25 February 2022

Foreign Investment Division
The Treasury
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By email: FIRBStakeholders@treasury.gov.au

To Foreign Investment Division

2022 Foreign Investment Reforms - Exposure Draft Regulations

The Australian Financial Markets Association (AFMA) welcomes the opportunity to comment on the exposure draft of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (Regulations).

1. Summary

AFMA generally welcomes and supports the proposed changes to be brought about the by the Regulations. Our principal reservation is in regard to the drafting of the foreign custodian corporations exemption amendment to paragraph 30(d) of the Regulations. This is because it narrows the availability of the exemption available for foreign custodians and is in conflict with the stated purpose of the amendments which is to reduce regulatory burden and streamline arrangements for some less sensitive types of investment. We also seek clarification on the unit holdings amendment and the rights issue exemption in particular circumstances.

2. Moneylending exemption

2.1. Clarification

AFMA supports the clarification to the moneylending exemption so as to apply to a moneylending agreement that has been entered into by a new entity, where it was created by a foreign moneylending business predominantly for the purpose of lending money (or otherwise providing financial accommodation).

2.2. Improved readability

AFMA supports improving readability of the regulation by separately defining the terms 'moneylending agreement' and 'moneylending business' in section 5 of the current principal regulation.

2.3. Expanded availability

AFMA supports amending the moneylending exemption to expand its availability.

3. Non-stock or mutual entities

AFMA supports exempting non-stock or mutual entities that are widely held (with at least 100 members) and are licensed financial institutions (whether in Australia or elsewhere) from seeking foreign investment approval when they are involved in moneylending for residential land.

4. Media business definition

AFMA supports narrowing the definition of an Australian media business and raising the 5 per cent control threshold.

5. Unlisted Australian land entity

AFMA supports raising the control threshold for foreign persons who acquire an interest in an unlisted Australian land entity from 5 per cent to 10 per cent, aligning the control thresholds for listed and unlisted Australian land entities.

6. Unit holdings

AFMA would like to confirm our understanding that the intention of exempting acquisitions of interests in securities where the proportionate share or unit holding does not increase as a result of a person's acquisition is to allow foreign investors the opportunity to participate in an issuance and not be disadvantaged by being diluted?

If this is the intention, AFMA supports the amendment. On this basis we seek clarity for industry on what factual circumstances would constitute "reasonable grounds" and when this would apply, and what are circumstances that do not constitute reasonable grounds.

An understanding drawn from the answers to these questions would be needed to evaluate how much information would be required to mitigate the possibility of being incorrect. For example, if there were reasonable grounds to believe all investors were going to take up the offer to contribute, and then one investor suddenly pulls out which results in percentage interest exceeding the current holding. What would be the ramifications of this? Would it result in a breach or possibly a forced sale?

7. Rights issue exemption

AFMA has questions about the proposed clarification that foreign persons who acquire additional securities in an Australian entity under a rights issue do not require further approval if the issue is consistent with the meaning in the Corporations Act 2001. The Explanatory Statement to the Regulations says that '*The exemption applies to foreign persons when they acquire additional securities in an Australian entity under a rights issue as long as it is a voluntary, pro-rata rights issue under the Corporations Act 2001 (or a law of a foreign country or part of a foreign country)'*. This statement is perplexing as it has generally been understood that the rights issue exemption applies to rights issues by both Australian and non-Australian entities.

AFMA raises the query as to whether aligning the definition with the Corporations Act the exemption will remain and approval from the Foreign Investment Review Board (FIRB) will not need to be sought in the event that a rights issue is not fully subscribed (and is not fully underwritten) and by virtue of taking up the rights entitlement, there is an increase in percentage holding within the rights issuer company?

The amending exemption will be helpful to an Australian corporate entity that is a shareholder, but which is treated by FIRB as a foreign entity because it has foreign ownership. However, it is important to flag that the exemption will not necessarily apply in all cases as rights issues by ASX listed entities are generally not offered in most foreign jurisdictions (other than New Zealand) because of the cost and complexity associated with ensuring compliance with the variety of prospectus laws in each jurisdiction. It is noted that the Corporations Act definition of rights issue requires offers to be made to registered security holders in Australia or New Zealand – because foreign companies might, as may be permitted by local laws – exclude such security holders.

In addition, we draw your attention to the point that the definition in the Corporations Act has been amended by an ASIC regulatory instrument (see *ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84*), whereas the proposed amending regulations do not take this into account.

8. Foreign custodian corporations exemption

AFMA thinks the proposed amendment to paragraph (30) which results in a narrowing of the definition by including “any foreign person” that the foreign custodian is providing custodial services to is not within the stated intention of the changes to reduce the regulatory burden. This narrows the availability of the exemption, as it means the exemption is available only where non-foreign persons have equitable interests in the assets. If it was put into effect it would undermine the policy underlying the exemption (ie foreign custodian as a bare trustee and not making substantive decisions relating to the asset). It is not logical for the exemption to not be available simply because one foreign person has an equitable interest in the asset (which might be a very small percentage interest).

By way of further explanation, the proposed change will result in brokers having to seek approval from FIRB as the Custodian as well as the client doing the same on the same underlying stock. Currently, the broker would not be required to seek such approval. in a

situation where a broker is providing custodial services to a foreign entity, it would not have the ability as bare custodian to control the voting rights in the shares. For this reason, it seems inconsistent with the general policy behind FIRB requirements to include custodial services simply by being a foreign entity as the legal owner of the shares in the registry when the underlying beneficial owner is different. This exemption for the custodian should apply regardless of the domicile of the underlying beneficial owner (especially since if the underlying beneficial owner is a foreign person themselves, they will already be subject to FIRB approval requirements).

Regarding the narrowing of the exemption, AFMA does not support the proposed amendment.

AFMA does support expanding the exemption so that a right by the foreign custodian corporation to be indemnified for any liabilities incurred in good faith and without negligence in the provision of the relevant custodian services is not to be considered an equitable interest in assets for the purposes of the exemption. Also, the technical amendment so that the pre-requisite requiring that the foreign custodian corporation only exercise voting rights associated with the interest at the direction of the equitable interest holder or another custodian only applies if voting rights are associated with the interest is supported.

Please contact David Love either on 02 9776 7995 or by email dlove@afma.com.au in regard to this comment letter.

Yours sincerely

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