5 August 2025

International Tax Unit
International Tax Branch
Corporate & International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: BailinBonds@treasury.gov.au

Dear Treasury

Foreign Bail In Bonds
Exposure Draft Consultation

The Australian Financial Markets Association (**AFMA**) represents the interests of over 130 participants in Australia's financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. AFMA's members are the major providers of wholesale banking and financial market services to Australian businesses and investors.

AFMA has within its membership the vast majority of foreign banks that operate in Australia and may issue financial instruments, such as bonds, through their Australian branches. AFMA is accordingly keen to ensure that the taxation treatment of such instruments is ascertainable with certainty by issuers, investors and the Australian Taxation Office (**ATO**).

On this basis, AFMA is pleased to make a submission to the proposed Regulation, as set out in the Exposure Draft of legislation clarifying foreign bail-in bonds' tax treatment (**the Proposed Regulation**), giving effect to the Government's announcement in the 2024 MYEFO Statement.

Executive Summary

The following is noted by way of executive summary:

- Treasury should consider expanding the ambit of the proposed Regulation to allow for any feature required by APRA and/or a comparable foreign regulator to be included in an instrument to be disregarded in assessing whether that instrument is debt for taxation purposes. This would be consistent with the Board of Taxation recommendation and assist in future proofing as prudential regulatory standards and powers evolve globally;

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- The proposed Regulation should apply to a broader range of instruments, including those that are not subordinated and instruments that may not be considered to be "term" debt;
- The definitions of "non-viability condition" and "non viability trigger event" should be expanded to address powers held by comparable foreign regulators, including allowing for the terms of the instrument to be varied; and
- The term "comparable foreign regulator" should be defined in the proposed Regulation as opposed to in the Explanatory Statement.

Introductory Comments

AFMA notes the proposed approach in the proposed Regulation is to extend the clarification provided to APRA regulated banks in 2012 to instruments issued by foreign banks through their Australian branches. This is proposed to be done through extending the class of instruments to which the current Regulation 974-135.05 applies to include a note that is issued by an entity that is regulated for prudential purposes by APRA "or a comparable foreign regulator." However, the notes themselves need to satisfy the conditions to be "relevant term subordinated notes" as defined in Regulation 974-135.05(3).

These conditions are very prescriptive and assume that both the triggers and the notes to which the regulation apply are the same as they were in 2012 and that the regulatory regimes in comparable jurisdictions align completely with the APRA regime. This effectively limits the scope of the relief to a subset of instruments which may be narrower than the instruments to which a comparable foreign regulator chooses to impose a condition.

As noted by Treasury, the application of the proposed Regulation does not deem the instrument to be debt for tax purposes; rather the effect of the proposed Regulation is to ignore the condition imposed by the regulator in assessing whether the instrument satisfies the debt test in Section 974-135. As such, AFMA's view is that the proposed Regulation should be broader through applying to a wider class of instruments, which may occur through reducing the prescriptive requirements that need to be satisfied for the notes to fall within the ambit of the Regulation. In this regard, we agree with the comment in the Explanatory Statement that accompanies the proposed Regulation, which provides that "as a result, all instruments subject to non-viability conditions imposed by regulators are eligible to be treated as debt, should the other requirements of the debt instrument test be satisfied."

AFMA's preferred policy approach is for a broad regulation which allows for powers held by APRA or comparable foreign regulators to be ignored in determining whether an instrument satisfies the requirements to be treated as debt for tax purposes. This would assist with future-proofing the tax outcomes as prudential regulation evolves, enhance certainty for issuers, investors and the ATO and be consistent with the comments made by the Board of Taxation, as elaborated on below.

Board of Taxation Approach

The impact of prudential regulatory powers to the debt test in Section 974-135 was considered by the Board of Taxation as part of its review of the Debt Equity rules in 2015, albeit in respect of APRA-regulated entities. AFMA would submit that the consideration and recommendations

of the Board should apply symmetrically to entities that are regulated by comparable foreign regulators.

