

# Introduction to automatic exchange of information for BVI Investment Funds

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

## The legislative framework

The BVI Government is a signatory to:

- A Model 1B intergovernmental agreement with the United States (the **IGA**) which provides the framework for the implementation of the US Foreign Account Tax Compliance Act (**FATCA**) in the BVI
- The OECD sponsored Multi Competent Authority Agreement regarding the new common I reporting standard on automatic exchange of information (**CRS**, together with the IGA, the **AEOI Agreements**).

As BVI entities are not directly subject to the AEOI Agreements, the key BVI statute in relation to tax information exchange is the Mutual Legal Assistance (Tax Matters) Act 2003 (**MLAT**) and the orders made under MLAT (together, the **AEOI Legislation**).

The BVI International Tax Authority (**ITA**) is the designated Competent Authority under MLAT and is responsible for matters concerning tax information exchange. The ITA has issued guidance notes (the **Guidance Notes**) in relation to the US and UK IGAs which can be found [here](#) and in relation to CRS which can be found [here](#).

## Funds as investment entities and therefore financial Institutions

There are differences between all three of the AEOI Agreements which have been replicated in the AEOI Legislation in terms of the definitions and application to the business of any BVI fund.

In practice, despite the differences, the majority of BVI investment funds fall within the definition of Investment Entity, under each of the regimes. There will be some very rare exceptions to this rule. Investment Entities are one of the types of Financial Institution under the AEOI Legislation. Under FATCA, the term Foreign Financial Institution is used, but for the purposes of this Guide we will refer to FIs or Financial Institutions. The majority of BVI funds will, subject to some very limited exceptions, be Reporting FIs.

## Reporting financial institutions

Reporting FIs are required to comply with registration and reporting obligations imposed under the AEOI Legislation. The most notable obligations are:

- To register with the Internal Revenue Service of the United States (**IRS**) to obtain a global intermediary identification number (**GIIN**) (even if the Reporting FI has no US Reportable Accounts) either through the [IRS FATCA PORTAL](#) or through a paper submission. Registered Deemed Compliant FIs are also obliged to register with the IRS.
- To register with the ITA through its online portal, the [BVI Financial Account Reporting System](#) (the **BVI FARS**)
- To identify Reportable Accounts in accordance with the due diligence requirements set out in the AEOI Agreements, the relevant AEOI Legislation and the Guidance Notes
- To report annually to the ITA certain specified information with respect to any Reportable Accounts.

## Registration with the IRS

A BVI fund which is a reporting FI is required by FATCA 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, in reality, all funds will 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 (**RO**), despite the fact that under the US IGA this role is not mentioned. The application requires the RO to certify that the information provided is accurate and that the BVI fund will comply with its FATCA obligations. The RO should be someone with authority under BVI law to provide the confirmations and submit the information required by the application. A director or general partner of the fund would have this authority under BVI law and may delegate it to a third party such as the compliance officer or the investment manager or another person providing GIIN registration and RO services.

## Registration with FARS and the principal point of contact

All reporting FIs are required to appoint a principal point of contact (the **PPOC**) and register with the BVI FARS by 30 April in the first calendar year in which it is required to 'comply with reporting obligations'. In theory, this means that if the fund is formed in September 2017, it is not required to register until 30 April 2018. However, we recommend that clients register with the BVI FARS at the same time as the GIIN application is made.

The principal point of contact must be appointed by the Reporting FI and a PDF document or letter must be signed by a senior official or director of the Reporting FI confirming that the PPOC has been authorised to be the PPOC on behalf of the Reporting FI.

## Identification of reportable accounts

The directors, general partner 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.

### US and United Kingdom reportable accounts

In respect of FACTA and the UK IGA, a Reportable Account is any Financial Account maintained by the FI and held by one or more Specified US or United Kingdom Persons or by a non US or United Kingdom entity with one or more controlling persons that is a Specified US or United Kingdom Person.

### Reportable accounts under CRS

In respect of the CRS Regulations, a Reportable Account is any Financial Account maintained by the FI and held by one or more Reportable Persons.

## Financial account

In the funds context, a Financial Account is "an equity or debt interest in the Investment Entity other than interests which are regularly traded on established securities markets". As the majority of BVI 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 BVI 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.

## Specified persons or reportable persons

The AEOI Agreements and the AEOI Legislation set out in detail the scope of Specified Persons (both US and UK) and Reportable Persons under CRS can be found in the relevant legislation. A detailed analysis is beyond the scope of this Guide.

## Reporting to the Tax Information Authority

Subject to certain transitional arrangements that will expire before 1 January 2018, reporting to the ITA must be done by 31 May in each year. The information which must be provided 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. The full definitions of '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 under the Review of fund documentation section.

## FATCA and non-participating FIs

Reporting FIs are not subject to withholding tax unless they are designated as Non Participating FIs. The IRS may classify a BVI 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 ITA and require it to compel the Reporting FI to obtain and report the required information. Failure to do so within 18 months of the first notification permits the IRS to deem the Reporting FI to be a Non Participating FI and the BVI entity will be subject to withholding tax.

## Review of fund documentation

To address the issues arising under AEOI Legislation, investment managers are well advised 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
- That 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.

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. Links to entity and individual self-certification forms issued by the ITA can be found [here](#) and [here](#) respectively
- An acknowledgement that the fund will disclose information to the ITA, which in turn will provide that information to the 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 under BVI laws); and
- 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 BVI.



For more information and key contacts please visit [harneys.com](https://www.harneys.com)

© Harneys, October 2024

Harneys is a leading international offshore law firm. From locations around the globe, Harneys advises the world's top law firms, financial institutions and corporations on the laws of British Virgin Islands, Cayman Islands, Cyprus, Luxembourg, Bermuda, Anguilla, and Jersey. Jersey legal services are provided through a referral arrangement with Harneys (Jersey) which is an independently owned and controlled Jersey law firm. For more information about Harneys please visit [harneys.com](https://www.harneys.com) or contact us at [marketing@harneys.com](mailto:marketing@harneys.com).

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation.