Urgent!
CRM considerations on the CRS:

The “heads up” for
Reporting Financial Institutions
on foreign investors’ limited
voluntary disclosure opportunities

Nearly one hundred jurisdictions (**Participating Jurisdictions**) have already committed to participate in the CRS promulgated by the Organisation for Economic Cooperation and Development (**OECD**). Most of them have committed to be “early adopters” of the CRS which means that they must enact CRS-enabling legislation very soon if they are to make the CRS “the law of the land” by 1 January 2016.

The Cayman Islands is one of the few early adopters that already has CRS-enabling domestic regulations. On 20 October 2015, the Cayman Islands Ministry of Financial Services issued an Industry Advisory[i] (**Cayman Advisory**) that Reporting Financial Institutions (**RFIs**) should consider advising clients and account holders that, with the advent of the Common Reporting Standard (**CRS**):

(a) They should ensure that their tax affairs are in compliance in their jurisdictions of residence;

(b) They provide RFIs with all necessary details to enable them to report under CRS; and

(c) Data will be reported to tax authorities in their jurisdictions of residence.

It appears that RFIs in other early adopter Participating Jurisdictions should also consider the merits of the Cayman Advisory in the case of their own clients and account holders. That is, whether they should take a proactive approach to customer relationship management (**CRM**) even in anticipation of domestic CRS-enabling legislation and domestic regulatory guidance.

This raises three questions for the RFI:

(1) What is the position of clients or account holders who do not have their tax affairs in compliance with their jurisdiction of tax residence?

(2) What is the RFI to do if it knows or forms a reasonable suspicion that the client or account holders has been evading taxes in its jurisdiction of tax residence?

(3) Should the RFI assist the client or account holder to circumvent the reporting and due diligence procedures under the CRS?

The short answers are, respectively:

(1) The taxpayer could face imprisonment and other sanctions unless he makes a voluntary disclosure before the tax evasion is detected by his tax authority and his jurisdiction has a voluntary disclosure programme. The table at the bottom of this article summarises the position in forty-seven surveyed jurisdictions.

(2) The RFI will generally have to file a Suspicious Activity Report / Suspicious Transaction Report with its Financial Reporting Authority / Financial Intelligence Unit.

(3) No!

(1) Client's / account holder's tax affairs are "not in compliance"

On 7 August 2015 the OECD published its **Update on Voluntary Disclosure Programmes: A pathway to tax compliance.** [ii] That guidance provides high-level answers to the first question based on survey results from forty-six Participating Jurisdictions and the United States. The survey results disclose how those jurisdictions treat taxpayers who have committed tax evasion in respect of assets held in and income derived from financial accounts in other jurisdictions, in the following two situations:

i. No voluntary disclosure: the tax authorities detect the tax evasion without the taxpayer having made a timely and comprehensive voluntary disclosure; and

ii. Voluntary disclosure: the taxpayer has made a timely and comprehensive voluntary disclosure of his tax evasion before being detected by the tax authorities.

The OECD's guidance states:

> "… The Standard [i.e. Standard for Automatic Exchange of Financial Account Information in Tax Matters which include the CRS] calls on governments to obtain detailed account information from their financial institutions and exchange that information automatically with other jurisdictions on an annual basis. A large number of countries, including most financial centres, have publicly committed to implementation and are working on a specific and ambitious timetable leading to the first automatic information exchanges in 2017 or 2018. Against that light, it has become evident to a large number of persons who

still have hidden assets abroad that the chances of their tax authorities detecting their tax evasion will further increase in the near future. Already now, it has become apparent that the political agreement to adopt the Standard is having a positive impact on taxpayer behaviour, as well as on the yield drawn by countries from voluntary disclosure programmes.

The limited time left until the automatic exchange of information under the Standard becomes a reality in a large number of countries will, in many instances, be the last window of opportunity for non-compliant taxpayers to voluntarily disclose assets held in and income derived from offshore accounts. This is therefore a crucial moment for countries to consider launching, enhancing or drawing public attention to their respective voluntary disclosure programmes. In doing so, countries can explicitly provide their taxpayer with an opportunity to regularise past non-compliance prior to the entry into force of the automatic exchange of information under the Standard.

…For some years now, the OECD's guidance on compliance risk management has emphasised the importance of understanding what drives taxpayer behaviour and how it can be influenced to encourage greater compliance. The factors influencing taxpayer behaviour are complex but a tax administration will have more influence over future behaviour if its compliance strategy is responsive to the taxpayer's attitude to compliance."

The guidance observes that factors influencing taxpayer behavior include business, industry, sociological, psychological and economic. Taxpayers' behaviors and the tax authorities' corresponding compliance strategy can be visualized in a pyramid with four levels, with 1 at the top down to 4 at the bottom. Tax authorities' objective is to apply appropriate levels of pressure or help to make taxpayers fully compliant.

Taxpayers attitudes to compliance	**Tax authorities' compliance strategy**
1. A small minority have decided not to comply and are engaged in deliberate and determined evasion	➢ Use the full force of the law
2. A larger number don't want to comply, but will if tax authorities pay attention	➢ Deter by detection
3. Even more try to comply but don't always succeed	➢ Assist to comply
4. Most are willing to do the right thing	➢ Make it easy

The table at the bottom of this article reveals:

1. Fifty-six Participating Jurisdictions have committed to require their RFIs to start reporting in 2017 on reportable accounts maintained for or controlled by taxpayers resident in any Participating Jurisdictions that are Reportable Jurisdictions.
2. Another forty Participating Jurisdictions have committed to require their RFIs to start reporting in 2018 on reportable accounts maintained for or controlled by taxpayers resident in Reportable Jurisdictions.

3. The consequences for persons who have committed tax evasion in the surveyed jurisdictions – i.e. forty-six Participating Jurisdictions and the United States - where this is detected by the tax authorities without the taxpayers' voluntary disclosure and where it voluntarily disclosed before detection.

(2) RFI has knowledge / suspicion of client's / account holder's tax evasion

As a result of RFIs' increased communications with clients and account holders tax status it is inevitable that compliance personnel employed by some RFIs or their delegates (e.g. fund administrators) will come to know or suspect that certain clients or account holders are committing tax evasion. The FATF Recommendations make it very clear that tax crimes are among the designated categories of offences that fall constitute "money laundering".[iii]

In the Cayman Islands, tax evasion is "criminal conduct", "criminal conduct" is "money laundering", and knowledge or suspicion of money laundering must reported to the Money Laundering Reporting Officer (**MLRO**). If the MLRO agrees he must file a Suspicious Activity Report (**SAR**) with the Financial Reporting Authority (**FRA**) which is the Financial Intelligence Unit under Cayman Islands law. Failure to report to the MLRO or to the FRA, as the case may be, is a criminal offence. Conversely, there are legal protections for the persons making such report to the MLRO/FRA. "Tipping off" the suspected tax evader would also be a criminal offence. The position should generally be quite similar in other Participating Jurisdictions in the CRS that comply with the FATF Recommendations.

(3) Anti-avoidance

It is unwise if not already illegal for an RFI to assist any client or account holder to circumvent or attempt to avoid the reporting and due diligence procedures under the CRS. The CRS requires Participating Jurisdiction to have rules and administrative procedures in place to ensure effective implementation of, and compliance with, the prescribed reporting and due diligence procedures.

These rules and administrative procedures include:

1. Rules to prevent any Financial Institutions, persons or intermediaries from adopting practices intended to circumvent the reporting and due diligence procedures;
2. Rules requiring Reporting Financial Institutions to keep records of the steps undertaken and any evidence relied upon for the performance of the above procedures and adequate measures to obtain those records;
3. Administrative procedures to verify Reporting Financial Institutions' compliance with the reporting and due diligence procedures; administrative procedures to follow up with a Reporting Financial Institution when undocumented accounts are reported;
4. Administrative procedures to ensure that the Entities and accounts defined in domestic law as Non-Reporting Financial Institutions and Excluded Accounts continue to have a low risk of being used to evade tax; and
5. Effective enforcement provisions to address non-compliance.

