17 May 2021

Department of Home Affairs
Critical Infrastructure Centre
3-5 National Circuit,
Barton ACT 2600

By email: ci.reforms@homeaffairs.gov.au

Dear CI Reforms Team

Re: AFMA submission on Draft Critical Infrastructure Asset Definition Rules: Security Legislation Amendment (Critical Infrastructure) Bill 2020

The Australian Financial Markets Association (AFMA) welcomes the opportunity to provide comment to the draft critical infrastructure asset definition rules under the Security Legislation Amendment (Critical Infrastructure) Bill 2020. The policy approach to the definition rules for critical financial services and markets sector assets impacts the wide-ranging AFMA membership. Given the interconnections across these assets, it is important that their definitions are carefully calibrated to ensure functional efficiencies within the financial services industry.

AFMA appreciates the close engagement with the Department of Home Affairs (the Department) around critical infrastructure reforms since 2020 and we trust our comments will be of assistance.

We limit our comments in this response to critical banking assets, interaction with the FIRB regime and critical financial market infrastructure assets. We make no comment on clearing and settlement infrastructure, significant financial benchmarks, derivative trade repositories and payment systems.

Critical banking assets

While AFMA previously supported [1] the $50 billion asset threshold to capture ADIs under critical banking assets, our more developed view is that this simple metric is limited and must be complemented with other criteria at the rule level to ensure an appropriate level of focus both across firms and within firms. We also hold that this threshold is on the

[1] In our submission to the Exposure Draft of the Security Legislation Amendment (Critical Infrastructure) Bill 2020

lower end relatively given the size of nationally significant entities and there should be provision made for it to increase over time to prevent bracket creep.

AFMA would support ongoing engagement with the industry to further refine the definition of critical assets. We envisage qualitative criteria to define the level of criticality that go beyond broad asset metrics. We note that the drafting of the policy approach to definition rules lacks clarity around what gets captured as critical banking assets. Firms may find it difficult to fully understand and provide feedback on the asset definitions absent the details of the obligations that may apply to them. Consideration should be given to how these definitions may impact ADIs, their related body corporates and overseas subsidiaries.

AFMA also supports an approach that *excludes* certain assets from the scope of critical banking assets as provided for in section 9 of the Bill. The rules should also address the nature and type of products and services provided. For example, it may not be the case that every business and operation of an ADI is critical to Australia's economic and social wellbeing and therefore should not be classified as a critical banking asset.

ADIs currently face a substantial regulatory workload related to the aims of the critical infrastructure rules. APRA currently has underway tripartite audits for compliance with CPS 234 on information security. APRA has another large piece of work scheduled to start consultation in September being the creation of a prudential standard for data management CPS 235. This is a major undertaking for ADIs many of whom already have large projects underway to prepare for the requirements that are expected to come out of this process.

In addition to these, APRA Chair Wayne Byers has recently announced upcoming reviews in relation to operational resilience across some of its prudential standards – CPS 231 - Outsourcing, CPS 232 Business Continuity, CPS 233 Pandemic Planning. This is also supplemented by Cyber Operational Resilience Intelligence-led Exercises (the CORIE framework) by the Council of Financial Regulators.

These projects are all appropriate and worthwhile. However, taken together they will create a larger burden for firms and their supporting audit and accounting firms. We understand anecdotally that resources are already under pressure and the ability to access suitably qualified additional staff, particularly with travel restrictions in place, is limited.

While not in scope for this consultation, based on the existing high maturity levels, regulatory compliance and reviews, AFMA again supports that the ministerial 'on switch' to activate the rules applicable to the aspects of the Positive Security Obligation may be kept 'off' for APRA regulated entities.

Implications for the Foreign Investment Review Board (FIRB) regime

The *Security of Critical Infrastructure Act 2018* (the Act) and the *Security Legislation Amendment (Critical Infrastructure) Bill 2020* have implications for the FIRB regime overseen by the Australian Treasury. The definition of 'national security business' under

the *Foreign Acquisitions and Takeovers Regulations 2015* (FATR) includes a responsible entity for an asset, or an entity that is a direct interest holder in relation to a critical infrastructure asset (within the meaning of those terms as enacted by the Act).

