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Director, Tax Agent Regulation Unit
Personal and Indirect Tax and Charities Division

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By email: PwCResponse@treasury.gov.au, TPBCode@treasury.gov.au

EY Submission
Response to PwC matter proposed reforms:

- Enhancing the Tax Practitioners Board's sanctions regime consultation paper
- Tax Agent Services (Code of Professional Conduct) Determination 2023 exposure draft

Dear Directors

EY welcomes the opportunity to provide comments to Treasury on further aspects of the Government's response to the PwC matter, released for comment on 10 December 2023 in:

- Response to PwC – Tax Agent Services (Code of Professional Conduct) Determination 2023 exposure draft (the ED)
- Response to PwC – Enhancing the Tax Practitioners Board's sanctions regime consultation paper (the paper).

We support the policy objective of the proposed expansion of the Code of Professional Conduct (the Code) in the Tax Agent Services Act 2009 (TASA), as expressed in the explanatory materials to the ED, to increase the transparency of the tax profession and ensure the integrity of the tax system. We note the changes to the Code include measures which in particular seek to expand the application of the TASA to non-tax and BAS agents who work with or for such agents.

However, the TASA does not apply to professional services firms, tax intermediaries and advisors that do not meet the requirements to register or where an exclusion or exception applies, such as lawyers that do not prepare or lodge returns or other like statements. We submit that the changes proposed under the ED will fall short of meeting the policy objective unless these requirements are also imposed on the broader tax profession.

The proposals in the ED and paper will apply to all registered tax and BAS agents and will add significant additional costs of compliance with adverse impacts in particular for sole practitioners and smaller tax firms which do not have readily available resources to implement or manage these extensive new rules and to ensure monitoring and compliance.

We note that feedback on these proposals has been sought in a relatively short timeframe that included the end of year holiday period, which has somewhat restricted the ability of stakeholders to appropriately consider the materials and to respond. We hope that there will be opportunities to

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review proposals as they progress further including to provide comments on exposure draft law in respect of the consultation paper matters.

We are concerned whether the proposed Code changes and expanded sanctions regime will meet the policy intent of the measures including due to issues with drafting approaches, interaction with the current Code and with other obligations imposed on tax agents and their firms and from the need for greater certainty.

We set out in the attached appendix a series of particular concerns we have identified with the proposed measures, with recommendations.

In addition to these items, we are concerned how the proposed new Code items would apply where there is both a partnership or company that is registered and individuals in that partnership or company who are also registered, whether those individuals are partners/directors or employees of the partnership/company. This includes how the overlap of items applying to both the partnership/company and the individuals may duplicate activities, reporting and sanctions which increases cost of compliance and potential adverse impact on tax advisors.

Although this is a current issue, we believe that the extensive nature of the new proposed Code items and significant increases in the range of and extent of sanctions including significant financial penalties that may be imposed for breaching the Code, highlights issues from this dual approach which should be clarified. This should include clarity as to how overlapping reporting requirements can be satisfied on a whole of partnership/company agent basis for reporting on its own behalf and on behalf of individual agents of the firm.

* * * * *

Should you have any questions in relation to this submission or wish to discuss these matters in further detail, please do not hesitate to contact Tony Merlo (03 8575 6412, tony.merlo@au.ey.com) or Brian Lane (03 8650 7250, brian.lane@au.ey.com) in our Tax Policy Centre.

Yours sincerely

EY

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Appendix

Tax Agent Services (Code of Professional Conduct) Determination 2023 exposure draft

The exposure draft determination (ED) proposes to add 8 new items to the current list of 16 items in the Code of Professional Conduct (the Code) in section 30-10 of the Tax Agent Services Act 2009 (TASA), being:

- 10 Upholding and promoting the ethical standards of the tax profession
- 15 False or misleading statements
- 20 Conflicts of interest in dealings with government
- 25 Maintaining confidentiality in dealings with government
- 30 Keeping of proper client records
- 35 Ensuring tax agent services provided on your behalf are provided competently
- 40 Quality assurance and other internal controls
- 45 Keeping your clients informed of all relevant matters.

The new items are drafted in a "principle-based policy" style which includes imprecise wording and broad concepts which require the reader to refer extensively to the accompanying explanatory material (EM) to understand Treasury's intent.

We are concerned that the drafting approach with its reliance on the EM will:

- Result in uncertainty in application by covered tax and BAS agents including whether the EM discussion can be wholly relied upon
- Result in increased potential for controversy between covered tax and BAS agents and the Tax Practitioners Board (TPB) in that the TPB's interpretation of the wording of the section might not accord with the EM in particular circumstances, and also in legal proceedings given the courts approach to restrict the use of EMs where the words of the provisions are considered to be clear.

