Crypto Council for Innovation

29 April 2022

Via Email: taxpublicconsultation@oecd.org

International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration
The Organisation for Economic Co-operation and Development

Dear Ladies and Gentlemen:

The Crypto Council for Innovation (CCI)[1] is submitting this letter with respect to the 22 March 2022 consultation document titled, "Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard."

CCI is a global alliance of crypto industry leaders that shares insights and expertise about the global crypto ecosystem while addressing misperceptions and misinformation. CCI supports governments and institutions worldwide in efforts to shape and encourage the responsible regulation of crypto in a way that unlocks potential and improves lives.

We appreciate the opportunity to provide some high-level comments relating to the consultation document. Given the limited time for review and coordination among our members, however, we would request that the OECD consider additional time for interested parties to provide more detailed comments to the questions posed by the consultation document.

Our comments below focus on three principal themes: (1) Regulatory Conformity; (2) Implementation Dates; and (3) Carve-Outs.

1. Regulatory Conformity

The Crypto-Asset Reporting Framework (CARF) outlined in the consultation document will exist alongside other tax and customer transparency regimes such as the Common Reporting Standard (CRS), the Foreign Accounts Tax Compliance Act (FATCA) and AML/KYC rules, including rules applicable to virtual assets, based on Financial Action Task Force (FATF) recommendations. We believe that greater conformity of CARF with these other regulatory frameworks enhances the tax transparency goals of CARF and creates greater operational efficiencies in Crypto-Asset Service Providers' provision, and local governments' receipt, of digital asset transaction information.

Conformity between CARF and CRS information for financial assets or FATF virtual asset recommendations allows institutions and governments tasked with managing the reporting of crypto-asset related information to maintain similar systems and processes without having to create new processes

[1] CCI's members include A16z, Block, Coinbase, Fidelity Digital Assets, Gemini, Paradigm, Ribbit Capital, and Electric.

specifically for crypto-asset transactions when there is no overriding policy reason to do so. Conformity also leads to more consistent and robust data sets for governments.

We are making the following recommendations relating to regulatory conformity:

(a) Conform Self-Certification Renewals with CRS

Part III.C.4 of CARF provides that for a self-certification to remain valid, the information on it must be confirmed by the user or controlling person at least once every thirty-six (36) months. This essentially sets a three (3) year expiration limit on any self-certification, whereas, under CRS, self-certifications remain valid until there is a change in circumstance that causes information on the self-certification to be incorrect. Certain businesses provide services that will be subject to both CRS and CARF. The same customer, for example, may have a financial account invested in stocks and securities and be invested in crypto-asset holdings. To have a different self-certification standard for CARF and CRS in this instance would create an incongruity where a customer self-certification may remain valid for CRS but is not for CARF reporting. Different standards between CARF and CRS seem incongruous given that a Reporting Crypto-Asset Service Provider may rely on a self-certification provided by a Crypto-Asset User or Controlling Person. Further, the FATF recommendations that apply to Virtual Asset Service Providers require ongoing monitoring but not automatic renewal. Businesses will need to build in additional re-solicitation processes solely for CARF and/or may have to manage potentially conflicting statuses between CRS and CARF.

Recommendation: We recommend that self-certifications for CARF remain valid until there is a change in circumstance and believe the change in circumstance monitoring for CRS and AML/KYC purposes should suffice in providing a safeguard for changes in a user or controlling person's tax status.

(b) Conform Pre-Existing Procedures with CRS

The due diligence procedures for pre-existing crypto-asset users in CARF also diverge from those for financial accounts under the CRS and FATCA. For both CRS and FATCA, pre-existing accounts for individuals and in many cases for entities are generally allowed to be documented based on a review of existing account and AML/KYC documentation instead of a new self-certification. CARF will require a self-certification from Preexisting Crypto-Asset Users within 12 months after a jurisdiction introduces these rules under Part III.A.1 and III.B.1.

