

21 December 2012

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The Treasury
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Email: futureofadvice@treasury.gov.au

Dear Ms Sim,

FSC SUBMISSION – Exposure Draft - Accountants' exemption replacement regulations

Thank you for the opportunity to provide a submission with regards to the recently released Exposure Draft - Accountants' exemption replacement regulations.

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers and financial advisory networks. The FSC has over 130 members who are responsible for investing \$1.9 trillion on behalf of more than 11 million Australians.

The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Stock Exchange and is the fourth largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC welcomes the issue of draft regulations to remove the accountants' exemption (which has exempted accountants from complying with all the legislative and regulatory requirements pertaining to advice which financial advisers comply with). The FSC has advocated on this issue in our submissions to the Cooper/Stronger Super review and on FoFA.

We submit that all body corporates and individuals who provide financial advice should be regulated by the same legislative and regulatory requirements as other advice providers including FoFA legislative requirements. We believe it is critical that all providers of financial advice – regardless of the financial advice scope – operate under the same legislative/regulatory umbrella to ensure there is a level playing field.

A level playing field is significant if the aims of FoFA are to be achieved which include:

- more Australians receiving affordable advice;
- enhancing the quality of advice; and
- building confidence and trust in those that provide Australians with financial advice.

The FSC submits that:

- All providers of financial advice should operate under the same legislative and regulatory requirements inclusive of all the FoFA obligations (be they accountants, financial advisers/planner and/or intra-fund advice advisers);
- All providers of financial advice should be Licenced by ASIC;
- That all providers (new and existing) of financial advice (including accountants) comply with the existing and proposed changes to ASIC RG146 (including the prospective adviser certification, monitoring and supervision and knowledge update review). This will ensure, in the future, that all providers of advice across the market have met the minimum entry and ongoing requirements to this profession.

Our submission discusses these concerns in more detail. We look forward to discussing the contents with you. If you have any questions regarding the FSC's submission, please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely



CECILIA STORNILO
SENIOR POLICY MANAGER



FSC SUBMISSION

EXPOSURE DRAFT

ACCOUNTANTS' EXEMPTION

REPLACEMENT REGULATIONS

DECEMBER 2012

1 KEY ISSUES

Consultation with members has highlighted the following key issues:

- 1.1 NON FINANCIAL PRODUCT ADVICE LICENCE OR TRANSITIONAL LICENCE ARRANGEMENT
- 1.2 FINANCIAL PRODUCT ADVICE
- 1.3 CLARITY REGARDING COMPETENCY AND CORPORATIONS ACT REQUIREMENTS
- 1.4 REMOVAL OF THE ACCOUNTANTS' EXEMPTION
- 1.5 CERTIFICATION V AUDITED ACCOUNTS
- 1.6 GENERAL COMMENTS

Each of the key issues is discussed in turn following:

1.1 NON FINANCIAL PRODUCT ADVICE LICENCE OR TRANSITIONAL LICENCE ARRANGEMENT

a) *Non-financial product Licence*

Consistent with the Government's announcement in 2011¹, throughout the FoFA consultation process discussions indicated that the removal of the accountants' exemption would result in the creation of a new strategic advice license (licensing "lite"), the ability for any strategic advice provider to operate under this new license and provide the accounting profession transitional arrangements to the licensing regime. This licence design was the agenda for two specific meetings with the Minister's office, ASIC and Treasury on this topic matter attended by a roundtable of industry, accounting and financial services in which the FSC was involved in pre October 2011.

The above understanding was reinforced in communications by the Minister in his media release of 23 June 2012:

*"Importantly, the new Licence does not allow specific product recommendations but is designed to enable accountants **and any financial advisers** who may hold this licence to provide **more strategic** and low-cost forms of financial advice which will greatly assist Australians to manage their finances effectively [emphasis added]"*.

