

The logo consists of the letters 'CRS' in a white, serif font, with a horizontal line underneath the 'C'.

CharlesRussell
Speechlys

**STEP Lausanne:
Automatic Exchange of
Information for Swiss cross-
border intermediaries**

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AEoI

The Headlines

Automatic Exchange of Information

Headline impacts

An overview of the Common Reporting Standard (the “Standard”)

- 50+ countries committed from the outset – 40+ more expected subsequently
- Will apply to Switzerland from 2017; first exchanges of Swiss information will be in 2018
- The Standard will affect the information gathered from every investor and account holder
- Information on non-resident investors/account holders will be reported locally, and then shared with the appropriate tax authorities globally
- Information therefore inherently exposed to more data security risk
- Reporting obligations will inherently be exposed to interpretative variations
- Implementation will require a strategic and flexible approach by reporting financial institutions in implementing countries
- The Standard will be implemented across the EU through the Directive on Administrative Cooperation

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Headline impacts

Am I affected?

The Standard affects a similar class of financial institutions as FATCA, comprising:

- **Depository institutions:** accepting deposits in the ordinary course of a banking or similar business.
- **Custodial institutions:** holding, as a substantial portion of their business, financial assets for the account of others.
- **Investment entities:** (i) primary business involves certain asset management or financial services for or on behalf of a customer; or (ii) gross income is primarily attributable to investing, reinvesting, or trading in financial assets, if the entity is managed by another financial institution.
- **Specified insurance companies:** insurance companies that issue or are obligated to make payments for cash value insurance contracts or annuity contracts.

N.b. several of the exemptions found in the FATCA regulations or IGAs are NOT incorporated in the common reporting standard – e.g.:

- financial institutions with a local client base
- local banks
- certain retirement funds
- financial institutions with only low value accounts
- sponsored investment vehicles
- some investment advisors and investment managers
- certain investment trusts.

This means that AEOI is likely to impact more financial institutions than FATCA.

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Headline impacts

Requirements applied to my business

Reporting Financial Institutions will have to:

- engage in due diligence procedures to identify Reportable Accounts held by:
 - residents of an implementing jurisdiction; or
 - certain passive entities that have Controlling Persons (as defined for AML/KYC purposes) that are resident in an implementing jurisdiction
- report those accounts, along with financial information about them, to local tax authorities, who in turn will exchange the information with the relevant implementing jurisdictions

Need to develop systems to:

- review existing customer base, and
- introduce new client take-on procedures.

Need to establish reporting systems to capture the required information, and report it to the relevant authority

Unlike FATCA, there is **no withholding obligation** under the common reporting standard

Also, **no centralised registration** (although a government in an implementing country could require this on a domestic level)

Automatic Exchange of Information Timeline

Date	Event
19 November 2014:	Switzerland signed the MCAA
14 January 2015:	AEoI-focussed consultations launched
April 2015:	End of consultation periods
June 2015:	Federal Council dispatches anticipated
Autumn 2015:	First parliamentary discussions anticipated
Winter 2015:	Second parliamentary discussions anticipated
Spring 2016:	Referendum deadline
September 2016:	Referendum vote (if any)
2017:	Entry into force in Switzerland of the MCAA and the AEoI Act (and the CAA)
2018:	First exchange of information by Switzerland



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Mistakes not to make...

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Mistakes not to make [1]

“Our local laws aren’t in place – we might as well wait until they are”

- The systems required to enable reporting financial institutions to comply with the Standard and their local rules (when implemented) will be weighty
- Where financial institutions required systems for FATCA, it was not abnormal for readiness to be achieved as long as 18 months after first actions
- Envisaged that the extra systems required for the Standard may not unusually take longer still to implement
- Review current systems NOW to ascertain how much work is to be required to get up to Standard compliance

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Mistakes not to make [2]

“We did FATCA; so AEol will be a piece of cake”

- It's true that the FATCA process may give valuable experience and basic principles to make the process of complying with the Standard more easy
- However, AEol is NOT merely a “beefed up FATCA”; it is far more wide-reaching and will require more extensive systems, and the burden it will put on businesses in terms of information gathering and reporting will potentially be far greater

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Mistakes not to make [3]

“FATCA didn’t apply to us; neither will AEOI”

- The Standard will apply to ALL entities in participating jurisdictions that are classified as “Reporting Financial Institutions”
- There are no “deemed compliant” statuses under the Standard
- Even if FATCA didn’t apply to your business...the Standard will

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Mistakes not to make [4]

“I’m going to need to become a tax expert”

- Tax is of course the main driving point for the Standard
- However, although final details are awaited, it is unlikely that financial institutions will need to consider tax more than to know whether the investor/account holder is tax resident in the jurisdiction in which the financial institution is based
- It is likely that it will need to identify, therefore, NON-RESIDENT investors/account holders only; it may only need to retain advisors in its home jurisdiction
- However, will financial institutions also need to identify the country of tax residence?
 - If so, how can it do this?
 - Self-certification?
 - What if there are suspicions that certifications are incorrect/fraudulent?
 - Will financial institutions need to instruct local advisors to protect from erroneous reporting?



