

Tuesday, 28 April 2015

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By email only

Common Reporting Standard: Non-Reporting Financial Institutions and Excluded Accounts

The Financial Services Council (**FSC**) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, licensed trustee companies and public trustees. The Council has over 125 members who are responsible for investing more than \$2.5 trillion on behalf of 11 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 targeted consultation 8 April 2015 Treasury draft *Common Reporting Standard: Non-Reporting financial institutions and Excluded Accounts* Discussion Paper (the **CRS NRFI and Excluded Accounts Paper**). We thank Treasury for the opportunity to comment on this paper. The CRS NRFI and Excluded Accounts Paper has adopted many of FSC's comments made in our 18 July 2014 submission on CRS which the FSC welcomes. Our comments on the CRS NRFI and Excluded Accounts Paper are below.

Flexibility as CRS is implemented and with CRS experience

1. As CRS is implemented it may subsequently become apparent that certain financial institutions may be appropriate to be considered for an addition to the list of *Non-Reporting Financial Institutions*, or that certain financial accounts may be considered for inclusion as an *Excluded Account*.
2. FSC reserves the right on behalf of its members to make additional comments as CRS is implemented. For example, it may subsequently come to our attention that particular Financial Institutions ought to be considered for addition to the list of *Non-Reporting Financial Institutions*, provided that the financial institutions have a low risk of being used to evade tax, are defined in Australian law, have substantially similar characteristics to the Non-Reporting Financial Institutions specifically defined in CRS subsection VIII B 1a) and 1b) and their status does not frustrate the purposes of the CRS.

3. Similarly, as for low-risk Non-Reporting Financial Institutions the Australian Government is able to add to the list of *Excluded Accounts* provided that the accounts have a low risk of being used to evade tax, are defined in domestic law, have substantially similar characteristics to the Excluded Accounts defined in CRS subsection VIII C 17 and their status does not frustrate the purposes of the CRS.
4. In addition to our comments in this submission, if FSC or FSC members identify in future any Financial Institutions types which may be considered for addition to the list of *Non-Reporting Financial Institutions*, or any accounts which may be appropriate for consideration as an additional *Excluded Account*, we may contact Treasury. We acknowledge such consideration would need to meet the CRS objectives as set out in paragraphs 2 and 3 above. It is important that the implementation of CRS in Australia continue to provide the ability for additional categories of Non-Reporting Financial Institutions and for additional Excluded Accounts to be provided for in future, if appropriate in light of CRS objectives.
5. We also refer Treasury broadly to FSC's submission dated 18 July 2014 for more detailed comments on some aspects (a copy of that submission is provided with this submission, by email to Treasury).

General Comments – Non-Reporting Financial Institutions and Excluded Accounts – consistency between CRS and FATCA (and ensuring all CRS Excluded Accounts or Non-Reporting Financial Institutions also apply under FATCA and vice versa)

6. The definition of *Non-Reporting Financial Institutions* should be aligned to FATCA to avoid the position of Australian Financial Institutions having one status under FATCA and then a different status under the CRS. Further the definition/categories of *Excluded Accounts* should be consistent under FATCA and CRS. Where we have sought for additional matters in this submission as an additional CRS *Non-Reporting Financial Institution* or an additional CRS *Excluded Account* (for example, relating to Native Title Trusts) then such CRS addition should also be applied to FATCA (via an amendment to the FATCA IGA). Different interpretations (as between FATCA and CRS) will create a complex on-boarding process and confuse customers further.

Sponsored Financial Institutions

7. The CRS definitions make no reference to the **Sponsored FI** category that is incorporated in FATCA. CRS should allow a Sponsored Entity to be Non-Reporting FI. This would be the same as for Trustee-Documented Trusts under CRS.

Key financial institutions subject to CRS reporting but not subject to FATCA reporting

8. The CRS NRFI and Excluded Accounts Paper notes that (among other institutions) that *Financial Institutions with a Local Client Base* are subject to CRS but under FATCA are *Non-Reporting Financial Institutions* that are treated as deemed-compliant foreign financial

institutions. The reasons, noted in the CRS NRFI and Excluded Accounts Paper, for this difference between FATCA and CRS for (relevantly) *Financial Institutions with a Local Client Base*, are integrity provisions in CRS and the fact that such FATCA exemption is not suited to a multilateral system. Subject to these stated reasons, given the principle of seeking FATCA and CRS consistency, we consider that *Financial Institutions with a Local Client Base* should similarly be not subject to CRS reporting (as well as not being subject to FATCA reporting) on the same basis as applies under FATCA. However, for the moment FSC has no additional comments in light of the comments in the paper which explain the reasons for the difference in this case between FATCA and CRS. (FSC does not comment on *Local Banks or Financial Institutions with only Low-Value Accounts*, as FSC is not aware that such FATCA exemptions would be materially relevant to FSC members as providers of wealth management products and services.)

