

Guidance Note

Summary of Automatic Exchange of Information (“AEOI”)
Obligations for Cayman Islands Entities

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The AEOI Regime

US FATCA: Sections 1471 to 1474 of the United States Internal Revenue Code of 1986, commonly referred to as the Foreign Account Tax Compliance Act, (“US FATCA”) was enacted in the United States in 2010 in order to reduce perceived offshore tax evasion by US persons holding assets through offshore accounts that were not subject to US information reporting to the United States Internal Revenue Service (the “IRS”). On 29 November 2013, the Cayman Islands government signed a Model 1B (i.e. non-reciprocal) intergovernmental agreement with the United States in connection with the implementation of US FATCA (the “US IGA”).

UK FATCA: On 5 November 2013, the Cayman Islands government signed an intergovernmental agreement with the United Kingdom (the “UK IGA”) aimed at improving international tax compliance by providing a framework for the implementation in the Cayman Islands of a reporting regime relating to UK tax residents (“UK FATCA”), which is similar in scope to US FATCA. With the implementation of the OECD Common Reporting Standard (as below), UK FATCA was phased-out and, since 2018, Cayman Islands entities only need to comply with regulations concerning US FATCA and the Common Reporting Standard.

Common Reporting Standard: On 29 October 2014, the Cayman Islands government signed a Multilateral Competent Authority Agreement to implement the Organization for Economic Cooperation and Development’s (the “OECD”) Global Standard for Automatic Exchange of Financial Account Information - Common Reporting Standard (the “CRS”).

US FATCA and the CRS shall be referred to collectively in this guidance note as “AEOI”.

The AEOI Regulations

Cayman Islands regulations were issued on July 4, 2014 to give effect to the US IGA and the UK IGA, and on October 16, 2015 to give effect to the CRS (collectively, the “AEOI Regulations”)¹. Pursuant to the AEOI Regulations, the Cayman Islands Tax Information Authority (the “TIA”) has published guidance notes on the application of the US IGA and the CRS (the “Guidance Notes”). The Guidance Notes are intended to provide practical assistance to businesses, their advisers and the TIA in interpreting the AEOI Regulations and are a key component of Cayman’s AEOI regime for the implementation of the US IGA and the CRS.

Summary of AEOI Obligations

Pursuant to the AEOI Regulations, each Cayman Islands entity that is a Reporting Financial Institution (a “Reporting FI”) is required to:

- register with the IRS to obtain a Global Intermediary Identification Number (a “GIIN”)(US Regulations only);
- notify the Cayman Islands Department for International Tax Cooperation (the “DITC”)through the TIA that the FI will be subject to reporting obligations under the AEOI Regulations (or any of them) – it should be noted that under the CRS Regulations the requirement to notify the TIA applies to all Financial Institutions (each an “FI”) and not just Reporting FIs;
- carry out due diligence procedures which are designed to identify any reportable accounts; and



¹ On 4 July 2014, The Tax Information Authority (Amendment) (No.2) Act, 2014, The Tax Information Authority (International Tax Compliance) (United Kingdom) Regulations, 2014 (as amended), and The Tax Information Authority (International Tax Compliance) (United States) Regulations, 2014 (as amended) (the “US Regulations”) were brought into force. On 16 October 2015, the Cayman Islands Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations, 2015 (as amended) (the “CRS Regulations”) were brought into force.

- report on any such reportable accounts by the requisite deadline set out in the AEOI Regulations.

The AEOI Regulations principally apply to Reporting FIs and therefore in respect of Non-Reporting Financial Institutions (“Non-Reporting FIs”) referred to further below, there are no or reduced obligations under the applicable AEOI Regulations. Further, the AEOI regimes can also have an impact on an entity that is not a Financial Institution. In this regard, any entity that is not a FI will be considered a Non-Financial Foreign Entity under US FATCA (“NFFE”) or Non-Financial Entity under the CRS (“NFE”). There are two categories of NFFE/NFE - Active or Passive². An NFE, whether Passive or Active, has no obligations itself under the AEOI Regulations but may have to confirm its status and provide details of its controlling persons to another FI with whom the NFE maintains an account if requested to do so by that FI.

