11 March 2013

General Manager
Revenue Group Law Design Practice
The Treasury
Langton Crescent
PARKES ACT 2600

Attention: Philip Ackroyd

Via email: **taxagentservices@treasury.gov.au**

Dear Sir,

Tax Laws Amendment (2013 Measures No. 2) 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 banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. AFMA welcomes the opportunity to make a submission on the Exposure Draft of *Tax Laws Amendment (2013 Measures No. 2) Bill 2013,* the accompanying draft Explanatory Memorandum and the Proposed Changes to the Regulations, the effect of which is to bring "tax advice (financial product) services" within the regulatory regime administered by the Tax Practitioners Board (**TPB**).

Following initial comments on timing and transition, our submission addresses three major policy areas, namely:

(i) The definition of "tax advice (financial product) services" and particularly ensuring that the proposed regulatory regime does not unnecessarily capture individuals/entities that are merely repeating information that is publicly available from appropriate sources, providing factual information or making tools (such as calculators) available to investors;
(ii) Acknowledging the robustness of the regulatory regime applicable to banks and other financial institutions and seeking to avoid duplication with respect to regulation through having such entities registered at the entity level through leveraging existing processes; and

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(iii) Ensuring that the existing carve out for custodians from the definition of "tax agent services" applies equally to the definition of "tax advice (financial product) services" and clarifying the ambit of the exemption.

1. Timing and Transition

At the outset, it is noted that there are significant industry concerns regarding the ambit of the regime and the particular requirements that are imposed on participants. Clarification as to the definition of a "tax advice (financial product) service," the registration requirements applicable to Australian Financial Services licensees and the education/training requirements that will need to be met after 1 July 2016 are issues that are fundamental to the implementation of the new regime and require further consultation.

The Exposure Draft and accompanying Draft Explanatory Memorandum, together with the Proposed Changes to the Regulations were issued for public consultation on 8 February 2013 with a four week open consultation period, at a time where affected entities are grappling with a number of regulatory reforms, not the least being the *Future of Financial Advice* reforms. Given the concerns raised at an industry level in respect of the proposed regime, AFMA submits that there should be an extension to the exemption of "tax advice (financial product) services" from the Tax Agents' regime to allow further consultation. Such an extension should be at least six months, resulting in the first transitional period commencing on 1 January 2014 or later.

It is noted that given the proposed phasing in of the regime, an extension of time could merely reduce the first transitional period, meaning that there is no extension to the date at which the transitional period expires (i.e. 1 July 2016). Without the extension, affected entities need to determine whether they are going to "opt in" to the regime, through notification to the TPB, without properly understanding what they are opting in to.

2. Definition of "tax advice (financial product) services"

The proposed Section 90-15 of the *Tax Agent Services Act 1999* (**the TASA Act**) defines a "tax advice (financial product) service" in accordance with the definition of a "tax agent service" in Section 90-5[1]. Relevantly, a service will only constitute a "tax advice (financial product) service" to the extent that an entity can reasonably be expected to rely on the service for the purpose of either:

(i) satisfying their liabilities or obligations that arise, or could arise, under a taxation law; or
(ii) claiming entitlements that arise, or could arise, under a taxation law.

While the policy intention of this definition is to ensure that advice that is provided to an entity which is capable of being relied upon is provided by an appropriately registered adviser, there is a lack of clarity from both the Exposure Draft and the draft Explanatory

[1] With the exception that a "tax advice (financial product) service" cannot include representation of the entity in its dealings with the Commissioner of Taxation.

Memorandum as to what would constitute "tax advice" in the wider context of the provision of financial advice, noting that, as a general proposition, any tax advice is usually incidental to the financial advice being provided. In particular, AFMA is concerned that the breadth of the definition may inadvertently bring into the regulatory net entities that provide either factual information or reiterate advice provided by other entities.

We submit that to the extent that an entity provides a general statement to another entity that is based on either information from the Australian Taxation Office (such as from its website) or from the Product Disclosure Statement that was issued with respect to the particular financial product, it be made clear that such statements do not constitute "tax advice (financial product) services," to the extent that the entity acknowledges the source of the statements and that any receiver who intends to rely on the statements should request advice from a registered provider of "tax advice (financial product) services".

In addition, the proposed legislation and accompanying regulations should clearly articulate that statements of fact are not considered to be "tax advice." Examples of such statements of fact would include comments as to the marginal tax rates applicable to entities of various types and the rate of any applicable capital gains tax discount. Such an approach would allow financial advisers who merely refer to publicly available information in advising their client and are not being relied upon from a tax perspective to be excluded from the regulation of the TPB. It is AFMA's view that such an approach would minimise compliance costs (both from an industry and also a TPB perspective) without undermining the integrity of the proposed legislation.

