



12 February 2013

Manager
Finance Tax Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: tofa@treasury.gov.au

Attention: Nan Wang

Dear Ms Wang

Tax Laws Amendment (2013 Measures No. 1) Bill 2013

The Australian Financial Markets Association (**AFMA**) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

AFMA welcomes the opportunity to provide a submission on the Exposure Draft of the *Tax Laws Amendment (2013 Measures No. 1) Bill 2013 (the Exposure Draft)* which will insert amendments to the Taxation of Financial Arrangements (**TOFA**) provisions contained in Division 230 of the *Income Tax Assessment Act 1997 (the 1997 Act)*.

In particular, our submission focusses on the proposed Section 230-527, which allows a foreign Approved Deposit-taking Institution (**ADI**) to utilise the Statement of Financial Performance and Statement of Financial Position given to the Australian Prudential Regulatory Authority (**APRA**) as the basis for making certain elections relevant to the TOFA regime¹ (**the TOFA elections**).

¹ The elections are set out in proposed Section 230-537(2) of the Exposure Draft

AFMA welcomes the policy intent behind the proposed Section 230-527, namely to overcome the practical difficulties associated with branches of foreign banks being able to make the TOFA elections. Such difficulties arise due to the eligibility for the elections being based on the existence of financial reports. AFMA has been closely involved in bringing this issue to Treasury's attention, including through its submission to the then Assistant Treasurer, the Honourable Nick Sherry, of 19 March 2010.

AFMA has long advocated a position whereby branches of foreign banks are able to rely on the statements provided to APRA under Prudential Standard APS 310 as being sufficiently robust to be the basis for foreign bank branches to make the TOFA elections without undermining the integrity of the TOFA regime. Accordingly, we are concerned that the proposed drafting of Section 230-527, coupled with comments in the proposed Explanatory Memorandum, may undermine the policy objective from a practical perspective.

Prudential Standard APS 310

As noted in AFMA's submission of 19 March 2010, Prudential Standard APS 310 requires that, for a foreign ADI, an auditor provides "reasonable assurance" that the information contained in reports provided by the foreign ADI is reliable and in accordance with relevant prudential standards. The information that is provided by the foreign ADI to APRA that is subject to the "reasonable assurance" requirement includes ARF 320.0 – Statement of Financial Position and ARF 330.0 – Statement of Financial Performance. As acknowledged in the draft Explanatory Memorandum, these statements are required to be lodged by ADIs under Section 13 of the *Financial Sector (Collection of Data) Act 2001*.

From a policy perspective, our understanding is that to the extent that a branch of a foreign bank adheres to the APRA requirements set out under Prudential Standard APS 310, then such adherence should allow the branch of the foreign bank to make the TOFA elections. This is a policy position that AFMA supports and wishes to ensure is reflected in Division 230 of the 1997 Act and the accompanying explanatory material.

The Exposure Draft and Explanatory Memorandum

The proposed Section 230-527 imposes three criteria that need to be satisfied in order for the Statement of Financial Performance and Statement of Financial Position to be acceptable to allow for the branch of the foreign bank to make the TOFA elections, namely:

- (i) The statements cover the activities of an Australian permanent establishment of the foreign ADI for the year;
- (ii) The statements are prepared in accordance with the recognition and measurement standards under the accounting principles; and
- (iii) The statements are audited in accordance with the auditing principles.

With respect to the first two criteria, we note that adherence to the APS 310 requirements should also satisfy the legislative requirements. With respect to the first

criterion, the instruction guide for ARF 320.0 states that the Statement of Financial Position is to be “an unconsolidated report of the Australian licensed ADI’s operations/transactions that are booked or recorded inside Australia.” In relation to the second criterion, the Instruction Guide for the Reporting Form ARF 320.0 (Statement of Financial Position) states that “(u)nless otherwise specifically stated, institutions are to comply with Australian accounting standards regarding the measurement of asset, liability and equity items.” There is a similar comment in the Instruction Guide for Reporting Form ARF 330.0 (Statement of Financial Performance) that states “unless otherwise specifically stated institutions are recommended to follow the Australian accounting standards regarding the:

- Interpretation/definition of items of revenue or expense;
- Measurement basis of items of revenue and expense; and
- Netting of items of revenue and expense.”