Preliminary Step 1 – Determine if the Cayman entity is a Financial Institution

The first step to be undertaken by a Cayman Islands entity is to establish whether, for the purposes of the AEOI Regulations, the entity is a FI. This, together with establishing the type of Financial Institution that it is, will determine the extent of the obligations that need to be undertaken. The AEOI Regulations and Guidance Notes assist Cayman Islands entities in determining their status as a Financial Institution or NFE (and whether it would be an Active or Passive NFFE/NFE).

Broadly, under the AEOI Regulations, the term Financial Institution includes:

- **Custodial Institution** - any entity that earns a substantial portion (at least 20 percent) of its gross income from the holding of financial assets for the accounts of others and from related financial services;
- **Depository Institution** - broadly any entity that accepts deposits in the ordinary course of a banking or similar business;
- **Specified Insurance Company** - an entity that is an insurance company (or a holding company of an insurance company) and issues, or is obligated to make payments with respect to, a cash value insurance or annuity contract will be a Specified Insurance Company. Insurance companies that only provide general insurance or life insurance should not be financial institutions;
- **Investment Entity** - there are different definitions of Investment entity under the IGA and the CRS (although they are substantially similar and, for the purpose of the US Regulations, entities have a choice of which definition to apply) as follows:

US Regulations: an Investment Entity is an entity that conducts as a business, or is managed by an entity that conducts as a business, one or more of the following activities, for or on behalf of a customer, trading in:

- money market instruments (cheques, bills, certificates of deposit, derivatives etc.);
- foreign exchange;
- exchange, interest rate and index instruments;



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² An Active NFFE/NFE is an entity that conducts a business activity other than the holding of assets that produce investment income such as interest, dividends etc. One test to establish an Active NFFE/NFE is whether less than 50% of that entity's gross income for the preceding year was passive income (i.e. income other than trading income) and less than 50% of its assets were assets that produced passive income. A Passive NFFE/NFE is any NFFE that is not an Active NFFE/NFE.

- transferable securities and commodity futures trading;
- individual and collective portfolio management; or
- otherwise investing, administering or managing funds or money on behalf of other persons.

Primarily conducts as a business one or more of the following activities or operations for or on behalf of a customer:

- trading in money market instruments (cheques, bills, certificates of deposit, derivatives, etc.); foreign exchange; exchange, interest rate and index instruments; transferable securities; or commodity futures trading;
- individual and collective portfolio management; or
- otherwise investing, administering, or managing Financial Assets or money on behalf of other persons; or

The gross income of which is primarily attributable to investing, reinvesting or trading in Financial Assets, if the entity is managed by another entity that is a Depository Institution, a Custodial Institution, a Specified Insurance Company, or an Investment Entity.

In practice, when applying these definitions, an entity that is professionally managed will generally be an Investment Entity, by virtue of the managing entity being an Investment Entity. In practice, most investment funds in the Cayman Islands (including hedge and private equity funds) will fall within each definition of an Investment Entity and therefore be a Financial Institution.

Preliminary Step 2 – Determine if the FI is a Reporting or Non-Reporting FI

The next step to be undertaken by a FI is to establish whether it is a Reporting FI or Non-Reporting FI. By default, every FI is a Reporting FI unless it qualifies as a Non-Reporting FI under the relevant set of AEOI Regulations.

This exercise to identify any applicable exemptions can be complex and involves many variables and should therefore be considered on a case-by-case basis. However, one of the most common applicable exemptions under the US Regulations and UK regulations to the fund industry, aside from the use of a sponsoring entity (as referred to below), is the investment adviser/investment manager exemption. This provides that an entity which would be a FI solely because it:

(a) renders investment advice to, and acts on behalf of; or

(b) manages portfolios for, and acts on behalf of a customer for the purposes of investing, managing or administering funds deposited in the name of the customer with a Financial Institution, would be treated as a certified deemed compliant Financial Institution and therefore a Non-Reporting FI.

