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Senate Standing Committees on Economics
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Treasury Laws Amendment
(Better targeted Superannuation Concessions and Other Measures) Bill 2023
Schedule 7 Licensing exemptions for foreign financial services providers

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the *Treasury Laws Amendment (Better targeted Superannuation Concessions and Other Measures) Bill 2023*. These comments are solely directed to ‘*Schedule 7 Licensing exemptions for foreign financial services providers*’ (Schedule 7).

AFMA represents the interests of over 125 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, and traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses, institutional investors, and superannuation funds.

AFMA agrees with the policy objective of Schedule 7 to assist Australian professional and wholesale investors to diversify their investment opportunities by reducing barriers to entry for foreign financial services providers (FFSPs) in Australian financial markets, while also ensuring appropriate regulatory oversight of FFSPs to maintain domestic market integrity and investor protection. This should provide Australian professional and wholesale investors with improved access to global financial markets and attract additional investment and liquidity into Australian financial markets.

Schedule 7 is reforming ad hoc arrangements put in place as a temporary ASIC rule twenty years ago to limit the extra-territorial reach of the Australian Financial Services Licence (AFSL) regime, that was part of

the Financial Services Reforms in 2001. It was appreciated, at the time, that the AFSL regime was potentially too broad and that exemptions were required to make the regime work in practice. The ASIC exemptions through Class Order instruments were not considered entirely satisfactory by industry, but FFSPs worked within their limitations. AFMA welcomes and supports the introduction of new exemptions into legislation, but we also propose some small adjustments in this submission to avoid unintended negative consequences.

Further context

Institutional markets are globally integrated and are easily the largest and most competitive segment of international financial markets. For instance, Australian financial institutions and corporates raise substantial funding on the overseas markets, while Australian superannuation and managed funds are large net equity investors in foreign companies and other foreign investments. Similarly, foreign investors hold a large part of Australian government debt and are significant shareholders in many ASX listed companies. To be successful as a financial centre, Australia must be able to attract and retain the businesses that operate in this segment. The importance of having efficient cross-border investment operations is particularly important to the superannuation investors. Impediments and additional regulatory costs are borne by superannuation fund members and must be minimised.

It is a legally complex and expensive task for FFSPs to manage their licensing and regulatory obligations across all the jurisdictions in which they service customers. In certain circumstances, the regulatory barrier could result in services being reduced or completely withdrawn in the jurisdictions in which it is considered too difficult or onerous to do business, having regard to the size of the market or potential business revenue from servicing customers in those jurisdictions. For Australia, FFSPs have to date, largely been able to operate with a relatively low (but adequate) degree of ASIC oversight, with minimal adverse consequences.

Many global banks provide financial services to Australian clients from a range of offshore locations, through many different entities around the world. Some of the entities, for example, in Japan, China and India, are not located in one of jurisdictions that have been assessed by ASIC to be sufficiently equivalent and appear unlikely to be included as a comparable jurisdiction under the proposed new exemption. In respect of those jurisdictions, the relevant FFSPs would likely need to rely on the new professional investor exemption. However, there are conditions under the relevant exemptions which we consider impose an unnecessary regulatory barrier to FFSPs in the context of institutional financial markets; which could impact on Australian wholesale and professional investor access to international investments and opportunities.

These issues matter because, as a developed open economy whose financial markets are integrated with global markets, businesses based in Australia will want to deal with financial entities located overseas. Doing so provides diversification in investment and funding, access to better prices in the most competitive markets, new business opportunities and better integrated services for firms in Australia that have significant global operations. Many of our members' Australian clients are increasingly investing in international markets, and when they do, in addition to receiving products and services from their local entities, they also receive services from staff and entities in offshore locations that have their own

regulatory regimes and mechanisms for redress. An important objective of Schedule 7 is to facilitate large Australian fund managers, superannuation funds, hedge funds and other client types managing hundreds of millions if not billions of dollars of assets accessing the services they need from global service providers without unnecessary regulatory impediments from Australian law purporting to regulate other jurisdictions.

AFMA has three technical comments to make on Schedule 7 that would better facilitate the provision of services to Australian clients by FFSPs, where the regulatory benefit does not outweigh the costs to FFSPs which could impact on their decision whether to service the Australian market.

1. Professional investor exemption – Section 911A(2)(eo)(ii) - Service outside the jurisdiction

In respect of the proposed professional investor exemption, subparagraph 911A(2)(eo)(ii) requires that the FFSP provides the financial service to professional investors from a place outside this jurisdiction, unless subsection 911E(1) (about marketing visits) applies to the financial service.