A more prescriptive drafting approach is required given the extensive and potentially significant punitive new penalty regime proposed to apply to a breach of the Code.

A more prescriptive drafting approach is also required given the interaction with new self-reporting of Code breaches and the "dob in a tax agent" measures that should only be enlivened for significant breaches of a clearly articulated and widely understood rule.

We recommend that the new items should be redrafted to more directly include specific requirements, such as those which are explained in the EM. This would provide greater certainty and improve understanding of each item and also reduce the risk of future interpretation controversies. Consideration should also be given to aligning requirements with the APES 110 *Code of Ethics for Professional Accountants* which applies to many tax agents.

We further recommend that the current 16 Code items are reviewed to consider whether clarification of each item and expectations and requirements for tax/BAS agents to comply with each is needed,

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including in respect of their interaction with the new CODE requirements and also given the proposed new sanctions and new reporting of breaches provisions.

We set out our further concerns and also provide our recommendations below.

10 Upholding and promoting the ethical standards of the tax profession

The proposed item is drafted in a very imprecise way which does not explain what the expected requirements are and how they can be met, without having regard to the EM.

The proposed item is also drafted in a "wide as possible application" manner which cannot be practically complied with by tax and BAS agents.

A tax/BAS agent cannot protect public trust and confidence in the integrity of the tax profession over which they have no control or influence. For example the fact that the tax profession includes a significant population of individuals and firms who are not tax/BAS agents and who are not covered by TASA and the Code such as some lawyers.

The item would apply on a strict interpretation of the current drafting to a tax/BAS agent in respect of other organisations of which they are not a part of and other tax/BAS agents, employees, contractors etc of those other organisations. This is clearly not the intention as reflected in the EM which in some but not all respects seeks to limit this sensibly, applying to people within a tax/BAS agent's organisation which the agent interacts with including employees that they are supervising or collaborating with and/or unregistered individuals providing tax/BAS agent services on their behalf.

We strongly recommend that this item be redrafted to reflect a restricted application of the requirements to persons which a tax/BAS agent is interacting with in their own practice or firm as set out in the EM.

15 False or misleading statements

We are concerned that the requirement to correct statements made as soon as possible after a tax/BAS agent becomes aware that the original statement was false, incorrect or misleading would apply to statements made in income tax returns and other returns and documents of a tax/BAS agent's clients which the tax/BAS agent has lodged and signed as tax/BAS agent.

The decision whether to apply for an amendment of a tax return or other return/document lodged for or statement made on behalf of a client is a decision of the client and not of the tax/BAS agent. We are concerned that without further specific legislative backing a tax/BAS agent who advises the Commissioner of an error in a client's return or statement without their permission may face potential legal action from that client. This requirement also risks tax/BAS agents breaching item 6 of the Code in relation to confidentiality of client information, should the exception for disclosure where there is a legal duty to do so not subsequently be taken to have applied.

We are also concerned that the existence of this requirement may discourage clients from seeking advice, if they perceive that the decision on actioning the outcome of that advice is taken out of their hands by virtue of such obligation to correct matters being imposed on the tax/BAS agent.

We recommend that this item apply only to statements made by a tax/BAS agent which do not relate to statements made in relation to clients unless the client consents.

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We are also concerned how this item would apply to statements made by a firm as tax/BAS agent and who has the responsibility to correct such statements.

We recommend to avoid duplication, that the partnership/company should be authorised to correct statements rather than an individual agent of the firm.

20 Conflicts of interest in dealings with government

Proposed item 20 raises interpretation issues with what is:

- A conflict of interest
- Material.

There will be different views between different persons of what is a conflict of interest. For example clients of tax/BAS agents may have a different view to the tax/BAS agent of what is a conflict and government agencies may have a different view to the tax/BAS agent of what is a conflict.

We recommend that the EM provide extensive guidance as to what is considered material.

We are concerned that the EM is seeking to broaden the item to apply to circumstances which are not listed in the item in that it states that a tax/BAS agent should disclose conflicts of interest known to exist in respect of another person or entity, in the second last paragraph for that section. We recommend that this EM paragraph should be removed.

Further, we recommend that the EM could reference requirements in APES 110 *Code of Ethics for Professional Accountants* which applies to many tax agents.

25 Maintaining confidentiality in dealings with government

Proposed item 25 imposes broad brush obligations on tax and BAS agents for confidentiality of information in respect of government agency “activities” which may not apply to other persons who are involved in the same “activities” i.e. any non-tax/BAS agents including lawyers and other tax intermediaries.

As currently drafted if a consultation occurs which involves both tax/BAS agents and tax lawyers and there is no clear statement from the agency as to whether the consultation is confidential, the lawyer would be free to discuss but the tax/BAS agent would face sanctions for discussing.

