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Director
Beneficial Ownership and Transparency Unit
Market Conduct Division

Via email: BeneficialOwnership@TREASURY.GOV.AU

Multinational Tax Integrity: Public Beneficial Ownership Register (BOR) Consultation Paper

The Financial Services Council (FSC) is a peak body which sets mandatory Standards and develops policy for more than 100 member companies in one of Australia's largest industry sectors, financial services. Our Full Members include Australia's retail and wholesale funds management businesses. The financial services industry is responsible for investing more than $3 trillion on behalf of over 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is one of the largest pools of managed funds in the world.

The FSC's fund manager members provide investment solutions to institutional and individual clients worldwide. Their clients include superannuation funds, banks, insurance companies, corporations and millions of individuals who are largely saving for long-term goals, such as retirement.

The FSC supports the Federal Government's aim for increased transparency in order to combat tax avoidance, money laundering and financing terrorism. However, we are concerned that the proposals in the consultation paper have serious privacy implications and go beyond the Financial Action Task Force (FATF) Recommendation 24. We are also concerned that the proposal does not adequately consider proportionality for low risk widely held Managed Investment Schemes (MIS) in determining the identities of their beneficial owners.

We are pleased the Government recognises the legitimate reasons for distinguishing the beneficial and legal owners of an asset. In Australia (and elsewhere in the world), individuals can get exposure to a diverse range of assets and the expertise of an investment manager by participating in a collective investment vehicle. We also agree with the Government's proposal to exempt regulated entities from disclosing trust beneficiaries if the relevant trust is a registrable superannuation entity.

In considering the applicability of these proposals to unlisted MISs, it is important to consider how MISs are structured in practice. Collective investment vehicles take different forms, depending on the jurisdiction in which they are formed. In Australia, almost all money in collective investment vehicles is in trust structures called Managed Investment Schemes (MIS). The manager of a MIS, the Responsible Entity (RE), is licensed by ASIC and holds the legal title to the scheme's assets. The RE holds legal title to the assets on trust (as a fiduciary) for the beneficiaries (the individual unitholders in the scheme). The MIS structure is unique to Australia.

Financial Services Council Ltd
Level 5, 16 Spring Street
Sydney NSW 2000
E. info@fsc.org.au
W. fsc.org.au
ABN 82 080 744 163
@FinServCouncil
@FinServCouncil
@financial-services-council

Recently, legislation was passed to implement a new investment structure, the Corporate Collective Investment Vehicle (CCIV), a corporate structure that is operated by a Corporate Director. The Corporate Director has roles and responsibilities similar to an RE for a MIS. The remainder of the FSC submission focusses on the application of the Government's proposals to REs and MISs; these FSC comments also largely apply to CCIVs and Corporate Directors.

The percentage interest of any one unitholder is not generally determinative of control or influence over an RE of a MIS (nor is the percentage interest of a member of a CCIV generally determinative of control or influence over the Corporate Director of a CCIV). REs are required by law to manage and govern MISs in accordance with the scheme's governing documents, including the investment management agreement, unitholder agreement, and the scheme's constitution, and in the best interests of the beneficiaries/unitholders as a whole. Unlike a company, a scheme does not have separate legal personality. Australian law requires the REs of MISs to be Australian public companies and it is the RE, as opposed to the scheme itself, that is a legal entity. As schemes are generally unit trusts in Australia, they provide look through tax treatment through to the underlying individual unitholders and the vast majority of schemes are not trading trusts.

The Consultation Paper makes reference to Recommendation 24 of the FATF and Australia's most recent partially compliant rating. We also note that earlier this year FATF consulted on changes to Recommendation 24, which are now implemented, and FATF is currently consulting on guidance to assist countries and the private sector in meeting their obligations. In line with FATF's amendments to Recommendation 24, we encourage the Government to consider implementation of a Beneficial Ownership Register (BOR) on the basis of risk, context, and materiality, so as to enable efficient access to information by regulatory authorities. We would like to highlight the limitations with the current proposal considering the Australian legislative environment and put forward some recommendations.

