

1 November 2010

Hon. Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
CC:PA:LPD:PR (NOT-121556-10)  
Room 5203  
PO Box 7604, Ben Franklin Station  
Washington DC 20044  
UNITED STATES OF AMERICA

Dear Mr Shulman

**COMMENTS BY THE FINANCIAL SERVICES COUNCIL OF AUSTRALIA ON THE FOREIGN ACCOUNT TAX COMPLIANCE ACT (“FATCA”) AND NOTICE 2010-60 (“THE NOTICE”)**

The FSC welcomes the opportunity to comment on the FATCA provisions and the Notice issued pursuant thereto.

The FSC represents the retail and wholesale funds management, superannuation and life insurance industries within Australia. The FSC has 135 members who collectively are responsible for investing more than AUD 1 trillion on behalf of the Australian public. The Australian funds management industry is the fifth largest in the world.

We summarise below our members’ proposals on how FATCA could apply within the existing Australian legislative and regulatory framework in a manner that our members believe supports the policy objective of the law. A more detailed explanation of our proposals is contained in Addendum A.

**Executive summary**

1. Managed Investment Trusts (“MITs”) that are low risk based on investor type or profile should be excluded from the operation of FATCA on the basis that the risk of tax avoidance/evasion is extremely low, if present at all.
2. Widely held MITs should be deemed to comply with the provisions of FATCA on the basis that:
  - a. Australian tax law limits the percentage of foreign ownership of MITs;
  - b. Our members estimate that foreign investors (including interests held by US account holders) equal approximately 3% of all MIT members;
  - c. It is likely to be practically and legally impossible to obtain the information required under FATCA for existing US account holders; and
  - d. Significant costs will have to be incurred in making IT changes, which, given the small percentage of overall foreign investors, is unlikely to produce any revenue benefit for the US Treasury.
3. MITs that do not have a low risk profile or are not widely held should be subject to FATCA on a prospective basis (i.e. after 1 January 2013) because it is likely to be practically and legally impossible to obtain the information required under FATCA for existing US account holders.

4. Apart from pure risk policies issued by life companies, superannuation policies issued by the superannuation class of life companies should be exempted from reporting requirements under FATCA. Annuity policies and investment bond policies should be subject to FATCA on a prospective basis (i.e. after 1 January 2013) because it is likely to be practically and legally impossible to obtain the information required under FATCA for existing US account holders.

The FSC would also welcome any opportunity to meet with representatives of the IRS to discuss and answer any questions it may have in respect of our proposals.

Yours sincerely

**MARTIN CODINA**  
**Director of Policy**

## **ADDENDUM A**

### **The concept of a MIT**

Throughout this proposal reference is made to a MIT, which in the context of FATCA would qualify as a Foreign Financial Institution.

By far the greatest proportion of collective investments in Australia is made in and/or through MITs. The FSC estimates that our members operate more than 90% of all MITs by number and value that are offered in the Australian market. All MITs are subject to the provisions of the Corporations Act 2001 and most are also registered with the Australian Securities and Investment Commission ("ASIC"), which is Australia's corporate, market and financial services regulator. The regulatory and reporting frameworks applicable to MITs (both from a corporate and tax perspective) are extensive and robust.

A MIT is a term used for Australian tax law purposes (mainly for withholding tax purposes and to confirm the tax character of income, gains and losses made in respect of underlying assets) and refers to a trust that has the following characteristics:

- It must either have an Australian trustee or be managed and controlled from Australia;
- It must not be conducting a trading activity;
- It must carry out its investment management activities in Australia; and
- It must comply with requirements of the Corporations Act 2001 applicable to managed investment schemes (MISs).

A MIT must fully distribute all of its annual income to unit holders in accordance with Australian tax law.

In general, a MIS is a scheme in terms of which:

- people (i.e. members) contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for members
- the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)

## **PROPOSAL 1**

### **MITs that are low risk based on investor type or profile should be excluded from reporting requirements under FATCA**

We agree with our European counterparts, the European Fund and Asset Management Association (“EFAMA”) that MITs with a low risk investor base should be excluded from the provisions of FATCA on the basis that the risk of tax avoidance/evasion is extremely low, if present at all.

In our view, a MIT will have a low risk investor base if it falls within one of the categories set out in Addendum B.

We submit that the founding documentation of each MIT (i.e. trust deed) including supporting documentation such as Product Disclosure Statements and Information Memorandums issued under local law to investors should suffice to prove whether the relevant MIT’s investor profile is in fact low risk. These documents can be provided to the IRS, if required, to prove whether a relevant MIT has a low risk investor profile.

