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Exposure Draft (September 2015) Common Reporting Standard legislation

The Financial Services Council (FSC) has over 115 members representing Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The industry is responsible for investing more than $2.6 trillion on behalf of 11.5 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The Financial Services Council promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

We refer to the Exposure Draft legislation introducing the Common Reporting Standard (**CRS**), namely the *Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015: Common Reporting Standard* (**ED CRS Bill**) released 18 September 2015. We welcome the opportunity to make this submission.

This submission is in two parts. Firstly, we set out the CRS implementation principles (set out in our 18 July 2014 submission to the Treasury Discussion Paper *Common Reporting Standard for the automatic exchange of tax information* (June 2014)) which should be considered to ensure an orderly transition to CRS (and FATCA). Secondly, we set out our comments on the ED CRS Bill. Further consultation (and/or engagement with industry) by Treasury may be needed as industry transitions to CRS.

Yours sincerely

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Part 1: CRS Implementation Principles

FSC has previously submitted to Treasury in relation to the application of the Common Reporting Standard, including FSC's submission dated 18 July 2014 in response to the Treasury Discussion Paper *Common Reporting Standard for the automatic exchange of tax information* (June 2014). In our 18 July 2014 submission we noted various CRS implementation principles, in the table below, which should be considered in implementing CRS. The table is an extract from our July 2014 submission.

Principle No.	Over-arching principles relevant to a consideration of CRS
1.	We urge the Government to leverage the existing information it receives via the ATO, for example in tax returns and the AIIR and to look to build on, and leverage, that information to satisfy CRS.
2.	**Flexibility: Alternative methods of meeting CRS need to be available**. The methods available should be flexible to allow each institution to implement the most appropriate and cost effective manner of implementation of CRS given their circumstances (such as systems and procedures). Some institutions will wish to consider leveraging AIIR. Others may prefer to use other methods, including leveraging processes and mechanisms implemented for FATCA. CRS should be applied flexibly to accommodate the circumstances of each institution.
3.	**FATCA exclusions (in Annex II of the IGA) need to be carried across as CRS exclusions**.
4.	**Consistency between FATCA, CRS and AML (anti-money laundering requirements) is required**. In relation to consistency between FATCA and CRS, in particular consistency is required in relation to in-scope financial institutions and financial accounts.
5.	Curing indicia of residency – there will be difficulties (and waste) in approaching existing clients on tax residency.
6.	Listed Investment Entities/ETFs – our [*18 July 2014*] submission sets out some particular issues for CRS and Listed Investment Entities/ETFs.
7.	The CRS requirements should be principles based generally, not prescriptive as to the manner of meeting CRS.

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Principle No.	Over-arching principles relevant to a consideration of CRS
8.	Further consultation on the CRS Timetable may be required. As to whether a timeframe is achievable depends on the final detail of the CRS requirements and the extent to which any FATCA IGA (Annex II) exclusions are or are not replicated in CRS (see Principle 3 above). If some institutions can comply earlier than other institutions, the timetable should be reasonable and allow institutions (but not mandate) to opt in to CRS early. FSC can not be definitive as to whether a 2017 start date for CRS is achievable. Broadly it might be achievable for some institutions if CRS replicates FATCA including all FATCA exemptions and FATCA thresholds being carried across to CRS. However, there are likely to be some institutions for which 2017 is not achievable. (By way of example, because CRS applies to some financial institutions that were not in scope for FATCA, such organisations will need more time to implement CRS.)
9.	Government should consider impacts on a range of stakeholders such as financial planners (on collection requirements).
10.	CRS should provide a mechanism to exclude accounts/products in future (as new product types are launched, for example in response to legislative change).
11.	**It is critical that entities are able to rely on self-certification of tax residency**, provided they do not have reasonable grounds to suspect the self-certification is not reliable. That is, the onus should be on account holders to provide their tax residence to financial institutions rather than for financial institutions to undertake onerous procedures to determine tax residence of financial account holders. Each country's tax residency rules could be different. Anything other than self-certification is likely to be unachievable, costly, and not necessarily more determinative in relation to tax residency.
12.	AML simplified verification procedures should be carried across to a CRS environment.