The CRS Regulations are intended to apply more broadly than the US Regulations with the scope of exemptions available under the CRS being far narrower. The Investment Adviser/Investment Manager exemption referred to above is, for example, not applicable under the CRS. In addition, under the US Regulations, a FI could appoint a sponsoring entity to perform its obligations meaning that the FI itself would be considered a Non-Reporting FI. The sponsoring entity concept has not been adopted in the CRS. Therefore, certain FIs



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(e.g. general partners, investment advisers, investment managers and sponsored entities) that would be considered Non-Reporting FIs under the US Regulations and may be Reporting FIs under the CRS Regulations and will therefore be required to comply with the due diligence and reporting obligations set out in the CRS Regulations. This is an important difference between these AEOI regimes and such entities should refresh their classification for CRS and not assume it is the same as for US FATCA.

Financial Institutions that are Non-Reporting Financial Institutions generally have no, or reduced, obligations under the AEOI Regulations. Stuarts can assist you with determining whether an entity is classified as a Non-Reporting FI and if so advise what, if any, obligations under the AEOI Regulations may apply to that entity.

The remainder of this guidance note applies to entities that are Reporting FIs under one or more of the AEOI Regulations.

Obligation 1 – Registration with the IRS

A Reporting FI will (for the purposes of the US IGA and US Regulations) need to register with the IRS and obtain a GIIN. An application for registration should be made not later than 30 days following the date of commencement of that entity's business. Registration can be completed through the IRS FATCA registration portal at <https://www.irs.gov/businesses/corporations/fatca-foreign-financial-institution-registration-system>. The IRS has issued detailed guidance to assist with this process.

Where the Financial Institution is a member of an expanded affiliated group, current IRS procedures require that the lead of this group registers and has obtained their GIIN so that when other group members/ Related Entities are registering they are also able to use this information.

Obligation 2 - Registration with the DITC/TIA

Pursuant to the AEOI Regulations, a FI is required to notify the DITC via the Automatic Exchange of Information Portal at <https://ditcportal.secure.ky/login> (the "AEOI Portal") by no later than 30 April in the first calendar year in which the Reporting Financial Institution is required to comply with reporting obligations under the applicable AEOI Regulations. Under the CRS Regulations, this notification procedure is not limited to Reporting FIs but to all FIs generally although in light of the narrower list of Non-Reporting FIs, in practice most Cayman Islands FIs will be Reporting FIs for CRS purposes.

Entities will need to complete the annual notification process for both US FATCA purposes and for CRS reporting purposes going forward. The DITC has issued a comprehensive user guide to assist with the use of the AEOI Portal which can be accessed at https://www.ditc.ky/wp-content/uploads/DITC_Portal_User_Guide.pdf.

Prior to making a notification, each Reporting FI should take steps to authorise a person to act as the FIs principal point of contact (the "PPOC") for all purposes of compliance with the applicable AEOI Regulations.

- To complete the notification process, each FI will need to provide the following information:
- Name of FI and any number given to it by the TIA;
- Confirmation of whether the FI will be subject to the US Regulations and/or the CRS Regulations;
- In the case of the CRS Regulations, whether the entity is a Reporting FI or Non-Reporting FI;



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- GIIN (where obtained);
- FI registration category as determined in accordance with the applicable AEOI Regulations;
- Contact name, email address, telephone number and full office address of the individual authorised by the FI to be the PPOC; and
- In the case of the CRS Regulations, the full name, address, business entity, position and contact details (including an electronic address) of a person the FI has authorised to give notification of any change to the TIA of its PPOC (the “Authorised Person”).