## **PROPOSAL 2**

### **Widely held MITs including the operators of Investor Directed Portfolio Platforms through which investors invest should be deemed to comply with the provisions of FATCA**

The FSC submits that MITs that are considered to be widely held for Australian tax purposes should be deemed to comply with the provisions of FATCA.

Generally, Australian tax law treats a registered MIT as widely held if:

- Units in the MIT are listed for quotation on the Australian stock exchange or the MIT has at least 50 members;
- 75% of the participation interest in the MIT is not controlled by 20 or fewer persons; and
- No foreign resident individual has an interest of 10% or more in the MIT.

Generally, Australian tax law treats an unregistered MIT as widely held if:

- The MIT has at least 30 members;
- 75% of the participation interest in the MIT is not controlled by 12 or fewer persons; and
- No foreign resident individual has an interest of 10% or more in the MIT.

Our proposal to exempt widely held registered or unregistered MITs is based on the following:

- As also mentioned in EFAMA’s submission, the Technical Explanation of the FATCA provisions prepared by the Staff of the Joint Committee on Taxation (JCX-4-10, February 23, 2010) (“the Technical Explanation”) anticipates that the Secretary may provide rules that would permit certain classes of widely held collective investment vehicles (of which MITs is an example) to be deemed to meet the provisions of FATCA.
- Widely held MITs represent a limited risk of abuse in that foreign resident individuals do not have the ability to control the underlying assets of the MIT. Therefore from a cost benefit perspective, a disproportionate amount of money would have to be spent to identify US account holders compared to any additional amount of revenue that may be obtained by the US Treasury.

- It is noted that within the Australian context, foreign residents comprise a very small percentage of the total investor profile of widely held MITs. A survey amongst our members indicates that foreign residents, of which US account holders would be a subset, accounts for approximately 3% of total MIT members. The majority of investors are Australian residents, whether individuals or institutional investors and complying superannuation funds. This means that the significant costs that will have to be incurred to confirm, verify and transmit information on an annual basis in respect of a very small percentage of foreign investors will effectively be borne by Australian members, thus (unfairly) reducing their investment return by increasing the administration costs associated with managing the affairs of the trust.
- Of the even smaller percentage of non-resident individuals that are US account holders that invest in MITs, many have dual Australian permanent residency and US citizenship and live and work in Australia and also file tax returns in Australia. It is likely that because of the provisions of the Double Tax Agreement between Australia and the US, these US account holders would not have any further tax liability in the US in respect of distributions they may receive from a MIT on the basis that they will likely be Treaty resident in Australia.
- In terms of standard account opening procedures in Australia, all Australian tax residents (which would include non-resident US account holders that live and work in Australia on a temporary basis) have a choice as to whether they wish to supply their tax file number ("TFN") when opening an account with a financial institution or when making an investment in a MIT. If no TFN is supplied (either because one has not yet been obtained, or the taxpayer refused to supply it), withholding tax at the rate of 46.5% (which is the highest individual marginal tax rate) is levied on a gross basis against all amounts distributed or payable to such person by the MIT or financial institution. If a TFN is supplied, no tax is withheld by the financial institution or MIT, but through information reporting procedures implemented by the Australian Tax Office (referred to as the Annual Investment Income Report, or AIIR), all distribution information and certain personal details in respect of all account holders and MIT members are transmitted to the ATO on an annual basis to enable the ATO to verify that information supplied in an investor's or account holder's tax return match income they may have received throughout the year. Given the fact that personal income tax rates in Australia are much higher than in the US, it would be inconceivable for US account holders that fit this profile wanting to avoid the payment of US tax – as explained, because of Australia's high tax rates, it would be better for them to pay tax in the US as opposed to Australia.
- By far the majority of investors investing into MITs do so through various platforms referred to as Investor Directed Portfolio Services, or IDPS platforms for short. An IDPS is a service for acquiring and holding investments that generally involves custody arrangements and consolidated reporting to investors. The services are typically marketed as a master fund or wrap account. The Technical Explanation also anticipates that entities that provide administration, distribution and payment services on behalf of collective investment vehicles (such as MITs) may be deemed to meet the requirements of FATCA to the extent necessary to implement the rules. We therefore submit that IDPS operators that provide administrative and account keeping services to investors that invest through the IDPS into widely held MITs should, in line with the proposed exemption for widely held MITs, be similarly exempted.
- It is highly questionable whether MITs will be able to verify the details of existing US account holders as required by FATCA if they should not be exempted. This is because MITs would under Australian law have no effective way of legally compelling US account holders to supply the details required by FATCA. We are mindful that the FATCA Act requires foreign financial institutions to close the accounts of "recalcitrant account holders" under these circumstances, but preliminary advice obtained suggests that, in the absence of fraud or other suspected criminal activities, there may be no legal basis under Australian law to do so.