And also included in the regulatory impact statement issued by Treasury 1 July 2012;

'all AFSL holders and new applicants would be able to apply for the conditional AFSL – the licence would not be restricted to accountants' (p15)

It is our understanding that the policy intent with regards to the removal of the accountants' exemption as discussed previously was to ensure that:

- More Australians are able to access more affordable advice aided by the creation of a strategic advice licensing class not limited to accountants; and
- Build trust in advice providers by ensuring all providers of financial advice to retail clients operate within the same legislative/regulatory framework and meet the same competency and experience requirements.

¹ Future of Financial Advice Information Pack, 28 April 2011, page 15. "The Government also recognises that many accountants are not financial advisers, and may not wish to provide holistic advice or recommendations to clients to purchase specific financial products. Expanding the supply of this type of financial advice is in line with the Government's objective to improve access to lower-cost, simpler financial advice for all Australians."

There are benefits associated with a non-financial product advice Licence including but not limited to:

- Enabling a more cost effective advice model by for example:
 - Eliminating the need to conduct product research as required by the new Best Interest Duty and related obligations; and
 - Reducing Professional Indemnity insurance costs;
- Enabling advice providers to concentrate on strategic advice and charge accordingly for that service (thus streamlining certain compliance aspects of FoFA Law).

We support the creation of a limited or exempted Licence for advice providers (not limited to recognised accountants) to provide class of products advice and strategic advice (i.e. non-financial product advice).

Our interpretation of the draft regulations is that the proposed exempt licence:

- Does not provide for a strategic advice (non-financial product advice) Licence;
- Is purely a transition arrangement for accountants moving to a full licensing arrangement (with class of product and limited financial product advice authority);
- Provides a waiver of the competency obligation and compliance certificate requirements during the transition period; and
- Only available to 'exempt Licencees' and therefore achieves a new licensing regime limited to 'recognised accountants' (including partnerships/corporate entities controlled by recognised accountants).

Therefore it is unclear to us why the draft regulations differ from the Government policy.

If the intent is to create an ASIC license which limited to the provision of non-financial product advice, we submit the drafting requires amendment to:

- Create a new Licence;
- Which enables non-financial product advice
- Which affords any provider who demonstrates, or can demonstrate organisational competence, to be permitted to subscribe to the limited Licence like recognised accountants.

Recommendation

Consistent with the Minister's media statement and Treasury's Regulatory Impact Statement, the new ASIC licence regulation is re-drafted to:

- Create a new ASIC AFSL license;
- Which enables non-financial product advice; and
- Which affords any provider who demonstrates, or can demonstrate organisational competence, to be permitted to subscribe to the limited license like recognised accountants.

Based on our interpretation, it appears that the licensing requirements are now structured in a manner whereby accountants will be subject to the full licensing obligations to create consistency with all other licence holders. Rather than creating a separate licence, accountants will only be

eligible for the reduced competency requirements if they choose to apply for a licence that covers only class of financial product advice (defined as an 'exempt licence').

The FSC does supports this outcome on the basis that, from 2016 accountants wanting to provide advice on Self Managed Superannuation Funds will be subject to the same legislative requirements as the remainder of the advice industry including compliance with FoFA, and by 2019 will also be subject to the competency and audit certificate requirements to which other licensees are subject.

Recommendation

The FSC submits that the ASIC licensing process may require some modification to enable applicants to easily apply for a licence which covers only the areas captured by the definition of exempt licensee.

We also submit that the new licence should be available to any other provider that is able to meet the usual licensing requirements and obligations. That is, the categories for an exempt licence should also be available as under a 'full licence'.

b) Transition

We interpret that the transition created by the draft regulations works as follows:

- Reg 7.6.01BA - enables a recognised accountant to apply for an exempt Licence between 01/7/2013 and 30/06/2016.
- Reg 7.6.04(1)(j) – creates a condition that enables the exempt Licensee three years from the date they obtained the Licence to demonstrate organisational competency to ASIC.
- The combination of the two regulations above means if someone applies for a licence on 30/06/2016 they will not be required to comply with ASIC organisation competency requirements until 30/06/2019 effectively providing a six year transition from the commencement of the exempt licensing regime to the full licensing regime. However, we note, that from 2016, exempt licensees will be subject to all other licensing obligations which are applicable to the broader industry and will also be subject to the broader Corporations Act requirements that apply to licensees.