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FATCA II?

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The Standard for FATCA-compliant businesses

The Standard: Defined terms

1. “Reporting FI”

- “Participating” so long as residence (or branch location) in a participating jurisdiction
- Reporting unless “Non-reporting”

2. “Investment Entity”

- Similarly defined as for FATCA IGAs
- “Managed by” in the Standard includes entities whose gross income is primarily attributable to investing, reinvesting or trading in Financial Assets

3. “Financial Account”

- Includes equity and debt interests in certain circumstances (traded institutions), unlike for FATCA

4. “Financial Assets”

Defined, unlike in FATCA IGAs

5. “Non-Reporting FI”

- Narrow definition, but includes certain trusts
- Scope to add to list for low-risk entities provided objectives of the Standard are not frustrated

6. “Reportable Account”

- Passive NFEs expanded to include Investment Entities managed by FIs in non-participating jurisdictions – so these IEs will have to provide information on residency of Controlling Persons

7. “Documentary Evidence”

- Does not include QI documents

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The Standard for FATCA-compliant businesses

The Standard compared with FATCA [1]

- “**Jurisdiction FI**”: based on place of residence or branch location
- “**Reportable Jurisdiction Person**”: focusses on tax residency under the law of the jurisdiction
- **Reporting**: Broadly the same information as for FATCA, but also;
 - Date of birth, and
 - Place of birth(for new accounts)
- Note – no need to report account balances for year in which it is closed, although fact of closure needs to be reported
- **Exchange**: Information only exchanged by jurisdictions in years in which both jurisdictions have AEOI-consistent reporting legislation in effect
- **Culpability**: No distinction between minor/administrative errors and significant non-compliance
- **Reach**: All financial institutions affected

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The Standard for FATCA-compliant businesses

The Standard compared with FATCA [2]

- **Collaboration**: Scope for reliance on third-party service providers
- **Data safeguards**: As with FATCA IGAs, all information is subject to confidentiality rules and other safeguards, including the provisions limiting the use of the information exchanged
- **Further scope for safeguards**: Additionally, safeguards required under the domestic law may be specified by the supplying Competent Authority
- IGAs require written notifications from Competent Authorities that appropriate safeguards and the infrastructure for an effective exchange relationship are in place. These are not required under the Standard



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Due diligence vs FATCA

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Record checks

Processes

Documented Evidence Residence Test

Based on Documentary Evidence (broadly, 'official' documents from country of residence) on records

Electronic Record Search

Review the FI's electronically searchable data for;

- Account Holder identified as resident of Reportable Jurisdiction
- Current mailing/resident address in Reportable Jurisdiction
- Telephone numbers in Reportable Jurisdiction
- Standing instructions to transfer funds to Reportable Jurisdiction
- Effective PoA or authority to person in Reportable Jurisdiction

- "Hold mail" or "Care of" address in Reportable Jurisdiction

If indicia, treat as resident

If "hold mail" or "Care of" indicia, apply Paper Record Search or Self-Certification

Paper Record Search

Search FI's master client file within 5 years for

- Documentary Evidence
- Account opening forms
- AML/KYC documents
- Powers of attorney/authorities
- Standing instructions

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The Standard for FATCA-compliant businesses

Due diligence: pre-existing accounts (individuals)

The Standard

- No *de minimis* carve-outs
- Lower Value Accounts (less than \$1m): Documented Evidence residence address test permitted before Electronic Record Search required
- Specific procedures for “hold mail” instructions or “c/o” addresses
- 1 calendar year for completion of reviews of accounts becoming “High Value” in a year
- Enhanced annual reviews required for undocumented “High Value” accounts

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The Standard for FATCA-compliant businesses

Due diligence: new accounts (individuals)

The Standard

- Generally the same ID requirements (including Self-Certification and considering reasonableness of Self-Certification based on information obtained)
- However, Self-Certification requires tax residence information
- Self-Certification includes date of birth and TIN
- “Reason to know” test where self-certification is incorrect or unreliable
- No *de minimis*
- Note that new accounts for pre-existing clients can be treated in most cases as if “pre-existing” for these purposes

