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Common Reporting Standard
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Implementing the global standard on automatic exchange of information

1. The New Zealand Law Society appreciates the opportunity to comment on *Implementing the global standard on automatic exchange of information: an officials' issues paper*, released on 19 February 2016 (the **Issues Paper**).

2. The Issues Paper has been prepared in connection with the Government's commitment to adopt the global Standard for Automatic Exchange of Financial Account Information in Tax Matters (**AEOI**) initiative. The Common Reporting Standard (**CRS**) is a component of this.

3. Once implemented, the AEOI regime and the requirements under the CRS will require financial institutions to carry out due diligence and report certain information to the tax authority in the jurisdiction in which they are resident. Each participating jurisdiction will then exchange this information with the other participating jurisdictions. The Issues Paper seeks feedback on various matters that will need to be addressed in order to implement AEOI in New Zealand, asking a number of discrete questions about different issues relevant to the implementation of the CRS.

4. The Law Society's responses to a number of the discrete questions in the Issues Paper are set out in the **attached** table. In answering the questions, the Law Society has adopted the following broad principles that it considers should underpin the development of any domestic legislation necessary to implement AEOI in New Zealand.

A. Domestic rules in relation to AEOI and the CRS should follow those already enacted for the purposes of FATCA (to the extent possible)

5. New Zealand has already enacted laws to allow New Zealand entities to comply with the information sharing obligations placed upon them under the Foreign Account Tax Compliance Act (**FATCA**) regime (enacted pursuant to the *Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Act 2014*). The FATCA rules that have been enacted were subject to consultation with affected parties during the pre-legislative process.

6. While there are some differences between the FATCA and AEOI regimes, the information sharing rules under each initiative are broadly similar and many of the rules contained in the CRS have been directly imported from FATCA.

7. Given the similarities between FATCA and AEOI, the Law Society considers that any legislation enacted to implement AEOI and the CRS in New Zealand should broadly follow the approach that New Zealand has already adopted for FATCA (to the extent possible). For sanctions and penalties, for example, the Law Society considers that the approach adopted in FATCA would work equally well for AEOI purposes and should be used.

B. Compliance costs for participants should be kept to a minimum

8. As the Issues Paper acknowledges, the implementation of AEOI is likely to involve significant compliance costs for financial institutions, both when the rules are implemented and on an ongoing basis. This has been exacerbated by the relatively rapid implementation of the rules, and with the timeline for implementation recently brought forward.

9. It is therefore critical that any legislation enacted is designed in a manner that, to the extent allowable under the CRS, gives financial institutions flexibility to adopt different approaches in relation to complying with the CRS if this will result in cost benefits for them. Wherever practicable, optionality should be built into the domestic rules so that participants can choose the most cost-effective and least burdensome compliance option for their particular business.

10. For example, giving financial institutions the option of adopting a "wider approach" to CRS due diligence and reporting would be ideal. This would mean that larger financial institutions would be able to collect and hold wider information, and potentially report all of this to Inland Revenue, while smaller financial institutions would not be forced to report sooner than they otherwise would be required (i.e. because all of their non-resident account holders were resident in a jurisdiction or in jurisdictions that had not yet signed up to AEOI).

C. Compliance should be made as easy as possible for persons subject to the CRS

11. Given the acknowledged high compliance cost and burden, it is essential that financial institutions are able to comply with their obligations under AEOI and the CRS with the lowest possible compliance burden. A pragmatic approach to reducing the compliance burden should be adopted. This includes adopting measures such as the use of a "residence address" test (including for change in circumstance procedures) for lower value pre-existing individual accounts to identify the tax residence of the account holder.

12. A similar approach should be taken in regard to account holders that are not New Zealand Reporting Financial Institutions (**NZRFIs**) in order to minimise the cost and burden to them of providing information to financial institutions.