We see merit in a four year transition period to enable prospective limited licensees the ability to meet licensing requirements (slightly more generous than the proposed three year transition afforded financial advisers to comply with the Tax Agent Services Act education/experience licensing requirements) which would provide;

- Applicants to obtain a limited licence from 1 July 2013 to 30 June 2014; and
- A three year period from the date of application to meet competency requirements. This would provide a four year transition period from the commencement of the exempt licensing regime to the full licencing regime.

This means that by 2017, all accountants providing SMSF advice would be Licenced by ASIC².

² Page 1 *Replacement of Accountants' licensing exemption – Regulation Impact Statement – Treasury* states, "From 1 July 2016, all accountants must hold an AFSL to provide any advice relating to SMSFs."

Recommendation

The limited Licence can only be applied for between 1 July 2013 and 30 June 2014, with a three year transition period from date of application to meet organisational competency requirements.

1.2 FINANCIAL PRODUCT ADVICE*a) Concerns with RG 7.6.01BA (modifications to s912A of the Corporations Act)*

The Amendments proposed to s912A 4(c)(ii) enable financial product advice to be provided on superannuation products in relation to a person's existing holding but only to the 'extent required for':

- (A) **Making a recommendation** that the **person establish a self-managed superannuation fund**; or
- (B) Providing advice to the person on contributions or pensions under a superannuation product.

The proposed amendments to s912A (4)(c) enable financial product advice, on existing holdings, only to be provided for the purposes of making a recommendation to establish an SMSF. We query whether the drafting would enable a person operating under a limited licence to consider existing superannuation products and recommend against the establishment of an SMSF.

There are circumstances where it may not be appropriate to establish an SMSF and in fact adhering to s947D of the Corporations Act (covering additional requirements when advice recommends replacement of one product with another) or acting in the best interests of the client may necessitate a recommendation NOT to establish an SMSF.

For example, Client A would like to establish an SMSF. However, the client wishes to pay low fees and only has \$30,000 invested in superannuation. Consideration of the client's existing super fund reveals they are only paying \$300 dollars in administration fees. It may not be in the client's interests to establish an SMSF and it would be appropriate to recommend against establishing an SMSF.

Recommendation

The FSC recommends that s912A 4(c)(ii)(A) be amended to insert the following **bold** words into the relevant section;

“making a recommendation **in relation to the appropriateness of** establishing a self managed superannuation fund;”

This would enable someone to consider a client's existing superannuation holdings for the purposes of recommending against the establishment of a SMSF.

Further, exempt Licencees should be able to provide 'general' (and not personal) switching advice in relation to rolling over other super funds into a SMSF (e.g. things to consider in relation to rolling over funds into an SMSF).

b) *Class of product advice*

We also note that it is not clear from the drafting of ‘class of financial product advice’ whether or not the advice will be considered personal or general financial advice. In our view, the concepts of personal and general financial product advice should apply equally to ‘class of financial product advice’ and the relevant training and other obligations associated with the provision of that advice should need to be complied with by those operating within the exempt licence category.

Recommendation:

The FSC request clarification that the definition of ‘class of financial product advice’ can be either personal or general advice and that the provider of the advice will need to be appropriately trained to provide that advice (for example, meet RG 146 requirements and the proposed requirements under CP 153).

c) *Best Interest Duty and Scalable advice*

We submit ASIC’s *Regulatory Guide 244 Giving information, general advice and scaled advice* may need amendment to assist the exempt Licences in understanding how to provide personal super switching advice under a full Licence. Guidance on how to give “class of product” advice versus personal advice would also be informative to entrant to advice.

Recommendation

The FSC recommends that the ability to scale advice should not be limited to accountants under this licence and should be available to all Licenced participants without breaching the best interest duty.

1.3 CLARITY REGARDING COMPETENCY AND CORPORATIONS ACT REQUIREMENTS

a) *Competency Requirements*

It is unclear from the proposed regulations, what competency requirements exempt licencees must comply with during the three to six years in accordance with Reg 7.06.01 BA whilst still providing financial product advice and class of product advice.

