Briefing Note: IMPLEMENTING THE COMMON REPORTING STANDARD IN SOUTH AFRICA IN TERMS OF REGULATIONS UNDER THE TAX ADMINISTRATION ACT, 2011

GENERAL BACKGROUND

1. Greater transparency and the automatic exchange of information between tax administrations is an important step forward in countering cross border tax evasion, aggressive tax avoidance and base erosion and profit shifting (BEPS) through, for example, transfer pricing arrangements.

2. Legislative amendments to the Tax Administration Act, 2011, were affected in the Tax Administration Laws Amendment Bill, 2015, in order to implement a scheme under which SARS may require South African financial institutions to collect information under the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters, which encompasses the Common Reporting Standard (CRS) that was endorsed by G20 Finance Ministers in 2014 ("an international tax standard").

3. The draft Regulations applies the *wider* CRS approach, which effects the most changes to the CRS as published by the OECD. In order to implement the standard on a consistent and efficient basis, certain financial institutions must report on all account holders and controlling persons, irrespective of whether South Africa has an international tax agreement with their jurisdiction of residence or whether the jurisdiction is currently a CRS participating jurisdiction. This will substantially ease the compliance burden on reporting financial institutions as they would otherwise have to effect system changes and collect historical information each time a jurisdiction is added to the CRS or South Africa concludes a new international tax agreement. The reporting financial institutions will, pursuant to these amendments, be obliged by statute to obtain the information and provide it to SARS.

ASSESSMENTS OF LOW-RISK PROPOSALS OF NON-REPORTING FINANCIAL INSTITUTIONS AND EXCLUDED ACCOUNTS FOR INCLUSION IN THE REGULATIONS

4. The OECD AEOI *Standard for Automatic Exchange of Financial Account Information in Tax Matters* ("the AEOI Standard") provides jurisdictions with the option to exclude jurisdiction-specific low-risk financial institutions and financial accounts from the due diligence requirements, provided that certain conditions have been met (see Section VIII subparagraphs B(1)(c) and C(17)(g) of the AEOI Standard).

5. These "low-risk lists" will be published by South Africa as part of its domestic implementing legal framework to the AEOI Standard. While this element of the AEOI Standard intentionally provides implementing jurisdictions with some flexibility to develop their own tailored low-risk lists, under the Standard it is in the interests of all implementing jurisdictions that this flexibility is not used inappropriately, undermining the level playing field between participating jurisdictions.

6. Implementing jurisdictions will expect a level playing field that provides for information

to be exchanged that complies with the full scope set out in the AEOI standard.

7. It is anticipated that the AEOI Group, as part of its ongoing CRS implementation monitoring functions, will conduct an early review of *inter alia* this aspect of the domestic legal frameworks for implementing the Standard, i.e. an assessment of the jurisdiction-specific low-risk lists of non-reporting financial institutions and excluded financial accounts. **The key objective of the assessment of the low-risk lists will probably be to obtain early comfort that the lists are not being used inappropriately, undermining the level playing field.**

8. Furthermore, the earlier that any inconsistencies between the low-risk lists and the AEOI Standard are identified, the better for financial institutions as any changes in the content of the low-risk lists will increase costs for financial institutions.

9. For any such review, South Africa will be required to substantiate the rationale behind *each of* the entries in the low-risk lists included in the Regulations to be issued under paragraph *(a)* of the definition of "international tax standard" of section 1 of the Tax Administration Act, 2011 ("the CRS Regulations").

10. Within the confines of the criteria set out in the AEOI Standard and in order to ensure that its low-risk lists are not being used inappropriately or undermining the level playing field, South Africa must decide which of its institutions and products are considered suitable for inclusion in the low-risk lists.

11. This note proposes a mechanism that provides a more detailed focus on ensuring the AEOI Standard has been applied appropriately in the compilation of the jurisdiction-specific lists of low risk financial institutions and excluded financial accounts. It sets out an approach and process to ensure that South Africa has applied the requirements in the AEOI Standard correctly when deciding what should be included in its low-risk lists.

The proposed approach and process in compiling "low-risk" lists

12. When compiling low-risk lists, there are a number of steps that must be completed as set out in the AEOI Standard. In particular, these domestically defined non-reporting financial institutions and excluded accounts must:
    a. present a low risk of being used for tax evasion;
    b. have substantially similar characteristics to the categories of non-reporting financial institutions and excluded accounts otherwise included in the AEOI Standard;
    c. not frustrate the purposes of the AEOI Standard; and
    d. be defined in domestic law (this would include the CRS Regulations).

    It will be necessary to demonstrate that these criteria have been met in compiling the "low risk" lists.

13. A structured way to set out how the process of compiling low-risk lists has been carried out is required, as well as the reasons for the inclusions of entities or accounts on the

lists. **Appendix 1** contains a template for this task. Instruction notes on completion of the template are also provided at the end of the Appendix. The template sets out each of the specific steps that must be undertaken in compiling the low-risk lists, along with space to provide analysis and justifications as to why certain inclusions should be made.

14. It should also be noted that CRS avoidance schemas to transfer undeclared income to excluded accounts prior to the commencement of reporting periods have been detected, indicating that a cautious approach in compiling the "low risk" list of jurisdiction-specific excluded entities or accounts is highly appropriate.

15. For purposes of the inclusion of any proposed entry in the low-risk lists included as Annex II and III of the CRS Regulations, Appendix 1 will have to be completed by the requesting Reportable Financial Entity or representative group of Financial Entities.

16. These appendixes must be submitted before or on the closing date for commentary on the CRS Regulations to be published on 30 November 2015, which closing date is proposed to be on **4 January 2016**.

17. MS Word versions of Annexure 1: Template for Non-Reporting Financial Institutions and Annexure 2: Template for Excluded Accounts can be requested from **acollins@sars.gov.za**.

Comments on the draft public notice must be submitted before or on 4 January 2016 to Catinka Smit at csmit@sars.gov.za or Adele Collins at acollins@sars.gov.za

Attached to this Note are the following:

1. Annexure 1: Template for Non-Reporting Financial Institutions
2. Annexure 2: Template for Excluded Accounts
3. The Draft CRS Regulations
4. The unofficial draft CRS Regulations with tracked changes.