



24 March 2022

Renee Roberts
Executive Director Policy & Advice
Australian Prudential Regulation Authority

By email: Renee.Roberts@apra.gov.au

Dear Ms Roberts

Issue Alert - Use of Bank Name in Notifications

The Australian Financial Markets Association (AFMA) is alerting APRA to an issue that arises in the event that the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* (Bill) presently in Parliament is passed and becomes law.

The *Banking Act 1959* places restrictions on financial businesses using certain words and expressions related to banking. Section 66 of the Banking Act prohibits a person from (among other things) using or assuming the words 'bank', 'banker' or 'banking' in relation to their financial business unless APRA has granted approval or an exception in the Banking Act applies.

APRA recently published the '*Overseas Banks: Operating in Australia*' guidelines in August 2021 (Guidelines), which acknowledge that overseas banks are able to carry on a cross-border banking business in Australia in limited circumstances without holding a banking licence from APRA or an Australian financial services (AFS) licence from ASIC. One of the exemptions from holding an AFS licence currently available is the professional investor exemption under s 911A(2E) of the Corporations Act 2001 (as notionally inserted by reg 7.6.02AG) (Current Exemption), which only applies in limited circumstances to persons 'not in this jurisdiction'.

As you may be aware, the explanatory memorandum to the *Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022* indicates that the Current Exemption will be replaced by a new professional investor exemption made available under proposed s 911A(2)(eo) of the Corporations Act (Proposed Exemption). Among other requirements, any person seeking to rely on the Proposed Exemption must (under proposed s 911H and 911K, respectively) provide notice to ASIC and the intended client prior to providing the financial services. There are prescribed content requirements for the notices including the person's (eg overseas bank's) name. On one view, complying

with proposed s 911H and 911K could breach s 66 of the Banking Act and we are hopeful that this not the intended regulatory outcome.

Assuming the Bill is passed in its current form, we request that APRA provide confirmation that it will not take any action against an overseas bank under s 66 of the Banking Act for using or assuming its own name in any notifications to an existing or prospective client or regulator provided that:

- 1) the overseas bank does not maintain an office or permanent staff in Australia, including staff employed by another entity within the banking group which conducts business on its behalf;
- 2) the overseas bank is not soliciting business from retail customers in Australia; and
- 3) all business contracts and arrangements are clearly transacted and booked offshore and are subject to an offshore legal and regulatory jurisdiction.

The above requirements are taken from page 9 of the Guidelines and we do not believe extending the scope of the current position to explicitly cover any notices given to current or prospective clients or a regulator would cause any material incremental harm. On the other hand, we strongly believe that preventing certain overseas banks from relying on AFS licensing exemptions under the Corporations Act would greatly increase the regulatory burden and costs applicable to those overseas banks and may even cause some overseas banks to cease (or at least limit) servicing the Australian market. We understand a number of overseas banks currently provide various FX and derivatives related services to professional investors in Australia under the Current Exemption and would like to continue to provide those services under the Proposed Exemption.

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