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EXPLANATORY STATEMENT

STATUTORY RULES 2010 No.

Issued by authority of the Assistant Treasurer

Tax Agent Services Act 2009

Tax Agent Services Amendment Regulations 2010

Section 70-55 of the *Tax Agent Services Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Tax Agent Services Regulations 2009* were registered on 13 November 2009. Amongst other things, these Regulations prescribed the registration requirements under the Act, the criteria for recognition as a tax agent or BAS agent association and the fees for registration.

The *Tax Agent Services Amendment Regulations 2010*

These Amendments propose a number of changes to the existing Regulations. In particular they:

- exempt certain services from the definition of a ‘tax agent service’ and ‘BAS service’, taking them outside the ambit of the regime;
- defer the application of the tax agent services regime to those providing financial product advice in certain circumstances; and
- make a minor technical correction.

Further details of the Regulations are set out in the Attachment.

These Amendment Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

These Amendment Regulations will commence on the day after they are registered on the Federal Register of Legislative Instruments.

Details of the Tax Agent Services Amendment Regulations 2010

Regulation 1 — Name of Regulations

This Regulation provides that the title of the Regulations is the *Tax Agent Services Amendment Regulations 2010*.

Regulation 2 — Commencement

Regulation 2 notes that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

Regulation 3 — Amendment of *Tax Agent Services Regulations 2009*

Regulation 3 provides that these Regulations amend the existing *Tax Agent Services Regulations 2009* which were made on 12 November 2009 and registered the following day.

Schedule 1 – Amendments (Item 1)

Regulation 3 - Definitions

This amendment notes that words and expressions used in the Regulations have the same meaning as they have in the *Income Tax Assessment Act 1997*.

Schedule 1 – Amendments items 2 and 3

Regulation 6, 13 and 14 – services that are not considered to be tax agent services

Under these amendments, Regulation 6 is moved and therefore becomes Regulation 13. This is a technical amendment to ensure that the sequence of the Regulations reflects the order of the Act.

A tax agent service is defined in section 90-5 of the Act. Subsection 90-5(2) allows services to be excluded from this definition through Regulations.

These amendments expand the list of services that are considered not to be a tax agent service and are therefore not subject to regulation under the Act. In some circumstances, this is intended to provide long-term certainty to particular sectors where the application of the tax agent services regime would be inappropriate. In other circumstances, it provides short-term certainty to particular sectors while consideration is given to whether the application of the tax agent services regime is appropriate.

Notably, because a BAS service is simply a subset of a tax agent service, a service that is excluded from the definition of tax agent service will also cease to be a BAS service.

Services provided between related entities

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Under these amendments, a service provided by an entity to a related entity will not be a tax agent service. This recognises that it would not be appropriate for the registration requirements to be applied where services are, effectively, internal and provided between closely related parties with common ownership elements.

A ‘related entity’ is defined by these amendments, and includes an associated entity, as defined in section 50AAA of the *Corporations Act 2001* (Corporations Act). This term encompasses concepts of related bodies corporate (defined in section 50 of the Corporations Act) and entities controlling other entities (the test for control is outlined in section 50AA of the Corporations Act).

Notably, an exclusion based on the concept of *associated entity* will ensure that services that are often provided between certain closely related entities that are effectively of an internal nature, will not be captured by the tax agent services regime.

For instance, the tax functions for a corporate group will often be allocated to a team within one entity of that corporate group. They will be responsible for managing the tax obligations for the entire group. While a ‘fee’ may be paid for these services, it acts as a means of allocating costs amongst the group (in contrast to a payment for an arms length transaction). The use of the term associated entity will ensure that services provided both within wholly owned groups (such as groups that are consolidated for income tax purposes) and other groups of related bodies corporate will fall outside the scope of the tax agent services regime. There is no requirement for these groups to be listed.

A ‘related entity’ also includes a company under common ownership. Section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) indicates that two companies are under ‘common ownership’ where, amongst other things, the ultimate owners of the companies (that is, traced through any interposing companies and trusts) are the same individuals whose ownership rights are held in the same proportion. While such companies may also be ‘associated entities’ this would not always be the case.