Summary of Recommendations:

- **Recommendation 1:** The initial phase of implementation of a beneficial ownership register should not include public information. Information provision should be limited to government and regulatory authorities in line with FATF Recommendation 24. There should be specific consultation on public access once the government has set up a central beneficial ownership register in a subsequent phase. The Government should also consult with the Office of the Australian Information Commissioner.

  For inclusion of individuals on a BOR, there could be a dollar threshold for funds under management as well as the 20% test.

  Clarification is also sought regarding which entities and agencies will have access to the information collection and whether there will be restrictions on the use of that information.

- **Recommendation 2:** Unlisted registered MIS including platforms and wraps, and unlisted CCIVs, should be exempted from the beneficial ownership disclosure requirements. Reporting of RSEs by a regulated entity should not be required.

- **Recommendation 3:** Alternatively, the REs of managed investment schemes and Corporate Directors of unlisted CCIV sub-funds should be exempt from being required to report RSE unitholders, related entities or other widely held institutional holders where there is a chain of interposed trusts (or CCIV sub-funds) such as an IDPS, master trust or platform. Reporting should be limited to natural persons that have a greater than 20% direct holding in the MIS, CCIV sub-fund or platform. There should be further consideration of the operational requirements when investor holdings are through adviser platforms.

  Government should provide a safe harbour on what constitutes being "reasonably assured" or what constitutes "reasonable steps" regarding regulated entities' enquiries with respect to beneficial ownership. The safe harbour should consider what information would constitute reasonable steps with regard to foreign investment vehicles.

- **Recommendation 4:** We do not agree with substantial holding and tracing notices being amended to capture additional beneficial ownership information as it relates to MISs which invest in listed entities.

- **Recommendation 5:** Government should give greater consideration to the extent the measures are intended to have in terms of extra-territorial effect. Further guidance or a safe harbour should be provided on what constitutes reasonable steps for identifying foreign beneficial owners.

- **Recommendation 6:** If unlisted registered MISs are not exempted, then the proposed requirement to be reasonably assured of the identities of beneficial owners (and therefore to issue notices) should be proportionate. The RE of a registered MIS should not be required to issue tracing notices or establish formal certification processes to trace beneficial owners unless the RE has sufficient information available to it which would allow the RE to form a reasonable suspicion that an investor may meet the threshold for disclosure. This recommendation should similarly apply to Corporate Directors of CCIVs.

  Guidance or a clear legislated safe harbour should be issued on what constitutes reasonable steps for REs of MIS when identifying and verifying beneficial owners (and similarly for Corporate Directors of CCIVs). In our view, entry into the register for a MIS or CCIV should only be for known information related to holdings of units or voting rights of natural persons.

- **Recommendation 7:** A MIS or CCIV should only be required to register beneficial ownership that is known about holdings of units or voting rights over 20% where these are natural persons.

- **Recommendation 8:** More consultation and detail are needed around commencement and transition arrangements. Implementation phasing should account for the complex nature of systems and processes required for MISs and CCIVs to give effect to beneficial ownership trace through.

1. Privacy concerns

We do not support making information maintained by regulated entities in the initial phase of the proposed BOR available to the Australian public. Making this information available to the public, particularly in the absence of any qualifying criteria:

- goes beyond FATF recommendation 24, which only requires beneficial ownership information to be made available to regulatory authorities;
- goes beyond the existing regime for access to member registers in Chapter 2C of the *Corporations Act 2001*, both in terms of the ability to use the information and the content, where even redacted details of the date of birth goes far beyond what is available when accessing the register of a company or MIS;
- does not appear to advance the Government's stated objective for the BOR, that is addressing tax fraud, money laundering, sanctions avoidance, and related-party transactions/phoenixing, because the public does not police these activities;
- is likely to encroach on individuals' rights to privacy in respect of their legitimate investment activities and may make investment in Australia less desirable as a result;
- presents serious risk for investors and regulated entities in terms of the security of the information contained on the register, particularly in the current environment of heightened data breaches and widespread identity theft;
- may compromise law enforcement where information that is part of an ongoing investigation is made public before regulatory action is concluded by authorities;
- will impose additional regulatory burden on regulated entities who will be required to meet public demand for the information and have the required administrative and technical resources to do so; and
- may not be in the public interest and could encourage misuse of information such as to bribe or influence individuals, or to encourage vexatious lobbying, litigation or claims being made against individuals on the register.