Other entities treated as Non-reporting entities under US Treasury Regulations (FATCA) – Non-Reporting status should apply similarly to CRS

9. The following entities should also be treated as *Non-Reporting Financial Institutions* under CRS:
 - (a) An Investment Entity that manages other reporting accounts and does not maintain financial accounts for customers: e.g. certain asset managers and financial planners, should be treated as Non-Reporting Financial Institution under CRS;
 - (b) Inter-affiliate Financial Institution: Financial Institutions that do not maintain financial accounts with persons that are not Related Entities of the Financial Institution, should be treated as a Non-Reporting Financial Institution under CRS.
10. In order to allow for greater flexibility and alignment with FATCA, the CRS legislation should allow the Commissioner of Taxation, regulation making power to treat certain entities as Non-Reporting (and certain accounts as Excluded Accounts) under CRS if providing such exemption does not frustrate the objective of CRS.
11. The characteristics for being a CRS non-reporting financial institution might include:
 - (a) the objectives of CRS;
 - (b) the likelihood of the entity/vehicle being used as a tax avoidance vehicle; and
 - (c) the compliance burden on financial institutions if the entity/vehicle is not treated as a Non-Reporting Financial Institution.

Excluded Accounts – dormant and small accounts

12. For ease of administration, dormant accounts that have a balance not exceeding a certain threshold (for, example, \$1,000) should be treated as Excluded Accounts. FSC is informed that this is similar to a concession being offered by the UK regulations.

Pure Risk Life Insurance – confirmation that CRS does not apply

13. The ATO guidance for FATCA (not CRS) clarifies (to avoid doubt) that FATCA does not apply to life insurance risk products. This is very helpful. FSC considers similar guidance is necessary for life insurance risk products and CRS (again to avoid doubt). FSC recommends that:
- (a) the Explanatory Memorandum for any domestic Australian law enabling legislation implementing the CRS clarifies that pure risk life insurance contracts are not subject to CRS; and also
 - (b) that the ATO issues CRS guidance equivalent to the ATO's FATCA guidance, to the effect that pure risk life insurance contracts are not subject to CRS.
14. Given our comments in paragraph 13 above, we request that Treasury confirm that the Explanatory Memorandum for any enabling CRS legislation and that any ATO guidance on CRS will confirm the position that CRS (as for FATCA) does not apply to life risk products. Irrespective, even if one of these (the EM for CRS legislation or any ATO guidance on CRS) confirms the position for CRS for life risk insurance products, that will remove all doubt for issuers of life risk products, and assist by clarifying that CRS does not apply to life risk insurance products.

Trustee-Documented Trust: Non-Reporting Financial Institution

15. We particularly welcome the Trustee-Documented Trust category of Non-Reporting Financial Institution. This will reduce the CRS reporting burden for trustees/trusts.

Excluded Accounts - Escrow Accounts

16. It is requested that the definition of escrow accounts (E.2) be amended to include construction of real and personal property. E.2 is therefore requested to read:

'A sale, exchange, lease or construction of real or personal property...'

17. This is to allow escrow services relating to property construction or improvements to take advantage of the current exemption contemplated for the sale, exchange or lease of property. In the absence of this amendment, escrow agents providing services in relation to property construction may be considered to be providing a custody service whereas escrow agents providing similar services for property sales are exempt from the CRS. These escrow services are provided to provide protection in the context of a broader property transaction

(building works) and funds are held on behalf of purchasers and sellers where the release of these funds is contingent on certain conditions (generally construction certificates).

Excluded Accounts (or Non-Reporting Financial Institution) - Native Title Trusts

18. Certain FSC members act as Trustee for Native Title Trusts. Native Title describes the recognition by the Australian legal system of rights and interests of Aboriginal and Torres Strait Islander people to land and waters according to their traditional laws and customs. Native Title Trusts are generally established to manage and distribute funds to traditional land owners and these distributions are generally exempt from tax under the *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (No. 84, 2013). Under this Act traditional land owners are defined as *Indigenous persons* and Native Title Trusts are defined as *Indigenous holding entities*.
19. These Trusts may be considered to be Financial Institutions under the CRS where they appoint a professional Trustee that is also an Investment Entity. The obligation to obtain a CRS self-certification from an Indigenous person is considered to be overly onerous given the geographical factors typically associated with these persons and their lack of access to the financial system. This potential CRS obligation would significantly hinder the work of Indigenous holding entities in distributing funds to Indigenous persons and is inappropriate due to the very low likelihood of Indigenous persons constituting a Reportable Account under the CRS.
20. Below is some suggested *initial* drafting in relation to a CRS exemption we seek for Native Title Trusts. Due to the limited time to prepare this submission, the drafting is a guide only and FSC has not had an opportunity, in the timeframe available, to finalise the appropriate technical drafting. FSC would be pleased to provide further more detailed drafting to Treasury if Treasury would like and/or (on Treasury's request) to confirm with our members acting as trustee for Native Title Trusts a final form of drafting.

Initial draft drafting for CRS exemption for Native Title Trusts

An exemption for these Trusts from the CRS is requested, either:

- (a) for a new type of **Excluded Account** to be added, specifically '**native title benefit accounts**', defined as an account maintained in Australia established in connection with any of the following:
 1. an indigenous person*; or
 2. an indigenous holding person*

* as defined under the *Tax Laws Amendment (2012 Measures No. 6) Act 2013* (No. 84, 2013);

OR

- (b) for Indigenous holding persons (as defined in the Tax Laws Amendment (2012 Measures No. 6) Act 2013 (No. 84, 2013)) to be considered to be **Non-Reporting Financial Institutions** (although the first option in (a) above is preferred).

Please feel free to contact Stephen Judge on (02) 9299 3022 if you have any questions on our submission. We thank Treasury for continuing to consult with industry as CRS is implemented.

Yours sincerely



Stephen Judge
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