Finally, a ‘related entity’ extends to a stapled entity or an associated entity of that stapled entity. Section 124-1045 of the ITAA 1997 provides that an entity is a stapled entity in relation to stapled securities if ownership interests in the entity form part of the stapled securities. Ordinarily, the stapled entities would be a company and a unit trust, with a share in the company and a unit in the unit trust constituting the stapled security. These entities are clearly operating a common economic enterprise and services provided between these entities can also be regarded as an internal matter. The definition also extends to associated entities of a stapled entity – this recognises that the two stapled entities are often part of a much larger stapled group and the stapled entities may have subsidiary companies or trusts.

Services provided by the trustee of a trust to the trust

Under Australia’s taxation laws, trustees must lodge an annual return for the trust and otherwise manage the tax affairs of the trust. While many trusts are family trusts and it is unlikely that any fee would be payable to the trustee (usually a member of the family) to undertake these duties, trust structures can be and are used as larger investment vehicles where the trustee, often a corporate trustee, is paid a management

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fee for its services. Part of this fee could be attributable to the services performed by the trustee in ensuring that the trust meets its tax obligations.

Under these amendments a trustee, in discharging its obligations in managing the trust's tax affairs, need not be registered as a tax agent.

In some instances where the trustee is part of a broader group of entities, the tax services provided to the trust may be provided by a related entity of the trustee. These amendments also ensure that services provided in those circumstances are not tax agent services.

Services provided by the manager or operator of a registered scheme

A managed investment scheme provides a vehicle by which funds are pooled for investment. These can take the form of cash managed trusts, property trusts and many agricultural schemes. Certain managed investment schemes are required to be registered under the Corporations Act and are operated by a responsible entity. Unregistered schemes are operated by entities that effectively take on the role of a responsible entity, a role that combines the duties of a manager and trustee of the scheme.

As with the trustee of a trust, part of the responsibilities of an operator or a managed investment scheme is to manage the tax affairs of the scheme. This would include completing and lodging annual tax returns and Business Activity Statement (BAS) returns and otherwise ensuring that the scheme complies with its tax obligations. Again, these amendments ensure that in fulfilling its obligations in relation to the scheme, a responsible entity need not be a registered tax agent (or BAS agent).

In some instances where the responsible entity is part of a broader group of entities, the tax services provided to the scheme may be provided by a related entity of the responsible entity. These amendments also ensure that services provided in those circumstances are not tax agent services.

Services provided between partners in a partnership

The income tax law regards entities that carry on business in common with a view to profit to be partners in a partnership (defined in section 995-1 ITAA 1997). In most instances, one party in the partnership is often best placed to manage the tax affairs of the partnership (which includes lodging an annual partnership return). These amendments make it clear that in performing these functions a partner (or a related entity of the partner) is not required to register. However, if a partner provided taxation advice to another partner in matters unrelated to the partnership and charged a fee for doing so, the tax agent services regime would apply and the entity would be required to register.

Services provided by a partner in a joint venture

While a partnership would cover most instances where entities have agreed to undertake a common economic enterprise, it would not cover all such instances. For instance two parties may decide to undertake a common economic enterprise through a separate entity or in circumstances where the output of a joint venture (rather than

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the profits) is shared. This arrangement is outside of a formal ‘partnership’ arrangement under the taxation law. In these situations, it may be agreed that one of the parties to the joint venture undertakes the necessary tax compliance work for the joint venture entity. These amendments ensure that such services do not constitute tax agent services.

Services provided by licensed custodians

The primary role of asset custodians is to provide for the safe-keeping and administration of assets on behalf of clients. As a part of this, custodians will act on client instructions, settle transactions authorised by clients and collect and distribute income from the assets that they administer.

As a closely connected and integral part of undertaking these activities, custodians may provide a number of tax-related services. For example, master custodians (who provide services to Australian corporate and government institutions), may provide:

- reports to clients containing information for incorporation into their client’s tax return;
- advice to unit holders of a trust regarding taxation components for distributions; and
- BAS preparation services (in relation to the asset being administered) for review by clients.