Considering that specific financial product advice can be provided on important and complex issues such as;

- contributions or pensions to a person’s existing superannuation fund;
- a person’s existing holdings in relation to the establishment of a SMSF which we understand would include switching advice and importantly also require advice on the person’s existing insurance held within superannuation; and
-
- as well as class of product advice on a range of issues;

We submit that it is essential that those who apply for and those who provide advice under, the limited licence meet the necessary RG146 training and minimum competency requirements from the date of application, in all areas in which they provide advice.

The above competency requirement is consistent with the additional information on the replacement of the accountant's exemption released by Bill Shorten on 23 June 2012 stating that 'accountants will need to meet ASIC's existing training requirements to hold a licence and provide financial advice. This will ensure only accountants with appropriate skills and knowledge are authorised to provide financial advice under the new authorisations.'

Equally important is ensuring RG146 competency requirements are met by those who provide advice under the limited Licence as this will ensure that advice providers have adequate knowledge on the areas in which they are advising which will enable them to act in the best interests of the client.

Recommendation

We submit that it is essential that those who apply for and those who provide advice under, the limited licence meet the necessary RG146 training and minimum competency requirements from the date of application, in all areas in which they provide advice.

b) Corporations Act Requirements

There seems to be a great degree of misunderstanding around whether those operating under the limited licence will be required to meet the relevant Corporations Act requirements of those authorised or Licenced to provide financial services.

The transition into the licenced regime is being driven out of the Government's recognition that the accountant's 'exemption does not provide an appropriate framework for advice in relation to SMSFs and superannuation more generally' and more importantly raises consumer protection issues 'as key protections afforded by the AFSL regime are not in place.'³

The problems are clearly identified in the Regulatory Impact Statement which highlights that;

*' Unlike other providers of advice operating within the regime, accountants operating under the exemption are **not required to meet licensing and ongoing criteria including maintaining the competence of employees, ensuring they are adequately trained, having dispute resolution mechanisms and adequate compensation arrangements for retail clients, and.....are not required to provide advice that is appropriate for their clients and disclosure obligations do not apply.**'⁴*

In removing the accountants' exemption and proposing a limited licence regime, the Government's objectives are 'to ensure there is an appropriate regulatory framework governing the provision of SMSF advice to clients'. The regulatory impact statement recommended the implementation of Option A by bringing accountants that provide SMSF advice into the AFSL regime which would;

- significantly increase the level of consumer protection associated with this form of advice;

³ Regulation impact statement: Replacement of Accountants' Exemption. Page 1-2,

⁴ Ibid Page 2.

- require that anyone providing switching advice involving SMSF's will need to meet switching obligations under s947D of the Corporations Act and comply with the proposed best interest duty
- ensure that existing training requirements continue to apply to accountants that seek a licence during the transition period; and
- expect anyone holding this form of AFSL to meet all other licensing and ongoing obligations, with the exception of lodging an annual audit.

The key objectives and expectations included in the regulatory impact statement have not been carried across into the explanatory statement and there is ambiguity in the regulations. Considering that the limited licensing regime is a new regime, we recommend that the regulations expressly confirm that all other Corporations Act requirements of those authorised or Licensed to provide advice continue to apply. This would remove the confusion around whether those operating under the limited licence are required to meet the best interest duty, satisfy disclosure requirements such as the provision of a Statement of Advice and Financial Services Guide and are required to maintain appropriate compensation arrangements.

This will ensure the government achieves the objectives set out in the regulatory impact statement and ensure 'the advice provided by accountants will be subject to the same regulatory requirements as financial advice provided from any other source'⁵.

Recommendation

The FSC recommends that the explanatory statement confirm that both those who apply for, as well as those who are authorised to provide advice under, the limited licence meet RG 146 requirements from the date of application and that the regulations expressly provide that all other Corporations Act requirements of those authorised or licensed to provide advice continue to apply.

