



12 June 2014

Ms Natarshia Stecum  
Director, New Measures and Government Relations  
Australian Taxation Office

By email: [PGINewMeasuresTeam@ato.gov.au](mailto:PGINewMeasuresTeam@ato.gov.au)

Dear Ms Stecum,

***Foreign Account Tax Compliance Act and the Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA dated 28 April 2014 ('IGA')***

- **Comments on Draft ATO Guidance dated 30 May 2014**
- **Exemption for 'regularly traded' products**

I refer to the Draft Guidance '*How the ATO may administer the FATCA*', which was distributed by the ATO for comment on 30 May 2014.

The Stockbrokers Association of Australia would like to comment on the Draft Guidance, particularly in relation to the exemption in Article 1(s) of the IGA for '**regularly traded**' products.

Article 1(s) of the IGA provides as follows:

(s) The term "**Financial Account**" means an account maintained by a Financial Institution, and includes:

(1) in the case of an Entity that is a Financial Institution solely because it is an Investment Entity, any equity or debt interest (**other than interests that are regularly traded on an established securities market**) in the Financial Institution;

(2) in the case of a Financial Institution not described in subparagraph 1(s)(1) of this Article, any equity or debt interest in the Financial Institution (other than interests that are regularly traded on an established securities market), if (i) the value of the debt or equity interest is determined, directly or indirectly, primarily by reference to assets that give rise to U.S. Source

Withholdable Payments, and (ii) the class of interests was established with a purpose of avoiding reporting in accordance with this Agreement; and

(3) any Cash Value Insurance Contract and any Annuity Contract issued or maintained by a Financial Institution, other than a noninvestment-linked, nontransferable immediate life annuity that is issued to an individual and monetizes a pension or disability benefit provided under an account that is excluded from the definition of Financial Account in Annex II.

Notwithstanding the foregoing, the term “Financial Account” does not include any account that is excluded from the definition of Financial Account in Annex II. For purposes of this Agreement, **an interest is “regularly traded” if there is a meaningful volume of trading on a continuous basis**, and an **“established securities market” means an exchange that is officially recognized and supervised by a governmental authority in which the market is located and that has a meaningful annual value of shares traded on the exchange**. For purposes of this subparagraph 1(s), an interest in a Financial Institution is not “regularly traded” and shall be treated as a Financial Account if the holder of the interest (other than a Financial Institution acting as an intermediary) is registered on the books of such Financial Institution. The preceding sentence will not apply to interests first registered on the books of such Financial Institution prior to July 1, 2014, and with respect to interest first registered on the books of such Financial Institution on or after July 1, 2014, a Financial Institution is not required to apply the preceding sentence prior to January 1, 2016.

*(emphasis added)*

## Clarification Sought

There are certain key terms in the above provision relating to the exclusion of products that are **regularly traded** that require further guidance. As will be seen, some guidance has been given in relation to similar provisions of the US/UK IGA, and we would urge the ATO to adopt that approach.

The relevant terms of Article 1(s) above upon which clarification is sought are:

1. *meaningful volume of trading*
2. *on a continuous basis*
3. *meaningful annual value of shares traded on the exchange.*

### 1. ‘meaningful volume of trading’

In relation to the term ‘*meaningful volume of trading*’, the Draft Guidance does not give any explanation. Reference to ‘*meaningful*’ in this and the third term below is in need of clarification.

There are some 2200 companies and issuers listed on the ASX. While the main indices are dominated by the top 200 (indeed, the top 20) stocks, that leaves around 2000 stocks and other products of varying market capitalisation whose turnover and liquidity vary greatly. However, in order to remain listed on ASX, all companies must maintain minimum shareholder spread, turnover and other disclosure requirements.

Accordingly, we submit that ATO should interpret the ‘*meaningful volume*’ provision as being satisfied if the stock remains listed on a recognised exchange. To require some measurement of turnover, free float or market depth, etc. would be overly complicated and

impossible to implement in practice. The ATO should take comfort from the fact that, while listed on a public, regulated exchange, the stock fulfils the requirements as to trading.

This approach is similar to that of HM Revenue & Customs in the United Kingdom under the first FATCA IGA that was signed with the U.S. The U.K. interprets the *'regularly traded'* requirement as being satisfied if the stock is **listed on a recognised stock exchange**. If a stock is listed, the exemption is satisfied and there is no need to check further that any transactions have in fact been undertaken.<sup>1</sup>

## 2. *'on a continuous basis'*

Similarly, the reference to trading *'on a continuous basis'* is in need of clarification, as there is no discussion of the meaning of the term in the Draft Guidance. There are occasions when trading in a stock, for legitimate reasons, is suspended. For example, trading in a stock may be suspended due to a pending corporate action such as a takeover announcement. The stock is still listed, but the market takes a pause to ensure that it can continue after the announcement on a fully informed basis. This should not mean that the stock was not traded on a *'continuous'* basis. Again we would submit that the fact of continuity of *listing* should be sufficient.

## 3. *'meaningful annual value of shares traded on the exchange'*

The discussion in the Draft Guidance (at page 13) makes it reasonably clear that the term **established securities market** includes all the Australian exchanges which hold a market operators licences issued by ASIC (i.e. ASX, Chi-X, APX, and others). However, reference is made to the fact that the exchange must have -

*'...a meaningful annual volume of shares traded on the exchange.'*

The Draft Guidance (at page 13) does not go into great detail on the meaning of that term. This term appears to be slightly different to the reference to *'meaningful volume'* in 1. above. That term refers to trading in *'an interest'*. The reference in 3. suggests trading across all stocks or products traded on the exchange. Clarification on this point would assist in the interpretation of this new provision. In any case, once again we submit that it should be sufficient that the stock(s) is(are) **listed on a recognised stock exchange**.

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In the Draft Guidance, confusion appears to have been caused by the mixing concepts of tax law into well-established concepts of securities law. We trust that these matters may be clarified, preferably by adopting the U.K. approach, prior to the commencement of FATCA on 1 July 2014.

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<sup>1</sup> HM Revenue & Customs *Implementation of The International Tax Compliance (United States of America) Regulations 2013 Updated Guidance Notes* 28 February 2014 Section 3.10

Thank-you for your consideration of these matters. Should you require any further information, please do not hesitate to contact me, or Doug Clark, Policy Executive on [dclark@stockbrokers.org.au](mailto:dclark@stockbrokers.org.au) .

Yours sincerely,

A handwritten signature in black ink, appearing to read "D Horsfield". The signature is written in a cursive style with a large initial 'D'.

**David W Horsfield**  
**Managing Director/CEO**  
**Stockbrokers Association of Australia**