

[TEXT OF THE FATCA COMMENT LETTER SUBMITTED BY  
AUSTRALIAN CUSTODIAL SERVICES ASSOCIATION]

November 1, 2010

Hon. Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
CC:PA:LPD:PR (NOT-121556-10),  
Room 5203,  
PO Box 7604, Ben Franklin Station,  
Washington, DC 20044

Dear Sir

**Foreign Account Tax Compliance Act Guidelines ~ *IRS Notice 2010-60***

We refer to the *Notice 2010-60* published by the Internal Revenue Service on 13 September 2010 relating to arrangements for the administration of the Foreign Account Tax Compliance Act (FATCA). The Australian Custodial Services Association (ACSA) welcomes the opportunity to comment on the FATCA regime and the operation of *Notice 2010-60*.

ACSA is the peak industry body representing members of Australia's custodial and investment administration sector. Collectively, the members of ACSA hold securities in excess of AUD \$ 1.3 trillion in value in custody and under administration. Members of ACSA include National Australia Bank Asset Servicing, JP Morgan, HSBC, State Street, RBC Dexia Investor Services, Citigroup and BNP Paribas.

Further information about ACSA is available at our website at:

[www.custodial.org.au](http://www.custodial.org.au)

The purpose of this letter is to:

- Provide information on the role of asset custodians in the Australian investment industry in the context of the proposed FATCA reporting requirements;
- Make some comments, and seek clarification, on aspects of *Notice 2010-60* that are specific to the Australian investment custodian industry;
- Confirm ACSA's support for the FATCA submission lodged (or to be lodged) by the Australian Financial Services

Commission (FSC) ~ FSC represents the managed investment trust (MIT) industry in Australia. MITs are one of the main client groups for Australian investment custodians;

- Confirm ACSA's support for the FATCA submission lodged (or to be lodged) by the Australian Superannuation Fund Association (ASFA) ~ ASFA represents the pension fund (superannuation) industry in Australia. Large superannuation funds (industry funds and other funds regulated by the Australian Prudential Regulation Authority (APRA) are one of the main client groups for Australian investment custodians;
- Request that the FATCA guidelines include an example clarifying the responsibilities of an Australian custodian holding a US investment through a US custodian.

#### *Impact on Australia's investment custody industry*

Australia has a substantial and mature funds management and superannuation industry which is the fifth largest in the world. A large proportion of the investments owned by participants in this industry (MITs and superannuation funds) are held through custodians.

Australia is a country with comparable taxes to those of the US. To our knowledge, Australia and its MITs and superannuation funds do not market themselves as a low-tax country with low-taxed investment entities in the way that some countries do.

For investments in US equities, debt and other securities, the investments would be held through an Australian master custodian who, in turn, would hold through a US custodian. A diagram of this typical structure is set out in the attachment to this letter.

For a US investment held through the structure outlined in the attachment, the US custodian is obliged to pay distributions received on the investment to the Australian master custodian, who, in turn, is obliged to pay its client (for a MIT, this will be the Australian Fund manager, known as the responsible entity (RE) and for a superannuation fund, this will be the trustee). For a MIT, the distribution will generally form part of its income that will be distributed periodically to unitholders as the investors in the MIT.

It is apparent that, if the effect of the FATCA rules is to require an Australian master custodian to collect information about the unitholders in MITs or the members of superannuation funds, there would be substantial issues. This is because the master custodian will not have access to such information as it does not have any relationship with the unitholders. Similarly, Australian sub-custodians in respect of payments from MITs do not usually have a relationship with the beneficial investor. How-

ever, we understand the effect of the FATCA rules and *Notice 2010-60* is that, in context of the structure set out in the attachment, if:

- The Australian master custodian enters into an agreement with the IRS as contemplated by *section 1471(b)(1)* of the new law (IRS Agreement); and
- Each MIT and superannuation fund client of the Australian master custodian that owns a US investment enters into an IRS Agreement and,
- Each other intermediary between a MIT and the beneficial investor enters into an IRS Agreement,

then, provided the various IRS Agreements are valid and current, there would be no obligation on the Australian custodians to report to the IRS, details of the unit holders or underlying investors (or ‘account holders’ in the words of the FATCA legislation).

In these circumstances, we would expect that:

1. the US custodian (withholding agent) would be able to pass on distributions and other amounts from the US investment to the Australian custodian without withholding the 30% tax; and
2. the Australian custodian would not be required to withhold FATCA tax from the distribution or other amount relating to US investment when it is paid on to its client.

From an investment administration perspective, it is imperative that the Australian custodian be able to act on the instruction from its client (that the client has a valid and current IRS Agreement) so that it can pay through, on a timely basis, an amount received from a US investment without having to withhold FATCA tax.

We request that the final FATCA guidelines include a specific example that addresses the structure set out in the attachment (that is, a foreign custodian holding a US investment through a US custodian, on behalf of a MIT or other form of collective investment vehicle and sub-custodians intermediating between collective investment vehicles and underlying investors).

We anticipate that, from an Australian custodian’s point of view, there will be several areas where we would need to seek clarification on the application of the FATCA rules. In particular, the nature and frequency of instructions regarding IRS Agreements that will need to be provided by:

- an Australian custodian to its US custodian/withholding agent;
- the RE of a MIT or trustee of a superannuation fund to the Australian custodian;
- and other FFIs down the chain.