AFMA appreciates the importance of ensuring the security and resilience of key Australian assets, services, and infrastructure and supports compliance with the FIRB framework. However, this framework is complex and costly to implement. The proposed expanded definitions of critical assets will add further complexity to the regime by including a significant number of entities into the scope of 'national security business'.

Eight of the top ten brokers in Australia are foreign owned[2]. When providing services to Australian clients, these firms usually acquire an interest in many listed companies. This interest acquisition arises even where the brokers do not own the stock themselves, but from the exposure they have to their clients' holdings. Given the size of these firms, their interest in listed companies can occasionally be large and like all companies in Australia, they must comply with the substantial shareholder requirements under the *Corporations Act 2001*. In compliance with the FIRB regime, these firms must also seek prior approval from the Treasurer before acquiring an interest[3] of 10% or more in a national security business, the definition of which will now be even broader considering the proposed rules.

Firms face large administrative burdens when categorising listed entities under the FIRB regime. In some cases, this is made more difficult by inconsistent publicly disclosed information. The proposed rules will make this more complex. Firms will be required to bear high costs to determine the total asset value and organisational structures of entities to establish their criticality, in addition to assessing firms in all other categories under the FIRB and critical asset regimes.

AFMA suggests in the interest of efficiency that the Minister prescribes the entities in the financial subsectors they determine to be critical assets. This will provide greater certainty and consistency across firms in the application of the FIRB and critical asset regimes, removing the need for time-intensive, costly, and subjective assessments.

We note a precedence for this type of published information for example for critical broadcasting and food and grocery assets, as well as through ASIC's quarterly allocation of equity market products in block trade tiers[4].

Critical financial market infrastructure assets

AFMA notes that under the proposed turnover metric threshold test (threshold test) for Tier 1 Market Operators, market licensees are captured where at least one of the turnover metric threshold tests is exceeded for at least two consecutive quarters.

[2]By proportion of total value traded, YTD.
[3] As aforementioned, this may be due to clients' holdings.
[4] See https://asic.gov.au/regulatory-resources/markets/market-structure/block-trade-tiers/.

AFMA suggests that more clarity is required on whether this relates to two consecutive *calendar* quarters (i.e. 1 January to 31 March; 1 April to 30 June; 1 July to 30 September; 1 October to 31 December).

If it is assumed that the threshold applies to *calendar* quarters, it would be useful for the industry to understand the proposed outcome if the threshold test is originally exceeded for two consecutive calendar quarters, but then turnover falls below the threshold test in subsequent calendar quarters. In such a scenario, AFMA seeks clarity on whether the Market Operator would remain in scope given that the threshold was already exceeded for two consecutive quarters.

To ensure an efficient transition to these definitions and related requirements, AFMA suggests allowing a sufficient formal transition period to comply with the requirements once the threshold test is exceeded.

Threshold test - $30 billion average daily notional value

AFMA suggests further clarity should be provided on:

- what type of transactions will be included in the $30 billion average daily notional value;
- how 'transactions' are defined - specifically whether the threshold test only includes executed trades;
- any expectations on how the $30 billion average daily notional value should be calculated (e.g. determine all transactions executed through the market within the calendar quarter, aggregate, then divide by number of calendar days; which quarters will the calculations will start to apply to);
- whether the $30 billion average daily notional value should be applied for all aggregated transactions, or based on product classes (for e.g. $30 billion for stocks/bonds, $30 billion for derivatives etc).

AFMA welcomes further engagement with the Department over additional reviews of the asset definitions and the co-design process of the sector-specific rules.

We thank you for considering our comments. Please feel free to contact us via the Secretariat should you have questions about our response.

Yours sincerely

Damian Jeffree

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