A central register accessible only to authorities and competent entities could be useful to our members' AML processes and allow them to cross check the information they have received to the central database and investigate any discrepancies. Consideration of whether to allow broad public access to a BOR should occur at the future phase of the project, once the Government has assumed

control of a central BOR. At that time, the Government should consider whether public access to the BOR would further its stated objectives and whether it is necessary and proportionate in meeting the essence of FATF's recommendations. We would again encourage the Government to consult specifically on public access to the BOR, once competent authorities and other stakeholders have had experience of the BOR under the initial phase.

Where an investor can be identified as holding 20% of a MIS, public disclosure would increase privacy risks. For instance, there could be a MIS with $10 million of funds under management and among its initial investors is a $2 million contribution from an SMSF or another MIS. Under the proposal, the SMSF or MIS would need to publish details in the public register for a relatively small holding. As the paper notes, the proposals will lead to an additional three million additional structures subject to disclosure. There is a risk that a large volume of new disclosure could be superfluous. We submit that there could be a dollar threshold for funds under management as well as the 20% test.

The global context should also be considered at that time, given that this issue is evolving. For example, in a judgment dated 22 November 2022, the European Court of Justice has determined that unqualified public access to the BORs of EU member state companies contravenes the right to respect for private and family life in the Charter of Fundamental Rights of the European Union. The finding was made on the basis that the information that was publicly available was not limited to what was necessary, was not proportionate to the objective being pursued, and the interference with the right was not offset by any identifiable benefit.

While there is no equivalent right to privacy in the Australian Constitution, the Office of the Australian Information Commissioner states that privacy is acknowledged as a fundamental human right. Regardless of the precise legal framework applicable to individuals' privacy, the consequences of making personal information freely publicly available are serious. The decision to adopt this approach should be made and controlled by Government, taking into consideration the global context at the time, and not something that should be undertaken by the private sector in the initial phase of BOR's development. We would also note recent data hacking issues involving major Australian companies, which underscores the need for Government to move carefully when asking private entities to hold more private data.

We also note more broadly that success and usefulness of the BOR for regulatory agencies will be heavily dependent on what if any information sharing arrangements the Australian Government is able to make with the Pacific Nations in terms of their beneficial ownership information. Many Pacific Nation countries have limited or no beneficial ownership transparency and are included on the EU list of non-cooperative jurisdictions for tax purposes. If the Australian Government is not able to make suitable information sharing arrangements with these countries, those who want to conceal their identity will simply structure their business arrangements in Australia to include holding or shell companies domiciled in these jurisdictions.

Recommendation 1: The initial phase of implementation of a beneficial ownership register should not include public information. Information provision should be limited to government and regulatory authorities in line with FATF Recommendation 24. There should be specific consultation on public access once the government has set up a central beneficial ownership register in a subsequent phase. The Government should also consult with the Office of the Australian Information Commissioner.

For inclusion of individuals on a BOR, there could be a dollar threshold for funds under management as well as the 20% test.

Clarification is also sought regarding which entities and agencies will have access to the information collection and whether there will be restrictions on the use of that information.

2. Application to widely held unlisted managed investment schemes

Given the widely held nature of the investment funds in our membership, it is rare for a single natural person to have over 20% of holdings in a MIS, with minimal risk of using a retail fund to carry out tax avoidance.

We also note that, for beneficial ownership register models adopted by comparative countries such as the United Kingdom (Persons with Significant Control (PSCs) regime) and Singapore (Register of registrable Controllers (RORC) regime), the obligation to maintain and publicly disclose a register or beneficial owners does not apply to open-ended investment funds.