In the Cayman Islands, the CRS Regulations provide that if a person enters into any arrangement, the main purpose or one of the main purposes of which is to avoid any obligation under the CRS Regulations, the arrangement is deemed not to have been entered into by the person and the CRS Regulations are to have effect as if the arrangement had never been in existence.

Conclusion

In the Cayman Islands RFIs and their delegates now have the benefit of the Cayman Advisory on the expected communication with clients and account holders. The recommended course of action is clear. The OECD's guidance – summarized in the table below - provides an indication of what those clients and account holders may be facing if their tax affairs are not in order. It is imperative for the RFIs to keep careful records of all such communications to and from the clients and account holders. If as a result of this communication the RFIs or their delegates come to know or suspect that the client or account holder is committing tax evasion it may be necessary to file a SAR with the FRA to comply with the Money Laundering Regulations and to avail oneself of the statutory protection required when carrying on relevant financial business with a person suspected of committing a money laundering offence. RFIs must be careful not to make any arrangement one of the main purposes of which is to avoid their due diligence and reporting obligations under the CRS.

RFIs in many other Participating Jurisdictions in the CRS are now confronted with similar considerations and, in the absence of clear regulatory guidance should consider seeking legal advice on the most prudent next steps to best serve their clients and to protect themselves.

Table:

The treatment of tax evasion and the existence of voluntary disclosure programmes in forty-six OECD-surveyed Participating Jurisdictions and the United States

Participating Jurisdiction	RFI first reports under CRS	i. No voluntary disclosure: the tax authorities detect the tax evasion without the taxpayer having made a timely and comprehensive voluntary disclosure				ii. Voluntary disclosure: the taxpayer has made a timely and comprehensive voluntary disclosure of his tax evasion before being detected by the tax authorities					
		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison -ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Anguilla	2017	*Not Surveyed……*									
Argentina	2017	Yes	Yes	Yes	Yes	No					
Barbados	2017	*Not Surveyed……*									
Belgium	2017	Yes	Yes	Yes	Yes	No					

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		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison-ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Bermuda	2017	*Not Surveyed……*									
British Virgin Islands	2017	*Not Surveyed……*									
Bulgaria	2017	*Not Surveyed……*									
Cayman Islands	2017	*Not Surveyed……*									
Colombia	2017	*Not Surveyed……*									
Croatia	2017	Yes	Yes	Yes	Yes	No					
Curacao	2017	*Not Surveyed……*									
Cyprus	2017	*Not Surveyed……*									
Czech Rep.	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
Denmark	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
Dominica	2017	*Not Surveyed……*									
Estonia	2017	Yes	Yes	Yes	Yes	No					
Faroe Islands	2017	*Not Surveyed……*									
Finland	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
France	2017	Yes	Yes	Yes	Yes	Yes	No	Part	No	No	No
Germany	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
Gibraltar	2017	*Not Surveyed……*									
Greece	2017	*Not Surveyed……*									
Greenland	2017	*Not Surveyed……*									
Guernsey	2017	*Not Surveyed……*									

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		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison -ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Hungary	2017	Yes	Yes	Yes	Yes	Yes	No	Part	Yes		No
Iceland	2017	Yes	Yes	Yes	Yes	No					
India	2017	Yes	Yes	Yes	Yes	No					
Ireland	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Islands	2017	*Not Surveyed*............									
Isle of Man	2017	*Not Surveyed*............									
Italy	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
Jersey	2017	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes		No
Korea	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
Latvia	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No
Liechtenstein	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
Lithuania	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		
Luxembourg	2017	Yes	Yes	Yes	Yes	No					
Malta	2017	Yes	Yes	Yes	Yes	Yes	No	Maybe	Yes	Yes	No
Mauritius	2017	*Not Surveyed*............									
Mexico	2017	Yes	Yes	Yes	Yes	No					
Montserrat	2017	*Not Surveyed*............									
Netherlands	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Niue	2017	*Not Surveyed*............									
Norway	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
Poland	2017	Yes	Yes	No	Yes	Yes	No	Part	Yes		No