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The Standard for FATCA-compliant businesses

Due diligence: pre-existing accounts (entities)

The Standard

- Carve-out for accounts under \$250k
- Accounts under \$250k to be reviewed when they exceed that amount at 31 December
- No requirement to ascertain whether an entity is “non-participating”
- Is the entity itself is a Reportable Person? (Usually verified from available information from AML/KYC procedures or through Self-Certification)
- Is the entity is a passive NFE? If so, confirm the residency of Controlling Persons. This should be achieved through available information, but may require Self-Certification from an account holder or Controlling Person of a passive NFE where applicable

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The Standard for FATCA-compliant businesses

Due diligence: new accounts (entities)

The Standard

- No carve-out, even for accounts under \$250k
- Determine whether account held by:
 - Reportable Person, or
 - A Passive NFE with one or more Controlling Persons who are Reportable Persons
- No requirement to ascertain whether an entity is “non-participating”
- Note that new accounts for pre-existing clients can be treated in most cases as if “pre-existing” for these purposes



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**Using gathered
information**

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Reportable accounts and persons

How should you be gathering identifying information?

- Contact an account holder at least twice during the two calendar years following identification of a Reportable Account. This can be by mail, email, fax, telephone or by asking for Self-Certification
- The Standard provides for the reporting of Tax Identification Numbers (“**TINs**”). TINs issued by relevant countries should be gathered alongside dates of birth for pre-existing accounts
- An identified Reportable Account remains so for all subsequent years even if the account has no balance or value or received no reportable payments
- If an account holder ceases to be a Reportable Person due to a change in circumstances, or if the account is closed, the account will cease to be reportable
- Due diligence procedures;
 - once on a global basis, or
 - reapplied to the entire account holder base in one country, each time that country reaches an agreement with another government to exchange information under AEOI?

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Reportable accounts and persons

Changes of circumstance processes

Mirror the “Model 1 IGA” FATCA definitions;

- Include changes to an account (e.g. addition, substitution, or change of an account holder) or any account associated with such account
- Will need to have internal controls (e.g. systems flags and reports) to track these changes in circumstance
- *N.b. Changes of circumstance are only relevant if they affect the status of the account holder for the purposes of reporting*

If a change gives reason to suspect that original documentation is incorrect or unreliable, the information can no longer be relied upon:

- Need to obtain new documentation that establishes tax residency
- If an account holder fails to respond to a request for documentation to verify status, treat the account as reportable until it is given the necessary information to correctly verify the status

Automatic Exchange of Information Reporting

Information to be reported

Report the following:

- the name, address, country(s) of residence, TIN and date/place of birth of each Reportable Person who is an account holder
- Where an entity is an account holder, and one or more Controlling Persons are a reportable person, report the name, address, country(s) of residence and TIN of the entity and the name, address, country(s) of residence, TIN and date/place of birth of each Reportable Person
- the account number (or functional equivalent in the absence of an account number)
- the name and identifying number (if any) of the Reporting Financial Institution
- the account balance or value (including, in the case of a cash value insurance contract or annuity contract, the cash value or surrender value) at the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the fact of the closure is to be reported, but not the closing balance

(Continued)

Automatic Exchange of Information Reporting

Reporting processes (cont.)

- in the case of any custodial account:
 - the total gross amounts of interest, dividends and other income generated by the assets held in the account, in each case paid or credited to the account (or with respect to the account) during the calendar year or other appropriate reporting period; and
 - the total gross proceeds from the sale or redemption of property paid or credited to the account during the calendar year (or other appropriate reporting period) where the Reporting Financial Institution acted as a custodian, broker, nominee, or agent for the account holder
- in the case of any depository account, the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period
- in the case of any other type of account, the total gross amount paid or credited to the account holder during the calendar year or other appropriate reporting period where the Reporting Financial Institution is the obligor or debtor (this includes the aggregate amount of any redemption payments made to the account holder during the calendar year or other appropriate reporting period). The information reported must identify the currency for each amount

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In the context of trusts

Classification and impact

- If professionally managed (e.g. professional trustee, investment manager, protector?), a trust is a Financial Institution
- If the FI is resident in a participating jurisdiction (residence based on trustee location), it is a reporting FI
- Reporting FI required to provide information on settlors, beneficiaries, trustees and protectors to their home jurisdictions
- Reportable accounts to be reported also – what is a reportable account in the context of a trust? Equity Interests of settlor/protectors/beneficiaries? Subject then to home jurisdictions' tax laws
- No reporting if trustee reports already
- If a passive NFE:
 - Controlling Persons to be reported
 - What is a Controlling Person in the context of a trust?
 - Discretionary beneficiaries? Receipts
 - Settlers? 100% interest? 0% interest?

