

Introduction to automatic exchange of information for Cayman Islands investment funds

This guide provides a high level summary of the main obligations for Cayman Islands investment funds under Cayman Islands automatic exchange of information (**AEOI**) legislation.

Background and legislative framework

Over recent years governments around the world have agreed international standards for the automatic sharing of financial account information between global fiscal authorities, with the aim of reducing tax evasion.

As part of its commitment to international transparency standards, the Cayman Islands Government is a signatory toⁱ:

- a Model 1B intergovernmental agreement with the United States (**US IGA**) which provides the framework for the implementation of the US Foreign Account Tax Compliance Act (**FATCA**) in the Cayman Islands
- the OECD sponsored Multilateral Competent Authority Agreement and certain bilateral agreements or tax treaties regarding the common reporting standard on automatic exchange of information (CRS, together with the US IGA, **AEOI Agreements**)

As Cayman Islands entities are not directly subject to the AEOI Agreements, the Cayman Islands has introduced legislation to implement the AEOI Agreements under the Tax Information Authority Act (**TIA Act**)ⁱⁱ.

The Department of International Tax Co-operation (**DITC**) is the Cayman Islands government department responsible for tax affairs and the Tax Information Authority (**TIA**), created by the TIA Act, is the Cayman Islands competent authority for tax co-operation and is housed within the DITC. The DITC has issued guidance notes (**Guidance Notes**) on the AEOI Legislation, which can be found [here](#) and [here](#), which provide details of the notification, reporting and ongoing obligations that apply, as well as a useful reminder of the differences between FATCA and CRS.

How are investment funds classified for AEOI purposes?

In practice, the vast majority of Cayman Islands investment funds fall within the definition of an Investment Entity (one of the types of Financial Institution under AEOI Legislation) and will be classified as Cayman Reporting Financial Institutions. There are certain differences between the definitions in each of the FATCA Regulations and the CRS Regulations, with the term Foreign Financial Institution being used under FATCA. In this guide we will be discussing 'FIs' or 'Financial Institutions'.

What are the notification obligations?

The most notable notification obligations are:

- **To register with the Internal Revenue Service of the United States (IRS)**: to obtain a global intermediary identification number (**GIIN**) (even if a Reporting FI has no US Reportable Accounts) either through the [IRS FATCA Portal](#) or through a paper submissionⁱⁱⁱ.

A Cayman Islands investment fund which is a Reporting FI is required by the FATCA Regulations to register with the IRS within 30 days of 'starting business'. While a fund is not technically operating until it starts to accept subscription payments from investors (for the purposes, at least, of the Mutual Funds Act), in reality, all funds have to provide their GIIN numbers to banking and other counterparties at a very early stage of their creation in order to open accounts. It is therefore important to get this registration done as soon as possible after the vehicle has been formed.

When registering for a GIIN, the IRS portal requires the name of a natural person to be listed as the FI's Responsible Officer. The Responsible Officer of a Reporting FI will be the person required to deal with the IRS online registration, certify that certain information (entered as part of the online registration) is accurate, and certify that the Reporting FI will comply with its FATCA obligations. It does not invoke the US Treasury concept of a Responsible Officer and those obligations are not imported into the Cayman Islands legal framework. Very often this person will be the compliance officer of the investment manager or one of the directors of the fund (if it is a corporate vehicle).

- **To register with the TIA through the Portal:** all Cayman Financial Institutions (both Reporting and Non-Reporting) must register with the TIA on the portal and provide the required information including details of their principal point of contact (**PPOC**) and authorising person (**Authorising Person**). This information must be submitted by a pdf authorisation [letter](#), signed by a director, trustee or general partner of the FI, as applicable, and is intended to provide the DITC with details of all Cayman Financial Institutions. Where an FI has reporting obligations under the FATCA Regulations, it will also be required to enter its GIIN when it registers on the portal. The Authorising Person will be the only person from whom the TIA will take instructions that the PPOC has changed.

The same person / entity cannot be appointed as both Authorising Person and PPOC, unless in the case of an entity it is licensed by CIMA. Any changes to the PPOC and/or Authorising Person must be notified to the TIA within 10 business days. For FIs which were already registered on the portal for FATCA and/or UK CDOT compliance purposes, their PPOC must have filed a variation in reporting obligations on the portal to register the FI for CRS purposes and an updated authorisation letter giving details of the FI's Authorising Person.

What are the due diligence, reporting and ongoing obligations or penalties?