The consequence of a pre-existing user failing to provide a self-certification within this time frame would be that the Crypto-Asset Service Provider must refuse to effectuate relevant transactions (*e.g.,* transfers) on behalf of the user. This will effectively lock user assets on the platform, which can be especially onerous for assets with high price volatility. This impact is not seen in the CRS regime, where a pre-existing account may be reported but assets remain eligible for transfer out from the custodial institution.

Moreover, under CRS as under FATCA, rules allowed a twenty-four (24) month due diligence review period for pre-existing accounts, except for certain high-risk accounts with balances exceeding $1 million. In contrast, the twelve (12) month review period for all pre-existing crypto-asset users without priority is inadequate for institutions to be able to create a process for reviewing and validating preexisting users, especially if there is a need to educate customers on new documentation requirements or to solicit, review and record additional customer information.

Recommendations: For due diligence with respect to pre-existing crypto-asset users, we recommend the following:

(i) The due diligence timeframe for reviewing pre-existing users should be extended generally to twenty-four (24) months consistent with CRS and FATCA, unless there is a high-risk indicia with respect to the pre-existing user, for example, transactions or transfers exceeding USD $1 million;

(ii) For pre-existing crypto-asset users, due diligence for individuals and entities that are Active Entities and Excluded Persons should be allowed based on account information, including AML/KYC, and publicly available information in a manner consistent with CRS, rather than solely on a new self-certification.

(iii) The consequence of a documentation failure for a pre-existing crypto-asset user should be reporting to all jurisdictions where there are residency indicia for the user but not the cessation of transfer activity with respect to the account or user.

(c) Allow Electronic Rather than Paper Searches

Under CRS, for pre-existing account due diligence, procedures generally allow for electronic searches of the account holder's record for potential tax residence indicia.

Recommendation: We recommend that in an increasingly electronic record-keeping world searches in the client records be limited to electronic searches, in the case of validating the reasonableness of a self-certification (*e.g.,* checking for conflicts) and for checking indicia, if applicable, for pre-existing users.

(d) Streamline Reporting

Under CRS, reporting is generally in the aggregate. For example, sales proceeds from sale or exchange of financial assets in custodial accounts are reported in aggregate for the year. There is no differentiation between whether the security sold is stock or partnership interest or debt and certainly not between one stock versus another. In contrast, CARF appears to require reporting asset by asset. It is unclear why this distinction is being made for crypto assets. As crypto assets continue to multiply, asset-by-asset reporting engenders a risk that data becomes so discrete as to be difficult to report from a business's perspective and difficult to digest from a tax authority's oversight function.

Similarly, the multiple categories of reportable events, including multiple "transfer" types, create additional complexity not present in the CRS regime. Under CRS, different income events may give rise to separate reporting, but the characterization of those events are often inherent in the asset or the instruction (to sell) given to the financial institution. Under CARF, the differentiation of transfers to and transfers from a crypto-asset user other than a sale may require knowledge that the Crypto-Asset Service Provider does not have. This may lead to data that is inconsistent as reported between different institutions and affect the quality of data received by the relevant tax authorities.

Recommendation: We recommend streamlining the CARF reporting to allow for aggregate reporting of proceeds and transfer amounts instead of on an asset-by-asset basis and streamlining the number of transfer categories listed as reportable.

(e) Do Not Require Reporting of Incoming Wallet Addresses

The consultation document asks whether Crypto-Asset Service Providers should be required to report on the wallet addresses of incoming transfers. We do not believe there is any value in this additional requirement as tax authorities would generally be receiving information on transfers out of accounts if the asset is being transferred from or through another Crypto-Asset Service Provider; also, once the asset is with the Crypto-Asset Service Provider, any subsequent sale, exchange or transfer would be captured by CARF reporting. Based on our understanding, the incoming wallet addresses are generally not captured and maintained by crypto-asset platforms in a manner that would allow them to match with users for reporting purposes.

Recommendation: We recommend that CARF does not include any additional requirement for capturing or reporting incoming wallet addresses.