Accordingly, adherence to APS 310 will require the presentation of a Statement of Financial Position and Financial Performance that cover the activities of the Australian branch of the foreign ADI and are prepared in accordance with Australian Accounting Standards.²

Audited in accordance with the auditing principles

The third criterion requires that the Statement of Financial Position and Statement of Financial Performance are “audited in accordance with the auditing principles.”

The term “auditing principles” is defined in Section 995-1 by stating that “a matter is in accordance with auditing principles if it is in accordance with auditing standards”, which takes its definition from the *Corporations Act 2001*. The *Corporations Act 2001* defines auditing standards by reference to the standards set by the Auditing and Assurance Standards Board (**AUASB**).

The draft Explanatory Memorandum states (at Paragraph 1.126) that the third criterion will be adhered to where the statements are audited “as taxpayers would have had their financial reports audited.” That is, the draft Explanatory Statement seems to imply that the Statements of Financial Position and Financial Performance will only be appropriate to allow for the making of the TOFA elections where the auditing process undertaken in respect of the statements is conducted in the same manners as for financial reports.

The concern that AFMA has is that, as noted by the AUASB, the auditing process undertaken for entities that produce financial reports differs to that of branches of foreign banks. The AUASB, in Guidance Statement GS 012³, states that “(a)s a foreign ADI (branch) is not required to prepare a financial report under the Corporations Act,

² It is noted that the term “accounting principles” is defined in Section 995-1 of the 1997 Act with reference to “accounting standards”. This term is defined by the *Corporations Act 2001* as meaning the accounting standards determined by the Australian Accounting Standards Board.

³ “Prudential Reporting Requirements for Auditors of Authorised Deposit-Taking Institutions”

there is no requirement for a statutory financial report audit to be undertaken. Therefore, the accounting records of a foreign ADI (branch) would not generally be subjected to a full scope audit...”

The AUASB, in issuing the Auditing Standards, has acknowledged that not all audit engagements will be in respect of financial reports, by issuing Auditing Standard ASA 805, which addresses audits of single financial statements and specific elements, accounts or items of a financial statement. The standard exists as generally, in the words of the AUASB, the “Australian Auditing Standards are written in the context of an audit of a financial report.”⁴

Accordingly, the requirements and processes undertaken by an auditor in providing a “positive assurance” report under APS 310 in respect of the Statements of Financial Position and Financial Performance are not identical to those imposed on an auditor conducting an audit of a financial report. It is important, therefore, that the Exposure Draft and draft Explanatory Memorandum be drafted in a manner that acknowledges the differences in the audit process for Australian branches of foreign banks.

Proposed amendment

In order to reflect the agreed policy intention, we request that the wording of both proposed Section 230-527 and also the draft Explanatory Memorandum be drafted in a manner that makes it clear that adherence to APS 310 in relation to the auditing requirements is sufficient to allow for the making of the TOFA elections.

In relation to proposed Section 230-527(3), we would suggest language such as:

“(c) are audited in accordance with the auditing principles as required by Australian Prudential Standard APS 310.”

We would also suggest that paragraph 1.126 of the draft Explanatory Memorandum be amended to reflect that the statements are to be audited as required by APS 310, replacing the words “as taxpayers would have had their financial reports audited.”

It is AFMA’s view that the adoption of this language in both the legislation and the Explanatory Memorandum will remove any uncertainty as to what the auditing requirements are without undermining either the integrity or the policy intention of the proposal.

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⁴ ASA 200

Thank you for the opportunity to comment on the proposed Exposure Draft and the accompanying Draft Explanatory Memorandum. Please contact me with any queries or comments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Colquhoun', written in a cursive style.

Rob Colquhoun

Director – Policy (Taxation)