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29 September 2023

Retirement, Advice and Investment Division
The Treasury
Australian Government
Langton Cres, Parkes ACT 2600

VIA EMAIL

Dear Officer,

Review of the regulatory framework for managed investment schemes

Boardroom Pty Limited (**BoardRoom**) is pleased to provide this submission in response to the consultation paper, *Review of the regulatory framework for managed investment schemes* (**Consultation Paper**) released by the Treasury Department (the **Department**) on 4 August 2023.

Executive Summary

BoardRoom supports the Department's efforts to reduce regulatory burden without detracting from consumer outcomes. Our submission examines focuses on the investor experience and administration of the current regulatory framework.

This submission comments on five (5) focus areas of the Consultation Paper, which, if addressed, would ensure the regulatory framework is fit-for-purpose and would reduce undue financial risk for investors.

BoardRoom's Experience

BoardRoom is one of the largest providers of outsourced unlisted managed fund registry management services within Australia. In our role, BoardRoom assists its clients by onboarding investors including sourcing Wholesale Certificates; capturing TMD responses; assisting with investor meetings & serving as a contact centre for investors.

BoardRoom's experience in dealing with administering the Regulatory Framework for Managed Investment Schemes can be demonstrated as follows; in 2022 BoardRoom's operations teams processed:

- 6,566 applications; and
- 5,728 off-market transfers

from Retail & Institutional investors across 77 clients and 387 funds.

This processing was in addition to the procedures that BoardRoom has adopted to provide information to our clients to enable them to comply with their ongoing customer due diligence processes.

Further, BoardRoom is Australia's largest supplier of outsourced corporate secretarial services; with clients that are listed on an Australian stock exchange (ASX, NSX or SSX), unlisted public companies and proprietary limited companies which are subsidiaries of Australian and overseas.

As a result, BoardRoom is uniquely placed to provide feedback on the impact of the proposed changes contained in the Consultation Paper on investor experience, duplicating existing processing requirements and additional costs.

1.5: Wholesale Certificate Thresholds

1. Should the financial threshold for the product value test be increased? If so, increased to what value and why?
2. Should the financial thresholds for the net assets and/ or gross income in the individual wealth test be increased? If so, increased to what value and why?
3. Should certain assets be excluded when determining an individual's net assets for the purpose of the individual wealth test? If so, which assets and why?
4. If consent requirements were to be introduced:
   a) How could these be designed to ensure investors understand the consequences of being considered a wholesale client?
   b) Should the same consent required be introduced for each wholesale client test (or revised in the case of the sophisticated investor test) in Chapter 7 of the *Corporations Act*? If not, why not?

In our experience processing applications, we have seen an increased reliance on Wholesale Certificates.

Picking up commentary in the Consultation Paper, we note research conducted by Assoc. Prof Ben Phillips from the ANU estimated that in 2021, 16% of Australian Adults met the individual wealth thresholds to be classified as a wholesale client, compared to 2% of Australian Adults in 2002.[1] In short, the profile of wholesale investors has been expanded and we propose a more narrow interpretation to ensure only those investors who understand the risks of an investment have access to that investment.

The rationale for introducing financial thresholds in the product value test and the individual wealth test assumes that individuals who have the required value in assets or income have the knowledge or experience to understand and take on additional risks or the means to acquire professional advice.[2] We would ask the Department to consider whether financial thresholds are sufficient or whether educational qualifications and 'work experience' should also be considered given the rationale focuses on 'knowledge or experience'.

In addition, BoardRoom supports the restriction on the use of an Investor's primary residence when calculating an investor's 'net assets'. This is not to say that the primary residence cannot be used, rather, it should not be the sole or primary asset relied upon by an investor during an asset test.

[1] B Phillips (2021), Sophisticated Investor Projections, ANU Centre for Social Research and Methods, p 8, accessed July 2023.
[2] Explanatory Memorandum, Financial Services Reform Bill 2001 (Cth), paragraphs 6.19, 6.20, 6.23 & 6.24

Scheme Governance and the role of the responsible entity

9. Should ASIC be able to direct a responsible entity to amend a scheme's constitution to meet the minimum content requirements, similar to the CCIV regime?

We support the introduction of an ability for ASIC to be able to direct a responsible entity to amend a scheme's constitution to meet the minimum content requirements.