Furthermore, we seek guidance on the consequences to the Australian master custodian if there is an instance of non-compliance by the RE of the MIT/trustee of the superannuation fund and specifically whether the Australian custodian could be held liable as a consequence flowing from such non-compliance. We consider that if the Australian custodian could be held liable in these circumstances, then it will lead to severe delays in the distribution of investment income to Australian investors.

If Australian custodians are not absolved from reporting as outlined above, then:

(a) a clearer and simpler definition of US Persons is needed. It will be unreasonably onerous if Australian Custodians have to determine US Persons beyond US citizenship or permanent residence for individuals and place of incorporation for companies.

(b) a longer transition time is needed in order for systems to be amended and for data to be validated to ensure correct reporting is done.

(c) to protect Australian Custodians against privacy and or confidentiality liability, it would be important that some form of privacy or confidentiality exemption be put in place. One way of achieving this may be for the US government to secure the passage of legislation by the Australian government to the effect that any action taken in good faith by Australian Custodians to comply with the FATCA law is exempt from Australian privacy or confidentiality laws.

(d) there needs to be clearer guidance on what documentation is sufficient for determining the status of customers and their meeting the definition of US Persons. Australian Custodians are concerned that the data they currently hold on their customers may not be sufficient and they may experience significant difficulties in obtaining more information.

### *Support for FSC Submission*

ACSA has had the opportunity to review the submission on FATCA lodged (or to be lodged) by the FSC. In this submission FSC is requesting that MITs be exempted from the FATCA rules on the basis that are a group posing a low risk of tax evasion. We agree with the comments by the FSC that the risk of US tax avoidance/evasion for investors in MITs is extremely low, if present at all and support the FSC submission for exclusion of MITs from the FATCA regime. If this submission is not successful, ACSA supports the position on timing put forward by FSC, that is, the new provisions should only apply on a prospective basis to accounts opened on or after 1 January 2013.

We would also like to register our concern over issues raised by the FSC about:

- the difficulties that will be faced by the responsible entities of MITs in obtaining the information about account holders;
- confidentiality and privacy issues that will be faced by responsible entities in seeking such information.

We note there are some Australian investments trusts that may not fall within the definition of a MIT for Australian taxation purposes. The FSC submission is confined to MITs but there may be valid reasons for FATCA arrangements similar to those put forward by FSC to be allowed for such trusts. Specific arrangements for such trusts should be left for them to pursue directly with the IRS.

### *Support for ASFA Submission*

ACSA has had the opportunity to review the submission on FATCA lodged (or to be lodged) by ASFA. In this submission, ASFA is requesting that superannuation entities such as complying superannuation funds, approved deposit funds, pooled superannuation trusts and exempt public sector superannuation schemes, be exempted from the FATCA regime.

We consider there would only be a very limited number of members of superannuation entities that are US taxpayers. Moreover, we believe it would be highly unlikely that even if a US taxpayer was a member of an Australian superannuation entity (because, perhaps, it was an expatriate US citizen living in Australia) that there would be any tax advantage to be obtained by holding a US investment indirectly through such entity. In these circumstances we believe that Australian superannuation entities should be classified as low tax risk entities and excluded from the FATCA rules.

We therefore agree with and support the ASFA submission.

### *Conclusion*

ACSA would be happy to meet with representatives of the IRS to discuss the concerns of the Australian investment custodian industry about the FATCA rules.

If you would like to discuss this letter and ACSA's position on the FATCA rules please contact the Chairman of ACSA's Tax Working Group, Mick Giddings on +613 8641 0898.

Yours sincerely

[signed]  
Australian Custodial Services  
Association  
Sydney, Australia

\* \* \* \* \*

***Attachment:***

Flow of US sourced income via an Australian Custodian

Link-to-image-2011163691

- Includes
  - APRA (Australian Prudential Regulation Authority) regulated industry funds
  - SMFs (Small Managed Funds)
  - Pooled Superannuation Trusts

**Flow of Income:**

1. US entity makes the payment to the US custodian.
2. The US custodian is the US withholding agent. In order to determine what rates of US withholding tax to apply prior to forwarding the payment to the Australian custodian, the US custodian will contact the Australian custodian to provide details on which of the underlying Australian managed funds and Super funds have entered into an FFI agreement with IRS or alternatively if they are exempt from the FATCA rules.

3. The Australian custodian will request the responsible entity of the Australian fund manager and the trustee of the super funds, to instruct whether each of the Australian funds and super funds have entered into an FFI agreement.

4. Upon receipt of the instruction, the Australian custodian will provide this information to the US custodian. It is assumed that the US custodian will maintain individual accounts for each of the underlying Australian managed funds/super funds and hence based on the instruction on whether a valid FFI agreement is in place or not, will deduct the appropriate withholding tax and then forward the net payment to the Australian custodian.

5. The Australian custodian enters into a FFI agreement, however given that the US distribution is passed on to the Australian fund manager and super funds, there is no direct relationship between the Australian custodian and any account holder in the managed funds or the super funds (including any US account holders) and thus the participating Australian custodian is not required to fulfil the reporting requirements under FATCA.

#### **FOOTNOTES:**

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In particular, Section IV Part E, dealing with Elimination of Duplicative Reporting.