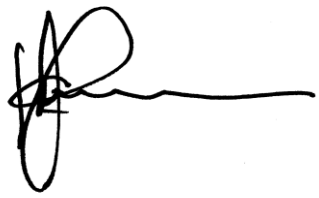
D. Financial institutions and other market participants should have certainty regarding what is required of them to comply with the new AEOI regime

13. Certainty is needed as to who has reporting obligations and what accounts are subject to due diligence and reporting obligations, in order for the new AEOI regime to be implemented with the minimum cost and burden to financial institutions. While the AEOI initiative is accompanied by significantly more commentary and other associated guidelines and material than was the case when the FATCA regime was being implemented, there may still be room for Inland Revenue to issue guidance notes, should it become evident that this would be helpful to taxpayers.

Conclusion

14. This submission was prepared by the Law Society's Tax Law Committee. If you wish to discuss this further, please do not hesitate to contact the Tax Law Committee convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / jo.holland@lawsociety.org.nz).

Yours faithfully



Chris Moore
President

Encl (1)

Appendix – Specific Comments

Consultation Question	Law Society Comment
1. ***Who must conduct due diligence under the CRS:*** *What entities would satisfy the CRS criteria (referred to in paragraph 2.15) for being New Zealand non-reporting financial institutions and, therefore, should be exempted from CRS due diligence and reporting obligations? [2.18]* *(Submissions on this point should confirm that the specific criteria set out in paragraph 2.15 and in CRS Section VIII.B.1(c) of the CRS have been met, or if not, then explain any substitute requirements relied on and how they are substantially similar.)*	To the greatest extent possible, the range of New Zealand reporting financial institutions (**NZRFIs**) that will not be required to carry out CRS due diligence and reporting should be the same as those currently exempted under the US FATCA regime (by virtue of being exempted under Annex II of the US/NZ FATCA intergovernmental agreement as "Non-Reporting New Zealand Financial Institutions" because they are either an "exempt beneficial owner" or "deemed compliant FFI"). . In particular, if at all possible, small or limited scope financial institutions that have a local client base only should be included as a low risk entity for the purposes of Section VIII.B.1(c) of the CRS and defined under New Zealand domestic law as a non-reporting financial institution (**NRFI**).
2. ***Determining which financial accounts will be the subject of CRS due diligence and reporting:*** (a) *Which financial accounts would satisfy the CRS criteria (referred to above) for being excluded accounts, and, therefore, should be exempted from CRS due diligence and reporting? [2.26]* *(Submissions on this point should confirm that the specific criteria set out in paragraph 2.15 and in CRS Section VIII.C.17(g) of the CRS have been met, or if not, then explain any substitute requirements relied on and how they are substantially similar.)*	To the greatest extent possible, the range of financial accounts that will not be subject to CRS due diligence and reporting should be the same as those exempted under the FATCA regime.
(b) *The CRS Commentaries also specifically contemplate that a participating jurisdiction has the option, in this regard, of defining certain types of dormant accounts as being excluded accounts. The CRS provides, as an example of a low risk excluded account, any dormant account with an annual balance that does not exceed US*	Yes. Including dormant accounts in the definition of "excluded account" should help reduce the compliance burden on financial institutions. NZ$1,000 is an appropriate threshold, notwithstanding it is not equivalent to US$1,000.

	$1,000.28. Should New Zealand generally include a dormant account with a balance or value that does not exceed NZ $1,000 in the definition of excluded account? [2.27]	
3.	***Determining what non-resident jurisdictions are within the scope of CRS and reporting – the potential application of the "wider approach" to CRS:*** *Should New Zealand adopt a "wider approach" to CRS due diligence and reporting, as stated in this paper? [2.31]*	The wider approach should be available, but should be optional. There is potential to reduce the compliance obligations of larger financial institutions if they can opt to collect information using a wider approach. However, allowing optionality means that smaller financial institutions could avoid having reporting obligations until their account holders' jurisdictions sign up to the AEOI regime.
4.	***Phasing of implementation:*** *We are also interested in other possible transitional arrangements for phasing in CRS obligations and welcome your views on options.* *Although the 1 July 2017 start date cannot be changed, we welcome submissions on possible transitional arrangements or options for phasing in reporting obligations that could be considered. [3.10]*	A graduated penalty regime during the implementation phase would be difficult and unwieldy and would not encourage compliance. Instead, a "soft landing" could be achieved by Inland Revenue relaxing enforcement activity and adopting an official policy of discretionary leniency towards financial institutions that are making good faith attempts to comply with the new regime.
5.	***Addressing significant non-compliance of tax authorities:*** *We welcome any submissions on whether conducting AEOI exchanges under the Multilateral Convention in the manner outlined above raises any concerns. [4.4]*	In broad terms, the current provisions outlined seem acceptable. However, it would helpful to have more visibility regarding the specific details and certainty in terms of limits (for example, definitions or examples around what "substantial" non-compliance with information confidentiality means).
6.	***Implementing domestic legislation:*** *Submissions regarding how such compliance issues can best be addressed in legislation are invited. In particular, we would appreciate your views regarding [4.8]:* (a) *What anti-avoidance rules should apply to prevent New Zealand reporting financial institutions, persons, or intermediaries, from adopting practices intended to*	The FATCA anti-avoidance rule in section 185L of the *Tax Administration Act 1994* should be extended to apply to the AEOI regime.

