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Committee Secretary
Senate Economics Legislation Committee
Department of the Senate
PO Box 6100
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16 February 2024
By email

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Dear Sir/Madam

Submission – Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023: Licensing exemptions for foreign financial services providers

1 Introduction

This submission is made by Herbert Smith Freehills (**HSF**) in response to the referral on 7 Dec 2023 to the Senate Economics Legislation Committee in relation to the *Treasury Laws Amendment (Better targeted Superannuation Concessions and Other Measures) Bill 2023 (Bill)* which was introduced into Parliament on 30 November 2023, for consideration “to carefully investigate this legislation and provide interested stakeholders with the opportunity to comment on the legislation”.

HSF is an international law firm with 24 offices located around the globe and which specialises in, amongst other things, financial services and financial services regulation. We regularly advise:

- (a) foreign financial services providers (**FFSPs**) who provide a range of financial products and financial services to their Australian based wholesale clients including superannuation trustees; and
- (b) Australian based wholesale clients including institutions and superannuation trustees in relation to the financial services they acquire from FFSPs.

We have closely followed the progress of the Bill (and exposure drafts of early legislation to implement FFSP exemption changes), and have made submissions to ASIC and Treasury in respect of previous consultations in relation to FFSP exemptions and draft legislation.

2 Submissions

- (a) As we stated in earlier submissions to Treasury and ASIC, we welcome the introduction of the Bill, which, if it is passed, will bring to an end the long period of uncertainty that FFSPs and their Australian clients have endured in recent years, with respect to the availability of the FFSP exemptions and whether FFSPs will be legally and commercially able to continue to provide their financial services to the Australian wholesale market.

We support the timely enactment of the Bill, and we hope that it can pass through Parliament without undue delay.

- (b) We are aware that:
 - (1) the Bill was considered by the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny Committee**) in January 2024;
 - (2) the Scrutiny Committee considered the proposed section 911F in the Bill which enables regulations to modify the operation of the primary legislation by narrowing the scope of the professional investor exemption, by passing

regulations to provide that it cannot be used in relation to particular kinds of financial products or services, or investors;

- (3) the Scrutiny Committee noted that the explanatory memorandum to the Bill stated that the proposed section 911F powers would only be exercised in 'exceptional circumstances' and asked the Treasurer:
- (i) what would constitute 'exceptional circumstances', and to provide examples and whether there is any guidance or relevant matters to be considered in exercising this regulation power; and
 - (ii) whether proposed section 911F of the Bill can be amended to include an express requirement that the regulations may only prescribe financial products, services, or classes of such as, being exempt from the professional investor exemption 'in exceptional circumstances'.

- (c) We support the Scrutiny Committee's suggestion to amend section 911F to insert an express requirement that regulations may only disapply the professional investor exemption in relation to particular kinds of financial products, financial services or professional investor 'in exceptional circumstances'. We suggest that the amendment would look like this:

Section 911F: Despite paragraph 911A(2)(eo), the regulations may provide, [in exceptional circumstances only](#), that the exemption under that paragraph does not apply for:

- (a) a particular kind of financial service; or
- (b) a particular kind of financial service in relation to a particular kind of financial product; or
- (c) a particular kind of financial product; or
- (d) a particular kind of professional investor.

Such an amendment would provide greater regulatory certainty and clarity for FFSPs and their clients.

In an ideal world, if the explanatory memorandum could also provide some guidance in relation to what may constitute such exceptional circumstances that would be welcome and helpful.

If you would like to discuss the matters raised in this submission, please contact any of us at the details below.

Yours sincerely



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