



FStaxworld Your March snapshot

In this month's *FStaxworld*, we analyze key portions of the Swiss law for enacting OECD CRS.

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The view from Deloitte

Dear Reader,

On 14 January, the Swiss Federal Council (Bundesrat) published the domestic draft legislation through which Switzerland intends to enact the OECD Common Reporting Standard (CRS) into domestic law, along with an accompanying explanatory report setting forth the obligations in further detail.



The act (available [here](#) in German) incorporates the mandatory features of a CRS rule set as interpreted by the Swiss authorities, but also adds supplemental requirements which Switzerland intends to impose on its own financial institutions. According to the press release issued by the Federal Council (available [here](#)), the additional regulations are necessary in order to ensure that "... all of the provisions of the [Multilateral Competent Authority Agreement (MCAA)] and the common reporting standard are sufficiently detailed, justiciable and thus directly applicable..."

By means of this publication, Switzerland became the first country to publish any enhanced guidance concerning the expected implementation of CRS (the UK guidance is promised in March). While the unique attributes of Switzerland's political process (to wit, the referenda) necessitated prompt action in order to ensure a valid law in time for the entry of CRS in Switzerland on 1 January 2017, the early release of guidance also secures the country a first-mover advantage; sculpting the landscape for the upcoming implementation debates between and amongst the prospective partner jurisdictions.

Below please find a brief description of key provisions set forth in the Swiss Automatic Exchange of Information act (The AEOI act) and accompanying explanatory report:

Scope of precedence (Article 1)

- The AEOI act governs the implementation of the MCAA and other international treaties concerning the automatic exchange of financial account information (paragraph 1).
- The first article also clarifies that deviating rules in applicable agreements have priority over the rules in the AEOI act (paragraph 2).

Definitions (Article 2)

- A bit fewer than half of the terms are defined in the act. For the majority the act refers to the definitions in the applicable agreement.
- Subparagraph 1.f introduces a new, Swiss wide taxpayer identification number for individuals.
- Subparagraphs 1.i and j define the terms “pre-existing account” and “new account”. In general, it is foreseen that this distinction is made separately with respect to each agreement (as per the day when an AEOI agreement becomes effective with a certain partner jurisdiction).
- Subparagraphs 1.k and l define the terms “high value account” and “lower value account”. Same as above, the distinction needs to be made separately with respect to each partner jurisdiction.

Non-reporting financial institutions (FI) and excluded accounts (Article 3)

- In general, the Swiss AEOI act intends to align the CRS non-reporting FI and excluded account categories with the ones from FATCA.
- The explanatory report (p. 32) states that all non-reporting Swiss FIs under FATCA (irrespective of whether they have the status based on the IGA, the Swiss law, or the Treasury Regulations) are “exempt” from CRS obligations, which arguably stretches the scope of domestic authority granted in the OECD CRS guidance for such definitions.
- In contrast to FATCA, the definition of an FI with a local client base is slightly amended (unlike under FATCA, the 98 percent threshold includes only Swiss residents and not residents of any EU member country) and the trustee-documented trust exemption is introduced.
- The Federal Council may amend the list of non-reporting FIs and excluded accounts without revising the AEOI act.

Swiss FIs (Article 4)

- In general, entities will be considered Swiss FIs if they are liable for tax in Switzerland, or – if they are not tax resident in any other country – if they have their place of (effective) management in Switzerland. Further elaboration on this topic by the Federal Council will be forthcoming.
- Trusts though will be considered Swiss FIs if one of their trustees (whether individual or entity) is a Swiss resident. Where a trust has trustees in multiple jurisdictions, there will be a reporting obligation towards each of the jurisdiction's tax authorities (explanatory report p. 35).

MCAA (Article 6)

- Paragraph 1 and the explanatory report (p. 35) state that the rights and obligations of Swiss FIs are governed by the so-called “Annex to the MCAA” (which means the OECD CRS), as amended by the Swiss AEOI act.

Simplification of reporting and due diligence obligations (Article 7)

- Paragraph 1 states that reporting Swiss FIs may use third party service providers to meet their CRS obligations, however, the reporting FIs "...remain responsible for the performance of their duties."
- Paragraph 2 clarifies that some or all lower value accounts can be documented applying the procedures for high value accounts. Further, some or all pre-existing accounts may be documented applying the rules for new accounts.
- Paragraph 3 grants the option to apply a CHF (or USD) 250,000 threshold for pre-existing entity accounts and not to perform related due diligence, identification or reporting procedures for accounts with balance or value not exceeding it.
- Paragraph 4 allows the application of the residence address test as an alternative to the electronic indicia search for lower value accounts.
- Paragraph 5 aligns the controlling person and equity holder definition with respect to the beneficiaries in a trust (i.e. beneficiaries that may only receive a discretionary distribution from a trust do not need to be treated as controlling persons until such distributions are paid out). However, a reporting Swiss FI can also decide to treat all such beneficiaries as controlling persons, irrespective of whether a distribution is received.
- Paragraph 7 allows a reporting Swiss FI to treat some or all accounts opened after the AEOI act entered into force as new accounts – this provision is necessary to apply the wider approach (often referred to as the "big bang" approach). If an account treated as a new account under this provision is not a reportable account, a reporting Swiss FI is not required to obtain the TIN at account opening. However, the TIN must be obtained by the end of the second year after the account became a reportable account (explanatory report p. 37-38).

Specification of reporting obligations (Article 8)

- According to paragraph 2 the Federal Council will specify the rules for the determination of the amount and character of payments.

