Cayman Islands -
AEOI Obligations - Guide for Financial Institutions

Introduction

AEOI is a collective term encompassing the US Foreign Account Tax Compliance Act ("FATCA"), the UK Crown Dependencies and Overseas Territories Information Exchange ("UK-CDOT"), and the Common Reporting Standard ("CRS"), which impose obligations on financial institutions ("FIs").

Pursuant to the Regulations[1] adopted by the Cayman Islands to implement the AEOI regimes, each Cayman Islands entity that is a FI is required to submit a notification to the Cayman Islands Tax Information Authority (the "TIA") providing specified information. Reporting FIs subject to FATCA are also required to register with the United States Internal Revenue Service (the "IRS") to obtain a Global Intermediary Identification Number (a "GIIN"). All reporting FIs must also implement a due diligence programme to facilitate the identification of any reportable account holders and report on any such accounts to the TIA or provide "nil returns" if no reportable accounts have been identified. The purpose of this guide is to outline the practical steps which a FI should take to facilitate compliance with the above obligations.

Getting started

The first step for any Cayman Islands entity, whether a company, partnership or trust, is to establish whether it is classified as a 'Financial Institution' (that is, a Custodial Institution, a Depositary Institution, an Investment Entity or a Specified Insurance Company) for the purposes of the Regulations. The scope of exemptions available under the CRS is narrower than under FATCA so certain entities that are classified as non-reporting Financial Institutions under FATCA will be classified as reporting FIs for the purposes of CRS.

Once an entity has verified that it is a Financial Institution, it needs to determine whether it is a FI or a non-reporting FI, as this will determine the scope of the obligations applicable to it. Non-reporting FIs do not have to register with the IRS or obtain a GIIN and are subject to reduced TIA notification and reporting obligations.

If a Cayman Islands entity is not classified as a FI, it will be a non-financial entity (that is, a "NFFE" or "NFE" in FATCA and CRS terminology respectively), in which case it will not have any registration or reporting requirements. However, it may be requested to certify its status as a NFFE or NFE when opening a new account with another FI (such as a bank or brokerage account).

Walkers can advise on how entities are classified for AEOI purposes, including any differences in the entity classification rules under CRS and FATCA[2].

Appointing a Contact

In order to commence the TIA notification process, the FI is required to appoint a "Point of Contact" (referred to as a "Responsible Officer" for IRS registration purposes) (the "Contact"), who must be a natural individual, to act as the principal liaison with the IRS and the TIA. The Contact may be a compliance officer, director or other individual within the FI or its group or, where the FI is delegating AEOI functions, an individual provided by a service provider such as Walkers Fiduciary.[3] The Contact is required to submit the applicable information to the IRS (where applicable) and
the TIA. The Contact should be formally appointed by way of a resolution of the FI. Resolutions to facilitate such appointments by company boards, general partners and trustees can be provided by Walkers.

It is also necessary to provide the TIA with details of an individual authorised by the FI to give change notices for the Contact. No other person will be able to change the Contact, so for practical purposes it makes sense to appoint an individual who is relatively permanent.

**Written policies and procedures**

Each reporting FI is also required to establish, implement and comply with written policies and procedures to comply with the CRS Regulations. The written policies and procedures must state how the FI will address its obligations, including but not limited to due diligence, record keeping and reporting to the TIA. Policies and procedures should be appropriate for the type of FI and its account holders and should reflect any delegation to service providers. Walkers can assist in preparing a FI’s written policies and procedures to meet its specific requirements.

**Registration with the IRS**

The Contact, once appointed should register the FI with the IRS to obtain a GIIN.

The registration process should be completed on-line through the IRS portal at [www.irs.gov/fatca-registration](http://www.irs.gov/fatca-registration), where a registration guide is available. Although paper application forms are available, the IRS has discouraged the use of these.

The IRS registration process, in brief summary, requires to the FI to supply its:

1. FI registration category;
2. legal name;
3. mailing address;
4. country of tax residence;
5. confirmation of overseas branches (if any);
6. Contact’s name and contact information; and
7. designation of names of up to five secondary persons to act as additional points of contact.

The Contact must certify that to the best of their knowledge and belief the information in the application is accurate and complete and that the FI will comply with its FATCA obligations. The Contact can then submit the application to the IRS.

The IRS will process the application and, assuming it is approved, will notify the Contact by email of the GIIN assigned to the FI.

**Notification to the TIA**

FIs which have already completed the notification process for FATCA purposes must ‘refresh’ their notification for CRS purposes (with 2017 being the first year in which CRS obligations apply). FIs that have been newly captured under the CRS will need to undertake the full notification process. The notification process, in brief summary, requires the FI to provide required information to the TIA including:

1. whether it is a reporting FI or a non-reporting FI and its FI registration category;
2. legal name;
3. confirmation of the Regulations to which it is subject;
4. GIIN number (where applicable);
5. FI email address;
6. Contact’s name and contact information; and
7. name and contact details for individual authorised to give change notices in respect of the Contact.