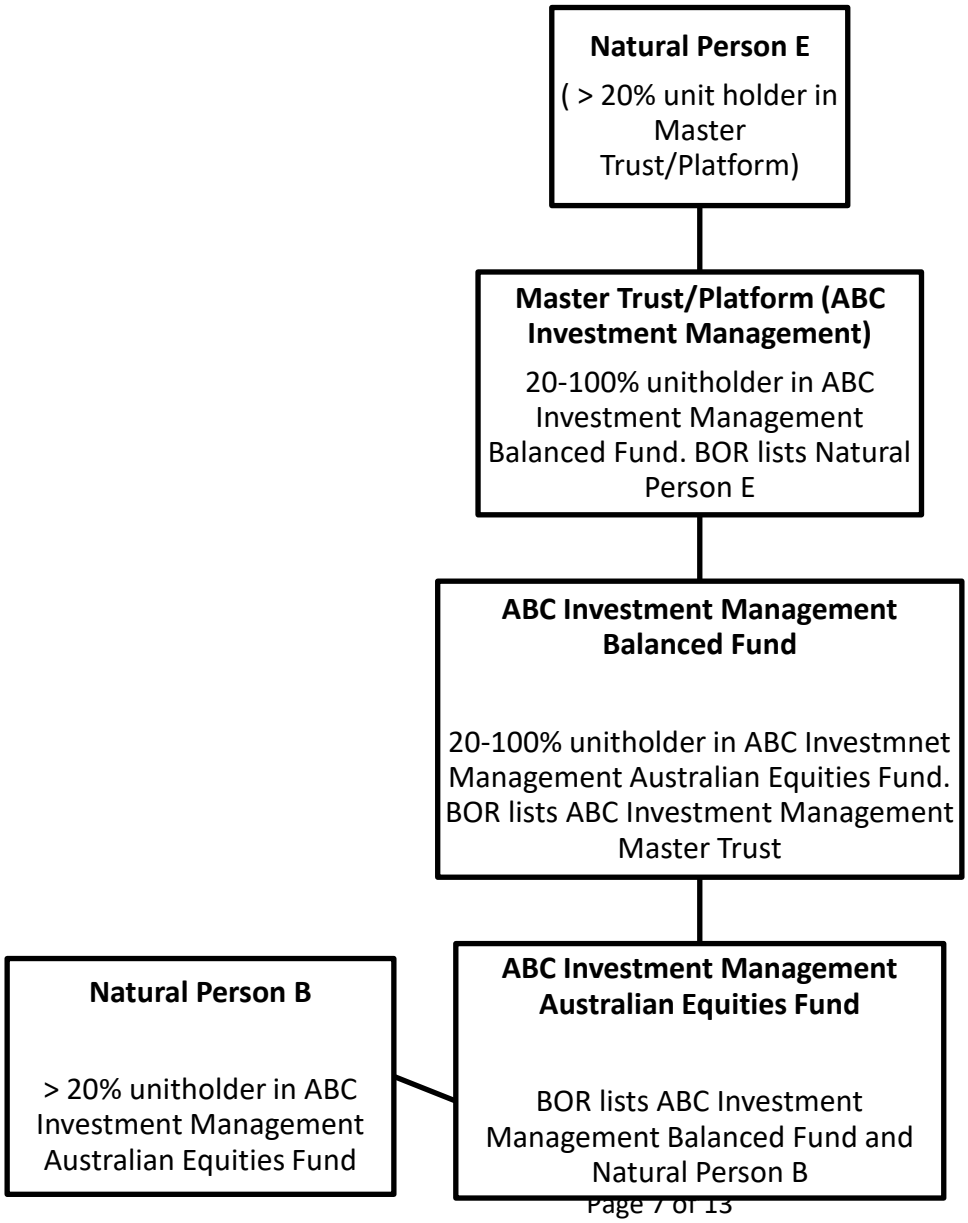
Given the unlikelihood of unlisted registered MISs in Australia having investors holding more than 20% in a single MIS, the structure of MISs in Australia and the role of the RE (whose identity is public knowledge) in its control and influence over a MIS, and ensuring consistency with comparative models adopted by overseas governments; we submit that unlisted registered MISs as a whole should, particularly retail MIS which are known to be widely held, be exempted from the beneficial ownership disclosure requirements.