In the review, the Board stated that (at 3.152, 3.153) "the Board considers there are advantages in having a regulation stating that the inclusion of APRA-required features in a financing arrangement does not of itself prevent an obligation from being a non-contingent obligation…This would avoid making regulations from time to time stating that particular APRA requirements do not prevent an obligation from being non-contingent." Accordingly, the Board made the following recommendation:

> "The Board recommends that a Regulation should be made that the inclusion of APRA-required features in a financing arrangement to satisfy the APRA characterisation as Tier 2 does not of itself prevent an obligation from being a non-contingent obligation."

AFMA supports the making of such a regulation in this instance, applicable also to comparable foreign regulators.

Removal of Subordination and Other Requirements

Current regulation 974-153.05(3) requires that, in order for the non-viability condition to be disregarded in assessing whether the instrument satisfies the debt test, it is necessary that the note is a relevant "term subordinated note." AFMA submits that the bail-in bonds issued by foreign banks through their Australian branches may not be subordinated in the same way that such notes are in an APRA-regulated context. Our view is that there is no material reason as to why subordination should impact the class of instruments to which the relief applies. Similarly, the use of "term" infers that the proposed Regulation may only apply to term debt of a long duration, whereas it should also apply equally to instruments of a shorter tenor.

Similarly, Regulation 974-135.05(3) sets out a number of prescriptive requirements that need to be adhered to in order for the relief to apply, such as the instrument:

- Has a term of not more than thirty years;
- Does not include an unconditional right to extend beyond thirty years;
- Has a condition that any payment of the principal or interest beyond the date on which would otherwise be payable must accumulate; and
- Does not give the issuer an unconditional right to decline to provide a financial benefit that is equal to the nominal value of the issue price.

To the extent that these requirements mirror APRA requirements and not those of comparable foreign regulators, then our view is that they should be removed. On this point, it is noted that the instrument will still need to satisfy the requirements in Section 974-135 in order to be characterised as debt for tax purposes.

The removal of these terms would ensure that the Regulation meets its stated objective of ensuring that all instruments subject to non-viability conditions imposed by regulators are eligible to be treated as debt, subject to satisfying the debt test requirements.

Non-viability conditions and triggers

Under the current Regulation 974-135.05(4), a non-viability condition is defined as a condition that, if a non-viability trigger event occurs, the note must be:

- Written off; or
- Converted to ordinary shares of the issuer or a parent of the issuer; or
- Converted into mutual equity interests of the issuer or a parent of the issuer.

AFMA's view is that these conditions are specific to APRA-regulated entities and, accordingly, in extending the relief to entities regulated by comparable foreign regulators, there should be additional flexibility in the determination of a non-viability condition. Specifically, eligible non-viability conditions should allow for the terms of the note to be varied, converted into securities as opposed to shares and be converted to securities of another entity apart from the issuer or a parent.

Similarly, the definition of "non-viability trigger event" in Regulation 974-135.05(5) should be updated to reflect the flexibility of other triggers held by comparable foreign regulators, such as allowing the terms of the notes to be varied as opposed to converted or written off.

Definition of "Comparable Foreign Regulator"

AFMA notes that the term "comparable foreign regulator" is not proposed to be included in the proposed Regulation. The draft Explanatory Statement provides that:

> "a comparable foreign regulator is a foreign regulator that issues and administers prudential standards that, in material respects, are substantially similar to those made and administered by APRA."

AFMA is of the view that the inclusion of this definition in the proposed Regulation would enhance certainty and supports its inclusion.

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Thank you for the opportunity to provide a submission in relation to the Exposure Draft. Please contact me on (02) 9776 7996 or at rcolquhoun@afma.com.au to discuss any of the matters that we have raised in this submission.

Yours sincerely,

Rob Colquhoun
Director, Policy