Specification of general due diligence obligations (Article 9)

- Paragraph 1 states that a self-certification is generally valid indefinitely (unless there is a change in circumstances). Furthermore, the explanatory report (p. 38-39) states a self-certification qualifies as a certificate ("Urkunde") for purposes of the criminal code (similar to the Form A), indicating that criminal liability may attach under Swiss law for fraud in connection with the self-certification.
- Paragraphs 2 to 4 contain the timelines for the pre-existing account remediation (same one or two year periods as known from FATCA) – however, a reporting FI can choose whether to start when an AEOI agreement with a specific country comes into force or as soon as the AEOI act becomes effective. The second option would be consistent with the application of the wider approach.
- Paragraph 5 clarifies that a residence address established by means of a Form A qualifies as documentary evidence for purposes of the residence address test for lower value accounts.
- Paragraph 7 obliges a Swiss FI to close a new account if not all necessary information is obtained within 90 days. The AEOI act mentions a right of extraordinary termination, which was primarily introduced to enable life insurance companies to close accounts (explanatory report p. 40).

Specification of special due diligence obligations (Article 10)

- Paragraph 1 states that an account with a negative balance or value is treated as having a balance or value of zero for account aggregation purposes.
- For the calculation of any values (e.g. the determination of relevant thresholds), Reporting Swiss FIs can use either CHF or USD.

Registration (Article 11)

- Reporting Swiss FIs must register with the Swiss Federal Tax Administration (FTA), regardless of whether they maintain reportable accounts.
- In order to register for CRS purposes, reporting Swiss FIs will need an UID (Unternehmens-

Identifikationsnummer), but special CRS identification numbers will not be assigned.

Information obligation of a reporting Swiss FI (Article 12)

- Reporting Swiss FIs must notify reportable persons of specified CRS-related information prior to reporting them for the first time to a partner jurisdiction. Additionally, a list of all partner jurisdictions must be published on each reporting FI's homepage.

Reporting (Article 13)

- Paragraph 1 clarifies that the deadline for reporting Swiss FIs to transmit information to the Swiss FTA is 30 June. In case there are no reportable accounts, a nil report is required.
- Paragraph 5 and the respective provisions in the explanatory report (p. 43) deal with the Swiss banking secrecy because there may be situations where the information reported by a Swiss FI may also be of interest for the Swiss tax authorities (if, say, Swiss tax residents are reported because there are "uncured" indicia indicating residence in a partner jurisdiction). In such cases the information can only be used by the Swiss tax authorities in the case of "Steuerstrafverfahren" (i.e. criminal acts of tax evasion under Swiss law).

Trusts that are reporting FIs in another jurisdiction (Article 15)

- Swiss trustees are allowed to report to foreign tax authorities on behalf of foreign trusts without violation of article 271 of the Swiss criminal code.

Changes in circumstances (Article 16)

- Any person that provided a reporting Swiss FI with a self-certification incurs an affirmative legal obligation to notify the reporting Swiss FI in the event of a change in circumstances. However, the Swiss AEOI act has no specific penal provision for cases of non-compliance.

Privacy rights (Article 17)

- The privacy rights of reportable persons are mainly governed by the Swiss federal act on data protection.

Information obtained from other countries (Article 18)

- Generally, information obtained from other countries regarding Swiss resident financial account holders captured under CRS and exchanged with the Swiss FTA will be forwarded to the cantonal tax authorities.

Compliance Review (Article 25)

- The Swiss FTA shall review whether Swiss FIs meet their CRS obligations, mirroring similar oversight of compliance with the bilateral withholding agreements with Austria and the UK or the EU savings tax.

Anti-abuse clause (Article 28)

- Reporting Swiss FIs are not allowed to manage or support artificial structures the main purpose of which is to circumvent the obligations under any applicable AEOI agreement or the Swiss AEOI act. According to the explanatory report (p. 48) the transfer of funds or money to another jurisdiction is not covered by this clause.

Criminal penalties (Articles 30 et seq.)

- The Swiss AEOI act foresees penalties up to CHF 250,000 in case of intentional infringement of CRS obligations (including the anti-abuse clause). In the event of negligence, the penalties will be up to CHF 100,000.
- In general, the criminal proceedings are brought against the accused individuals.

Approving powers (Article 35)

- The Swiss parliament may approve with a simple resolution ("einfacher Bundesbeschluss", i.e. not subject to a referendum) the activation of the MCAA with respect to any partner jurisdiction.

Referendum and effective date (Article 36)

- The Swiss AEOI act is subject to an optional referendum.
- The Federal Council will decide on the effective date of the AEOI act (most probably 1 January 2017).

For further analysis of this topic, please refer to our upcoming article in the April 2015 issues of the Treuhaender magazine (available in German at <http://www.treuhaender.ch>).

Regards,

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Robin King

Deloitte in Switzerland Reporting Support Offerings

FATCA introduced new reporting obligations, which altered and expanded existing reporting obligations and coordinated the rules of different reporting regimes with each other. As a result, there are more rules to consider and to understand, more process steps to be undertaken and more deadlines to be met. In line with your needs, we offer customized training workshops and tailored reporting guidance for your different annual tax reporting requirements (Form 8966, Form 1042-S, Form 1042 and Form 1099). Our training program consolidates and further refines your FATCA reporting implementation program, summarizing the modifications necessary to leverage existing policies on the range of regulatory reporting rules. Through the training, we address any questions specific to your financial institution and help devise methods for handling any unique challenges you face. Finally, this training bridges any knowledge gap between your FATCA team and reporting operations experts in order to align the two programs into a single FATCA reporting unit. For more information, please contact [Andreas Di Cesare](#).

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