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In the context of trusts

Who are “Controlling Persons” where trusts and foundations are concerned?

Section VIII, paragraph D6:

“The term “Controlling Persons” means the natural persons who exercise control over an Entity. In the case of a trust, such term means the settlor, trustees, the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust, and in the case of a legal arrangement other than a trust, such term means persons in equivalent or similar positions.”

Paragraph 134 of the guidance notes:

“...where the settlor(s) of a trust is an Entity, Reporting Financial Institutions must also identify the Controlling Person(s) of the settlor(s) and report them as Controlling Person(s) of the trust.”

It also requires financial intermediaries to interpret “Controlling Persons” consistently with the FATF Recommendations: Paragraph 1 of FATF’s guidance on Recommendation 25;

“Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust.”

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“Equity Interests”

Rights, entitlements, interests under trusts

Annex, Section VIII, C.4.

“The term “Equity Interest” means...in the case of a trust that is a Financial Institution”:

An interest held by any person treated as a

- **settlor** or
- **beneficiary** of all or a portion of the trust, or
- any other natural person exercising ultimate effective control over the trust.

“A Reportable Person will be treated as being a beneficiary of a trust if such Reportable Person

- has the right to receive directly or indirectly ... a mandatory distribution or
- may receive, directly or indirectly, a discretionary distribution from the trust”.



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Things to think about

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Third party AEol service providers

Collaborative approach?

Annex, Section II, D.

“Each Jurisdiction may allow Reporting Financial Institutions to use service providers to fulfil the reporting and due diligence obligations imposed on such Reporting Financial Institutions, as contemplated in domestic law, but these obligations shall remain the responsibility of the Reporting Financial Institutions”

- Possibility for service providers to fulfil reviewing, reporting and information transmission services
- Will depend on the domestic law that is implemented
- Scope for a AEol obligations to be subcontracted out?
- Responsibility/liability to remain with the FI (i.e. the client of such a relationship)

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Data security

Tax information will be automatically sent on a yearly basis to the tax authorities of participating countries

Bank-client confidentiality should not be abused by foreign clients in order to evade taxes in their countries of residence

However, bank-client confidentiality remains intact as “professional confidentiality” under AEOI, so Swiss professionals remain bound to secrecy obligations under Swiss law

- Faith in other participating jurisdictions?
Secure systems in place by the time Swiss information is received in 2018?
- Updates to terms of business?
- Cover for data leaks in transmission to Swiss authorities / to resident jurisdiction?

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Regularisation of the past

- The Standard does nothing for historical liabilities that may remain outstanding – if anything, it will throw light on them when jurisdictions receive information for the first time
- No requirement for countries to agree to have regularisation / voluntary disclosure systems in place to give historical evaders a chance to ‘come clean’
- However, where bilateral agreements are agreed, this might be a feature of them
 - E.g. March’s Swiss / Australian heads of terms; provides that each jurisdiction must have satisfactory Voluntary Disclosure channels in place
- Rubik agreements are anticipated to become irrelevant and fall away....

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Your business and AEoI

What to do next

- Understand that the required standard is to identify tax residency or residencies of clients (as opposed to determining whether a customer is a citizen of a particular country, which is a more simple connecting factor)
- Consider alternative precedent Self-Certifications or similar forms
- Implement necessary internal changes – personnel, IT systems, education
- Consider what controls are necessary to monitor changes in clients' circumstances
- Educate staff and clients on the additional KYC, due diligence and reporting requirements
- Minimise the impact on clients, business processes and cost, while achieving full compliance
- Revisit and enhance your processes and automated IT for due diligence, monitoring customer data, identifying reportable events, reporting and responding to authorities' requests for information
- Standardise reporting formats for quick and efficient processing
- Create sustainable and flexible IT systems to anticipate future additional AEoI requirements and new countries joining the Standard
- Consider the reality of any attempts to avoid implementation of certain AEoI requirements

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Matthew is a solicitor and a Registered Trust and Estate Practitioner (TEP).

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Matthew undertakes a broad range of private client tax and trust work, as well as corporate and commercial work for clients with international interests.

He advises on matters relating to complex international structures, including their establishment for succession and estate planning, asset consolidation and personal tax mitigation.

Matthew is able to assist with matters relating to offshore and onshore jurisdictions in conjunction with an extensive worldwide network of wealth management advisors, and to assist multi-national and/or international clients with their cross-border private wealth issues.

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