19 August 2015

General Manager
Small Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via Email: taxlawdesign@treasury.gov.au

Attention: Philip Akroyd/Melizza Chua

Dear Philip, Melizza

Third Party Reporting
Exposure Draft and Draft Explanatory Memorandum

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 make a submission on the Exposure Draft and accompanying draft Explanatory Memorandum in relation to the proposed Third Party Reporting regime. It is noted that we made a submission in relation to the Discussion Paper titled "Improving tax compliance – enhanced third party reporting, pre-filling and data matching" on 11 March 2014 and this submission should be read in light of the comments contained therein.

Our submission focusses on the proposed reporting regime in respect of shares and units in unit trusts.

Ambit of proposed reporting regime

Proposed Section 365-55 requires a "participant" in an "Australian financial market" to provide a report in respect of a transaction resulting in the change to the type, name, number or value of "reportable securities." We set out below our comments in relation to this requirement.

Australian Financial Markets Association
ABN 69 793 968 987
Level 3, Plaza Building, 95 Pitt Street GPO Box 3655 Sydney NSW 2001
Tel: +612 9776 7955 Fax: +61 2 9776 4488
Email: info@afma.com.au Web: www.afma.com.au

Requirement for participants to report

Through our engagement with the ATO and Treasury with respect to the proposed third party reporting regime, it has become apparent that the bulk of the transaction information with respect to changes to the type, name, number or value of securities would be sourced from the ASIC Market Analysis and Intelligence (MAI) System. Accordingly, as set out in the ATO Discussion Guide, the only information required to be provided by participants/brokers is identity information in respect of the client, namely name, address, date of birth, Origin of Order (OOO) and HIN. Accordingly, as noted in the draft Explanatory Memorandum, "financial markets and market participants will not have to report the same information to both ASIC and the Commissioner."

We are concerned by a statutory construction whereby the legislation proscribes certain information being compulsorily provided by participants, when in essence different information is in fact to be provided. Further, the exemptions set out in proposed Section 396-65 do not appear to adequately address the discrepancy between what is required by the legislation and what is actually to be reported. In respect of either exemptions for particular entities or general exemptions, the Commissioner is able to either determine that entities are not required to give reports, or are not required to do so for specified transactions. *Prima facie*, the Commissioner does not have the power to vary the information to be provided, and indeed compel participants to provide a report which is not transaction based but provides client information.

We submit that Item 5 in the table in proposed Section 396-55 be amended to reflect the actual information to be provided by participants.

Further, we note the Discussion Guide suggests that the participant provide both client information (name, address, date of birth, OOO) and also the client HIN. We would expect that these should be alternatives, i.e. given the HIN has all underlying information captured then it should be allowed to be provide in lieu of the client information.

Reportable securities

The information that is to be provided by the ASIC MAI system (in respect of transaction data) and by participants (in respect of customer data) is in respect of "reportable securities" as defined in Section 92 of the *Corporations Act.* This definition comprises:

- Shares;
- Debentures; and
- Interests/units in managed investment schemes.

It would appear that the scope of information is broader than shares/units and includes debt interests issued by a company as well. Clarity as to the scope of the measure is therefore sought.

On a financial market

Items 4 and 5 of the proposed legislation require ASIC and (as noted above) participants to report transaction information in respect of a "transaction about which data has been delivered to ASIC under the market integrity rules" (Item 4) or "made in the ordinary course of trading on an Australian financial market" (Item 5). Further, to the extent that

a transaction occurs in respect of a reportable security that is not in the ordinary course of trading on a financial market, the responsibility for providing the transaction information falls to the listed entity.

There is a further sub-set of transactions that need to be considered, being transactions that are not effected in the ordinary course of trading on a financial market but are reported to ASIC under the market integrity rules. Transactions may occur on an ASIC-registered crossing system, also known as a dark-pool, being a trading venue that, pursuant to the ASIC Regulatory Guide 223, is an "automated service provided by a market participant to its clients that matches or executes client orders with orders of:

(a) The market participant;

(b) Other clients of the market participant; or

(c) Any other person whose orders access the automated service;

otherwise than on an order book of a licenced market."

In effect, this means that where the participant is a member of the crossing system, the participant may be able to match order from clients or other members without going through the "approved stock exchange"/holder of an Australian market licence. In doing so, the participant will need to adhere to the "best execution" principle for the client, meaning broadly that if the price available in the crossing system is better than that which could be obtained on a financial market, the participant can cause the transaction to be effected on the crossing system.