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		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison -ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Portugal	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Romania	2017	*Not Surveyed*......................									
San Marino	2017	*Not Surveyed*......................									
Seychelles	2017	*Not Surveyed*......................									
Slovenia	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes		Yes
South Africa	2017	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No
Spain	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Sweden	2017	Yes	Yes	Yes	Yes	Yes	No	No	No	No	No
Trinidad and Tobago	2017	*Not Surveyed*......................									
Turks and Caicos	2017	*Not Surveyed*......................									
United Kingdom	2017	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Albania	2018	*Not Surveyed*......................									
Andorra	2018	*Not Surveyed*......................									
Antigua and Barbuda	2018	*Not Surveyed*......................									
Aruba	2018	*Not Surveyed*......................									
Australia	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes
Austria	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
Belize	2018	*Not Surveyed*......................									
Brazil	2018	*Not Surveyed*......................									

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		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison-ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Brunei Darussalam	2018	*Not Surveyed*…………									
Canada	2018	Yes	Yes	Yes	Yes	Yes	No	Maybe	Yes		No
Chile	2018	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
China	2018	Yes	Yes	Yes	Yes	No					
Costa Rica	2018	Yes	Yes	Yes	Yes	Yes	No	No		Yes	No
Ghana	2018	*Not Surveyed*…………									
Grenada	2018	*Not Surveyed*…………									
Hong Kong (China)	2018	*Not Surveyed*…………									
Indonesia	2018	Yes	Yes	Yes	Yes	Yes	No	Part			No
Israel	2018	*Not Surveyed*…………									
Japan	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes
Macao (China)	2018	*Not Surveyed*…………									
Malaysia	2018	Yes	Yes	Yes	Yes	Yes					
Marshall Islands	2018	*Not Surveyed*…………									
Monaco	2018	*Not Surveyed*…………									
New Zealand	2018	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
Panama	2018	*Not Surveyed*…………									
Qatar	2018	*Not Surveyed*…………									
Russia	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No
Saint Kitts and	2018	*Not Surveyed*…………									

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		Tax to be paid in full	Interest Charges	Monetary Penalties	Imprison-ment possible	General voluntary disclosure programme / law exists	Tax waived	Interest charges waived	Monetary penalties waived:		Imprison ment possible
									All	Part	
Nevis											
Saint Lucia	2018	*Not Surveyed*..									
Saint Vincent and the Grenadines	2018	*Not Surveyed*..									
Samoa	2018	*Not Surveyed*..									
Saudi Arabia	2018	*Not Surveyed*..									
Singapore	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No
Sint Maarten	2018	*Not Surveyed*..									
Slovak Rep.	2018	Yes	Yes	Yes	Yes	Yes	No	No		Yes	Yes
Switzerland	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
The Bahamas	2018	*Not Surveyed*..									
Turkey	2018	Yes	Yes	Yes	Yes	Yes	No	No	Yes		No
United Arab Emirates	2018	*Not Surveyed*..									
Uruguay	2018	*Not Surveyed*..									
Bahrain	TBD	*Not Surveyed*..									
Nauru	TBD	*Not Surveyed*..									
Vanuatu	TBD	*Not Surveyed*..									
United States (surveyed by OECD although not a Participating Jurisdiction)		Yes	Yes	Yes	**Yes**	Yes	No	No	No	No	No

6 November 2015

[i] CRS Regulations Are in Effect. Department For International Tax Cooperation. Cayman Islands. 20 October 2015. http://www.tia.gov.ky/pdf/CRS_Regulations_Are_in_Effect_-_20 Oct2015.pdf

[ii] Update on Voluntary Disclosure Programmes: A pathway to tax compliance. OECD. 7 August 2015. http://www.oecd.org/ctp/exchange-of-tax-information/Voluntary-Disclosure-Programmes-2015.pdf

[iii] Methodology for assessing technical compliance with the FATF Recommendations and the effectiveness of AML/CFT systems. Financial Action Task Force (FATF). August 2013. http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%2022%20Feb%202013.pdf