee on Corporations and Financial Services;
- (e) FAQ: “*What is ASIC’s policy on approving overseas regulatory authorities for the purposes of s911A(2)(h)?*” (see “Related papers”); and
- (f) public demand for policy under s911A(2)(h).

# Key terms

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In this policy proposal:

“AFS licence” means an Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services

Note: This is a definition contained in s761A.

“ASIC” means the Australian Securities and Investments Commission

“Corporations Act” means the *Corporations Act 2001* and includes regulations made for the purposes of that Act

“equivalence test” means the criteria set out in policy proposal paragraph A8 by which we will assess the equivalence of an overseas regulatory authority’s regime to the Australian regulatory regime

“foreign financial service provider” (FFSP) means a provider of foreign services who wishes to provide their financial services in Australia

“home jurisdiction” means the jurisdiction from which the FFSP originates and is regulated

“home regulator” means the overseas regulatory authority of the FFSP in their home jurisdiction

“home regulatory regime” means the regulatory regime in the FFSP’s home jurisdiction

“IOSCO” means the International Organization of Securities Commissions

“IOSCO Objectives and Principles of Securities Regulation” means the *Objectives and Principles of Securities Regulation*, originally adopted by IOSCO in September 1998 and as amended from time to time

“overseas regulatory authority” means a body established by or for the purposes of a foreign government to regulate financial services and includes an FFSP’s home regulator

“Principles for cross border financial services regulation” means the principles in our paper *Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment* (November 2002)

“[PS 51] (for example) means an ASIC policy statement (in this example numbered 51)

“reg 7.6.01” (for example) means a regulation under the *Corporations Regulations 2001* (in this example numbered 7.6.01)

“regulatory regime” means the rules that govern a financial facility, service or product and may include legislation, the rules, policies and practices of a regulator

“s911A(2)(h)” (for example) means a section of the Corporations Act (in this example numbered 911A(2)(h))

“self-regulatory organisation” (SRO) means a non-government entity that has authority to create, amend, implement and enforce rules of conduct and resolve disputes through arbitration

“wholesale client” means a wholesale client as defined in s761G of the Corporations Act.

# What will happen next?

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## Stage 1

Last quarter 2002                      ASIC policy proposal paper released

## Stage 2

28 February 2003                      Comments due on this policy proposal paper

March – May 2003                      Drafting of final policy statement

## Stage 3

2<sup>nd</sup> quarter 2003                      Final policy released

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### Your comments

**We invite your comments on the proposals and issues for consideration in this paper. All submissions will be treated as public documents unless you specifically request that we treat the whole or part of your submission as confidential.**

**Comments are due by Friday 28 February 2003 and should be sent to:**

**Erica Gray  
Regulatory Policy Branch  
Australian Securities & Investments Commission  
GPO Box 9827  
SYDNEY NSW 2001  
email: [erica.gray@asic.gov.au](mailto:erica.gray@asic.gov.au)**

**You can also contact the ASIC Infoline on 1300 300 630 for information and assistance.**

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## Related papers

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*Principles for cross border financial services regulation: Making the regulatory regime work in a cross border environment*  
(November 2002)

*“What is ASIC’s policy on approving overseas regulatory authorities for the purposes of s911A(2)(h)?”* (FAQ at [www.asic.gov.au](http://www.asic.gov.au))

ASIC policy proposal paper *Foreign collective investment schemes*  
(November 2002)

ASIC policy proposal paper *Australian market licenses: Overseas operators* (November 2002)

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### Copies of papers

**Download them from the ASIC home page:**

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