The requirement for a responsible entity to have a constitution that meets the requirements of the relevant provisions of the Corporations Act, was one of many reforms introduced in response to the recommendations contained in the ALRC/CASAC Report No. 65. Subsequent legislation (the Manage Investments Act 1998) implemented the recommendations through amendment of the Corporations Act.

In addition to the requirement in sec 601GA of the Act, which obliges the responsible entity to have a constitution which contains certain provisions, sec 601FC(1)(f) of the Corporations Act obliges the responsible entity to ensure the constitution meets the relevant statutory requirements.

As noted, currently the only action available to ASIC should it find the constitution does not meet the relevant requirements, is to deregister the scheme. While the threat of that should be sufficient to encourage a responsible entity to amend its constitution, it is our view that due to the potential negative effect that consideration of deregistration would have on the fund, the ability for ASIC to deregister a scheme should be seen as an action of "last resort".

We are of the option that the ability for ASIC to be able to direct a responsible entity to amend a scheme's constitution to meet the minimum content requirements, would avoid the negative connotation which would accompany a threat to deregister.

Right to replace the responsible entity

14. Are any changes required to the voting requirements or meeting provisions that allow members to replace the responsible entity of an unlisted scheme? If so, what changes and why?

BoardRoom has been involved in a number of instances where a meeting of members of an unlisted managed investment scheme has been called in order to consider a resolution to replace the responsible entity of a scheme. BoardRoom has acted for both the incumbent responsible entity and for an entity looking to replace the incumbent responsible entity. Accordingly, we have been involved in the counting of votes under the rules that apply to an extraordinary resolution.

Due to the role that BoardRoom undertakes as the registry services provider of a managed investment scheme, the actual type of resolution does not directly impact us. However, there have been instances where we (BoardRoom) have observed there has been a clear majority of the votes

that have been cast in relation to a resolution to remove a responsible entity only for the resolution to fail the second part of the test; that being there not being a majority of votes that can be cast.

Accordingly, we would support a move to remove the requirement for an extraordinary resolution and replace that with a requirement for an ordinary resolution; thus bring the listed and unlisted fund voting into sync.

Regulatory cost savings

24. What opportunities are there to modernise and streamline the regulatory framework for managed investment schemes to reduce regulatory burdens without detracting from outcomes for investors?

Under ASIC RG 97.226, you must give members who acquire a managed investment product as a retail client a periodic statement for a period of no more than 12 months (reporting period) during which the member holds the product: see s1017D(2). You must give a periodic statement as soon as practicable after the end of the reporting period and, in any event, within six months after the end of the reporting period to which it relates: see s1017D(3).

In our experience, a majority of retail clients do not review the information contained on these periodic statements; however, we acknowledge the importance of having this information available to investors on request.

We therefore propose that ASIC RG 97.226 be amended from, 'must give' to 'make available'. We expect that most clients will continue to access the information they need to manage their financial affairs through online registry portals and the day of mandating mailouts or emails is a thing of the past.

Proceedings at meetings

Amendment of the provisions of Part 2G.4 – Meetings of members of register schemes of the Corporations Act to replicate the provisions in Part 2G.2 of the Corporations Act, being those provisions applicable to meetings of members of a company.

There have been amendments made to Part 2G.2 of the Corporations Act to improve the regulatory provisions dealing with the conduct of meetings of members of a company. However, while these improvements would also be applicable for a meeting of members of a managed investment scheme, the changes have not been replicated in Part 2G.4.

For example, reference is made to the provisions which were implemented in respect of a meeting of members of a company to prevent the directed voting instructions given to a proxy who is not the chair of the meeting from being lost if the named proxy declines the appointment. The amendments which were made ensured in this case, the proxy appointment would be transferred to the chair of the meeting, in order that the intentions of the appointing shareholder are fulfilled.

Unfortunately, the same amendments were not replicated in Part 2G.4 of the Corporations Act. As a result, is it still possible for a situation to arise where the clear voting intention of a holder of interest is not fulfilled as the named proxy declines to accept the appointment. The lack of a provision similar to sec 250BC of the Act means those directed votes will not be counted in a poll.

We would strongly encourage review of Part 2G.4 of the Act to ensure the provisions applicable to meetings of members of a company are replicated in respect of meetings of members of a managed investment scheme.

Conclusion

We trust you find our feedback and comments useful and we welcome the opportunity to further discuss our responses. Please do not hesitate to contact us should you have any questions or require any further information.

Yours sincerely,

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