

Briefing November 2016

Automatic Exchange of Information (AEOI): Update on Status of Implementation in Switzerland and Partner States

On 16, 18, 22 and 24 November 2016, Switzerland signed joint declarations on the introduction of the AEOI with the significant South American hubs Argentina, Mexico, Brazil and Uruguay as well as with India and South Africa. On 21 November 2016, the Swiss Federal Tax Administration (SFTA) published an updated draft version of the Automatic Exchange of Information Guideline (Draft AEOI-Guideline). The latest publication is an updated version of the draft AEOI-Guideline published on 3 August 2016 (cf. [Bär & Karrer briefing of August 2016](#)) with the amendments highlighted in yellow. It is still only available in the form of a non-binding draft in German language. A final version as well as translations into French and Italian are expected to be published on 1 January 2017 when the AEOI will enter into force in Switzerland. Furthermore, on 23 November 2016, the Federal Council adopted the AEOI-Ordinance, which was on the same day published by the SFTA.

Update regarding Switzerland's Partner States

To date, Switzerland has signed an agreement for the introduction of the AEOI (CRS) with the below mentioned states (Partner States). The table gives an overview with regard to the status of debate in parliament, the date of entry into force, the first data to be exchanged as well as the date of the first data transmission.

Partner State	Date of Signing	Status of debate in parliament	Start of data collection	Start of data exchange
Australia	03.03.15	approved	2017	2018
EU	27.05.15	approved	2017	2018
Canada	05.02.16	approval expected for December 2016	2017	2018
Guernsey	20.01.16	approval expected for December 2016	2017	2018
Isle of Man	20.01.16	approval expected for December 2016	2017	2018

Partner State	Date of Signing	Status of debate in parliament	Start of data collection	Start of data exchange
Iceland	20.01.16	approval expected for December 2016	2017	2018
Jersey	20.01.16	approval expected for December 2016	2017	2018
Norway	20.01.16	approval expected for December 2016	2017	2018
Japan	29.01.16	approval expected for December 2016	2017	2018
South Korea	19.02.16	approval expected for December 2016	2017	2018
Argentina	16.11.16	consultation period to be initiated soon	2018	2019
Brazil	18.11.16	consultation period to be initiated soon	2018	2019
Uruguay	18.11.16	consultation period to be initiated soon	2018	2019
Mexico	18.11.16	consultation period to be initiated soon	2018	2019
India	22.11.16	consultation period to be initiated soon	2018	2019
South Africa	24.11.16	consultation period to be initiated soon	2018	2019

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As more than 100 states have already committed to implement AEOI, it is expected that Switzerland's list of partner states will further increase during the next few months. Switzerland mainly focuses on states with which it has close economic and political relations, states where taxpayers have the possibility to regularize their tax situation as well as states in which the maintenance of the Swiss financial institutions' access to the market is important. With the US, Switzerland intends to change from FATCA Model 2 to Model 1, which also provides for reciprocal automatic exchange of information.

Current status of implementation of AEOI legislation in Switzerland

The Administrative Assistance Convention, the Multilateral Competent Authority Agreement (MCAA), the bill on the Federal Act on the AEOI (AEOI-Act), the Ordinance on the International Automatic Exchange of Information in Tax Matters (AEOI-Ordinance) and the final version of the AEOI-Guideline are supposed to enter into effect on 1 January 2017. Based on this legislation, data may be collected as of 2017 and will be exchanged between the involved tax authorities as of 2018.

The most important amendment to the final version of the AEOI-Ordinance is that Switzerland will not treat the US as participating state (art. 1 AEOI-Ordinance). The qualification of the US as participating state was heavily criticized during the consultation period, where various participants proposed that Switzerland's treatment of the US should be in line with the other financial centers having in the meantime taken the US from their list of participating states.

Furthermore, the final version of the AEOI-Ordinance also qualifies associations and foundations established and organized in Switzerland as non-reporting financial institutions:

- Art. 5 AEOI-Ordinance / Cyph. 2.4.2.11 AEOI-Guideline: Associations established and organized in Switzerland not pursuing economic purposes qualify as non-reporting financial institutions in the sense of art. 3 para 11 AEOI-Act.

- Art. 6 AEOI-Ordinance / Cyph. 2.4.2.12 AEOI-Guideline: Foundations established and organized in Switzerland which a) pursue public or non-profit purposes and dedicate their profits solely and irrevocable to these purposes or b) pursue charitable purposes, whose profits do not exceed CHF 20,000 and these profits are solely and irrevocably dedicated to these charitable purposes. The conditions of alternative a) are in line with the requirements for profit tax exemption (see art. 56 lit. g Federal Act on Federal Direct Tax). Furthermore, the conditions of alternative b) correspond with the requirements for profit tax exemption as set out in the new Federal law on profit taxation of legal entities with charitable purposes entering into force as of 1 January 2018. Accordingly, Swiss foundations fulfilling the conditions for tax exemption should qualify as non-reporting FI.