(f) Conform CARF Crypto-Asset Definition with FATF for NFTs

Under FATF virtual asset guidance, a Virtual Asset is defined as "a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes." Para 53 of the FATF 2021 Virtual Asset Guidance document generally excludes NFTs that are collectibles from this definition of virtual asset. CARF commentary on Section IV(A)(2), para 5, appears in contrast to include NFT collectibles.

Conforming the definitions in the case of NFTs would allow Crypto-Asset Service Providers to implement similar operational processes for AML/KYC and CARF. Moreover, Crypto-Asset Service Providers could leverage existing AML/KYC information with respect to NFTs under CARF if the definitions were consistent. We also note that many NFTs that are collectibles are highly illiquid. As a result, if you have a swap of an NFT collectible for another NFT collectible, for example, valuation for reporting is often impracticable.

Recommendation: We recommend that the Crypto Asset definition and in particular the exclusion of NFTs that are collectibles be conformed as between CARF and the FATF virtual asset guidance.

2. Implementation Dates

(a) Phasing-In Effective Dates

Compliance with tax information reporting and exchange frameworks requires systems builds both for businesses obligated to report and for jurisdictions seeking to accept the data submissions. The design, build, implementation and testing that needs to take place to build new compliance and reporting systems take significant resources and time.

By example, while FATCA was initially enacted in 2010, its provisions did not become effective until some four years later. And while numerous countries signed the Multilateral Competent Authority Agreement (MCAA) in 2014, reporting on CRS did not begin until 2017 and commenced in phases for different jurisdictions.

For FATCA and CRS, financial institutions required to report generally already had some tax reporting infrastructure and still needed significant time to modify and build new compliance systems. For many digital asset businesses that may not have prior tax reporting infrastructure, the building out of compliance and reporting systems will take significantly more time and resources. We expect that a typical provider may require three (3) to four (4) years to design, build, implement, and test a compliance reporting system and to build out teams that will oversee and monitor the new compliance process. The process may also be more difficult than CRS or FATCA if there is no streamlining of the asset-by-asset reporting.

Recommendation: We recommend a phase-in approach for the implementation dates, which will allow for an initial level of compliance and additional time for institution and governments to build out compliance systems:

(i) A delayed effective date (Effective Date) of at least twenty-four (24) months for compliance to take place for a particular adopting jurisdiction following formal adoption by the jurisdiction of CARF in order to provide for systems builds and expansion of compliance teams;

(ii) Initial reporting be limited to basic information on user and highest balance (based on institution's own non-tax reporting processes*, e.g.,* monthly, quarterly statements or otherwise) for the year;

(iii) As a second stage, reporting be limited to gross proceeds from crypto to fiat trades in aggregate or, possibly, include crypto-to-crypto trades involving a specified list of liquid crypto-assets and provide guidance regarding a consistent requirement to determine the timing and fair market value determinations across jurisdictions; and

(iv) Any expanded reporting be deferred for at least two years after the initial compliance Effective Date during which time governments can further review the adequacy of initially reported data sets.

(b) Conform Reporting Due Dates with CRS

To streamline both governmental and business processes, it is useful to implement reporting due dates for CARF consistent with CRS reporting due dates, but with an allowance for a minimum time after year-end for Crypto-Asset Service Providers to collect and prepare data for reporting.

Recommendation: We recommend conforming the annual due date for CARF reporting with the CRS reporting due date for the applicable jurisdiction, but no earlier than May 1 of the year following the year to be reported.

3. Carve-Outs

(a) Establish De Minimis Thresholds

Like FATCA and CRS, CARF is intended to deter tax avoidance and create tax transparency. However, FATCA and CRS each contain certain de minimis exemptions for low-value accounts recognizing that such accounts are not high risk for tax avoidance schemes which tax authorities are most interested in. FATCA, for example, exempts deposit accounts with a value that is USD$50,000 or less for individuals. CRS similarly allows for exemption for pre-existing entity accounts with a value of USD$250,000 or less. Under U.S. tax information reporting rules recently enacted to report receipt of virtual assets in the course of a trade or business, the threshold for reporting is set at USD$10,000.[2]

It would make sense for a similar de minimis thresholds to apply under CARF to allow both businesses and the government to focus resources on higher risk accounts and use cases. Including all data points without consideration for significance may focus industry resources on information that may not be useful to tax authorities (*e.g*., reporting on numerous accounts with minor crypto-asset holdings or activity) rather than allowing businesses to concentrate resources on producing better quality data on accounts with higher risk profile.