One common scenario where there would be a greater than 20% reportable holding is where a Registered Superannuation Entity (RSE) or Investor Directed Portfolio Service (IDPS) would invest directly into an MIS. We note the Government's proposal to exempt regulated entities from the requirement to disclose trust beneficiaries if the relevant trust is an RSE. We support this given, as the paper notes, RSEs are already subject to significant oversight. However, it does appear that a regulated entity will still have to report that the RSE itself is invested in the MIS, the RSE's name, unique superannuation identifier, date of creation and the details of the RSE's trustees. Given that RSEs are regarded as low risk, it appears that the extra disclosure burden on MISs would be of little benefit in combatting tax avoidance. Given what is noted in the next section around the limited

level of control unitholders in an MIS have to remove the responsible entity and direct investment operations, the disclosure of RSEs invested in an MIS would also be of limited benefit in understanding actual significant influence and control over an MIS.

Another common scenario is where there may be a chain of trusts. An MIS may have over 20% of its units held by related retail master trusts, IDPS or platforms, where the responsible entity of those trusts or platforms will invest in their own related entity's underlying investment options. Under the current proposed approach, in a scenario where the relevant trusts in the chain of trusts are 'regulated entities', beneficial ownership would be reported as follows:

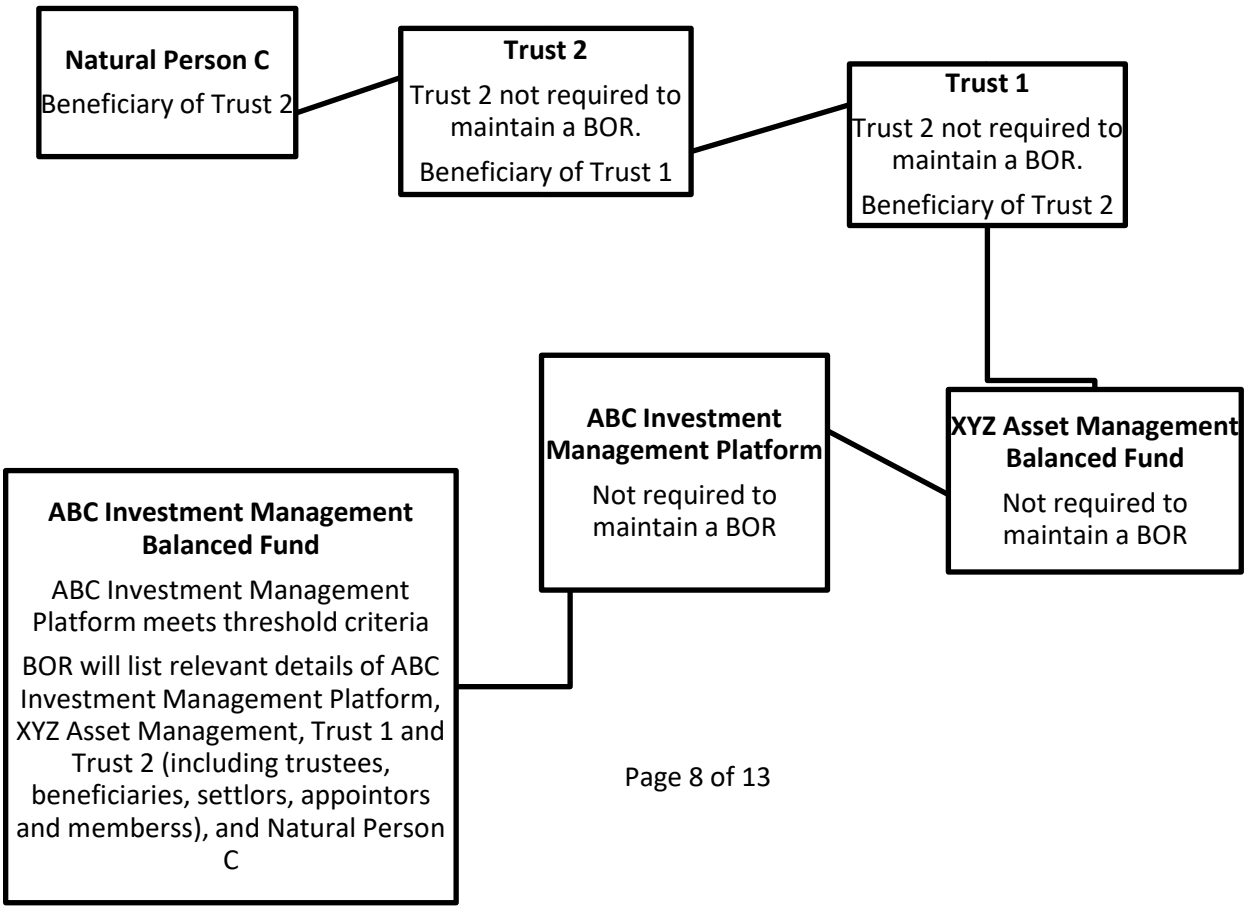
Figure 1.0 Chains of Related Entities



Under the proposal the trace through for each layer is limited to one level, and trace through is not required to the ultimate investor, it would appear redundant that each layer would need to report all related intervening trust unitholders. In the approach taken under the *Income Tax Assessment Act 1997* (ITAA) to determine whether an MIS is a managed investment trust (MIT), a 'closely held restriction' test is applied where the retail MIS must not have 20 or fewer persons holding 75% or more of the participation interests and a wholesale MIS must not have 10 or fewer persons holding 75% or more of the participation interests or one foreign resident individual holding 10% or more of the participation interests. Widely held entities and trusts in a chain of trusts are not treated as having an interest in the trust for the purpose of closely held rules. Rather, for the purposes of the test, the focus is on natural persons.