Global financial institutions, for certain business activities such as OTC derivatives, utilise global booking models for operational efficiency, including to enable its clients to directly face a single booking counterparty and to centrally aggregate risk positions. This operating model also supports a “follow the sun” approach – which is used by many large global financial services organisations - for dealing with global clients regardless of location or time-zone. This means that there may be representatives of an AFSL holder in Australia who may act in a limited capacity on behalf of other FFSP within the group to support transactions in the Australian time zone.

The requirement to provide the service from outside the jurisdiction should not apply where the FFSP is providing the service to a professional investor, and the representative of the FFSP acts predominantly for related body corporate that holds an AFSL. It is not clear why Australian clients should be precluded from interacting with an FFSP that adopts such a model.

Recommendation

Amend subparagraph 911A(2)(eo)(ii) to read:

The person provides the financial service from a place outside this jurisdiction, unless:

(A) subsection 911E(1) (about marketing visits) applies to the financial service; or

(B) the service is provided by a representative who acts predominantly inside this jurisdiction on behalf of an Australian financial services licensee.

2. Section 911H – Assistance to ASIC and submission to jurisdiction

Section 911H imposes conditions on all the proposed new exemptions to require FFSPs to give assistance to ASIC on its request in relation to the performance of ASIC's functions or exercise of its powers, and to submit to the non-exclusive jurisdiction of Australian courts for proceedings brought by ASIC or another Commonwealth authority.

FFSPs which rely on the sufficient equivalence exemption provide a deed to ASIC to submit to jurisdiction, and to take all other practicable steps to enable and assist its home regulator to disclose to ASIC any information or document. However, the condition to give assistance to ASIC as it reasonably requests under section 911H, is more extensive than this. Section 911H(3) contemplates that such assistance may include showing books or giving other information, however the broad obligation to give assistance under subsection (2) is potentially much broader than that.

These conditions are also entirely new in respect of FFSPs who previously or currently rely on the limited connection exemption or derivatives professional investor exemption. We expect that section 911H will create practical difficulties which may preclude FFSPs from continuing to service Australian persons or make FFSPs reluctant to rely upon the exemptions and may ultimately lead to FFSPs withdrawing their services to Australian professional investors.

The need for information sharing between regulators is appreciated. ASIC has a number of memorandums of understanding and cooperation in place with many regulators around the world, and FFSPs would generally accept an obligation to take reasonable and practicable steps to facilitate disclosure of information as between regulators, subject to data consent, privacy or secrecy rules which may prevent the sharing of information. However, the obligation to provide ASIC with "assistance" generally without limitation as to what such assistance may entail is overly broad. Most services provided by FFSPs to Professional Investors are for offshore financial services and financial products, traded in the FFSPs own market, which is under the supervision and oversight of the FFSPs domestic market regulator.

In most cases, the services provided to Australian professional investors represent a small fraction of the FFSPs business activities. In this context, being subject to broad and vague obligation to provide assistance to a regulator, through which additional or potentially onerous obligations could be imposed on the FFSP, may be challenging for FFSPs to accept.

Recommendation

Similar to proposed rule 911M(2), the requirements under section 911H should only apply where the financial services business that the person carries on is carried on predominantly inside this jurisdiction.

3. Section 911P – requirement to have an agent in this jurisdiction

Proposed section 911P(3)(a) requires clarification so that it is clear that a person that is a foreign company and proposing to operate under the 911A(2) (ep) comparable jurisdiction exemption is not automatically obliged to also register as a foreign company in Australia under Div 2 Pt 5B.2. The current drafting is ambiguous.

There is an entirely separate test for 'carrying on a business' which needs to be satisfied in order for an entity to be required to register as a foreign company. Most entities operating under the existing ASIC Class order relief are unlikely to be presently registered as foreign companies because it is unnecessary. There are a number of financial statement accounting, governance reporting and tax consequences that flow from becoming a registered foreign company that make it highly burdensome and costly for an entity to adopt such a status when they do not carry out business in Australia.

Recommendation

911P(3)(a) should be clear that that a person that is a foreign company and proposing to operate under the 911A(2) (ep) comparable jurisdiction exemption is not obliged to also register as a foreign company in Australia under Div 2 Pt 5B.2.

AFMA would be pleased to assist the Committee with any questions it may have on the submission. Please contact David Love either on [REDACTED] or by email [REDACTED] regarding this letter.

Yours sincerely

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David Love
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