EVANS &
PARTNERS

19 February 2014

General Manager
Retail Investor Division
The Treasury
Langton Crescent
Parkes ACT 2600

By Email: futureofadvice@treasury.gov.au

Dear Sir/Madam

Re: Draft Amendments to Streamline the FOFA Regime

Thank you for the opportunity to contribute to the public consultation process in relation to the draft amendments contained in the following instruments and accompanying explanatory documents:

- Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014; and
- Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014.

Evans and Partners Pty Ltd supports the Government's efforts to streamline the operation of the Future of Financial Advice regime and welcomes initiatives that reduce the time, resource and capital cost of compliance for smaller industry participants.

Please find enclosed our observations and analysis in respect of the draft amendments.

Should you have any queries or require additional information, please contact me on (03) 9631 9855 or via email at jbiemond@eandp.com.au.

Yours faithfully

Jim Biemond
Finance Manager

Encl.
Future of Financial Advice: Response to Draft Legislation and Regulations 19 February 2014

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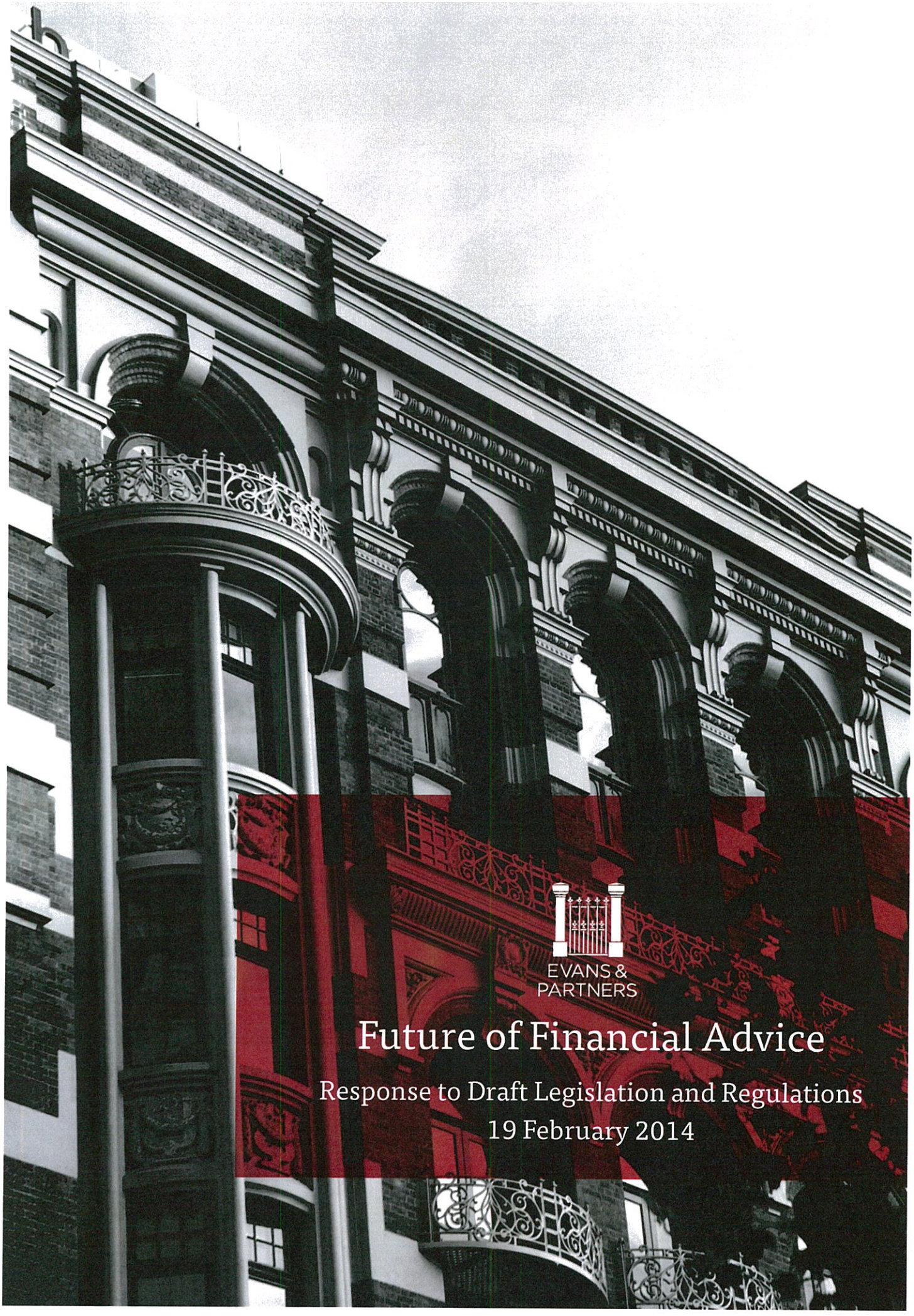

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Future of Financial Advice

Response to Draft Legislation and Regulations

19 February 2014

On 29 January 2014, the Federal Government released the following exposure drafts (with accompanying Explanatory Memorandum and Explanatory Statement) intended to amend and streamline the Future of Financial Advice (**FOFA**) regime:

- Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (**Bill**); and
- Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014 (**Draft Regulations**).

(together, **draft amendments**)

The draft amendments are open to public consultation and submissions close 19 February 2014. It is the Government's intention that the Draft Regulations will become effective in March 2014 and the Bill will be enacted sometime between May and July 2014.

Analysis and Recommendations

Evans and Partners Pty Ltd (**EAP**) welcomes the amendments proposed by the Government. Upon review of the draft amendments and accompanying explanatory documents, EAP would like to highlight three areas that require further scrutiny:

1. The date the amendments take effect;
2. Fee Disclosure Statements; and
3. The Brokerage Fee Exemption.

EAP would like to contribute the following observations and analysis to the public consultation process.

