9 May 2014

General Manager
Tax System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via Email: fatca_iga@treasury.gov.au

Dear Treasury,

Foreign Account Tax Compliance Act
Exposure Draft

The Australian Financial Markets Association (AFMA) represents the interests of over 130 participants in Australia's wholesale banking and financial markets. Our members include Australian and foreign-owned banks, securities companies, treasury corporations, traders across a wide range of markets and industry service providers. Our members are the major providers of services to Australian businesses and retail investors who use the financial markets.

AFMA welcomes the opportunity to provide comments in relation to the Exposure Draft and accompanying draft Explanatory Memorandum setting out changes predominantly to the *Taxation Administration Act 1953* to give effect to the obligations of Australian financial institutions under the US *Foreign Account Tax Compliance Act* (**FATCA**).

General administration of FATCA obligations

As a general comment, AFMA notes the considerable uncertainty facing Australian based financial institutions, including those with parents offshore, in discharging FATCA obligations. While these have been ameliorated to a certain extent through the signing of the Intergovernmental Agreement with the United States (**IGA**), there remains a number of issues upon which guidance from either Treasury or the ATO will be required.

We note the approach adopted to FATCA implementation by Her Majesty's Revenue and Customs, that is the publication of Guidance Notes and the formation of industry/government working groups to ensure consistent interpretations and

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compliance methodologies across financial institutions. AFMA recommends that a similar approach be adopted with respect to the implementation of the Australian IGA and is willing to be a part of any industry working group that may be established. It is vital that the representation of any working groups encompass the population of institutions affected by FATCA to ensure that FATCA implementation is competitively neutral.

In particular, it is unclear to industry as to what is required to obtain self-certification from customers as to their tax residence, particularly where the institution does not wish to use the W-8 forms. There is, at present, a lack of clarity as to what would meet the requirements of a "similar agreed form" and given that such certifications are pivotal to the discharging of FATCA obligations by financial institutions, clarity is needed in the short term.

Flexibility to apply the FATCA Regulations

The existence of the IGA, in general, reduces the operational burden associated with the implementation of FATCA for financial institution vis-à-vis the requirements in the FATCA Regulations (**the Regulations**). This is the case in respect of the due diligence requirements and also through carving out certain entities/accounts from the FATCA net. However, as noted in Paragraph 1.29 of the draft accompanying Explanatory Memorandum, financial institutions have the options of applying the provisions of the Regulations in lieu of the IGA and remaining FATCA compliant.

From a drafting perspective, the Exposure Draft merely refers to compliance with the obligations under the IGA. For example, proposed Section 396-20 refers to the "due diligence procedures required under the FATCA Agreement." AFMA submits that the drafting needs to embed the flexibility associated with financial institutions being able to comply with the Regulations. This could be potentially achieved through the definition of "FATCA Agreement" or otherwise.

Elections under the IGA

As referred to above, there are a number of concessions and elections available in the IGA that can be utilised by financial institutions to discharge FATCA obligations. These include:

- The ability not to report on certain pre-existing financial accounts, such as depository accounts held by individuals with a balance that does not exceed USD $50,000; and
- The ability to rely on due diligence undertaken by third parties on behalf of the financial institutions;

Such elections are not referred to in the Exposure Draft. AFMA has taken the view that the references in the Exposure Draft to "the FATCA Agreement" cover all elections that may be made pursuant to the IGA and consequently to the extent an election is allowable under the IGA then it is also permitted under the domestic law. To the extent that our view is correct, we would recommend explicit confirmation in the Explanatory Memorandum.

In addition, the Exposure Draft should confirm that Australian financial institutions are not obliged to apply the threshholds/elections if they so choose and can, if desired, report on all financial accounts. AFMA is aware that applying threshholds may be operationally more cumbersome for some institutions.

To the extent that an election is made by a financial institution under the IGA, AFMA's view is that such an election will be evidenced by the records held by the financial institution and there is no notification requirement. This should be confirmed in the Explanatory Memorandum.

Definition of "financial account"

Under the terms of the IGA, there is a somewhat expanded definition of a financial account which excludes from the "regularly traded" exemption an interest where the holder is registered directly on the books of the financial institution. AFMA understands that this primarily applies in the context of Exchange-Traded Funds and other listed funds. Acknowledging that this carve-out from the regularly traded exemption is somewhat specific to the Australian IGA, there is an extension in the IGA that allows for any such interests to give rise to a due diligence requirement from 1 January 2016 onwards.

AFMA has taken the view that the FATCA reporting requirements in respect of such holdings of financial accounts are *prima facie* the responsibility of the financial institution, and not any other entity that may have a relationship with the holder. Clarity on this issue is sought, either in the domestic law or otherwise. In particular, AFMA would object to any obligations being imposed on entities that are not the financial institution (or responsible for the financial institution) without appropriate consultation.

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AFMA acknowledges that many of the issues associated with the implementation of FATCA for Australian financial institutions (including those with foreign parents) relate more to the IGA and the guidance to be provided than the Exposure Draft and we look forward to engaging with the ATO and Treasury over the coming months to ensure that these issues are resolved efficiently and equitably. Please contact me on (02) 9776 7996 with any queries in the interim.

Yours sincerely,

Rob Colquhoun
Director, Policy