1.4 REMOVAL OF THE ACCOUNTANTS' EXEMPTION

It is our understanding that the Government's objective as announced in 2010, that all accountants who wish to continue to provide SMSF advice and any other type of financial product advice would be required to hold an AFSL – by removing the accountants exemptions currently in the Law:

*"The exemption permitting accountants to provide advice on the establishment and closing of self-managed superannuation funds (SMSFs) without holding an Australian Financial Services Licence (AFSL) **will be removed** [emphasis added]"⁶.*

The draft regulations issued only address one exemption currently available under the Law to accountants (regulation 7.1.29A). However, there are a number of other exemptions which these regulations do not address and it remains unclear why the proposed regulations deviate from the Government's policy announcements. It is unclear how these current exemptions are intended to interrelate with the proposed new regulations.

The exemptions which would appear to remain once this draft regulation is registered include:

- *Regulation 7.1.33A*

⁵ Ibid, Page 20.

⁶ Future of Financial Advice Information Pack, 26 April 2010, page 6.

We note that the proposed regulations do not remove the exemption that enables the provision of a service that consists only of a recommendation or statement of opinion provided to a person about the allocation of the person's funds that are available for investment among 1 or more of the following (a) shares; (b) debentures; (c) debentures, stocks or bonds issued, or proposed to be issued, by a government; (d) deposit products; (e) managed investment products; (f) investment life insurance products; (g) superannuation products; and (h) other types of assets.

- *Regulation 7.129(5)*

Relates to exempt services regarding superannuation funds and if financial product advice for a retail client-disclaimer regarding non-licensing and seeking appropriate advice.

- *Regulation 7.1.29(4)*

Relates to a person also provides an exempt service if and either:

(i) the advice does not constitute financial product advice to a retail client; or
(ii) the advice constitutes financial product advice to a retail client and it includes, or is accompanied by, a written statement that:

- (A) the person providing the advice is not Licenced to provide financial product advice under the Act; and
- (B) taxation is only one of the matters that must be considered when making a decision on a financial product; and
- (C) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.

We submit that this regulation remain to enable accountants to advice as a registered tax agent. We ascertain that there are sufficient limitations in this regulation that will not allow accountants to use regulation to avoid licensing. In particular:

- o taxation advice is the only thing they can take into account. Once the provider takes personal circumstances into account, the provider would have gone beyond the scope of this exemption; and
- o advice needs to be integral to overall accounting advice and they are not permitted to charge separately for the advice.

If a provider continues to provide SMSF advice using the SMSF exemption (the three regulations listed previous) do these providers avoid FoFA requirements and open the provider to possible action under the new anti-avoidance scheme provisions (s965 of the Corporations Act)

Given accountants have access to a formalised licensing regime, it remains unclear why the other exemptions relating to accountants should not be removed (in particular reg 7.1.33A which is largely covered by the new Licence and reg 7.1.29(5)). Allowing an accountant to be Licenced and also rely on other exemptions would create significant confusion in the eyes of the consumer.

Recommendation

The FSC recommends regulation 7.1.33A and 7.1.29(5) be reviewed and “omitted” where they contradict with the new licencing regime.

1.5 CERTIFICATION V AUDITED ACCOUNTS

We understand that recognised accountants, in particular CPA members are subject to robust Quality Assurance monitoring by their professional association and practicing certification is a common practise/process for accountants in practice today. It is our understanding that the accounting bodies only permit their members the certification process over the audited accounts process if the accountant does not hold (receives, accepts, transfers etc.) monies on account for their clients.

Recommendation

We recommend that the draft regulations should therefore clearly state and mirror practices the accounting bodies today deem acceptable for their members to ensure that any limited Licencee who holds monies on account for their client must comply with full audited accounts procedures (like existing Licencees do) rather than just self certification. That is, the self certification process should only be permitted for use by those recognised accountants operating under a limited Licencee who do not and do not intend to hold monies on account for their members.

1.6 GENERAL COMMENTS

We note that in light of the proposed legislation to restrict the term “financial planner” and “financial adviser”, that the holders to this limited Licence be prohibited from using the term(s) or like expressions until such time as the limited Licencee is able to comply with regulation 7.6.04(1) (j).

Recommendation

The holders using regulation s7.6.01BA is prohibited from using the restricted word or expression “financial planner” or “financial adviser”.