Sub-custodians (who generally provide services to non-resident institutions) may also be involved in tax related activities, for instance in withholding amounts from certain payments to clients under the Pay-As-You-Go (withholding) system and in seeking refunds of overpaid amounts.

While not all of these services would constitute a tax agent service within the meaning of the Act (this must be determined on the basis of a consideration of the facts in each case), these amendments remove any uncertainty. In particular, these amendments ensure that custodial and depository services, when provided by an entity licensed to provide those services under the Corporations Act (or their authorised representative), are not tax agent services.

The definition of a custodial or depository service, as defined section 766E of the *Financial Services Reform Act 2001*, makes it clear that such a service is not intended to constitute only the passive holding of assets. Indeed, the Explanatory Memorandum to that Bill (at paragraph 6.104) makes it clear that a custodial or depository service includes:

- paying tax or other costs associated with the assets; and
- performing any other function necessary or incidental to the safeguarding or administration of the assets (including record keeping and reporting functions).

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Deferral of the application of the tax agent services regime to financial planners in certain circumstances

Financial planners assist clients to develop and implement a financial strategy to meet their long term financial objectives. In doing so, they provide financial product advice and must accordingly hold an Australian Financial Services (AFS) license under the Corporations Act.

In the course of providing financial product advice, financial planners may consider the client's tax situation as well as the tax consequences of financial products. The tax services provided by financial planners may include, for example, providing advice on:

- the taxation benefits of salary sacrificing into superannuation in the context of a broader strategy to increase retirement savings;
- the relative merits of taking out life insurance policies both within and outside superannuation; and
- small business capital gains tax concessions as a means of maximising contributions into superannuation.

To provide immediate certainty to the financial planning industry and to enable broader consultation with the tax community, these amendments provide a 12 month exemption (ceasing on 23 April 2011) from the tax agent services regime for services provided by financial planners in certain circumstances.

Under the amendments, any service that constitutes financial product advice (see section 761A and 766A of the Corporations Act) is considered not to be a tax agent service if:

- if it is provided by an entity licensed to provide that service under the Corporations Act (that is, it is provided by an entity with an AFS license); and
- it is accompanied by a written and prominent statement indicating that the recipient of those services should consider taking advice from a registered tax agent before relying on advice that may impact on their tax obligations, liabilities or entitlements.

The exemption does not include a service that does not continue financial product advice (for instance, the completion of a tax return or representing a client in their dealings with the Australian Taxation Office).

The requirement that the written statement be prominent is intended to safeguard against entities seeking to comply with their obligations by including a disclaimer in a form (location or size) where it would not be reasonable to expect a client to read the statement.

Regulation 14 – services that are not BAS services

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This amendment exempts, from the meaning of a BAS service under section 90-10 of the Act, a service that is provided by a member of a GST group to another member of the GST group. This exemption recognises that the *A New Tax System (Goods and Services Tax) Act 1999* allows certain groups of entities to be treated as a single entity for the purposes of GST. To the extent that the group has elected to be treated as such, it is appropriate that the tax agent services regime not apply to BAS services provided within this group.

In most instances, entities within the same GST group will be related entities (as defined above). Accordingly, services provided between these entities will already be exempt from the tax agent services regime by virtue of the 'related entity' exemption as outlined above.

Schedule 1 – Amendments items 4 and 5

Item 4 makes a minor technical correction to Part 2 of Schedule 1 of the Regulations which sets out the criteria that an organisation must satisfy to become a recognised tax agent association. As the Explanatory Statement to the *Tax Agent Services Regulations 2009* notes, item 208 of that Part was intended to enable organisations to be able to be recognised, notwithstanding that they may not strictly meet similar criteria provided for in the Part, where they are subject to a law of a state or territory that requires arrangements to be in place in relation to professional and ethical standards for members, dealing with complaints and the publishing annual statistics.

Item 5 makes a minor technical correction to the Regulations.