

Automatic Exchange of Information (AEOI): Status of Implementation in Switzerland

Earlier this month, the Swiss Federal Tax Administration (SFTA) published the much anticipated draft version for the Guideline: Standard for the Automatic Exchange Of Information with regard to financial accounts - Common Reporting Standard ("Draft AEOI-Guideline"). The Draft AEOI-Guideline specifies the duties arising from the automatic exchange of information ("AEOI") for Financial Institutions (banks, insurance companies, certain collective investment schemes etc.), the SFTA and further involved players. Furthermore, the Draft AEOI-Guideline comments on the legal basis for the AEOI for Switzerland and provides useful clarifications in this context. It is currently only available in the form of a non-binding draft in German language. Translations in French and Italian are expected for early 2017, as the AEOI will take effect on 1 January 2017.

Current status of implementation of AEOI in Switzerland

The legal foundations for introducing AEOI [the Administrative Assistance Convention, the Multilateral Competent Authority Agreement ("MCAA") and the bill for a Federal Act on the AEOI in tax matters] were submitted to the Federal Assembly for approval in June 2015. These three bills have been approved by the Swiss Parliament in the final vote in December 2015. Since the referendum deadline expired unused on 9 April 2016, the three bills will enter into force as of 1 January 2017.

On 18 May 2016, the Federal Council initiated the consultation on the Ordinance on the International Automatic Exchange of Information in Tax Matters (AEOI-Ordinance). The consultation of the interested parties will last until 9 September 2016. The AEOI-Ordinance contains the Federal Council's implementing provisions for the Federal Act on the International Automatic Exchange of Information in Tax Matters (AEOI-Act). The AEOI-Ordinance mentions in parti-

cular other non-reporting financial institutions and exempt accounts and regulates details with regard to the reporting and due diligence requirements for reporting Swiss financial institutions.

At the beginning of August 2016, the SFTA published the aforementioned Draft AEOI-Guideline.

The Administrative Assistance Convention, the MCAA, the AEOI-Act, the AEOI-Ordinance and the final version of the AEOI-Guideline are jointly, supposed to enter into effect on 1 January 2017 so that data can be collected as of 2017 and will be exchanged as of 2018.

Switzerland's Partner States

To date, Switzerland has signed an agreement for the introduction of the AEOI with the following states ("Partner States"):

1. EU (The AEOI-Agreement with the EU applies to all 28 member states)

2. Australia
3. Canada
4. Guernsey
5. Isle of Man
6. Iceland
7. Japan
8. Jersey
9. Norway
10. South Korea

"Swiss Finish" – Swiss Provisions in addition to MCAA and CRS

Although MCAA [including Common Reporting Standard ("CRS")] represents the legal basis for the AEOI, the importance of the domestic legislation such as the AEOI-Act, the AEOI-Ordinance and the recently published AEOI-Guideline are significant, as they provide for specific Swiss regulations where CRS leaves room for discretion to the Partner States. Furthermore, the Swiss domestic implementation legislation, provides details on the applicable procedure and additionally includes criminal provisions. The most important "Swiss Finish" provisions, i.e. simplifications, clarifications and additional duties, as regulated in the AEOI-Act/AEOI-Ordinance and further specified in the Draft AEOI-Guideline, are the following:

- **Participating States:** Switzerland will apply the AEOI to all Partner States. Furthermore, the AEOI will be applied also to certain so-called "Participating States". Switzerland has opted for a rather wide definition of the term "Participating State" including not only the Partner States but also for a limited time-period states which committed to implement AEOI. In this context, the US are expressly mentioned in view of the US domestic FATCA legislation. So far, Switzerland is the only state including the US as Participating State. As a consequence of this broad definition, financial institutions are not obliged to identify beneficial owners of Professionally Managed Investment Entities (such as collective investment schemes, domicile companies, trusts and other private investment vehicles) with legal seat in the US or other Participating States.
- **Non-Reporting Financial Institutions:** Art. 3 AEOI-Act defines most of the Non-Reporting Financial Institutions, in particular governments and governmental bodies, pension institutions, condominiums, Swiss collective investment schemes and trusts whose trustees qualify as a Financial Institution themselves. The AEOI-Ordinance adds three additional exceptions: central depositories, co-ownership associations and legal entities providing asset management or investment advisory services. The Draft AEOI-Guideline provides further clarification regarding the identification of these non-reporting financial institutions. The peer reviews will show whether all of these excluded financial institutions meet the requirements as set out in the OECD-Commentary.
- **Duty to register for Financial Institutions:** Despite of the fact that the CRS does not contain such a duty, Swiss Financial Institutions have to register with the SFTA until the end of the year in which the qualification requirements as financial institution are met, i.e. for most financial institutions until 31 December 2017. An intentional breach of the registration duty will be punished with a fine of CHF 250'000 (art. 32 AEOI-Act). Financial Institutions have to de-register with the SFTA by the end of the year during which they cease to meet the criteria to qualify as Reporting Financial Institution. In case the qualification as Financial Institution is not clear, SFTA may upon request of the Financial Institution issue a declaratory decision.

