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21 December 2012

Dear Sir/Madam,

Exposure Draft – Corporations Amendment Regulation 2013

We appreciate the opportunity to provide comments on the Exposure Draft - Corporations Amendment Regulation 2013. The Regulations make a number of amendments to remove the current exemption that has the effect of allowing recognised accountants to provide advice relating to the establishment and disposal of self-managed superannuation funds (SMSFs) without an Australian Financial Services Licence (AFSL) from 2016, and provides alternative licensing arrangements.

The decision to remove the accountants' licensing exemption and replace it with a conditional licensing regime for recognised accountants is part of the broader Future of Financial Advice (FoFA) reforms. Deloitte supports the overarching principles of the FoFA reforms, in particular that advice should not be put out of reach of those who would benefit.¹ Facilitating access to advice is one way of achieving this laudable objective. With accountants being the trusted advisor for many Australians, accountants are an important source of information and point of contact that the Government and ASIC should harness to facilitate access to financial advice. It is therefore important that the regulation and proposed licensing regime for accountants is appropriate.

We support the availability of a conditional AFSL that enables recognised accountants to provide advice relating to classes of financial products, but precludes them from providing advice in relation to specific financial products if they do not want to provide financial planning services.

¹ The Hon Minister Bowen, "Future of Financial Advice: Information Pack" Media Release 28 April 2010
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Meaning of class of product advice and specific financial products

Although the term “class of financial product” may be well understood by people who are familiar with the *Corporations Act 2001* (the Act) or their obligations as financial advisers under the Act, the concept of “class of product” or “specific financial product” is not necessarily well understood by some accountants. Further guidance or additional examples in the Regulations would help illustrate what is meant by the term “class of product” and “specific financial product”. A table splitting the examples of class of product advice, specific product advice and exempt advice into three columns or buckets, could help accountants understand which bucket their advice falls within. And, therefore whether they require a conditional AFSL, a comprehensive AFSL or do not require an AFSL to provide that type of advice.

In this regard, we welcome the Government including an example of permissible advice that relates to term deposits in draft regulation 7.6.01BA(4). We suggest including a similar example that relates to superannuation products, shares, simple managed investment schemes, general insurance products, and life risk insurance products. As always, care should be taken to avoid any unnecessary confusion by including undefined terms such as a general or specific recommendation in draft regulation 7.6.01BA(4).

It should also be noted that the terms “specific financial product” and “particular financial product” seem to be used interchangeably. We suggest a more consistent approach is taken in the language that is adopted in the Regulations and the Act more generally to mitigate confusion and to foster greater certainty. For example, there are a number of exemptions that refer to “specific financial products”, “generic financial products” “particular financial products” and “classes of financial products” that accountants typically rely upon to provide advice to their clients without using an AFSL. Without adequate guidance or consistency there may be confusion around whether accountants can rely on certain exemptions to provide advice relating to specific financial products or whether they will require a conditional AFSL. Those exemptions include:

1. Advice on a risk that another person might be subject to and identification of generic financial products or generic classes of financial product that will mitigate that risk (regulation 7.1.29(3)).
2. Advice in relation to the establishment, operation, structuring or valuation of a superannuation fund and, among other things, the advice does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products (regulation 7.1.29(5)).
3. Allocation of funds available for investment, in which the *note* says that the regulation does not apply to a recommendation or statement of opinion that relates to specific financial products or classes of financial products (regulation 7.1.33A).
4. Certain general advice that does not attract remuneration, where an advisor gives advice that is not about a particular financial product (regulation 7.1.33G).

Advice on clients' existing holdings

Although we support a conditional AFSL and the rationale for making this type of AFSL available to accountants who do not wish to provide advice on specific financial products; we are concerned accountants may be hamstrung by a conditional AFSL. For example, an accountant may wish to advise their clients that they should diversify their portfolio. If that portfolio originally consists of 100% in specific shares such as BHP and the accountant advises their client that they should hold 30% in shares, 20% in simple managed investments, 20% in cash and 30% in property; by implication the accountant is recommending their client dispose of their specific shares. This would constitute financial product advice in relation to a specific financial product that is not permitted under a conditional AFSL.

We believe further consideration of whether accountants should be permitted to consider their client's existing holdings may be required or indeed whether the best interest duty would require consideration of these holdings.

Legislative clarity or regulatory guidance should then be provided to help clarify what accountants would be expected to do in this situation.

Guidance on the interaction between the exemptions and a conditional AFSL

Given many accountants may choose not to obtain either a conditional or a comprehensive AFSL, there may be even greater reliance placed on the exemptions to provide advice to their clients without an AFSL. It is important that a big picture approach is taken to the regulation of accountants, to ensure the regulatory objectives behind the removal of the accountants' licensing exemption and the introduction of a conditional AFSL are realised. This may necessitate a broader review of the various exemptions that accountants typically rely upon; resulting in a clear classification and guidance around which bucket an accountant may fall. That is, whether their advice falls within an exemption, would require a conditional AFSL, or a comprehensive AFSL.

Similarly, accountants may increasingly rely on the referrals exemption (regulation 7.6.01(1)(e)) to refer clients to either comprehensive or conditional AFSL holders. An awareness-raising exercise may be required to ensure that accountants are aware of the circumstances in which they may refer clients to AFSL holders and what disclosure is required. This will help mitigate the risk that accountants inadvertently provide financial product advice, which may be unauthorised, when they refer clients to other AFSL holders.