The main due diligence, reporting and ongoing obligations for FIs are:

- **Written policies and procedures:** every Cayman Reporting FI must establish and maintain written policies and procedures in respect of its obligations under AEOI Legislation and related Guidance Notes and implement and comply with those policies and procedures. Investment funds which have delegated this role to their administrator or another third party service provider must still have written policies and procedures in place, which describe the functions delegated, the oversight of the delegation and performance of any obligations that have not been delegated. For Cayman Reporting FIs which have not delegated these obligations, more comprehensive written policies and procedures must describe the performance of those obligations in a way that is reasonable for their business.
- **Identify Reportable Accounts**^{iv} in accordance with the due diligence requirements set out in the FATCA Regulations, CRS Regulations and related Guidance Notes. The directors, general partner, manager (for a limited liability company established in the Cayman Islands under the Limited Liability Act) or trustee(s) (each an **Operator**) of the Reporting FI must ensure that they have a compliance and diligence program in place to allow the Reporting FI to identify and report Reportable Accounts. In the funds context, a Financial Account is 'any equity or debt interest in the Investment Entity other than interests which are regularly traded on established securities markets'. As the majority of Cayman Islands funds do not issue debt or have their equity interests listed on an exchange, the classification of what the financial accounts are is relatively straightforward. For example, for a standard Cayman Islands corporate hedge fund, the Financial Account will be the shares held by the investor and the value will be the net asset value as reported from time to time.

The DITC has confirmed that the Cayman Islands is taking the 'wider approach' to due diligence under CRS. This means Cayman Reporting FIs should ensure that they identify the tax residency of **all** 'account holders' and relevant controlling persons (in the context of investment funds this means investors) and not just those that are in Reportable Jurisdictions. Under CRS, there is still a distinction between a 'Participating Jurisdiction' (which has indicated that it will sign up to and implement CRS) and a 'Reportable Jurisdiction' (for which reporting is required). Participating Jurisdiction and Reportable Jurisdiction is subject to change by the TIA. The latest information to be found on the TIA website.

- **Report annually to the TIA** certain specified information with respect to any Reportable Accounts.

Separate XML files must be submitted for each CRS Reportable Jurisdiction for which a Cayman Reporting FI has Reportable Accounts and for US Reportable Accounts. Reporting obligations under the FATCA and CRS Regulations can also be satisfied by submitting a manual entry return.

The information which must be provided in these filings will eventually include the name, address, taxpayer identification number (**TIN**), date of birth (where applicable), account number and account balance or value as at the period end. If the account holder is a passive non-financial entity^v whose Controlling Persons are Specified Persons (with regard to

FATCA) or Reportable Persons (with regard to CRS) then the name, address and TINs of those persons must be provided.

- **Nil returns** Cayman Reporting FIs must file nil returns for all CRS Reportable Jurisdictions for which they have no Reportable Accounts. This is done by submitting a CRS filing declaration once all the CRS Reportable Jurisdiction returns for the Cayman Reporting FI have been submitted. The Cayman Reporting FI has not discharged its CRS reporting obligation for any given year until the CRS filing declaration has been submitted. Although not mandatory, our view is that Reporting FIs should also file nil returns for FATCA purposes if they have no US Reportable Accounts.
- **Submit a CRS Compliance Form annually to the TIA** This form was introduced in 2020 and requires the Cayman Reporting FI to give a categorical breakdown of its CRS data and certain information about its CRS data collection process.
- **Liquidation reporting obligations** The CRS Guidance Notes require that Cayman FIs which are in liquidation or being wound up must fulfil their CRS notification and reporting obligations as normal. Liquidators must also make sure that the FI notifies the TIA of its final dissolution or winding up and Reporting FIs must comply with their reporting obligations for the previous calendar year and the current calendar year. Unlike under FATCA, under CRS a Cayman investment entity, like an investment fund, remains classified as such even if it is closed (has no remaining participating investors or is not open to further investors), or is in liquidation.
- **Offences and penalties** the CRS Regulations introduce various offences, including providing materially inaccurate information, tampering with information and hindering the TIA in its functions, with substantial fines / penalties applying on breach. The offences include potential criminal liability for directors and certain officers where their financial institution commits an offence, unless they exercised reasonable diligence to prevent the breach. Any defendant has a defence if they have a reasonable excuse - insufficient funds and reliance on an agent are not classed as reasonable excuses however. There will also be a deemed breach of policies and procedures if a Cayman Reporting FI relies on a self-certification or documentary evidence which it knows or has reason to believe is materially inaccurate. In addition, it is now an offence for any person to provide a false self-certification to a Cayman FI. It is therefore important for a Cayman FI and anyone who has been engaged to assist with the CRS due diligence process to be aware that if they do receive a false self-certification and they are aware of that fact, it may give rise to a requirement to make a suspicious activity report under the Proceeds of Crime Act.