Furthermore, the SFTA will control on a regular basis, whether the Reporting Financial Institutions respect their duties arising from the AEOI. In case the SFTA takes note of a breach of duties, it will give the respective Financial Institution the possibility to submit a statement. If the SFTA and the Financial Institutions disagree on the alleged breach of duty, SFTA will issue a contestable decision. The Financial Institution has the possibility to file a written objection against this decision within 30 days with the SFTA. The second decision issued by the SFTA may then be challenged before the Swiss Federal Administrative Court.
- **Duty to inform affected clients:** Reporting Financial Institutions have to inform affected clients ("Reported Persons") by 31 January of the year, in which data will be exchanged for the first

time, i.e. 2018. The information is to cover (i) the qualification of the Reporting Financial Institution as such and (ii) the scope of information to be exchanged in the context of the AEOI. Further, the information must include an up-to-date list of Partner States as well as the use of the exchanged information and the Reported Person's rights under the applicable Swiss data protection legislation and the AEOI-Act. According to Swiss data protection legislation and art. 19 AEOI-Act, Reported Persons have the right to ask the SFTA for inspection of the documents and to claim a correction of incorrect data if the incorrectness is due to a fault in transmission. With regard to an incorrect or inadmissible transmission, Reported Persons have the right to ask SFTA for a contestable declaratory decision (art. 19 para. 2 AEOI-Act).

From a Swiss perspective, every person with tax residency in Switzerland and cross border investments in one of Switzerland's Partner States (e.g. bank account with a German bank) will be affected by AEOI, as data with regard to such investments will automatically be transmitted to the SFTA. However, only persons with tax residency in Switzerland having undeclared movable property in one of Switzerland's Partner States will face legal consequences due to the introduction of the AEOI. Such persons have the possibility to avoid negative effects from the introduction of the AEOI by filing a voluntary disclosure with the competent Swiss cantonal tax authorities covering their undeclared, foreign assets. Since the first data to be exchanged between Switzerland and its Partner States and vice versa will be collected as of 2017, the voluntary disclosure should be submitted by 31 December 2016.

Persons affected by AEOI and Need for Action

Formally, Reported Persons include persons resident in a Partner State or a Participating State except for listed companies, governmental legal entities, international organizations, central banks and Financial Institutions. However, de facto, only individuals or legal entities domiciled in one of Switzerland's Partner States having undeclared, movable property in Switzerland will be materially affected by the AEOI.

Our Support

Bär & Karrer is pleased to assist you should you have any questions with regard to the implementation of AEOI in Switzerland in general, the draft AEOI-Guideline (which is only available in German) or also if you take into consideration making a voluntary disclosure. Furthermore, we are pleased to assist Financial Institutions to ensure compliance with its duties arising from the Swiss AEOI legislation or to represent them in proceedings with the SFTA.

Daniel Bader
T: +41 58 261 54 32
daniel.bader@baerkarrer.ch

Dr. Ruth Bloch-Riemer
T: +41 58 261 56 51
ruth.blochriemer@baerkarrer.ch

Dr. Daniel Lehmann
T: +41 58 261 54 30
daniel.lehmann@baerkarrer.ch

Zurich
Bär & Karrer AG, Brandschenkestrasse 90, CH-8027 Zurich,
T: +41 58 261 50 00, F: +41 58 261 50 01, zurich@baerkarrer.ch

Geneva
Bär & Karrer SA, 12, quai de la Poste, CH-1211 Geneva 11,
T: +41 58 261 57 00, F: +41 58 261 57 01, geneva@baerkarrer.ch

Lugano
Bär & Karrer SA, Via Vegezzi 6, CH-6901 Lugano,
T: +41 58 261 58 00, F: +41 58 261 58 01, lugano@baerkarrer.ch

Zug
Bär & Karrer AG, Baarerstrasse 8, CH-6301 Zug,
T: +41 58 261 59 00, F: +41 58 261 59 01, zug@baerkarrer.ch

www.baerkarrer.ch