



THE TAX INSTITUTE

THE MARK OF EXPERTISE

12 May 2014

Ms Lyn Redman
General Manager
Tax System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: fatca_iga@treasury.gov.au

Dear Ms Redman,

Tax and Superannuation Laws Amendment (2014 Measures No #) Bill 2014: FATCA

The Tax Institute welcomes the opportunity to make a submission to the Treasury in relation to the *Tax and Superannuation Laws Amendment (2014 Measures No #) Bill 2014: FATCA (Exposure Draft)*.

Our main concern with the Exposure Draft is that it may be interpreted as capturing Australian branches of foreign banks which have a local client base. This results in unnecessary compliance costs for such entities. We note that this concern was raised in a call with you on 3 May 2014.

Reportable Australian Financial Institution

Section 396-5 of the Exposure Draft requires a "Reporting Australian Financial Institution" that maintains a "US Reportable Account" to annually give a statement to the ATO. Further, section 396-10 of the Exposure Draft requires a "Reporting Australian Financial Institution" that makes a payment to a "Non-participating Financial Institution" to annually give a statement to the ATO.

The terms "Reporting Australian Financial Institution", "US Reportable Account" and "Non-participating Financial Institution" are defined by reference to the Agreement between the Government of Australia and the Government of United States of America (IGA).

A "Reporting Australian Financial Institution" means any Australian Financial Institution that is not a Non-Reporting Australian Financial Institution (see Article 1(o) of the IGA). Australian Financial Institution includes an Australian branch of a Financial Institution

not resident in Australia (see Article 1(l)(ii) of the IGA). A Non-Reporting Australian Financial Institution is any Australian Financial Institution that is so described in Annex II of the IGA (see Article 1(q) of the IGA).

Item III of Annex II of the IGA lists certain small or limited scope institutions as Non-Reporting Australian Financial Institutions. Item III.A. exempts a Financial Institution with a local client base. Item III.A.2 prevents a Financial Institution with a fixed place of business outside of Australia from qualifying for this exemption. The term “Financial Institution” does not refer to a branch (Article 1(g) of the IGA). The Australian branch of a foreign Financial Institution (which is deemed to be an Australian Financial Institution in its own right under Article 1(l)(ii)) could be a Financial Institution with a fixed place of business outside Australia by virtue of the operations the foreign Financial Institution. Accordingly, it is unclear whether that Australian branch could qualify for the category of Non-Reporting Australian Financial Institution in Item III.A., irrespective of the fact that it may carry on business activities only with Australian resident persons.

We submit that Australian branches of foreign Financial Institutions should be treated as equivalent to Australian Financial Institutions for the purpose of the exemption in Item III of Annex II. This could be addressed by removing or clarifying the “Financial Institution” requirement in Item III.A.2. of Annex II of the IGA.

Compliance with reporting requirements where no relevant transactions

The term “US Reportable Account” is defined to mean a financial Account held by one or more “Specified US Persons” (see sub-paragraph 1(cc) of Article 1). The term “Specified US Person” is defined in sub-paragraph 1(ff) of Article 1. It is noted that a corporation the stock of which is regularly traded on one or more established securities markets is not a Specified US Person.

Since a corporation the stock of which is regularly traded on one or more established securities markets is not a Specified US Person, it is our view that a Reporting Financial Institution that deals only with such corporations should not be required to send any report to the ATO.

We submit that the Exposure Draft should explicitly state that an Australian Financial Institution which does not have dealings within sections 396-5 and 396-10 of the Exposure Draft is not required to submit a ‘nil’ statement to the Commissioner.

Determining who is a non-participating Financial Institution

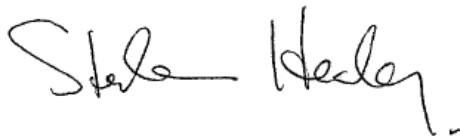
Section 396-10 of the Exposure Draft requires a Reporting Australian Financial Institution to determine which entities are Non-participating Financial Institutions. The term “Non-participating Financial Institution” is defined in Article 1(r) of the IGA. It is not clear how a Reporting Australian Financial Institution determines which entities are Non-participating Financial Institutions. The situation may be more problematic because subparagraph 2(b) of Article 5 enables the IRS to determine that a particular Reporting Australian Financial Institution is a Non-participating Financial Institution. We

submit that the Exposure Draft should clarify the way in which Reporting Australian Financial Institutions can determine which entities are non-participating financial institutions within Article 1(r) of the IGA. Failing this, we submit that the Explanatory Memorandum should provide specific guidance in this regard.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Steve Healey". The signature is fluid and cursive, with a horizontal line extending from the "S" and a small mark at the end of the "y".

Stephen Healey
Vice President