In addition, the FI must submit a PDF document evidencing the authority of the Contact to act on behalf of the FI. This authority should be a signed letter from the FI (on its letterhead and, where applicable, providing its GIIN) or a copy of the resolution giving authorisation to the Contact and containing the same Contact information outlined above. If a letter is used to evidence authority, it should be signed by an operator of the FI or, where signing authority has been conferred on the Contact in the authorising resolutions, by the Contact. Walkers will be happy to provide a letter appropriate for this purpose.

Once the notification has been processed by the TIA, the Contact will receive an email from the TIA containing a username and temporary password which will allow access to the reporting section of the AEOI Portal.

**Due diligence**

In preparation for reporting, each FI must carry out due diligence on Account Holders and, where relevant, Controlling Persons, in order to properly identify any Reportable Accounts. For AEOI purposes, accounts are defined much more broadly than as typically understood and will include, for example, not only custodial or bank accounts for a Custodial Institution or a Depositary Institution but also holdings of equity or debt interests for an Investment Entity. These will be require due diligence for FATCA purposes when held by US entities, citizens or residents and for CRS purposes when held by tax payers in the many CRS participating jurisdictions. In addition, due diligence will need to be carried out on an account holder’s Controlling Persons when the account holder is a Passive NFE. An Investment Entity in a non-participating CRS jurisdiction (such as the United States) that is managed by another FI will be deemed a Passive NFE.

The required due diligence measures are specified as part of the AEOI regimes and differ depending on whether the account is held by an individual or an entity, whether it is a new or pre-existing account and, in some cases, the balance or value of the account. FIs will need to carry out due diligence on each account holder and, where applicable, Controlling Persons, to ascertain whether any relevant indicia are present and determine whether an account is a Reportable Account for the purposes of any of the AEOI regimes.

Identification of new accounts should be completed by the FI as soon as practicable after the account has been opened or in any event within 90 days. As part of the necessary due diligence, the FI is likely to need to request the Account Holder to provide information in the form of a self-certification form (albeit potentially supplemented by an IRS W-8 or W-9 form to fulfil the FATCA aspects). Please refer to your usual Walkers contact, who will be able to provide the relevant Cayman Islands forms.
In addition, where an account is a pre-existing account (that is, opened before 1 July 2014 for FATCA purposes and before 1 January 2016 for CRS purposes, the FI must commence a remedial exercise to classify the account. A phased timetable is applicable to the remedial due diligence process (also known as ‘account scrubbing’) with a view to all accounts being classified for the purposes of all the AEOI regimes no later than 31 December 2017 (earlier in some cases).

Walkers is able to advise in relation to the applicable due diligence requirements. In practice, professional service providers including Walkers Fiduciary can carry out due diligence on an FI’s behalf. Investment fund administrators will often agree to complete the due diligence on investors. In such cases it will be important to determine which AEOI services are provided and whether there are any gaps in your AEOI compliance program, particularly in respect of extending services to cover CRS, which need to be addressed. Using a service provider to perform AEOI functions does not abrogate the FI’s own regulatory obligations and it will need to retain sufficient expertise to monitor the service provider and hold it to account.

**Reporting**

All reports should be submitted to the TIA through the AEOI portal, which will then disseminate reports on behalf of all Cayman Islands FIs to the relevant international tax authorities.

While reporting for FATCA purposes commenced back in 2015, reporting for CRS purposes commences for the first time in 2017. Reporting for the purposes of the UK Regulations is required in 2017 in respect of 2016 accounts but is being phased out and will be fully superseded by CRS (with 2017 being the only year in which reporting is required under both the UK and CRS regimes, as well as for FATCA). The TIA is expected to publish revised guidance notes to the CRS Regulations in the near future. Additional reporting is being phased in, with each annual rounds of reporting expanding to cover additional information on specified accounts.

The filing deadline for reports is 31 May in 2017 and each subsequent year (although FIs should seek to submit reports in advance of this date wherever possible).

Reporting must cover all identified reportable accounts and where applicable, Controlling Persons. Controlling Persons are the natural persons who exercise direct or indirect control over an entity. These will be those who will be those with an ownership interest of 25 percent or more or, where no such persons are identified, the natural persons owning a controlling stake of 25 percent or more) opened on or after 1 January 2016, as well as all accounts opened pre 1 January 2016 by individuals which had a value exceeding $1,000,000 as at either 31 December 2015 or 31 December 2016. Reporting on all entity accounts opened pre 1 January 2016 will commence in May 2018. Where a FI does not have any Reportable Accounts, a ‘nil report’ must be filed with the TIA. Although this was previously optional, from 2017 onwards it is mandatory.