What are the key dates each year?

Cayman FIs have to register on the portal by 30 April in the first calendar year in which they become a Cayman FI and so are obliged to comply with AEOI Legislation.

Reporting FIs have to submit their FATCA and CRS reports to the TIA by 31 July in each year.

The CRS Compliance Form must be submitted to the TIA by 15 September each year.

FATCA, Non-Participating FIs and withholding tax

Reporting FIs are not subject to withholding tax for FATCA purposes unless they are designated as Non-Participating FIs. The IRS may classify a Cayman Islands Reporting FI as a Non-Participating FI following the conclusion of the procedures set out in the US IGA. The IRS may determine that a Reporting FI is in 'significant non-compliance' with the FATCA obligations. It may then notify the TIA and require it to compel the Reporting FI to obtain and report the required information. Failure to do so within 18 months of first notification permits the IRS to deem the Reporting FI to be a Non-Participating FI and the Cayman Islands entity will be subject to withholding tax.

There are no withholding tax provisions under CRS.

What steps should Cayman Islands funds continue to take?

To address the issues arising under AEOI Legislation, investment managers and Operators of existing Cayman Islands investment funds should continue to review their existing documentation to ensure that:

- there is sufficient disclosure regarding the various AEOI regimes

- the fund has the ability to obtain self-certification documentation at subscription or on a regular basis
- there is a power for the fund to take broad steps to deal with investors who do not provide information or updated information and to allocate costs to those investors
- there are exculpation provisions for the operators of the fund from liability arising from AEOI compliance

All Cayman FIs should periodically review their CRS compliance policies and update them to make sure that they have suitable written policies and procedures in place, that they are correctly registered with the DITC, including having provided details of their Authorised Person and PPOC on the portal, and that they are able to file any nil returns needed.

Subscription documents require special attention and should include:

- an obligation on the investor to provide information and comply with due diligence requests which may require the provision of nationality, permanent residency information and tax residency representations. This can be in the form of a self-certification form^{vi}
- an acknowledgement that the fund will disclose information to the TIA, which in turn will provide that information to tax authorities globally
- a general waiver of any legal restrictions which might otherwise prevent disclosure of information by the fund (although it should be noted that the AEOI Legislation makes it clear that compliance with the disclosure obligations under the AEOI Legislation will not amount to a breach of other Cayman Islands laws)
- an acknowledgment of the effect of non-compliance and lack of disclosure by an investor and an acknowledgement that the fund may take any of the broad selection of powers that are reserved to the fund in its constitutional documents
- an agreement that the investor shall not have any claim against the fund for any damages or liability arising as a result of actions taken by the fund or remedies pursued by the fund in order to comply with any existing or future obligations imposed by any existing or future AEOI Agreements or any enabling legislation enacted in the Cayman Islands.

At Harneys we have a dedicated team of FATCA and CRS specialists who can help advise on your compliance with these obligations. In addition, we can also provide registration, reporting and principal point of contact and authorising person services.



For more information and key contacts
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- i The Cayman Islands Government is also a signatory to an intergovernmental agreement with the United Kingdom (**UK CDOT**) which was phased out in 2017 and superseded by the obligations contained in CRS. This guide sets out the main obligations for investment funds under FATCA and CRS, for information on earlier obligations under UK CDOT please connect with your usual Harneys contact.
 - ii The Tax Information Authority (International Tax Compliance) (United States of America) Regulations (**FATCA Regulations**) and the Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations, as amended (**CRS Regulations**), together **AEOI Legislation**). Definitions used in this guide are as set out in the AEOI Legislation unless otherwise indicated.
 - iii Registered Deemed Compliant FIs are also obliged to register with the IRS.
 - iv US Reportable Accounts under the FATCA Regulations and Reportable Accounts under the CRS Regulations.
 - v The full definitions of a 'Passive NFFE' or 'Passive NFE' are beyond the scope of this guide but can be found in the Guidance Notes and the self-certification forms listed below in Endnote 6.
 - vi Links to the entity and individual self-certification forms issued by the Cayman Islands DITC can be found [here](#).

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