	circumvent the CRS reporting and due diligence procedures?	
(b)	*If the main CRS compliance rules were incorporated into current Part 11B (Foreign account information-sharing agreements) of the Tax Administration Act 1994, is current section 22(2)(lc) of the Tax Administration Act 1994 sufficient to ensure CRS record keeping by relevant "persons"?*	Yes. Part 11B was introduced as part of a considered and consultative process for FATCA, and the same process should apply to AEOI for consistency and simplicity.
(c)	*Should CRS related records be required to be retained for the current 7-year statutory period that relates to tax-related records?*	Yes. This is in keeping with general tax-related records, as well as FATCA requirements.
(d)	*What penalties and procedures (including timeframes and procedures for providing corrected information) should apply when a New Zealand reporting financial institution has not complied with its due diligence and reporting obligations?*	The penalty regime in the *Tax Administration Act 1994* that applies to FATCA compliance should be extended to also apply to AEOI and CRS compliance (i.e. failure to comply with other obligations under an extended or equivalent Part 11B are dealt with under the existing penalty provisions in the *Tax Administration Act 1994*, and the specific "absolute liability" and "knowledge" offences in sections 143(1)(ab) and 143A(1)(ab) apply to address substantial non-compliance).
(e)	*Should an account holder be required to keep the New Zealand reporting financial institution (that maintains the account) informed on a timely basis about material changes in circumstances regarding the account?*	Yes. This should help minimise compliance obligations of NZRFIs.
(f)	*What rules should be in place to ensure that self-certifications are always obtained in the circumstances where the CRS requires such certifications?*	Rules regarding self-certification should mirror the self-certification rules for the FACTA regime, so that financial institutions can use the same streamlined process for both regimes.
(g)	*What are the ways that the CRS requirements regarding due diligence and reporting compliance can be implemented in New Zealand in a way that minimises compliance costs for*	CRS compliance requirements regarding due diligence and reporting should be as close as possible (without contravening CRS requirements) to the FATCA compliance obligations that many NZRFIs will already have systems in place to deal with.

	reporting financial institutions and account holders?	In addition, to allow for information to be provided by financial institutions to Inland Revenue, and by account holders (including solicitors) to financial institutions, the legislative protections against breaches of the *Privacy Act 1993* that were enacted for the FATCA regime (along with breaches of any other privacy or confidentiality laws) should be extended to allow financial institutions and account holders to provide the relevant information under the CRS regime. To comply with their obligations under AEOI, New Zealand financial institutions will have to obtain information from account holders that includes whether they are holding funds on behalf of other persons and, if so, the personal details (including name, address and tax identification numbers) of such persons, and provide that information to Inland Revenue. Financial institutions and account holders could potentially be in breach of the Privacy Act by providing the relevant information. Given that the provision of such information will be necessary to enable New Zealand financial institutions to comply with their obligations under the CRS, the Law Society considers that financial institutions and account holders should be afforded the same legislative protection against potential Privacy Act breaches that has been given to financial institutions under the FATCA regime. This could significantly reduce the compliance cost to financial institutions and account holders of implementing the CRS regime. Enabling legislation should impose a positive obligation on NFEs to provide information held by them to RFIs, to enable RFIs to meet their reporting obligations.
7.	***Defining the CRS "reporting period":*** *Currently US FATCA reporting in New Zealand is based on an annual "tax year" reporting period, that is year ending 31 March. Should annual CRS reporting also be based on "tax year", or some other reporting period basis (for example, "calendar year", "fiscal year", etc)? [5.3]*	31 March, for consistency with FATCA and other New Zealand reporting requirements.
8.	***Nil returns:*** *Should New Zealand Reporting Financial institutions be able to file "nil returns" with Inland Revenue? (That is, when they have no reportable*	It makes sense to have filing obligations for every entity that is a NZRFI. However, to reduce the compliance burden on NZRFIs, the Law Society recommends that an "opt out" option is provided (i.e. to allow a