If our proposal to exempt widely held MITs should not be accepted, we propose, because of the reasons mentioned under Proposal 3 below, that FATCA should apply on a prospective basis only (ie. after 1 January 2013) to US account holders.

### **PROPOSAL 3**

#### **Account verification and reporting procedures for MITs that do not have low risk investors or are not widely held**

In line with existing Australian “Know Your Client” procedures and compliance with Australian anti money laundering legislation, MITs are required to verify the identity of all investors (including non-residents) *at the time an investor first invests* into a MIT. Although current KYC procedures do not go as far as obliging MITs to obtain the TIN of US account holders (as what would be required under FATCA), the FSC would welcome working collaboratively with the IRS at expanding existing KYC procedures in respect of accounts opened *after 1 January 2013* such that our members are in a position to provide the IRS with the information it requires.

We propose adopting the suggested expanded KYC procedures only in respect of accounts opened after 1 January 2013 on the basis that, as mentioned above, it will according to our members prove practically and legally impossible to oblige existing account holders to provide and confirm the information required under FATCA. Although our members can write to existing account holders to supply the additional information required under FATCA, our members would have no legal means in terms of prevailing Australian law to enforce compliance with such requests or to verify the accuracy of replies received. In the absence of a specific requirement under Australian domestic law to do so, it is also unlikely that our members would be able to lawfully close the accounts of those investors that fail to respond to requests for information. We also note that many investors that make use of the services of financial advisors provide the postal details of their financial advisors for record purposes, reinforcing the practical difficulty in verifying and obtaining the kind of information required under FATCA in respect of existing account holders.

If the information reporting requirements under FATCA were to apply to accounts opened after 1 January 2013 only, our members would be in a position to insist that US account holders investing on or after this date must produce their original US passport and IRS confirmation of their TIN before they would be allowed to invest in or through any MIT that is either not low risk or not widely held. This would be the case irrespective of an investors makes use of the services of a financial advisor. Our members should then be in a position to supply the following information to the IRS on an annual basis, much of which is already supplied on an annual basis to the ATO through the AIRR process referred to above:

- Passport number;
- Name and address of account holder on record;
- TIN;
- Account number;
- Account balance comprising the difference between opening value and closing value as at a particular date; and
- Statement of the kind and amount of distributions made during a particular period.

The suggested approach will also allow our members that may choose to do so, to adjust the administrative cost associated with managing the accounts of US account holders accordingly so that any increased cost does not adversely impact non-US account holders.

### **PROPOSAL 4**

#### **Proposal to exempt certain policies issued by life companies**

In terms of the Notice, life company policies that relate solely to pure risk business (i.e. term life policies without an investment component) will not be subject to reporting under FATCA.

The Notice does however suggest that "...other contracts...or annuity contracts [that] combine insurance protection with an investment component...may present the risk of U.S. tax evasion that chapter 4 is designed to prevent."

In respect of these "other contracts or annuity contracts" we note and propose the following:

