INVESTMENT COMPANY INSTITUTE®
ICI Global
WASHINGTON, DC • LONDON • HONG KONG • WWW.ICI.ORG

James McLean Dreyfus
Manager, Policy Framework Unit
Treasury
Langston Cres
Parkes ACT 2600
Filed electronically: FIRBStakeholders@treasury.gov.au

August 30, 2021

Re: Evaluation of the 2021 foreign investment reforms: consultation paper

Dear Mr. McLean Dreyfus,

ICI Global[1] appreciates the opportunity to provide feedback to the Australian Government as it conducts an evaluation of the operation of the major reforms to Australia's foreign investment framework that commenced on January 2, 2021.[2] The reforms updated the framework in three broad ways: addressed national security risks; strengthened the existing system, particularly in relation to compliance; and streamlined investment in non-sensitive businesses.

As you have recognized in the consultation, foreign investment provides significant economic benefits to Australia. Managers of global regulated funds,[3] such as our member firms, generally are very interested in the Australian securities market and, as of June 30, 2021, US RICs and UCITS held AUD$299 billion in equity and fixed income Australian securities.[4] The total investments in an Australian entity that such a global asset manager makes on behalf of its clients may, in certain instances, be above the threshold for review by the Foreign Investment Review Board (FIRB), particularly because such a determination is generally made at the level of the asset manager. These asset managers invest on behalf of regulated funds and other clients that are not seeking to control or secure for themselves board positions of the companies in which they invest. For this reason, as the Australian Government undertakes its review, we urge it to consider how the foreign investment review framework, particularly relating to national security, can be improved to address

[1] ICI Global carries out the international work of the Investment Company Institute, the leading association representing regulated funds globally. ICI's membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US$41.1 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in Washington, DC London, Brussels, and Hong Kong.

[2] The consultation paper is available at: https://treasury.gov.au/sites/default/files/2021-07/c2021-193739-cp.pdf.

[3] The term "regulated funds" includes US funds, which are comprehensively regulated under the Investment Company Act of 1940 (US RICs), and non-US funds, that are organized or formed outside the US and substantively regulated to make them eligible for sale to retail investors (e.g., funds domiciled in the European Union and qualified under the UCITS Directive (UCITS)).

[4] Data for US RICs exclude money market funds, closed-end funds, and UITs. Data are as of June 30, 2021 and calculated using data from Morningstar Direct and Bloomberg.

Australia's legitimate national security concerns without unduly discouraging foreign investment in Australia by global asset managers and their regulated funds.

We raise below a few recommendations that we request the Government consider as it proceeds with its review.

Mandatory National Security Notification Regime Should Include Appropriate Exemptions Based on an Investor's Profile

Our response below is related to the following question in the consultation:

3.3 whether, or how, the reforms have affected Australia's attractiveness as a destination for foreign investment

The national security changes introduced two new types of actions that a foreign investor must evaluate to determine whether it should notify the Government – notifiable national security actions (NNSAs) and reviewable national security actions (RNSAs). Foreign investors that propose to take an action that is a NNSA must either submit an application for a "no objection notification" or an "exemption certificate." This requirement significantly impacts the normal operations of regulated fund managers that invest often and in relatively large amounts, on behalf of regulated funds and other clients, in Australian businesses, frequently across multiple regulated funds and clients. We recognize that investors planning a program of investments are permitted to apply for a time-limited investor-specific exemption certificate that would allow them to make eligible acquisitions without a case-by-case screening. The exemption certificate avenue, however, is not practical or useful for regulated fund managers as it is limited both in scope and in time and therefore does not accommodate the typical investment activity of such managers.[5]

Asset managers invest a regulated fund's assets in accordance with the fund's investment objective as described in its prospectus. For some types of funds, such as an international growth fund or an Asian equities fund, investment in an Australian entity takes place at the manager's discretion because that entity presents a desirable investment opportunity in line with the fund's investment objective. For other types of funds, such as an index or tracker fund, the fund's asset manager has a mandate to purchase securities in a particular Australian entity in approximate proportion to the security's representation in the fund's benchmark index. In both cases, the asset manager purchases these securities because of the fund's investment objective and not with an intent to control the companies in which the fund invests. As a result, depending on the fund, investment activity in Australian entities will vary. Investment may take place in multiple entities over a short period of time, or in a limited number of entities over a long period of time. Given that the national security rules are intended to screen investments that raise national security concerns, requiring regulated fund managers to comply with these notification obligations imposes upon them a disproportionate regulatory burden when they do not purchase securities for control and therefore do not pose a national security concern.

---

[5] On October 2, 2020, ICI Global provided feedback on the Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 (Exposure Draft Regulations) and the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Exposure Draft Fees Regulation). The response is available at https://www.ici.org/system/files/attachments/32807a.pdf.