We believe that it is not appropriate to include these requirements in the Code, which only applies to tax/BAS agents and rather any confidentiality obligations in respect of government agency activities whether they be paid engagements or otherwise such as participation in consultation should be dealt with in formal arrangements between that agency and the contracting entity or such participants.

We therefore recommend this item be removed. Alternatively, the item should be rewritten to apply only where explicit notice of confidentiality has been given by the Australian government agency.

30 Keeping of proper client records

The extent of additional administrative burden to meet this requirement may increase costs of completing work with impacts for practices and their clients, depending on the extent of what additional work must be completed.

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We recommend that the EM should provide appropriate guidance on what would be a "more complex matter" which would require additional records to be kept.

We also recommend that the TPB should also provide further clarification of the nature and extent of documentation which is expected to be kept.

35 Ensuring tax agent services provided on your behalf are provided competently

While the notion that persons involved in the provision of tax agent services should have appropriate relevant knowledge and skills is prima-facie a sensible and logical requirement for any tax practice, we are concerned how this item might be interpretated in an inappropriate and onerous manner over how practices might currently undertake supervision and training of staff in a manner which meets their current competency of work obligations under the Code.

We are also concerned how the requirement for adequate supervision may be applied and the impact this will have on tax/BAS agents. Specifically, if substantial additional work and documentation is required to show how all persons involved in client work have been supervised in particular noting the EM's discussion that this item would apply to the full range of employees with different levels of involvement in such work.

The guidance should acknowledge that one size does not fit all - appropriate supervision requirements may differ depending on the size of the firm, and the applicable training programs and quality assurance policies and procedures employed in relation to the provision of tax agent services.

We recommend that the EM is updated to reflect this. We recommend that the EM should also reference applicable professional standards of conduct which may apply such as APES 320 *Quality Control for Firms that provide Non-Assurance Services*.

45 Keeping your clients informed of all relevant matters

Item 45 is drafted in an imprecise but clearly very broad manner which may be very difficult and expensive to comply with, if interpreted strictly.

We recommend that the item and EM guidance make clearer that it is only clients of the tax/BAS agent for which relevant tax and/or BAS agent services are being or will be provided to must be notified. It would be inappropriate and impractical if all clients of a multi-disciplinary firm which is a tax/BAS agent were required to be contacted especially in light of the potential for multiple notification events to occur. Further, where a matter is connected to a particular tax/BAS agent in a firm, only the clients and prospective clients for whom that agent will provide services should be covered.

Item 45(a) requires agents to advise clients and prospective of "matters" in "writing". Without flexibility including allowance to use modern communication methods this could be a labour intensive, time consuming and very expensive process. We recommend that it is made clear that this requirement could be satisfied in a number of different ways which would not require an individual communication to what may be thousands of clients including via bulk electronic communication and by notices uploaded to the agent's firm website.

The item does not set out when a client or prospective client must be notified. Where notification arises because of a new matter this will be a significantly onerous and costly task depending on

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clarification of how this can be communicated. We recommend that it is made clear that the requirement must be met within a "reasonable time" which can be explained in the EM.

The item states that the disclosure is required "as and when a matter arises". Agents may therefore need to make new disclosures following each new matter which arises. Although unlikely, it is possible that a new matter may arise on successive days potentially requiring a new notification each time to potentially thousands of clients. Such a requirement would be unworkable.

We recommend that updates to the list of relevant matters and disclosure should not be required more often than quarterly.

The use of the term "matter" is broad and uncertain and must be constrained.

Without a clear list of matters we are concerned how widely this item might be interpreted. For example does "matter" extend to tax authority review or audit of position advised by tax agent? Perceived conflicts of interest might be "relevant" (noting that client expectations may differ significantly from professional standards applied by its tax agent, e.g. some clients believe acting for their competitors is a conflict).

We recommend that the item should include an exclusive list of the relevant matters such as the list of matters set out in the EM subject to our comments below.

The EM suggests that a current TPB investigation may be included as a matter to be notified. This is unfair to include, as this could be prejudicial against the agent. This could also encourage baseless allegations to be raised by aggrieved clients seeking to exploit this measure.

It is inappropriate to disclose infringement notices paid given that these are issued without any due process and payment is not an admission of fault.

Retrospective application
We submit that the retrospective application of this item for matters which arose between 1 July 2022 and commencement of the Determination is inappropriate and we recommend this should be removed.

We are concerned that this requirement may be interpretated to require disclosure of any past matter on the list of EM's examples whether or not that matter is still relevant to the agent's current services. For example in respect of partners that have left the agent's firm.