Date of Effect

Recommendation

EAP recommends that the draft amendments have a retrospective effective date of the **Application Day**, as defined by section 1528(4), that is 1 July 2013 or such earlier date as elected by the Australian Financial Services Licensee (**Licensee**).

Analysis

- The amendments contained in the Bill will take effect on the day after it receives Royal Assent.
- The amendments contain in the Draft Regulations will take effect on the day after it is registered.

This is a suboptimal outcome for the financial services industry. It will result in the existence of two versions of FOFA

- Version 1 applying from the Application Day until the day the draft amendments become law; and
- Version 2 applying once the draft amendments become law.

This will only add to the confusion that already exists about the application of the current FOFA regime which was created by the current complex grandfathering provisions. Further, the draft amendments will not have a consistent effective date due to the differing processes through which they become law.

In EAP's view, this is contradictory to the stated intention of the Government to streamline FOFA.

Ideally, the proposed draft amendments should have retrospective application such that they will completely erase the elements of the current law they are intended to amend. Not only will this ensure that the draft amendments will have a consistent effective date, but as a result there will only be one version of FOFA applying from the very start – the Application Day.

Fee Disclosure Statements

Recommendation

EAP seeks the total repeal the fee disclosure requirements because the policy intent cannot be achieved in its proposed form. This will allow businesses in the financial services industry to achieve more meaningful compliance cost savings.

Analysis

The draft amendments remove the requirement to provide a Fee Disclosure Statement (**FDS**) to retail clients where their Ongoing Fee Arrangement was entered into before 1 July 2013. An FDS must still be provided to retail clients where their Ongoing Fee Arrangement was entered into on or after 1 July 2013.

This amendment is not sufficient to achieve the Government's aims of reducing compliance costs in the context of EAP's own circumstances.

EAP needs to make the same investment in processes and IT software development to produce FDSs for a handful of new retail clients as it would to produce FDSs for all its retail clients. As the draft amendments significantly reduce the number of clients to whom an FDS must be issued (~90% for EAP) the same dollar of investment becomes an extremely inefficient use of EAP's limited resources.

EAP is of the view that the provision of the FDS provides no additional benefit to its retail clients. Due to the nature of the Ongoing Fee Arrangements EAP has entered into with its retail clients, EAP's current suite of reports provided to clients on an annual basis adequately discloses the sum of fees clients pay under those arrangements.

The original FOFA reforms were introduced with the purpose of giving retail client's greater control over the fees they pay through annual fee disclosure and fee renewal every two years. If this is still a valid policy outcome for FOFA, then repealing the fee renewal requirements and excluding the majority of retail clients from the FDS requirement renders the policy totally ineffective as, in the main, retail clients receive no consumer protection from what remains of these measures.

Brokerage Fee Exemption

Recommendation

EAP seeks further amendments to the Brokerage Fee Exemption to remove the inconsistencies with the Stamping Fee Exemption and to remove the inconsistent outcomes for Licensees who outsource to third party clearing participants.

Analysis

EAP would like to highlight two inconsistencies in the application of the Brokerage Fee Exemption (**Exemption**) that have not been addressed in the draft amendments.

The operation of the Exemption is such that where a brokerage fee (as defined by subregulation 7.7A.12D(2)) is received by a Licensee **AND** passed through to a representative, the brokerage fee is exempt from conflicted remuneration. Effectively, this implies that the treatment of the brokerage fee in the hands of the Licensee is dependent on what the Licensee then does with the benefit – ie:

- If it passes it through, the Exemption applies and the benefit is not conflicted remuneration; but
- If it retains the benefit or its representative is remunerated some other way (for example the pass through is not payable until certain thresholds are met) the benefit remains conflicted remuneration.

ASIC, as stated in Regulatory Guide 246, requires that each leg of a transaction between parties needs to be assessed against the law individually on its own merits. However, the current operation of the Exemption contradicts this approach.

Further, the construction of the Exemption is inconsistent with that of the Stamping Fee Exemption which has two prongs and allows for the possibility that Stamping Fees may not be passed through to representatives – ie:

- First prong: benefits received by a Licensee from the issuer are not conflicted remuneration; and
- Second prong: benefits received and passed through to a representative are not conflict remuneration.

EAP acknowledges that where a brokerage fee is not passed through, as contemplated by the Exemption, other exemptions may be available, albeit that the character and nature of the brokerage fee has not changed. By way of example, where personal advice was given, s963B(1)(d) – the Client Payment Exemption (**CPE**) could be relied upon. ASIC has laid out in RG 246 strict conditions for the application of the CPE. These conditions will be reinforced by the proposed addition of a note at section 963A.

In more complex circumstances where the Licensee outsources clearing and settlement activities to a third party clearing participant (**Clearer**), it is difficult for these conditions to be met. In an outsourcing arrangement with a Clearer, brokerage fees are physically passed from the client through the Clearer to the Licensee. In EAP's experience, the current nexus of standard terms and conditions signed by clients and the clearing agreements signed with the Clearer do not provide sufficient evidence of the client's clear consent as required by ASIC and by the proposed amendments. In order to apply the CPE, EAP has had to produce a second agreement to document the client's authorisation for brokerage fees to be passed through from the Clearer to EAP, in situations where there is no pass through to the retail client's advisor. Again, these circumstances in no way change the nature of the brokerage fee received by a Licensee.

The additional compliance burden arising from the described outsourcing arrangement has the effect of disadvantaging smaller Licensees who use Clearers versus those Licensees with in-house clearing capability. Equity can be restored by amending the Brokerage Fee Exemption so that it operates in a manner consistent with the Stamping Fee Exemption.

Contact

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