Under the existing regime, there is no distinction between state-sponsored and activist investors that seek to control strategic companies and/or access sensitive information and the investment activity of regulated funds and their regulated asset managers that manage assets on behalf of retail clients and institutional investors. The lack of a safe harbor or exclusion for investors such as regulated funds and their regulated asset managers creates an over-inclusive regime, capturing transactions raising extremely little, if any, national security risks. We, therefore, respectfully request that the Government move away from a one-size-fits-all approach by recognizing that significant differences in the specific characteristics of foreign investors, such as type of investor (e.g., regulated fund and regulated asset manager) and/or nationality, merit the inclusion of exclusions or safe harbors.

For example, we recommend that the Government consider excluding regulated asset managers and regulated funds from the mandatory notification requirement for NNSA if they meet certain conditions, given that they are inherently unlikely to give rise to national security concerns. Regulated funds, in particular, are comprehensively regulated investment vehicles that invest according to the fund's investment principles and objectives stated in the prospectus. We note that other jurisdictions that have recently amended their national security regulatory regulations, such as Japan, have provided exemptions for certain types of investors, including regulated asset managers and regulated funds, that agree to abide by specified conditions.[6]

Definition of National Security Business Does Not Adequately Identify Which Businesses Are in Scope

Our response below is related to the following questions in the consultation:

4.1 whether the national security screening requirements, and the concepts of NNSA, RNSA, and national security business and national security land, are well understood; and

4.2 whether the framework for defining these concepts (i.e. across the legislation, regulations and official guidance notes) is appropriate and sufficient.

An evaluation of whether an action is an NNSA or an RNSA is premised on the foreign person proposing to acquire an interest in (or start) a "national security business" or "national security land." Whether a business is included within the scope of the definition of "national security business," however, is not clear.

The Foreign Acquisitions and Takeovers Act 1975 includes "national security business" as a defined term and the National Security Guidance Note further explains this concept and the types of actions that may pose national security risks. Despite the Government's effort to provide clarity and guidance on the entities that would fall under the definition of national security business, whether a

---

[6] The Japan Foreign Exchange and Exchange Trade Act (FEFTA) includes an exemption for certain entities, including licensed or registered asset management companies and investment companies provided the following conditions are satisfied: (i) the foreign investor and its closely related persons will not become directors or corporate auditors of the target company, (ii) the foreign investor will not make certain proposals at general shareholders meetings of the target company concerning designated business sectors, and (iii) the foreign investor will not access nonpublic information about the target company's technologies in relation to business in designated business sectors. The Japanese Ministry of Finance has provided an English language summary of the final Rules and Regulations, available at https://www.mof.go.jp/english/policy/international_policy/fdi/20200424.htm.

particular entity is in scope requires a subjective determination by a foreign investor and can lead to different conclusions by different investors.

Clarity and certainty regarding whether a business is a national security business is of particular importance for investors such as regulated funds, which make investments frequently and have diversified investments. Well-intended investors may reasonably believe that their investment is not in a national security business and be subsequently penalized if the Government disagrees with that assessment. Such an outcome could result in significant reputational and financial damage to these investors.

We therefore request that the Government consider publishing a list of businesses that are national security businesses (at least for publicly listed companies). Such a list would ensure that foreign investors are aware of the businesses that the Government intends to be within the scope of the obligation and avoid foreign investors unintentionally neglecting to submit a notification.

Revised Fee Scale is Costly and Not Appropriate for Certain Investors

Our response below is related to the following question in the consultation:

7.1 *whether the new fees framework affects investor decisions on investing into Australia*

The revised fees framework, which introduced a sliding scale of fees in which the amount payable depends on the value of the consideration for the target and the type of action being taken, impacts the investment activity of regulated fund managers. The sliding fee scale seems to assume that an investor is undertaking a strategic transaction, which, as described above, is not the case with respect to the investment activity of regulated fund managers. In addition, the fees, particularly for large transactions, are costly relative to other jurisdictions and the market price movement of a security makes the fees unpredictable up until the time notification is made. In our view, imposing the sliding fee scale (i.e., fee increasing with the size of the transaction) to transactions undertaken on behalf of regulated funds is not appropriate because such investment is not being made to obtain control over time. We therefore request that the Government consider applying to these transactions the lower fee of $2,000 (regardless of the size of the transaction) that is applied to certain types of transactions under the Fees Regulation.[7]

* * * * *

We appreciate your consideration of our recommendations. Please contact the undersigned at +1 (202) 326-5876 or jennifer.choi@ici.org; or Eva Mykolenko, Associate Chief Counsel, ICI Global, at +1 (202) 326-5837 or emykolenko@ici.org, with any questions.

Yours sincerely,

/s/ Jennifer S. Choi

Jennifer S. Choi
Chief Counsel – ICI Global

---

[7] For example, the lower fee applies to transactions where the consideration value of the action is less than $75,000 and where a foreign person already holds an interest of more than 50 per cent in Australian land, a tenement, securities in an entity or assets of an Australian business, and the acquisition results in the person increasing their interest. Additionally, where the action is a reviewable national security action, the fee payable would be 25 per cent of this lower fee.