The reporting format is consistent with currently published Schema by the IRS and the format developed by the OECD for the CRS. Reports should include the following basic information in respect of each Reportable Account:

1. name;
2. address;
3. Tax Identification Number (TIN), National Insurance Number or functional equivalent (depending on the AEOI regime);
4. date of birth;
5. jurisdiction(s) of residence and place of birth;
6. account number or functional equivalent;
7. FI name and, where applicable, GIIN; and

8. account balance or value (in US$ or currency in which account is denominated) as of 31 December of the year immediately prior to the reporting date or immediately prior to closure if the account was closed during such prior year.

Certain additional information (for example, gross interest paid, gross dividends paid, aggregate redemption payments) may also need to be reported dependent upon the type of Reportable Account (for example, Custodial Account, Depository Account or other Financial Account). For US FATCA, in addition to the basic information above a FI must also report certain payments made to Non-Participating Financial Institutions.

FIs may submit reports to the TIA individually, by entering information manually on the AEOI Portal, or via bulk submission by uploading a XML file(s). The TIA encourages FIs to submit reports electronically using the XML format. Full instructions on how to submit reports are set out in the TIA's user guide.

**Offences**

FI and other persons (including those providing self-certifications to FIs) are liable for various offences for contravening the AEOI regimes. A FI's directors, managers, partners and similar are also guilty where their FI commits an offence unless able to provide he or she exercised reasonable due diligence to prevent the contravention. The court may impose a fine of up to $50,000. While financial penalties are higher under CRS, FATCA provides for possible imprisonment of up to two years.

**AEOI compliance**

Walkers and Walkers Fiduciary together provide a full suite of legal, registration, notification, due diligence and reporting and regulatory compliance services to Cayman Islands entities, to ensure their on-going AEOI obligations are satisfied. Please ask your usual Walkers contact for further details.

**Notes**

[1] On 29 November 2013, the Cayman Islands government entered into a Model 1B inter-governmental agreement with the United States (the "US IGA") in connection with the implementation of sections 1471 to 1474 of the United States Internal Revenue Code of 1986, commonly referred to as the US Foreign Account Tax Compliance Act or "FATCA". A similar agreement was entered into with the United Kingdom (the "UK IGA"), however this has now been almost phased out (with 2016 being the last year reported) in favour of broader international reporting discussed below. On 29 October 2014, the Cayman Islands along with 50 other jurisdictions (including the UK) signed a Multilateral Competent Authority Agreement (the "MCAA") to demonstrate its commitment to implement the Common Reporting Standard or "CRS", a global automatic exchange of information initiative developed by the Organization for Economic Cooperation and Development (the "OECD"), CRS together with FATCA being referenced herein as the "AEOI regimes".

On 4 July 2014, the Cayman Islands government issued The Tax Information Authority (International Tax Compliance) (United States of America) Regulations, 2014 (as amended) (the "US Regulations") and The Tax Information Authority (International Tax Compliance) (United Kingdom) Regulations, 2014 (as amended) (the "UK Regulations") (also being phased out with the UK IGA) and on 16 October 2015 the Cayman Islands government issued The Tax Information Authority (International Tax Compliance) (Common Reporting Standard) Regulations, 2015, which were amended on 19 December 2016 by The Tax Information Authority (International Tax Compliance) (Common Reporting Standard) (Amendment) Regulations, 2016, together with the "CRS Regulations", and together with the US Regulations and the UK Regulations, the "Regulations"), in each case to provide the framework for registration and reporting pursuant to the US IGA (still technically the UK IGA) and MCAA, with a view to facilitating the automatic exchange of tax information between the Cayman Islands and overseas taxation authorities. The Regulations are supplemented by guidance notes (the "Guidance Notes") which have been issued by the Cayman Islands Tax Information Authority (the "TIA").

[2] This guide does not address FIs who utilise the sponsoring entity or trustee documented trust approach.

[3] The Contact will not generally be regarded as an 'officer' of a company for the purposes of the Companies Law (2016 Revision) and there is no requirement for the company to update its Register of Directors and Officers or make any filings with the Cayman Islands Registrar of Companies. However, a company may wish to appoint the Contact as an officer to extend indemnity protections that are often afforded to officers under a company's articles of association. Where a formal officer appointment is made, an updated Register of Directors and Officers should be filed with the Registrar within 30 days - entities should also remember to monitor and report any changes to the Register involving the Contact on an ongoing basis in accordance with usual Cayman law requirements.

[4] Over 100 countries have now agreed to implement to the CRS. A list of all participating jurisdictions for the purposes of the regulations can be found at: http://tia.gov.ky/pdf/CRS/CRS_PJ_List_Gazette_Notice.pdf.

[5] It is expected that FIs will only need to file reports or nil returns in respect of ‘Reportable Jurisdictions’ for the purposes of the CRS. The TIA has not yet released the list of Reportable Jurisdictions, but this is expected before the first reports for the CRS are due to be filed in May 2017.

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For further information please refer to your usual contact or:

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