

EXPOSURE DRAFT

1 Inserts for
2 **Tax Laws Amendment (Foreign Source**
3 **Income Deferral) (No. 2) Bill**
4 **2010:Anti-roll-up rule**
5

EXPOSURE DRAFT (21/04/2010)

6 **Commencement information**

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Schedule ? Anti-roll-up rule	Royal Assent	
2.		
3.		

7 **Schedule ?—Anti-roll-up rule**

8 *Income Tax Assessment Act 1997*

9 **Division FAF—Foreign accumulation funds and foreign**
10 **life assurance policies**

11 **Table of Subdivisions**

12 FAF-A Application of this Division
13 FAF-B Commissioner may stop tax deferral benefits

14 **Subdivision FAF-A—Application of this Division**

15 **Table of sections**

16 @FAF5 Operation of this Division
17 @FAF10 Foreign accumulation fund
18 @FAF35 Excluded investors
19 @FAF40 *Tax deferral benefit*
20 @FAF45 Matters to be considered in determining purpose

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@FAF5 Operation of this Division

- 1
- 2 (1) This Division operates if:
- 3 (a) under a *scheme, an entity (the *investor*) has or acquires an
- 4 interest in an entity that is a *foreign accumulation fund at the
- 5 end of the investor's income year; and
- 6 (b) the investor is:
- 7 (i) an Australian resident at any time in the income year;
- 8 and
- 9 (ii) not covered by section @FAF35 [for the income year];
- 10 and
- 11 (c) under the scheme, the investor gets a *tax deferral benefit for
- 12 the income year; and
- 13 (d) taking account of the matters described in section @FAF45,
- 14 it is reasonable to conclude that an entity that (whether alone
- 15 or with others) entered into or carried out the scheme (or part
- 16 of it) did so for the sole or dominant purpose of that entity or
- 17 another entity getting a tax deferral benefit.

Territorial application

- 18
- 19 (2) It does not matter whether the scheme (or any part of it), was
- 20 entered into or carried out inside or outside Australia.

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This provision will be expanded to cover certain foreign life assurance policies.

@FAF10 *Foreign accumulation fund*

- 23
- 24 (1) An entity is a *foreign accumulation fund* for an income year of the
- 25 entity if:
- 26 (a) the entity is a foreign resident at any time in the income year;
- 27 and
- 28 (b) the entity is not a CFC [for the income year]; and
- 29 (c) the entity meets the requirement in subsection (2) for the
- 30 income year; and
- 31 (d) the exception in subsection (3) does not apply to the entity
- 32 for the income year.

Low risk investments

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- 34 (2) It must be reasonably likely that returns on [all] investments of the
- 35 entity in the income year will be subject to a low level of risk.

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The explanatory memorandum will explain the effect and intent of this provision.

Exception for distributing funds

- (3) The exception in this subsection applies to an entity if the entity makes *distributions of substantially all of the profits and gains of the entity covered by subsection (4) arising in the income year during the period:
- (a) starting at the beginning of that income year; and
 - (b) ending 3 months after the end of that income year.
- (4) These profits and gains are covered by this subsection:
- (a) the realised profits and gains of an entity;
 - (b) so much of the unrealised profits and gains of the entity as represents realised profits and gains of one or more other entities in which the entity has an interest (whether directly or indirectly through one or more interposed entities).

@FAF35 Excluded investors

An investor is covered by this section if the investor is:

- (a) a *complying superannuation fund;
- (b) [certain other types of funds].

This rule is intended to replicate the CFC rule for excluded entities.

@FAF40 Tax deferral benefit

An investor gets a *tax deferral benefit* for an income year of the investor from a scheme under which the investor has an interest in a *foreign accumulation fund equal to the difference between:

- (a) the proportion of the total profits and gains of the fund covered by subsection @FAF10(4) arising in the income year of the investor that is reasonably attributable to the investor's interest in the fund; and
- (b) the total of the *distributions of profits and gains made to the investor on the interest during that income year.

@FAF45 Matters to be considered in determining purpose

Take the following matters into account:

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- 1 (a) the distribution pattern of the fund, including:
2 (i) any statement by the fund of its policy in making
3 income or capital distributions; and
4 (ii) how the fund has previously made income or capital
5 distributions;
6 (b) [whether the tax that would have been paid by the investor
7 had the tax deferral benefit been included in the investor's
8 assessable income for the year is materially different to the
9 amount of tax actually paid by the fund on the amount of the
10 tax deferral benefit];
11 (c) the matters referred to in subparagraphs 177D(b)(i) to (viii)
12 of the *Income Tax Assessment Act 1936*;
13 (d) any other relevant circumstances.

14 **Subdivision FAF-B—Commissioner may stop tax deferral** 15 **benefits**

16 **Table of sections**

17	@FAF50 Commissioner may make determination
18	@FAF55 Commissioner must give copy of determination to investor
19	@FAF60 Review
20	@FAF65 Removal of double tax

21 **@FAF50 Commissioner may make determination**

- 22 (1) If this Division applies, the Commissioner may make a written
23 determination that the whole or a part of a *tax deferral benefit is
24 included in the assessable income of the investor for the income
25 year.
- 26 (2) In considering whether to make a determination in relation to a
27 whole or only a part of a *tax deferral benefit, the Commissioner
28 must have regard to:
29 (a) the extent to which the profits in the fund are realised;
30 (b) the number of days in the income year the investor was an
31 Australian resident;
32 (c) any other matters the Commissioner considers relevant.
- 33 (3) A determination under subsection (1) may form part of an
34 assessment.
- 35 (4) A determination under subsection (1) is not a legislative
36 instrument.

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1 **@FAF55 Commissioner must give copy of determination to investor**

2 (1) The Commissioner must give a copy of a determination under this
3 Division to the investor.

4 (2) A failure to comply with subsection (1) does not affect the validity
5 of the determination.

6 **@FAF60 Review**

7 An entity that is dissatisfied with a determination made in relation
8 to the entity may object against the notice in the manner set out in
9 Part IVC of the *Taxation Administration Act 1953*.

10 **@FAF65 Removal of double tax**

11 A provision will be included giving non-assessable non-exempt
12 income treatment to amounts received that have been taxed under
13 this measure.

14 **XX Subsection 995-1(1)**

15 Insert:

16 *foreign accumulation fund* has the meaning given by section
17 @FAF10.

18 *tax deferral benefit* has the meaning given by section @FAF40.