9 May 2014

Mr Gerry Antioch
General Manager
Tax System Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Gerry

RE : FATCA INTERGOVERNMENTAL AGREEMENT WITH THE U.S.A

Thank you for the opportunity to comment on proposed enabling legislation for the FATCA Intergovernmental Agreement (IGA) with the United States of America.

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The Council has over 125 members who are responsible for investing more than $2.2 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.

The FSC commends Treasury on its commitment to finalising the IGA. We expect the IGA to result in a significant reduction in compliance costs for the industry, compared to compliance with the full FATCA Regulations.

Our comments in relation to the implementing legislation are included in Appendix A.

Should you wish to discuss this submission further please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely

CARLA HOORWEG
Senior Policy Manager – Investment, Global Markets & Tax

Appendix A

General

We encourage Treasury to develop a mechanism to ensure that any relevant changes to the FATCA Regulations or model IGA text, such as IRS notices, are able to be relied upon by Australian Financial Institutions.

Ability to choose to apply thresholds

Under the terms of the IGA, Australia is permitted to allow Australian FIs to make certain elections when carrying out due diligence on accounts.

These provisions are contained in Annex I paragraphs 1C, IIA, IIIA, IVA and VA. These apply to the identification, due diligence and reporting of both individual and entity accounts.

We note that the Explanatory Memorandum allows Australian FIs to make these elections and notify the Commissioner, however, the draft legislation does not specifically provide for any such elections to be made.

We submit that Treasury allow Australian FIs to make all elections contemplated in the IGA and Regulations. We also suggest that clarification is provided such that an FI making an election who notes this election in its internal records shall not be required to notify the Competent Authority or Commissioner.

Classification of investment entities that solely provide services or financial accounts to Exempt Beneficial Owners

This issue has previously been raised with Treasury but we note that the draft legislation does not assist in resolving this problem.

The issue impacts entities that solely provide services to superannuation entities that are Exempt Beneficial Owners.

There are many entities in Australia that act solely as the trustee or custodian of a superannuation fund. These entities fall under the definition of an investment or custodial entity in the IGA, but the only services provided are to the exempt superannuation fund.

We request that Treasury provide these entities to be treated as non-reporting Australian Financial Institutions and that they are certified deemed compliant, so that there is no requirement to register or report.

Collective Investment Vehicles

Summary

The IGA has a definition of financial institutions that broadly covers the financial products envisaged by the FSC as being Collective Investment Vehicles (CIV).

However it does not provide the desired level of specificity for defining who has the reporting obligation for a CIV, or for defining the reportable information for a CIV.

We note that the UK FATCA regulations and guidance provides useful specificity in this regard.

We request that Treasury ensure that the draft legislation and/or other relevant documentation specifies, in regards to a CIV, who has the reporting obligations and what is to be reported.

Definition of a Collective Investment Scheme

Collective Investment Vehicles are known colloquially within Australia as Collective Investment Schemes (CIS).

Industry has previously requested the use of an expanded definition of CIS, to provide certainty for various financial products not explicitly treated within the FATCA Regulations, IGA templates or other guidance as follows:

- A managed investment scheme as defined in the Corporations Act
- An Investor Directed Portfolio (IDPS) service regulated by ASIC
- An IDPS like scheme regulated by ASIC
- Any arrangement under which an investor receives equity interests in one or more managed investment schemes and the investor's contributions and investment proceeds across all managed investment schemes are consolidated for reporting and customer management purposes by an operator or manager.

FATCA reporting obligations are limited to the scheme manager or operator

We submit that clarity is required in the enabling legislation that the person responsible for the management and operation of a CIS (and no-one else) is the Reporting Financial Institution.

Interests in the scheme are the only FATCA-reportable accounts

We submit that clarification is required that the only reportable accounts for a CIS are the interests in the scheme.

Suggested Solution

To meet the outcomes previously requested by industry, the Australian enabling legislation and/or other relevant documentation should specify that, in the case of a CIS:

- the person that has responsibility for the management and operation of the scheme (and no-one else) is the reporting financial institution; and
- the only reportable accounts in the case of a collective investment scheme are the interests in the scheme.

To reduce uncertainty in the industry, we also recommend the following CIS definition is included in the Australian FATCA enabling legislation and/or other relevant documentation:

A collective investment scheme includes:

1. a managed investment scheme as defined in the Corporations Act; and
2. an Investor Directed Portfolio (IDPS) service regulated by ASIC; and
3. an IDPS like scheme regulated by ASIC; and
4. any arrangement under which an investor receives equity interests in one or more managed investment schemes and the investor's contributions and investment proceeds across all managed investment schemes are consolidated for reporting and customer management purposes by an operator or manager.

Clarification of reporting requirements for payments to NPFIs.

Background

Article 4 of the IGA provides that for 2015 and 2016, Reporting FIs must report the name of each NPFI to which it has made payments and the aggregate amount of such payments. There has been some uncertainty as to what constitutes payments and clarity has been provided in the Regulations and the enabling legislation of other partner countries.

Update to the Regulations

The IRS has modified the transitional reporting requirements under the chapter 4 Regulations for calendar years 2015 and 2016 with respect to payments of foreign reportable amounts made to nonparticipating FFIs to the effect that a participating FFI is only required to report foreign

reportable amounts paid with respect to a financial account that it maintains for a nonparticipating FFI.