Further, we submit industry-standard tools that advisers make available to investors, such as computer programs and calculators, should be specifically excluded from the definition of "tax advice (financial product) services." This would be consistent with the approach adopted by ASIC in Class Order 05/1122 – *Relief for providers of generic calculators.*

Finally, even if the above proposals are adopted, it appears that there remains considerably uncertainty as to what would constitute "tax advice" such that the adviser is providing a "tax advice (financial product) service." The Explanatory Memorandum, at paragraphs 1.25 to 1.27, needs to more properly articulate the line between general advice and taxation advice and provide examples that give industry sufficient comfort as to the circumstances in which they have an obligation to adhere to the proposed regime.

3. Application to Approved Deposit-taking Institutions (ADIs)

AFMA provided a submission on 27 September 2011 in respect of the application of the Tax Agent Services regime to the Australian financial services industry. It was our submission that "services provided by entities within an APRA regulated ADI group, or its overseas equivalent, do not constitute tax agent services." The basis for this submission was that, in order to continue to hold a banking authorisation, approved deposit-taking institutions were required to have in place governance (including fit and proper tests)

and risk management systems that are more comprehensive than those required under the TASA Act. The spate of regulatory reform subsequent to the Global Financial Crisis only enhances the robustness of the governance and risk management processes applicable to financial institutions.

Paragraph 1.32 of the draft Explanatory Memorandum provides that "partnerships and companies will have to satisfy the TPB that they have a sufficient number of individuals, who are registered…to be able to provide tax advice (financial product) services to a competent standard and to carry out supervisory arrangements." Given the robustness of the regulatory regimes applicable to approved deposit-taking institutions, as noted above, it is our submission that the institution, once registered with the TPB be relieved from the requirement from having its employees also individually register.

Such an approach would leverage off the existing regulatory processes applicable to such institutions and in particular the monitoring conducted by the institution as a requirement of its Australian Financial Services Licence and the supervision undertaken by ASIC to ensure that the necessary monitoring occurs. It would allow the TPB to be satisfied that the institution is providing "tax advice (financial product) services" to a requisite standard, thereby ensuring integrity in the process undertaken by the TPB is maintained, without causing unnecessary duplication of regulation.

4. Maintenance of existing carve-out for custodians

The current *Tax Agent Services Regulations 2009* provide that for the purposes of Section 90-5(2) of the TASA Act, which excludes certain services from the definition of "tax agent service", a service will be excluded where it is "a custodial or depository service provided by a financial services licensee or an authorised representative of the licensee." The policy behind this exclusion was set out by the then Assistant Treasurer, the Honourable Nick Sherry, in a Media Release in 2010, which stated that the Assistant Treasurer was "satisfied that the existing compliance framework for custodians – including, but not limited to, their obligations under the AFSL regime, as well as the impact of the prudential standards set down by the Australian Prudential and Regulatory Authority – provides adequate oversight of this industry."

We submit that the policy behind this regulation remains valid and hence it should be made clear that a custodial or depository service provided by a financial services licensee is not included in the definition of a "tax advice (financial product) service." Further, the Explanatory Memorandum should make it clear what is included within the definition of "custodial or depository services," with reference to Section 766E of the *Corporations Act 2001*.

In particular, the Explanatory Memorandum should make it clear that the following services are specifically excluded from the definition of "tax advice (financial product) services" on the basis that they constitute custodial or depository services:

- Providing statements to investors stating the amount of interest that may be treated as either deductible or non-deductible through the mechanical

application of capital protected borrowing rules contained in Division 247 of the *Income Tax Assessment Act 1997;*

- Providing year end statements that set out dividend income and/or capital gains made by an investor throughout the course of the year through investment in financial products; and
- Acting as trustee and providing distribution statements to beneficiaries detailing the income to which the beneficiary was presently entitled at the trust's year end and the components thereof.

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AFMA's view is that the Exposure Draft, draft Explanatory Memorandum and Proposed Changes to the Regulations give rise to a number of issues, such as those set out above, that require further consultation to provide affected parties with the certainty that they require prior acceding to the new regime. Accordingly AFMA looks forward to engaging in further dialogue with Treasury to ensure that the proposed amendments appropriately achieve their policy objectives while mitigating the impact on advisers.

Yours sincerely

Rob Colquhoun
Director, Policy (Taxation)