The FI will also need to provide a pdf document evidencing the authority of the person purporting to be the PPOC. This document should be a signed letter from the FI (on its own letterhead) or a copy of the resolution of the operator of the entity giving the authorization to the PPOC and containing the information outlined above. Stuarts attorneys can assist by preparing a template letter and operator resolutions granting the authority to the PPOC and Authorised Person.

Once the notification process had been completed, the PPOC will be granted access to the AEOI Portal and the PPOC may authorise one or more additional persons to be ‘users’ of the AEOI portal in relation to that FI’s registration.

Obligation 3 - Due Diligence Compliance

In relation to all Financial Accounts maintained by a Reporting FI, that Reporting FI will need to establish and maintain arrangements (and in the case of the CRS Regulations, establish and maintain written policies and procedures) that are designed to identify Reportable Accounts³. In addition, a Reporting FI under the US Regulations, a Reporting FI must establish and maintain arrangements that are designed to identify the jurisdiction of residence and, in relation to the US Regulations only, the US citizenship of an account holder. Under the CRS Regulations, the policies and procedures must identify each corporation tax purposes and apply the due diligence procedures set out in the CRS. A Reporting FI must also keep the information obtained from its due diligence procedures and a record of the steps taken to comply with the AEOI Regulations for 6 years from the end of the year to which the information relates or the steps were taken.

In the CRS Regulations, the Cayman Islands has incorporated the “wider approach”. In this regard, the due diligence procedures in the CRS (in particular the indicia search procedures) are designed to identify Reportable Accounts, understood as being those of residents in a jurisdiction that is a Reportable Jurisdiction at the moment the due diligence procedures are performed. However, the “wider approach” extends the due diligence procedures to identify each jurisdiction in which an Account Holder or a Controlling Person is resident for income or corporation tax purposes. Such an approach could significantly reduce costs for Financial Institutions because they would not need to perform additional due diligence each time a new jurisdiction joins the CRS.

The nature and scope of the due diligence requirements vary depending on the type of account, the status of the account holder and the value of the account. As a minimum, the FI should request that each account holder completes either (i) the applicable W-8 or W-9 IRS form and a Cayman CRS Regulations self-certification form or (ii) a combined AEOI Regulations self-certification form. Self-certification forms can be found at: https://www.dtc.ky/wp-content/uploads/2020/06/Individual_Self_-_Certification_Form.docx and



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³ “Reportable Account” in brief means custodial or bank account (for a Custodial Institution or Depository Institution) or holdings of equity and debt interests (for an Investment Entity) held by US entities, citizens or residents (for the purposes of the US Regulations) or tax payers in the CRS Participating Jurisdictions (for the purposes of the CRS Regulations)

https://www.ditc.ky/wp-content/uploads/2020/06/Entity_Self - Certification_Form.docx .

These forms will enable the FI to analyse each account holder to see whether any relevant indicia are present and ascertain whether an account is a Reportable Account for the purposes of any of the AEOI regimes. Identification of accounts should be completed by the FI as soon as practicable after the account has been opened or in any event within 90 days.

It should be noted that a self-certification cannot be relied upon if a FI has reason to know that it is incorrect, unreliable or there is a change in circumstance which changes the account holder's status. Under the CRS Regulations, a Reporting FI is deemed to have contravened the policies and procedures relating to a self-certification or documentary evidence if the FI knows or has reason to believe the self-certification or other documentary evidence is inaccurate in a material way and it makes a return that relies on that self-certification or other documentary evidence's accuracy.

In practice, FIs will (as they are entitled to do under the AEOI Regulations) engage professional service providers, such as fund administrators, to perform the necessary due diligence required and to analyse and classify financial accounts.