We submit that the Australian implementing legislation also takes this approach with respect to Article 4(1)(b) of the model 1 IGA – meaning that only payments made to NPFFIs that are financial accounts of the Australian Financial Institution shall be reportable.

So for example dividend payments made by a bank (that is not an Investment Entity) to an NPFFI on the register would not need to be reported as the NPFFI is a not a Financial Account. If Financial Institutions that are not Investment Entities are required to report payments to holders on their register, they would need to undertake due diligence of all Entities to determine which are NPFFIs, This due diligence would only be required for the purpose of Article 4(1)(b) in its current form.

The Regulations now also state "that a participating FFI will be permitted to report all payments made to the account if it does not want to distinguish foreign reportable amounts from other amounts paid to the account. In respect of this, we seek the Australian implementing legislation to allow Australian Financial Institutions to report all payments made to the NPFFI is it is not practical for record keeping systems to separate foreign reportable amounts from non-reportable amounts.

Classification of holding companies and inter-affiliated group entities.

Neither the draft legislation, nor any of the supporting documentation, deals with issues previously raised with Treasury over the classification of holding companies and inter-affiliated group entities under FATCA.

We submit that Treasury either to specifically provide for their classification in the legislation, or as part of the implementation provisions permit the use of the definitions in the Regulations when classifying these entity types, as in doing so, the intent of the legislation is not thwarted.
Specifically we require clarification on the definition of a holding company and when it will be an FI for FATCA and the ability to apply the provisions of the Regulations on the inter-affiliate FFI/related entity exemption.

Summary of issue

Many FI groups in Australia have a large number of intermediated companies within the group structure, often created solely for governance and taxation reasons. While these entities do not offer FATCA financial accounts their treatment as a financial institution under the IGA is unclear. The final IRS regulations and the UK guidance provide clarity to the "FATCA Status" of these entities and when they would be in scope for FATCA. We urge the Government to provide similar clarification.

Why intermediated entities should be excepted from registration and reporting

Entities that from part of a FI group in Australia are often wholly or majority owned within the group structure. They will hold shares in a subsidiary, and may well not trade or have employees. The only account that might be offered is a debt or equity interest in itself to another entity, but these will only be financial accounts in very limited circumstances. As a result, if such entities were required to register, this would be a futile exercise as there would no financial accounts on which to report, while creating an un-necessary additional compliance burden on FI groups and the ATO alike

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Treatment of holding companies under the UK and the IRS Regulations

Holding companies are treated as a financial institution under the IRS regulations section 1.1471-5(e)(1)(v) where:

- the primary activity consists of holding (directly or indirectly) all or part of the outstanding stock of one or more members of its Expanded Affiliate Group (EAG) and that EAG

includes a financial institution that is a depository, custodial, investment or insurance company.; or

- formed in connection with or used by a collective investment vehicle, mutual fund, exchange traded fund, private equity fund, hedge fund, venture capital fund, leveraged buyout fund, or any similar investment vehicle established with an investment strategy of investing, reinvesting, or trading in financial assets.

This means the holding company does not have to hold the stock of an FI to be brought into scope, it just needs to be in a group that includes at least one FI. In contrast, the UK have clarified in section 3(1) and section 3(9) of their enabling instrument that the holding company is only in scope as a financial institution where it is holding the stock (directly or indirectly) of an FI. As a result of these rules, all holding companies in financial institution groupings will be required to register with the IRS even though the majority will never offer a financial account and will always file a nil return.

Inter-affiliate FFI and Related Entity Exemption

There is an exemption to FI status noted in both the IRS and UK regulations that provides for the scenario where such an intermediated holding company entity makes limited payments outside of its group. This exemption, known as the inter-affiliate FFI or related entity exemption, under the IRS regulations and UK guidance respectively, is outlined below.

Under IRS regulation section 1.1471-5(e)(5)(iv) and Paragraph 2.4 of the UK guidance, an entity will be exempt where it:

1. does not maintain Financial Accounts (other than accounts maintained for members of its related entity group)

2. does not hold an account with or receive payments from any withholding agent (entity making US sourced payments) other than a member of its related entity group;

3. does not make withholdable payments (US sourced FDAP income or gross proceeds payments) to any person other than to members of its related entity group that are not limited FIs or limited branches; and

4. has not agreed to undertake reporting as a Sponsoring Entity or otherwise act as an agent regarding the Agreement on behalf of any Financial Institution, including a member of its related entity group.

A large portion of Australian holding companies in FI groups would meet this exemption.

Self Managed Superannuation Funds

To avoid uncertainty we suggest that the explanatory memorandum make specific mention of self managed superannuation funds qualifying as exempt beneficial owners under Annex II of the IGA.

Listed Investment Entities

Pre-existing clients of stockbrokers at 1 January 2016 who trade listed investment entities (including Exchange Traded Funds – ETFs) after 1 January 2016 will not have had FATCA due diligence performed and will need to have their FATCA status established by the product issuer. Currently there is no mechanism by which product issuers can gather this information.

We acknowledge that Treasury is facilitating an industry working group with the objective of establishing a workable solution to address ETFs, and other listed investment entities impacted by this issue, in preparation for 1 January 2016. The FSC is committed to continued engagement with Treasury and key industry stakeholders on this issue.

Life Insurance Products
The references to age 90 contract expiry in Annex II (section V, B) may be difficult for certain life insurers to satisfy, as previously discussed in submissions to Treasury on this issue.

We submit that guidance be provided clarifying the treatment of pure risk products and would welcome the opportunity to discuss such guidance with Treasury.