Another scenario would be where an investor is invested through a chain of trusts where the trusts are not 'regulated entities'. It is unclear how the rules would then apply. Arguably, the end MIS would need to trace through to the natural person at the end of the chain of trusts in the scenario below. This would be materially burdensome. Further, the listing of all beneficiaries in the chain of underlying private trusts could involve serious privacy issues (as discussed in section 1 of the submission). These beneficiaries could easily have little to no involvement in the trust (such as children of the owner). The fact that an ultimate beneficial owner has established trusts or other intermediate entities should be irrelevant. It is only the ultimate beneficial owner who should be shown on the public register where that information is readily obtainable by the RE.

Figure 2.0 Chains of Trusts with Unrelated Entities



Further, in the scenario in figure 2.0, attribution of indirect ownership is unclear. While ABC Investment Management Platform may have 20% or more of the regulated entity, the regulated entity may still have to list Trust 1 and Trust 2 even though they may merely be beneficiaries, so may have less than 20% indirectly in the regulated entity. Indirect ownership should only be attributed if the first entity has a majority interest or dominant influence over the regulated entity. It is also unclear who should be registered if no natural person can be identified. Other jurisdictions have a default of registering the CEO or equivalent if no natural person can be identified.

In the scenarios above, as a result of the aggregated investments, master trusts, IDPS or platforms may hold over 20% of an MIS, however the individual investors are not likely to hold a large percentage of those investments. if an investor invests in an MIS through another platform or master trust which is not a related entity to the ultimate MIS, it would be difficult for the RE of the MIS to identify the beneficial owner as it is the platform that performs the KYC checks and would be better placed to identify the beneficial owner. If an MIS needs to identify the ultimate beneficial owner, it would need the cooperation of the other platform to identify the beneficial owner. There is no obligation for platforms to provide this information and undertaking engagement with platforms to provide this information may be resource intensive with little benefit given the widely held nature of an MIS or platform.

For platforms themselves, tracing through many layers of wholesale funds, chains of trusts, down to the retail fund and ultimately the individual investor would be a large administrative challenge. The RE of a platform would have to introduce regular enquiries or a formal certification process with extra paperwork for representatives of an investor such as a financial advisor in order to confirm who ultimately owns a particular account with the platform. However, it is uncertain whether there would be cooperation with such enquiries and extra processes.

The consultation paper states that regulated entities be required to be *reasonably assured of the identities of their beneficial owners*. This seems to create the expectation that regulated entities seek the identity of all beneficial unitholders, regardless of whether there are reasonable grounds to believe that they hold 20% of units.