- Apart from pure risk term life policies, life companies in Australia typically offer superannuation policies, annuity policies and investment bond policies, all three of which have an underlying investment component.
- Superannuation policies (issued by the superannuation class of a life company) would in practice be issued under two circumstances that may be relevant for FATCA. It is noted that this point deals with the situation of an individual investing in a superannuation policy out of his / her own volition, as opposed to the situation where an employer is legally compelled to make superannuation contributions on behalf of an employee in terms of Australian law. We understand that the application of FATCA in the latter case will be dealt with in a separate submission by The Association of Superannuation Funds of Australia. The circumstances are:
  - The first involves the case of an American individual account holder that holds dual Australian permanent residency and US citizenship and that permanently resides in Australia.
  - The second involves the case of an American individual account holder that holds US citizenship and that temporarily resides in Australia and eventually returns to the US.
- We propose that superannuation policies issued under both scenarios referred to in the previous bullet point should be exempted from the provisions of FATCA for the following reasons:
  - In both cases, contributions made must by law remain in the fund until the individual reaches pension age (currently 60 years). All contributions made also suffer tax at 15% in the fund.
  - In the first case, once the individual reaches pension age, Australia will in terms of the current provisions of the Double Taxation Agreement with the US retain taxing rights in respect of pension benefits the individual may receive in terms of the tie breaker provisions of the Double Tax Agreement. There is therefore no avoidance of US tax in this case.
  - In the second case, non-residents that depart Australia after having made superannuation contributions (through the premiums they have paid in respect of a superannuation policy they may have taken out) suffer a further 35% tax on their superannuation benefit, thus bringing their effective tax rate to 50%. Because of the high rate of tax paid by non-residents when departing Australia, it is our members' experience that in practice non-residents do not invest in these kinds of policies.
- FATCA could in principle apply to annuity policies and investment bond policies, but because of the practical and legal difficulties in obtaining information from existing account holders (as elaborated under Proposal 2 and 3 above), it is proposed that FATCA should apply to these types of policies on a prospective basis only, i.e. after 1 January 2013.

## ADDENDUM B

A MIT would meet the condition of prohibiting investment by specified US persons if the MIT prohibits investment by a US person other than either a person described under Internal Revenue Code section 1473(3) (A) through (J) or any other US person that is excluded from this definition under a different provision of the Code or under any form of tax guidance.

The US persons described in subsections (A) through (J) of IRC section 1473(3) and therefore not required to be reported are the following:

- Any corporation the stock of which is regularly traded on an established securities market,
  - Any corporation which is a member of the same affiliated group (as defined in IRC section 1472(e) (2) without regard to the last sentence thereof as a corporation the stock of which is regularly traded on an established securities market.
  - Any organisation exempt from taxation under IRC section 501(a) or an individual retirement plan.
  - The United States or any wholly owned agency or instrumentality thereof.
  - Any State, the District of Columbia, any possession of the United States, any political subdivision of any of the foregoing, or any wholly owned agency or instrumentality of any one or more of the foregoing.
  - Any bank (as defined in IRC section 581).
  - Any real estate investment trust (as defined in IRC section 856)
  - Any regulated investment company (as defined in IRC section 851)
  - Any common trust fund (as defined in IRC section 584(a))
  - Any trust which is exempt from tax under IRC section 664© or is described in IRC section 4947 (a) (1).
1. A foreign person is a low risk investor described in this paragraph if it is within any of the following categories:
- a) A pension or employee benefits plan or arrangement that is generally exempt from income taxation in the foreign country in which it is established.
  - b) A foreign government, any political subdivision of a foreign government or any wholly owned agency or instrumentality thereof.
  - c) A wholly owned and controlled entity of a foreign government
  - d) A foreign central bank of issue
  - e) Any international organisation or any wholly owned agency or instrumentality thereof.
  - f) An investment entity wholly owned and controlled by a foreign government.
  - g) An entity established in a foreign jurisdiction for a public purpose, eg., religious, scientific, literary, educational or charitable purpose, operated exclusively for that purpose and generally exempt from income taxation in the jurisdiction in which it is established, or
  - h) A non financial foreign entity (“NFFE”) to which the reporting requirements under section 1472(a) do not apply.

Under section 1472 (c) (1) and (2), the reporting requirements under section 1472(a) do not apply to the following categories of foreign entities:

Section 1472(c) (1):

- A. Any corporation the stock of which is regularly traded on an established securities market;
- B. Any corporation which is member of the same affiliated group (as defined in section 1471 (e)(2) without regard to the last sentence thereof as a corporation; described in subparagraph (A) above;
- C. Any entity which is organised under the laws of possession of the United States and which is wholly owned by one or more bona fide residents (as described in section 937 (a) of such possession;
- D. Any foreign government, any political subdivision of a foreign government , or any wholly owned agency or instrumentality of any one or more of the foregoing;
- E. Any international organisation or any wholly owned agency or instrumentality thereof;
- F. Any foreign central bank of issue; or

Section 1472(c) (2): Any other class of persons identified by the Secretary for purposes of this subsection as posing a low risk of tax evasion.

- i) Any NFFE that complies with the requirements under Chapter 4 of the Code.
- j) A pooled fund whose investors, directly and indirectly, are limited to persons in any combination of the above categories or whose investors are pooled funds whose investors directly and indirectly, are limited to persons in any combination of the above described categories.