The retrospective application will also require significant work to review activities of essentially the last 2 years which may not be recorded in an easily accessible way given that there had been no previous requirement to record such matters.

We recommend that all new items including item 45 should only apply on a prospective basis.

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Enhancing the Tax Practitioners Board's sanctions regime consultation paper

The Enhancing the Tax Practitioners Board's sanctions regime consultation paper (the paper) sets out potential reforms intended to enhance the range of sanctions available to the TPB:

- Criminal penalties for practitioners that operate without a registration with the TPB
- Broader and increased civil penalties in the Tax Agent Services Act 2009 (Cth) (TASA)
- An infringement notice scheme attached to the civil penalty regime
- A new TPB power to allow it to enter enforceable voluntary undertakings with tax practitioners
- A new TPB power to impose interim and contingent suspensions.

The paper also briefly considers the current scope of TPB orders.

We welcome the introduction of a broader range of sanctions and graduated penalties to address the current gap between a choice of "low-level" and "high-level" sanctions where appropriate. It is vital that these new sanctions and potential application of very significant financial penalties have safeguards and checks and balances to ensure they are used in the manner contemplated.

We note that the table 1 comparison of the current and future state of TPB sanctions omits "written cautions" and "orders (such as education directions)" from the list of proposed future state sanctions for both "medium level sanctions" and "high level sanctions". We do not take the proposed enhancements to the sanctions regime as changing the ability of the TPB to apply their current sanction powers to a lesser range of circumstances that they currently can apply them to, and it seems inappropriate to suggest that there is an effective reduction in the potential use of current sanctions as a result of the introduction of the proposed additional measures.

We recommend that it is made clear that the current range of sanctions remain available to the TPB in all circumstances.

The paper generally proposes that the new penalties would apply in respect of breaches of Division 50 of the TASA and also for breaches of the Code (i.e. other than in respect of the reintroduction of criminal penalties for unregistered persons).

We recommend that the penalty regime for breaches of the Code be considered separately to that of other offences under the TASA as is the current approach, given the nature of the Code including its principal-based drafting and potential uncertain application to an extensive range of circumstances. This includes that the sanctions should be included specifically in Division 30 with appropriate modification compared to penalties for Division 50 matters and specific EM guidance.

We assume the new sanctions and penalties would not apply in respect of the Part4A disqualified entities reporting provisions given that these have only recently been enacted and they include specific penalty provisions.

We further recommend that detailed guidance or clarifications should be provided concerning:

- What breaches are expected to attract which sanctions
- What levels of penalty would apply for different breaches e.g.:
    - Making false or misleading statements

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- Using a deregistered entity
- Using a disqualified entity without timely approval of TPB
- Failure to comply with the Code items.

- Examples of egregious behaviour that would warrant the highest level of penalty.

We make some further observations and recommendations below.

Broader and increased civil penalties in the Tax Agent Services Act

We recommend that defences to penalties must be included as part of the proposed expansion and increase in civil penalties potentially applicable for breaches of the Code.

Potential defences to penalties could be as follows:

- A defence to the provisions in respect of an individual tax agent/BAS agent is that the breach:
  - did not involve any element of dishonesty, and
  - involved behaviour that was not unreasonable by the then standards of the individual's profession.
- Alternatively a defence to the provisions in respect of an individual tax agent or BAS agent is that the breach was made in good faith and without any intention to cause harm.

Infringement notice scheme attached to the civil penalty regime

We recommend that any infringement notice regime should include a right for the recipient to challenge the notice and then to allow the appeal of the notice to a court.

Clarifying TPB orders

The paper notes recent amendments made to section 30-20 of the TASA in Treasury Laws Amendment (2023 Measures No.1) Act 2023 following an amendment to the Bill made in the Senate, without any prior public consultation, to include a fourth example of orders that the TPB can make, requiring you to notify, in writing, all of your current clients about the findings of the TPB's investigation specified in the order.

We recommend that this new potential order option requires investigation and clarification by the TPB and potential amendment as needed. This investigation would benefit from consultation to inform how practically the order could be used as well as to clarify how such an order may operate including for example in respect of a tax practice with more than one tax/BAS agent, for practices with partners/principals who are not tax/BAS agents including where the tax/BAS agent is the entity and for professional services firms who have tax and non-tax partners and clients.

For example, it would not seem to serve the purpose of the act if the order was to notify all clients of a professional services firm where the firm is the tax/BAS agent (such an order would raise significant practical and costs of compliance issues), but rather the order should be able to be made such that it was restricted to the sub-set of clients who had a particular partner as their engagement partner.

We also recommend that the other self-notification of a Code breach and notification of the belief that another agent has breached the Code changes included in this amending Act require investigation and clarification by the TPB and potential amendment as needed.