Compliance with conduct and disclosure obligations

Accountants may also benefit from guidance on how to comply with their obligations under the Act when they provide advice pursuant to a conditional AFSL. For example, because a conditional AFSL would preclude an accountant from recommending a specific financial product, an accountant should decline to provide advice sought on specific financial products pursuant to subparagraphs 961B(2)(e) and (d), respectively. Indeed, as noted above, a conditional AFSL would preclude an accountant from considering their client's existing holdings in specific financial products, which may otherwise be required to comply with their best interest duty.

Simplifying the application process

We strongly support simplifying the application process for recognised accountants who apply for a conditional AFSL. A simplified registration or application process that reduces the cost of applying for a conditional AFSL would be very welcome. Guidance on how to apply for a conditional AFSL would also help many accountants who have never applied for an AFSL.

For those licensees that wish to transition from a comprehensive AFSL to a conditional AFSL, we suggest ASIC automatically recognise and grant comprehensive AFSL holders a conditional AFSL. We anticipate one of the benefits of a conditional AFSL and related guidance will be far greater clarity around the ambit of the various exemptions and what advice accountants require a conditional or comprehensive AFSL to provide. Where accountants do not want to provide financial planning services, a conditional AFSL could provide the necessary certainty, discipline and demarcation around only providing strategic, non-product advice. If this is considered a sound regulatory objective, we encourage the Government or ASIC to automatically grant a conditional AFSL to comprehensive AFSL holders, which we believe may increase the uptake of a conditional AFSL.

Competence and knowledge requirements

We also welcome only requiring conditional AFSL holders to maintain **knowledge** of the financial services covered by a conditional AFSL (draft regulation 7.6.01BA(1)) vis-à-vis comprehensive AFSL holders who are required "to maintain the **competence** to provide the financial services" covered by a comprehensive AFSL.

However, we have a number of concerns with how draft regulation 7.6.04(1)(k) is currently drafted, which may cause confusion around exactly what conditional AFSL holders will be required to demonstrate to ASIC within three years of being granted the conditional AFSL.

Draft regulation 7.6.04(1)(k) provides that conditional AFSL holders will be required to demonstrate to ASIC within three years from the date on which the licence is granted:

(k)(ii) if the licensee is a partnership or body corporate - each recognised accountant that supervises and has responsibility for the provision of financial services covered by the licence has:

(A) knowledge of the licensee's obligations under the Act and these Regulations; and

(B) the competence to provide the financial services covered by the licence.

As currently drafted, draft regulation 7.6.04(1)(k) combines a number of different obligations and concepts. We note for example "recognised accountants that supervise the provision of financial services" are otherwise referred to as responsible managers in Regulatory Guide 105: Licensing: Organisational competence (RG 105). Persons with responsibility for the provision of financial services are otherwise referred to as "representatives" in the Act. Competence is defined in RG 105 to mean knowledge and skills, which could effectively duplicate the obligation in subparagraph (A).

To simplify the relevant obligations and foster consistency and ease of understanding, we suggest splitting draft regulation 7.6.04(1)(k) into separate obligations that relate to a conditional AFSL holder's organisational competence and its representatives, and adopting the same language in the general obligations of licensees in section 912A(1) of the Act and RG 105.

Draft regulation 7.6.04(1)(k) should therefore specifically impose an obligation on an exempt licensee to demonstrate to ASIC within three years of being granted a conditional AFSL that it can:

1. maintain the competence to provide those financial services; and
2. ensure that its representatives who are recognised accountants are adequately trained, and are competent to provide the financial services covered by the licence.

RG 105 could also be used to explain how conditional AFSL holders can demonstrate compliance with the organisational competence obligation in (1); and RG 146 Licensing: Training of financial product advisers could be used to ensure that their representatives who are recognised accountants are adequately trained and competent to provide financial services covered by the conditional licence; subject to any necessary amendments to relevant regulatory guides.

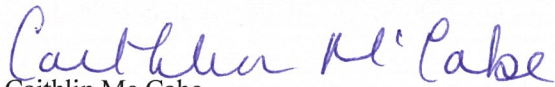
AML/CTF implications

We also wanted to draw to your attention the possible AML/CTF implications for accountants who are AFSL holders. As part of its Stronger Super reforms, the Government has proposed amending the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) so that from 1 July 2013 the rollover of assets from a superannuation fund that is not a self-managed superannuation fund into a self-managed superannuation fund will be a "designated service". This means that an AFSL holder who arranges for their client to receive the new designated service of having their assets rolled over from a non-self-managed superannuation fund into a self-managed superannuation fund will be subject to certain AML/CTF Act obligations because they may provide designated service item 54. Therefore, from 1 July 2013 recognised accountants who use either a conditional or

comprehensive AFSL to advise their clients about rollovers into self-managed superannuation funds, may be subject to the AML/CTF Act (e.g: they will need to have “know your client” systems in place and report suspicious transactions to AUSTRAC).

Thank you again for the opportunity to comment. We would be pleased to discuss our comments with either yourself or other members of your team. If you wish to do so, please do not hesitate to contact me on (02) 93227288.

Yours sincerely



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Partner

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