Therefore, we submit that where a related party, platform, master trust or wrap account has invested in an underlying investment option which is a widely held MIS, it should not be captured by beneficial ownership reporting requirements. That is, trusts along the chain should not be required to report related entities. Using the first chart above, we would submit that beneficial ownership information should only be captured where natural person B and natural person E have greater than 20% of the units directly in the MIS or greater than 20% of the units in the master trust or platform.

Alternatively, Government should provide in legislation a reasonable steps safe harbour. This would be of great assistance in reducing the regulatory burden for regulated entities, helping to provide the processes and procedures to enable them to discharge their obligation to be “reasonably

assured" or take "reasonable steps" regarding their enquiries with respect to beneficial ownership. The safe harbour should consider what information would constitute reasonable steps with regard to foreign investment vehicles.

Recommendation 2: Unlisted registered MIS including platforms and wraps, and unlisted CCIVs, should be exempted from the beneficial ownership disclosure requirements. Reporting of RSEs by a regulated entity should not be required.

Recommendation 3: Alternatively, the REs of managed investment schemes and Corporate Directors of unlisted CCIV sub-funds should be exempt from being required to report RSE unitholders, related entities or other widely held institutional holders where there is a chain of interposed trusts (or CCIV sub-funds) such as an IDPS, master trust or platform. Reporting should be limited to natural persons that have a greater than 20% direct holding in the MIS, CCIV sub-fund or platform. There should be further consideration of the operational requirements when investor holdings are through adviser platforms.

Government should provide a safe harbour on what constitutes being "reasonably assured" or what constitutes "reasonable steps" regarding regulated entities' enquiries with respect to beneficial ownership. The safe harbour should consider what information would constitute reasonable steps with regard to foreign investment vehicles.

Recommendation 4: We do not agree with substantial holding and tracing notices being amended to capture additional beneficial ownership information as it relates to MISs which invest in listed entities.

Additional clarification is also sought regarding the Government's intent about the types of MISs or regulated entities on which the proposed obligations are to be imposed. For instance, an entity could be a SICAV (an open-ended collective investment vehicle in Western Europe) or an OEIC (a UK open ended investment company), associations or a partnership (onshore or offshore, limited or unlimited). From the consultation paper, it is unclear whether offshore entities are proposed to be regulated or whether trace through is required if the offshore scheme is invested in an Australian MIS. If they are captured, what would constitute reasonable steps in tracing and identifying foreign beneficial owners? We submit that the government should consult further on obligations that would apply with various underlying legal structures.

Should there need to be tracing in respect of potential foreign owners with different legal structures and laws, consideration should be given to the manner and mechanisms through which there is engagement with foreign jurisdictions and their respective agencies and the interoperability of the

proposal with foreign tracing laws.

Recommendation 5: Government should give greater consideration to what extent the measures are intended to have extra-territorial effect. Further guidance or a safe harbour should be provided on what constitutes reasonable steps for identifying foreign beneficial owners.

3. Definition of beneficial ownership

The threshold requirements in the consultation paper refer to specified holdings or rights. A concern for FSC members is how these thresholds apply in the context of an MIS or CCIV across different types of entities beyond companies. In the UK, the test is only applied to a company.

We acknowledge that the regime will cover more beneficial owners by including the broadest range of entities. However, beneficial ownership registers for MISs which have multiple MIS, platforms and/or nominee/custodians on the unit register have practical difficulties. The difficulties with looking through unit registers of MIS has been well established in the context of validation of residency of the ultimate beneficial owner for withholding tax administration requirements – practically, many MIS are unable to validate residency of the ultimate beneficial owners. There will need to be significant time to establish a practical method to overcome challenges in obtaining the information for the underlying investors, as well as the systems to implement the requirement. The absence of a single, unified definition, with varying thresholds under different legislation may cause significant confusion and misunderstanding among the reporting entities and relevant authorities regarding their beneficial ownership disclosure requirements and will make it difficult to efficiently produce simple forms for data collection purposes.