	accounts or undocumented accounts to report for CRS purposes)? [5.4]	particular NZRFI to declare that they will not foreseeably have any reportable accounts, similar to the declaration that a non-active trust can elect to file to relieve itself of filing obligations).
9.	***Whether certain CRS terms need to be defined:*** *Certain terms in the CRS are not defined (for example, "passive income", "maintaining" a financial account, etc). Are there any CRS terms that need to be defined in domestic law? [5.5]*	Ensuring that it is understood what entities have reporting obligations and what accounts they must carry out due diligence and report on is key to successful implementation of a new regime such as AEOI. To this end, there may be significant benefit in defining some terms that are used in the CRS but are not otherwise defined in the commentary or related materials. It may be helpful for Inland Revenue to consider releasing a guidance note. In addition, the Law Society suggests that there is a provision or guidance from Inland Revenue setting out that terms that are not expressly defined in the CRS or related materials are to be interpreted under New Zealand domestic law but with an interpretation under New Zealand's tax law prevailing over any other law (i.e. according to the Tax Acts and applicable case law).
10.	***Currency translation rules:*** *To reduce compliance costs, should our domestic law allow New Zealand reporting financial institutions to simply choose to treat all dollar amounts in the CRS as being in New Zealand dollars? [5.6]*	We agree that NZRFIs should be able to elect to treat all dollar amounts in the CRS as being in US dollars (as set out in the CRS), or as being in NZ dollars. This should reduce compliance costs for NZRFIs and remove the requirement to convert account balances to US dollars.
11.	***Pre-existing accounts – Tax Identification Numbers (TINs) and date of birth:*** *Should there be a requirement under domestic law for New Zealand reporting financial institutions to obtain and report TINs and "date of birth" for pre-existing reportable accounts (beyond merely making reasonable efforts to obtain that information in the way referred to in the CRS)? [5.7]*	No. This would extend the compliance obligations of NZRFIs.
12.	***"Place of birth" of individuals:*** *Should there be a legislative requirement for New Zealand reporting financial institutions to obtain and report "place of birth" information for reportable accounts of individuals where such information is available in the electronically searchable data that they maintain? [5.8]*	No. As above, this would add to the compliance obligations of NZRFIs.