Any transactions conducted through a crossing system must be reported to a financial market on which the stock is able to be traded and from there to ASIC under the market integrity rules.

Consequently, the legislation should specify that it is ASIC, and not the company nor the participant, that has the obligation to provide transaction information in respect of these transactions.

Retail transactions

While not apparent in either the Exposure Draft or the draft Explanatory Memorandum, AFMA understands from consultation with Treasury and the ATO that the proposed reporting regime will apply only in respect of transactions conducted by retail customers. This is an important distinction as participants will flag the status of their customer base at the on-boarding stage and determine both whether they have obtained the necessary information and also that such clients will be the subject of reporting to the ATO.

To that end, it is important that the definition of "retail" for the purpose of the third party reporting requirements mirrors that in the *Corporations Act.* Section 761G of the *Corporations Act* provides that generally, a client will be a "retail client" with respect to the provision of a financial product unless (based on the current regulations):

- The price of the financial product being offered is in excess of $500,000; or
- The financial product is to be used in a business that is not a small business; or
- The client has net assets of at least $2.5 million; or

- The client has gross income for each of the last two years of at least $250,000, based on an accountant's certificate.

It should be made clear in the legislation that the ambit of the proposed reporting measures, with respect to shares and units, is only in relation to retail clients, as defined under Section 761G of the *Corporations Act.*

Further, clarity should be provided that the participant has no obligation to "look-through" fiscally transparent entities to determine whether the underlying clients are themselves retail. For example, where the participant's client is a managed investment scheme which is treated as wholesale, our expectation is that the participant will not need to look through the scheme to ascertain whether the underlying investors are wholesale or retail. This will be consistent with the AML/CTF regime in Australia.

Instalment warrants and deferred purchase agreements

One area where the application of the proposed measures is unclear is in relation to instalment warrants. As noted in the Explanatory Memorandum to the *Tax and Superannuation Laws Amendment (2015 Measures No. 2) Bill* 2015, an instalment warrant is a:

> "derivative based investment product that involves an investor borrowing against an asset (such as a share or a unit in a unit trust) and repaying that loan in instalments over the life of the warrant. The asset is held on trust to secure the repayment of the loan, with the benefits of ownership of the asset (such as dividends and franking credits) flowing through to the investor. After the final payment is made, the investor obtains legal ownership of the asset."

The instalment warrant itself may be listed and capable of being traded in the ordinary course of trading on an approved market; however based on our understanding as to the ambit of the proposed regime, given that such products are derivatives, then the transactions in respect of the warrants will not be the subject of reporting.

However, given the asset is held in trust, and generally will be a listed share or unit, then the fact that there has been a change in the beneficial ownership of the underlying security through a transfer of the instalment warrant would suggest that the trustee is obliged to report the transaction. Hence, while the transfer of the instalment warrant is out of scope, the transfer of beneficial title to the underlying security, without a change of legal title, means that it may be within scope.

This may be contrasted with deferred purchase agreements, that may also be listed and capable of being traded on an approved market. Deferred purchase agreements allow the holder to receive a basket of securities (which generally will be listed) on expiry of the agreement, with the number/value of the securities delivered dependent on the performance of another underlying. Unlike instalment warrants, deferred purchase agreements do not confer beneficial title to the underlying securities until delivery, and there is no bifurcation of legal and beneficial title under a trustee arrangement. It would appear that deferred purchase agreements, and transactions in relation to them, are out of scope.

Commencement

It is noted that the ATO has issued electronic specifications for transactions made through payment systems and also for transfer of reportable securities, including units in unit trusts, that set out technical systems requirements in respect of collection and reporting. As Treasury is aware, changes to IT systems require a significant lead time of approximately 18 months, and hence given our expectation that the Bill will only be passed towards the end of 2015 (at the earliest), the commencement date of 1 July 2016 appears ambitious. This is particularly the case given the ATO specifications cannot be finalised until the Bill is passed.

There are also other significant IT-related events occurring in the next 12 months that directly impact market participants and will constrain their ability to undertake anything other than critical IT builds. These include:

(i) The transition to T+2 settlement of cash equities products on 7 March 2016; and

(ii) The upgrade (replacement) of the existing ASX trading platforms, currently scheduled for April and October 2016.

Accordingly, we would recommend a deferral of commencement date that enables for the required technical systems amendments to be undertaken prior to the commencement of the reporting obligation. This would be at least 18 months after the issuance of final electronic specifications.

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We appreciate the opportunity to provide a submission on the Exposure Draft. Please contact me with any queries.

Yours sincerely,

Rob Colquhoun
Director, Policy