[2] See section 6050I(d)(3) of the Internal Revenue Code.

Recommendation: We would recommend limiting reporting to aggregate transactions with a value that exceed a de minimis threshold of USD$10,000. This we believe is especially relevant for Reportable Retail Payment Transactions.

(b) Initially Treat NFTs as Out-of-Scope

The technology and use cases for non-fungible tokens (NFTs) continue to evolve and appear in many cases to differ in nature from traditional cryptocurrencies. While some NFTs have high value, many do not. Moreover, as noted above, NFTs can be highly illiquid and hard to value unless exchanged for fiat. In an exchange of one NFT for another NFT, for example, it may be difficult for a Crypto-Asset Service Provider to report on a particular value for the transaction especially if there isn't a readily available price for either NFT.

As noted above, we recommend excluding NFTs that are collectibles from the definition of Relevant Crypto Asset, consistent with FATF virtual asset guidance. But NFTs as a category are traditionally not used for payment and their legal status may be further circumscribed by the terms and conditions that the NFT transfer is subject, and the broader use cases, technology and legal status of NFTs continue to change.

Recommendation: Given the evolving nature of this technology, we recommend initially exempting NFTs from the definition of Relevant Crypto-Assets for reporting purposes or deferring the reporting with respect to NFTs, for an initial period of two (2) years after the Effective Date to allow for further time for evaluation, including issues relating to liquidity and function.

(c) Clarify Accounts Payable Transactions as Out-of-Scope

Under CARF, a Reporting Crypto-Asset Service Provider "means any individual or entity that, as a business, provides a service effectuating Exchange Transactions for or on behalf of customers …" Our reading of this definition is that accounts payable transactions would be exempt from CARF given that these payments are not made on behalf of customers. It would, however, be helpful for guidance to clarify that this is the case.

Recommendation: We recommend that commentary to CARF provide guidance that businesses' accounts payable functions would not be subject to CARF reporting.

(d) Exclude Merchant's Customer from Reportable Retail Payment Transaction Reporting

Under Part II.A.3.f of CARF, information on transfers that constitute Reportable Retail Payment Transactions must be separately reported. In this reporting, where the Crypto-Asset Service Provider is processing payment on behalf of a merchant, the CARF rules require the Crypto-Asset Service Provider to treat the customer of the merchant as the Reportable User, in addition to the merchant. This rule, however, may be difficult for a Crypto-Asset Service Provider to implement and may in some cases also lead to double reporting.

In a scenario where a merchant has asked a Crypto-Asset Service Provider to process payments for the sale of goods or services, the merchant will generally instruct its customer to transfer assets to a particular account (generally an omnibus account maintained at the Crypto-Asset Service Provider). The Crypto-Asset Service Provider under this model may have little visibility into who the merchant's customer is. In the case where the merchant's customer is also a customer of the Crypto-Asset Service Provider and the Crypto-Asset Service Provider can trace this payment, the reporting of the transfer out of the customer's account and a separate Reportable Retail Payment Transaction report would create duplicate reporting.

Recommendation: A merchant's customer should not be treated as a Reportable User when reporting proceeds settled on behalf of a merchant.

CCI appreciates the opportunity to provide these comments and appreciates your consideration of our feedback. We would be pleased to further engage on the comments contained in this letter or the consultation document generally. If you have any questions or require additional information, please do not hesitate to contact Sheila Warren at (510) 510-3633 or policyteam@cryptocouncil.org.

Sincerely,

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