In relation to a right to appoint or remove a responsible entity, the operation of this right is set out in the *Corporations Act 2001.* To replace a responsible entity, there is a requirement for members to pass an extraordinary resolution (which is defined as a resolution passed by at least 50% of the total votes that may be cast by members entitled to vote on a resolution). This is determined based on the specific circumstances of a resolution and cannot be determined from time to time outside of a resolution. For example, there is a need to determine if any members are excluded from voting, which could include if they have an interest other than as a member. As such, it is not a matter of merely knowing the number of units on the unit register to determine if a particular member has a right to replace the responsible entity. There are similar requirements in relation to the replacement of a Corporate Director of a CCIV.

In relation to the right to exercise significant influence or control, the entire premise of a MIS is for the responsible entity as the operator of the scheme to have day to day control. Further, there are statutory and fiduciary duties around the exercise of powers, which includes to treat all members in a class equally. As such, by definition, there cannot be the exercise of significant influence or control

over a MIS or it will fail to be a MIS. Similar comments apply to CCIV sub-funds.

It is also unclear how a RE can determine what are holdings or rights held 'directly or indirectly'. It would not always be aware of how its members hold or exercise their rights. Many of these holdings and rights are known and controlled by the member, not the RE. As such, the responsible entity is unable to maintain a credible register unless it is told what holdings or rights a member has. As correctly highlighted in the consultation paper, regulated entities may not be aware of who the beneficial owners of a MIS are, particularly owners who hold interests or exercise control through indirect channels. In relation to unlisted registered MISs, it would, in practice, be difficult for the RE to monitor beneficial interests by issuing tracing notices, especially as a large proportion of units in an unlisted MIS may be held through a 3rd party platform and the RE will not know the identity of the underlying platform investors. It would also be difficult for an open ended fund to keep track of beneficial owners where units on issue with fluctuate daily due to large redemptions.

Recommendation 6: If unlisted registered MISs are not exempted, then the proposed requirement to be reasonably assured of the identities of beneficial owners (and therefore to issue notices) should be proportionate. The RE of a registered MIS should not be required to issue tracing notices or establish formal certification processes to trace beneficial owners unless the RE has sufficient information available to it which would allow the RE to form a reasonable suspicion that an investor may meet the threshold for disclosure. This recommendation should similarly apply to Corporate Directors of CCIVs.

Guidance or a clear legislated safe harbour should be issued on what constitutes reasonable steps for REs of MIS when identifying and verifying beneficial owners (and similarly for Corporate Directors of CCIVs). In our view, entry into the register for a MIS or CCIV should only be for known information related to holdings of units or voting rights of natural persons.

Recommendation 7: Considering the nature of an MIS or CCIV, they should only be required to register beneficial ownership that is known about holdings of units or voting rights over 20% where these are natural persons. There should be consistency with the AML/CTF Rules.

4. Transitional arrangements

We note the consultation paper proposal will require regulated entities to maintain beneficial ownership registers as a transitional arrangement toward a future central registry, subject to technical feasibility and future consultation. This will mean that a regulated entity will have to undergo set up and compliance costs, updating the register regularly, only for these efforts to be made redundant due to the future creation of a central registry. Further, there is uncertainty around

the transition period toward a publicly maintained register.

We request that along with the recommendation for phased implementation (ie initially limiting the disclosure to government and regulatory authorities), clarification of the operational requirements and consultations on systems and processes are further considered before any announcements are made regarding the commencement of the regime.

Recommendation 8: More consultation and detail are needed around commencement and transition arrangements. Implementation phasing should account for the complex nature of systems and processes required for MISs and CCIVs to give effect to beneficial ownership trace through.

Finally, given the complexity of this proposal for industry, we would welcome further consultation with industry and would be happy to facilitate meetings with our members on the various issues raised in the submission. We would also welcome appropriate consultation time upon the release of any draft legislation.

If you wish to follow up on this submission or have any questions, please contact **Chaneg Torres, Policy Manager** at ctorres@fsc.org.au.

Sincerely,

Chaneg Torres
Policy Manager
Investments and Global Markets