Obligation 4 - Reporting

In respect of every calendar year, a Reporting FI is required to prepare a return setting out:

- certain information (either set out in the AEOI Regulations or in the case of the CRS, in the CRS itself) in relation to every Reportable Account that is maintained by the FI at any time during the calendar year in question;
- the FI's GIIN (if one has been obtained);
- in relation to US FATCA only, a statement relating to whether the FI has a Related Entity or branch which is unable to fulfill its FATCA obligations; and
- in relation to the CRS only, if the FI **DID NOT** maintain any Reportable Account in any Reportable Jurisdiction during the calendar year, a nil return. In this regard, whilst it is not a requirement for FIs to submit nil returns under the US Regulations, it is generally considered good practice to do so.

The information required to be provided in respect of each Reportable Account includes:

- the name and address of the account holder;
- jurisdictions of residence (CRS Regulations);
- the account holder's TIN (US Regulations) or functional equivalent (CRS Regulations);
- if an account is identifiable by an account number, that number or, if not, its functional equivalent;
- balance or value of the account in the currency in which the account is denominated;
- the relevant total gross credits (e.g. interest and dividends paid during the year) if any;



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- if the account holder is an individual, that person's date of birth (CRS only);
- if the account holder is a passive NFE that has Controlling Persons who are Specified Persons, the names and addresses of those Specified Persons and, if any of those persons is an individual, that same personal information as required for individual account holders as described above.

A Reporting FI will be required to submit a separate return with respect to each Reportable Jurisdiction for which it has Reportable Accounts under the CRS. .

All returns should be submitted to the TIA on or before **31 July** of the year following the calendar year to which the return relates (in the form required by the TIA) using the AEOI Portal. The TIA has issued guidance and instruction on the reporting process vis the AEOI Portal including on submitting manual returns (i.e. by manually inputting information to an online form) or electronically using XML format. The TIA will then on-report the returns to the relevant tax authorities in the appropriate jurisdictions.

Consequences for non-compliance with the AEOI Regulations

30% withholding (US FATCA only)

In respect of the US IGA and US FATCA, a Cayman Islands based FI that is significantly non-compliant with the US IGA and the US Regulations, will be subject to a 30% withholding tax on US source income. There is no withholding tax regime for the CRS Participating Jurisdictions relating to the CRS.

Offences under the US Regulations

A Reporting FI which:

- without reasonable excuse, fails to comply with a requirement of the Competent Authority under the Regulation that permits the TIA to request that the FI to provide or make available information including copies of relevant books and records for the purposes of determining whether information provided by a FI was correct and complete (the "Disclosure Regulation");
- without reasonable cause, fails to make a report required under the FATCA Regulations;
- fraudulently or negligently makes a false report, whether in its entirety or in any particular part;
- fails to implement arrangements or procedures in order to comply with the FATCA Regulations;
- with intent to avoid the provisions of these regulations, alters, destroys, mutilates, defaces, hides, or removes any document or information, including documents or information electronically held; or
- willfully obstructs an inquiry by the Cayman TIA under the Disclosure Regulation,

commits an offence and is liable on summary conviction to a fine of five thousand dollars, or in the case of subparagraphs a), c), d), e) and f) to imprisonment for a term of 2 years, or



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to both. That offence can be considered to be committed by any director, manager, secretary or other similar officer of the body corporate where the offence committed by the relevant body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any such person who was purporting to act in the capacity of director, manager, secretary or other similar officer of the body corporate.

Offences under the CRS Regulations

A Cayman Islands FI commits an offence if:

- it contravenes any regulation in Part 2 of the CRS Regulations (being the main regulations that bring into force the CRS); or
- it gives the TIA information that is materially inaccurate (the “Act”) and: the FI knew of the inaccuracy when the act was done; in doing the act, behaved fraudulently, intentionally, negligently or recklessly; in doing the act, contravened its policies or procedures referred to above; or discovered the inaccuracy after doing the act but did not tell the TIA about the inaccuracy as soon as practicable after making the discovery.