13.	***Reporting average monthly balances or values:*** *Should reporting of average monthly balances or values of reportable accounts be a legislative requirement in New Zealand? [5.9]*	No. It makes sense to report on the same basis as for FATCA purposes (i.e. report balance of value of account as at the end of the calendar year).
14.	***Certain trades facilitated by brokers:*** *Are any legislative provisions required so that exchange traded New Zealand reporting financial institutions are able to comply with their due diligence and reporting obligations under CRS where trades are facilitated by brokers? [5.10]*	No comment.
15.	***Service providers:*** *Should New Zealand reporting financial institutions be able to use third party service providers to fulfil their due diligence and reporting obligations? [5.11]*	Yes. This would be in keeping with the concept of a Sponsoring Entity in the FATCA regime, and could help to mitigate the compliance burden on NZRFIs. To further mitigate the compliance burden on NZRFIs, it should be made clear that the service provider is not be required to be a true third party (i.e. a group of related entities should be able to nominate one entity as a service provider to fulfil the group's due diligence and reporting obligations). The Law Society notes that there does not appear to be any reference to a service provider being a third party in the relevant provisions of the CRS (Section II paragraph D) or the OECD Commentaries (page 108).
16.	***New Zealand resident controlling persons as "reportable persons":*** *Should New Zealand resident controlling persons of passive NFEs be treated as reportable persons for domestic CRS purposes? [5.12]*	No. This would extend the ambit of the CRS and AEOI regime. The Law Society notes that Inland Revenue already has broad information gathering powers under the Tax Administration Act 1994. In addition, this would add to compliance obligations of NZRFIs.
17.	***Pre-existing entity accounts – using standard industry coding systems:*** *Should New Zealand reporting financial institutions be able, with respect to pre-existing entity accounts, to use as documentary evidence for the purposes of CRS due diligence, any classification in their records with respect to the account holder that was determined based on a standard industry coding system (provided that the conditions set out in the CRS Commentaries are met)? [5.13]*	Yes. This appears to be a sensible and pragmatic way of minimising the amount of compliance costs to NZRFIs in regard to due diligence on existing accounts.

18.	***Using the "residence address" test for lower value pre-existing individual accounts:*** *Should New Zealand reporting financial institutions be able to use the "residence address" test (including the change in circumstance procedures) for lower value pre-existing individual accounts to identify the tax residence of the account holder (as an alternative to the "electronic records" test)? [5.14]*	Yes. This has potential to reduce the compliance burden on NZRFIs.
19.	***"Related entity" definition and related managed investment funds:*** *Should an expanded definition of "related entity" be introduced into domestic law for the purposes of CRS due diligence to include related managed investment funds? [5.15]*	Yes. This has potential to reduce the compliance burden on commonly managed investment funds.
20.	***Pre-existing entity accounts' threshold:*** *Should New Zealand reporting financial institutions have the option of excluding from due diligence procedures pre-existing entity accounts with an aggregate account balance or value of US $250,000 or less as at the relevant CRS date? [5.16]*	Yes. This should simplify the compliance burden on NZRFIs.
21.	***Alternative due diligence procedures:*** *Should New Zealand reporting financial institutions be able to apply the due diligence procedures for new accounts to pre-existing accounts, and to apply the due diligence procedures for high value pre-existing individual accounts to lower value pre-existing individual accounts? [5.17]*	Yes. While this could require additional information to be provided by some account holders, it has the potential to simplify the compliance burden on NZRFIs.
22.	***New accounts opened by pre-existing customers:*** *Should the CRS definition of "pre-existing account" be expanded to include an additional account opened by a pre-existing customer (in the circumstances set out in the CRS Commentaries)? [5.18]*	Yes. This has the potential to simplify the compliance burden on NZRFIs.
23.	***Group cash value insurance contracts or annuity contracts:*** *Should New Zealand reporting financial institutions be able to treat a group cash value insurance contract or annuity contract that is issued to an employer and individual employees as a financial account that is not a*	Yes. This has the potential to simplify the compliance burden on NZRFIs.

	reportable account until the date on which an amount is payable to an employee or certificate holder or beneficiary? [5.19]	
24.	***Custodial accounts – reporting of "gross proceeds":*** *Should there be a phased implementation of the reporting of "gross proceeds" of custodial reportable accounts? [5.20]*	Yes. The timeframe for the implementation of AEOI and the CRS regime is already tight, and this should give some financial institutions further time to comply.
25.	***Trust beneficiaries as controlling persons of passive NFEs:*** *Should New Zealand reporting financial institutions be allowed to align the scope of the beneficiaries of a trust treated as controlling persons of the trust with the scope of the beneficiaries of a trust treated as reportable persons of a trust that is a financial institution? [5.21]*	Yes. This should simplify the compliance burden on NZRFIs.
26.	***Grandparenting rule for certain bearer shares for regulated collective investment vehicles:*** *What are the dates that should be used in the grandparenting rule for certain bearer shares (set out in CRS VIII.B(9)) regarding the non-issuing of bearer shares and ensuring that such shares are redeemed or immobilised? [5.22]*	As late as possible while complying with the CRS regime.