FSC acknowledges that many (but not all) of the above CRS implementation principles have been accommodated in the ED CRS Bill and we thank the Government for adopting those principles accommodated in the ED CRS Bill.

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Part 2: Comments on ED CRS Bill

Topic	Exposure draft reference	submission
Listed investment entities cannot obtain self-certifications prior to account opening	Recommendation to be addressed	As Treasury is aware, issuers of investment products traded on a secondary market exchange, including among others, exchange traded funds (ETFs), listed investment entities (LIEs), real estate trusts (REITS) and infrastructure funds (collectively **Exchange Traded Products or ETPs**)) are not able to obtain self-certification from investors prior to their acquisition of the ETP, as the issuer in the case of ETPs has no involvement in the 'account opening' process by which these products are acquired and accounts opened. Treasury has engaged with industry in relation to possible feasible solutions to address this and that work is ongoing. However, in the meantime until a solution has been identified, we suggest that the legislation should permit listed investment entities and ETPs to obtain self-certification from investors after account opening, or these entities should be allowed an extension of the timeframes for the application of CRS (as they have been under FATCA) to allow for a solution to be implemented.
Categories of non-reporting financial institutions – investment managers	Item 12 subparagraph 396-115(1)	Investment Advisors and Investment Managers are listed as a category of "Non-Reporting Financial Institutions" for FATCA but not for CRS. The CRS Implementation Handbook suggests that under CRS, "Investment Managers and Investment Advisors that are not maintaining any financial accounts have no reporting responsibilities. Therefore, even without the exception, these entities would not have any reporting obligations if they are maintaining any Financial Accounts." However, it is not clear what reporting obligations an Investment Manager would have under CRS that they would not have under FATCA. It is therefore recommended that Investment Advisors and Investment Managers be included as a category of Non-Reporting Financial Institutions for CRS as for FATCA to clarify that no reporting is required.

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Topic	Exposure draft reference	submission
Categories of excluded accounts - Estates	Item 12 subparagraph 396-115(3)	An "Account Held By an Estate", (*an account maintained in Australia that is held solely by an estate if the documentation for such account includes a copy of the deceased's will or death certificate*) is an excluded account in Annex II of the FATCA IGA. We understand it is the intention in the CRS that these are also "excluded accounts" for CRS and therefore we recommend that this category be included in the categories of excluded accounts in this subparagraph. (This is unless of course the CRS exclusion of estates is already covered by virtue of Section VIII C 17 (d) of the CRS which includes as a CRS Excluded Account "*an account that is held solely by an estate if the documentation for such account includes a copy of the deceased's will or death certificate*.)
Elections by entities	Item 12 subparagraph 396-115(4)	We support the proposal to give Australian entities the ability to make any elections permitted by the CRS in determining its obligations as permitted by the CRS. In particular, we support the option to use of third party service providers, apply different due diligence procedures and thresholds, apply the residence test and apply the exclusion for low value preexisting entity accounts. The ability to make these elections will assist industry to implement compliance processes in a more cost effective way and means that Australian industry should not be disadvantaged as compared with other jurisdictions.
Application of the CRS – all jurisdictions to be treated as Reportable Jurisdictions	Item 12 subparagraph 396-120(3)	We support the inclusion of all jurisdictions as Reportable Jurisdictions as this will enable the Australian industry to develop systems to comply with CRS once rather than having to modify systems as each new jurisdiction is added. This should reduce the costs of financial institutions having to update documentation whenever new jurisdictions implement new requirements. Clause 1.40 of the EM provides that the Commissioner has the discretion to address transitional issues that affect the treatment of "look through" of Investment Entities by publishing a list of jurisdictions that can be treated as "participating". We note that clause 31 of the CRS Implementation Handbook suggests a number of ways that jurisdictions can address this issue. **In order to provide certainty around this complex implementation issue, we would urge the first option of clause 31 be made available, and that this be mandated in the CRS Bill/legislation and not be left to the discretion of the Commissioner**. The first option in clause 31 of the CRS Handbook provides:

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		"A jurisdiction could address this transitional implementation issue by treating all jurisdictions that have publicly and at government level committed to adopt the CRS by 2018 ("**Committed Jurisdictions**") as Participating Jurisdictions for a transition period." Additionally, we request the option in the final sentence of clause 31 of the CRS Implementation Handbook also be permitted within the CRS Bill. The final sentence of clause 31 of the CRS Implementation Handbook provides: "*To reduce burdens for Reporting Financial Institutions, a jurisdiction may also consider allowing their Reporting Financial Institutions to apply to such accounts the due diligence procedures for Preexisting Entity Accounts, even if such accounts were opened after 1 January 2016*." Specifically, we submit that Australia should publish and maintain a 'Committed Jurisdictions' list (as set out in cl.31 of the CRS Implementation Handbook) and that there should not be a requirement to determine the controlling persons of Investment Entities in 'Committed Jurisdictions'.
Dollar amounts – AUD or USD	Item 12 subparagraph 396-120(8)	We support giving Australian entities the choice to treat dollar amounts as Australian dollars or US dollars. This reduces the burden of applying exchange rates to determine thresholds in systems that generally use Australian dollars.
Penalties for false or misleading self-certification	Item 12 subparagraph 396-130	We query whether it will be an effective deterrent to impose penalties for customers as it could potentially discourage completion of self-certification documentation or from obtaining financial services that are in their best interests.

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Transitional provisions – 2017	Item 14	We strongly support a significant transitional period. Industry requires a considerable period of time, at least 24 months, between the final legislation and guidance being released and the commencement of obligations in order to budget for, and make changes to IT systems, implement new onboarding documentation, update documentation, implement compliance monitoring systems and train staff. We understand that other jurisdictions including New Zealand and Malaysia are deferring the commencement of these obligations and Australian industry should not be disadvantaged by not permitting a similar transition period.
Phasing in the requirement to report gross proceeds	Item 14	The CRS Implementation Handbook suggests that a jurisdiction may provide for the reporting of gross proceeds to begin in a later year (see item 3 on page 12 of the Handbook). We recommend that the Australian Government provide additional time for financial institutions to implement systems and procedures to capture gross proceeds as these processes have not yet commenced for FATCA and the rules regarding gross proceeds under FATCA are not yet settled.
Definition of Controlling Persons of Passive NFEs	Recommendation to be addressed	We strongly recommend that the definition of “Controlling Persons” for the CRS adopted by the Australian Government should be aligned with the definition of “beneficial owner” under Australian AML/CTF laws (AML/KYC Procedures as referred to in the CRS commentary).
Self-certification relating to Controlling Persons	Recommendation to be addressed	We suggest that the Australian Government should permit financial institutions to accept a self-certification in relation to an entity account with Controlling Persons that is signed or positively affirmed by the account holder and not require the financial institution to obtain a signature or confirmation from the Controlling Person (this is consistent with the CRS Implementation Handbook). It will be virtually impossible to obtain confirmation from the Controlling Person (who may be overseas) where the account is maintained for the account holder.
Timing of pre-existing account due diligence	Recommendation to be addressed	The CRS Commentary states that it expects there will be a general two year period for reviewing pre-existing Individual/Entity Accounts and identifying Reportable Accounts. We recommend that Australia align with this requirement as there will be a need for all jurisdictions to align with this time period. A two year time frame should also be considered for high value individual accounts.
Classifications for Reportable Persons	Recommendation to be addressed	The FATCA and CRS classifications for Reportable Persons need to be aligned, consistent with the general principles outlined to ensure there is no need to have dual systems to capture information for these requirements.

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New Accounts	ED EM para 1.30	The ED CRS Bill provides financial institutions an option to defer the commencement of new account due diligence to 1 January 2018 as opposed to 1 January 2017 (EM para 1.58). In light of the above and assuming a financial institution elects to apply the rules from 1 January 2018, cl.1.30 of the EM should be amended to reflect the fact that all accounts opened on or after either 1 January 2017 or 1 January 2018 will be treated as New Accounts. At the moment cl.1.30 suggests that only accounts opened on or after 1 January 2017 will be treated as New Accounts.

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