A person (i.e., not just a FI) commits an offence:

- if in purported compliance with Part 2 of the CRS Regulations, the person gives the TIA information that is materially inaccurate and the act was done intentionally to cause, or the person knew the act was likely to cause, a contravention of the obligation on the TIA to keep confidential information that is received by the TIA for the facilitation of the automatic exchange of information or otherwise for tax purposes;
- if the person alters, destroys, mutilates, defaces, hides or removes information in a way that causes the person or anyone else to contravene Part 2 of the CRS Regulations in relation to the information or authorizes, advises or counsel’s someone else to do so; and
- if the person hinders the TIA in performing a function under the CRS Regulations.

It is also an offence for a person to make a self-certification that is false in a material particular for the CRS. It does not matter that the self-certification was made outside of the Cayman Islands or that the person did not know, or had no reason to know, that the self-certification was false.

If a FI commits an offence, the following persons are also guilty of that offence: directors, managers, secretaries or other similar officers of a body corporate; members of an LLC, general partners of an exempted limited partnership, partners of any other partnership, trustees of a trust. It is a defence for the defendant to prove that the defendant exercised reasonable diligence to prevent the contravention.

It is a defence to the above offences for the defendant to prove the defendant had a reasonable excuse. However, neither insufficiency of funds nor reliance on an agent appointed to carry out the AEOI obligations is a reasonable excuse.

The CRS Regulations provide the imposition of both fines and penalties (in each case up to approximately US\$60,000, plus, in the case of penalties, additional amounts for each day



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the contravention has not been remedied) provided that, in the case of penalties, the TIA has complied with a procedure for notifying the defendant of the imposition of such penalty providing the defendant with an opportunity to challenge such penalty.

Summary of the steps a Cayman Islands' entity should be taking

- Determine whether it is a FI, and if so, whether it is a Reporting FI;
- If it is a Reporting FI under the US Regulations, register with the IRS to obtain a GIIN;
- Implement a due diligence compliance programme in accordance with the AEOI Regulations, which, in the case of the CRS Regulations, must be in writing;
- Appoint a person to be the PPOC and, for the CRS Regulations, a person as an Authorised Person;
- Notify the TIA via the AEOI Portal that it is a Reporting FI (or, in the case of the CRS Regulations, a FI);
- As and when required, file the relevant annual returns to the TIA via the AEOI Portal; and
- Ensure that its constitutional documents and, for investment funds its offering memorandum or private placement memorandum, is up-to-date and contains disclosures relating to the FIs obligations under the AEOI regimes and the disclosure of information to the TIA.

How can Stuarts Help?

The Stuarts dedicated Regulatory Group offers legal services in connection with all aspects of automatic exchange of information ("AEOI"). Together with our affiliate, Southern Management Services Ltd., we can handle all aspects of AEOI compliance. We provide the full suite of automatic exchange of information 'AEOI' services to assist our clients with their regulatory obligations in the Cayman Islands.

- Provision of Cayman Islands legal advice regarding the potential application of FATCA and CRS to an entity;
- Determining entity classification under each reporting regime (FATCA and CRS) and any available exemptions;
- Advising on self-certification and due-diligence requirements;
- Drafting and assisting with self-certification forms, sponsored entity agreements, delegation agreements and outsourcing agreements;
- Drafting and assisting with AEOI policies and procedures;
- Registering an entity with the Internal Revenue Service (IRS) and obtaining a Global Intermediary Identification Number (GIIN);
- Registering an entity with the Cayman Islands Tax Information Authority and obtaining a Financial Institution (FI) Number;
- Advising on the requirements of principal point of contact (PPOC), Authorising Person (AP) and Responsible Officer (RO); and
- Conducting compliance reviews and assisting with reports.



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Guidance

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information, please contact:

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Our proven track record in advising leading international Law Firms, Investment Managers, Investment Companies and High-Net-Worth individuals is a result of the deep understanding of our markets.

At Stuarts, we strive to build and maintain enduring relationships with our clients through the combined legal expertise and business acumen of our practice groups and by providing outstanding service.



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