12 January 2022

Regulatory Powers and Accountability Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FFSP@treasury.gov.au

Treasury Laws Amendment (Measures for Consultation) Bill 2021: Licensing Exemptions for Foreign Financial Service Providers

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the draft *Treasury Laws Amendment (Measures for Consultation) Bill 2021: Licensing Exemptions for Foreign Financial Service Providers* (Bill).

AFMA agrees with the policy objective of the Bill to reduce barriers of entry and encourage greater engagement by foreign financial service providers in the Australian market. Facilitating Australian professional and wholesale investors to diversify their investment opportunities and attract additional investment and liquidity to Australian markets is good for the Australian economy. AFMA places high national importance on getting the Bill ready for Parliament's consideration.

The Bill achieves its objective by providing for three licensing exemptions for foreign financial service providers. AFMA supports the Government decision to put the law affecting foreign financial service providers on a proper statutory footing. The provisions governing the licensing of financial service providers were drafted in such a way that they could have extra-territorial effect if not properly bounded. It is time to make this boundary clear and certain, more than twenty years since the landmark legislation was passed.

The global catch-all drafting of the Corporations Act in regard to licensing was intended from the start to have exemption provisions to allow for differentiation of cross-border supervision of financial services delivered in other jurisdictions under foreign laws and supervision of foreign regulators. Consistent with the Corporations Act, the exemptions will clarify boundaries. The Australian economy is highly reliant on global investment integration. Temporary and ad hoc arrangements devised to quickly deal with financial services licensing implementation issues more than twenty years ago add cost and

Australian Financial Markets Association
ABN 69 793 968 987
Level 25, Angel Place, 123 Pitt Street GPO Box 3655 Sydney NSW 2001
Tel: +612 9776 7993 Email: secretariat@afma.com.au

complexity to dealings in the wholesale professional financial markets both for clients and service providers.

AFMA generally welcomes the Bill as drafted and considers it sound. Member comments have principally concerned implementation issues and queries on how ASIC will interpret the law and timelines for transition and implementation. There is keen interest to understand how additional comparable jurisdictions will be added to the list. Consistent with our previous discussions these matters are highly important in practice but secondary at this time to getting the legislation passed. The focus at present is on the legislative text. Accordingly, our comments are limited to one key drafting point and some clarification points.

1. Comparable regulation representatives - compliance with law

The key drafting issue noted by a number of members relates to the comparable regulator exemption and the inconsistency with the purpose of relying on home jurisdiction regulation, then requiring compliance with particular aspects of Australian law. This concern is focused on training and compliance by representatives with Australian law.

Subsection 911L(6) will require that 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***." It is made expressly clear in the Explanatory Memorandum (EM) that '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.

To be consistent with the intention of reliance on the comparable regulation, the reference to 'financial services law' should instead be to the laws of the comparable jurisdiction. These are the laws which properly govern the services being delivered under an exemption regime and with which training and supervision should be in accord.

Accordingly, AFMA recommends that the defined term 'financial service laws' in Subsection 911L(6) be replaced by reference to the laws of the comparable jurisdiction's law regulating financial services to make it clearly distinguishable from Australian financial services laws.

2. EM clarification – Offshore entities of AFSL

Paragraphs 1.28 and 1.33 of the EM set out that the professional investor exemption is available to a person that provides the financial services 'from a place outside Australia' and a 'foreign company licensed to provide the same financial service by a regulator in a foreign jurisdiction' respectively. Further to this, Paragraph 1.51 of the EM states 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". The draft legislation does not prescribe any restriction on the types of FFSPs that can rely on the exemptions. This is understood to mean that offshore offices of entities with an AFSL (e.g. the Head Office outside Australia) will be able to apply these exemptions. It would be helpful if the EM could make this clear.

3. First time notices

Paragraph 1.87 EM says *"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". For foreign companies that have until 31 March 2023 and are looking to move to the comparable regulator exemption will this be grandfathered or will they need to apply/notify on the intention to use the exemption? On the basis that grandfathering is permitted and a firm is able to rely on its current sufficient equivalence exemption until 31 March 2023, it would be helpful if subsection 911(G)(2)(a) were to be amended to include the suggested words underlined below in the draft paragraph so this is clear:

> *(2) The person must notify ASIC that the person intends to rely on the exemption:*
>
> *a. As soon as practicable, and before the 15th business day, after the first time (the start time) after the commencement of this section that the person starts to provide the financial service* <u>under or in reliance of the exemption</u>.

If grandfathering were not allowed, the concern arises around whether "15 days" is ample time for foreign firms (particularly those foreign entities with several entities) to arrange for the exemption.

4. Jurisdictional nexus

A noteworthy observation from a member was about the proposed professional investor and comparable regulator exemptions in the context of current trends in digital presence including locations of servers etc. It would appear the jurisdictional nexus test based on physical location is likely to become more uncertain over time as digital services rely increasingly on facilitation of services through offshore entities.

A ready solution to this point is not simple to propose and may sit more properly into a broader policy review of the suitability of Corporations Act provisions for digitised financial and other services where even intermediaries may no longer play a part in a transaction.

Thank you for the diligence and effort that has been put into preparing the Bill by the Treasury Team. Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au in regard to this letter.

Yours sincerely

David Love
General Counsel & International Adviser