In the context of the entry into force of the AEOI between Switzerland and the EU, the withholding tax agreements between Switzerland and Austria and Switzerland and UK will be terminated on 1 January 2017.

Most important amendments to the Draft AEOI-Guideline

The latest version of the Draft AEOI-Guideline highlights the amendments to the first draft version published on 3 August 2016. The latest version of the AEOI-Guideline is available at [Swiss Federal Tax Administration's homepage](#).

The most important amendments and clarifications are the following:

- **Criteria for Swiss domiciliary companies to qualify as investment entity (Cyph. 2.2.3.3, page 47):** A Swiss domiciliary company qualifies as an investment company (type b) where the gross income is predominantly attributable to the investment or reinvestment of financial assets or trading and the domiciliary company is managed by another legal entity which is a depository institution, a custodial institution, a specified insurance company or an investment company described under letter a (type a) (see sect 2.1.3).

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- **Clarifications regarding the classification of trusts (Cyph. 2.2.3.4, page 47):** Non-profit / charitable trusts have been specified as trusts whose main focus is the distribution of assets rather than the investment in financial assets.

Further, the definition of “professionally managed” has been specified: A professional administration is given if assets are managed by an FI (e.g. corporate trustee or asset manager) based on discretionary decision-making competences. A trust is considered being professionally managed in case it is managed by a FI (e.g. a corporate trustee qualifying as FI) or also if the trust provided a bank with a discretionary asset management mandate.

- **Clarifications regarding non-reportable accounts (Cyph. 3.12.8 et seq., page 75):** The latest version of the AEOI-Guideline further clarifies under which conditions reporting Swiss FI may treat the following accounts as non-reporting accounts:

- Swiss associations not pursuing economic purposes
- Swiss foundations fulfilling the conditions of art. 6 lit. a and b AEOI-Ordinance
- Co-ownership associations and real estate co-ownerships (*Stockwerkeigentümergeinschaft*) fulfilling the conditions of art. 7 lit. a-c AEOI-Ordinance
- Dormant accounts
- E-money accounts
- Escrow accounts
- Credit card accounts

- **FI's duties of care (cyph. 6.1, page 128):** In order to meet their duties of care FI may rely on the information given to them typically by their customer in the form of a self-certification unless the FI is aware of the fact or has reasons to believe that a document or a self-certification is incorrect or unreliable ('plausibility-test'). An intentional breach of the duty of care obligations will be punished with a fine up to CHF 250,000 (art. 32 AEOI-Act) and may also have regulatory consequences.

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. One of the AEOI-affected groups of people are individuals or legal entities domiciled in one of Switzerland's Partner States and having undeclared, movable property in Switzerland. Their specific situation under the tax legislation in their respective jurisdiction will need to be assessed by specialized local counsels.

From a Swiss taxation perspective, persons 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 be collected as of 1 January 2017 and will automatically be transmitted to the SFTA as of 2018. It is expected that the SFTA will further spread the data to the relevant Cantonal tax authorities. Persons with tax residency in Switzerland and 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 timing of voluntary disclosure submissions is crucial and needs to be assessed individually but always with a view to the timelines implemented between Switzerland and the Partner State in question. In particular, the Swiss taxpayer's eligibility for an exemption from punishment available under Swiss domestic voluntary disclosure legislation under certain pre-requisites needs to be evaluated in this context:

- It is, generally, recommended to submit the voluntary disclosure with the competent Swiss tax authorities as soon as possible and ideally before

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the start of data collection (cf. table above). This in order not to jeopardize the exemption from penal punishment available for first-time disclosing taxpayers if the conditions under Swiss legislation are met.

- ii. For voluntary disclosure procedures initiated after the start of data collection but before the start of data exchange, the availability of the exemption from penal punishment will need to be assessed and discussed with the competent tax authorities on a case-by-case basis.
- iii. For voluntary disclosure procedures initiated after the start of data exchange, the availability of the exemption from penal punishment is expected to be restricted to specific situations. However, it will need to be reviewed and discussed with the competent tax authorities on a case-by-case basis to what extent a reduction of the punishment may be achieved.

The same assessment with regard to criminal law consequences (particularly the imposition of a fine and the amount of fine) will, of course, need to be performed for voluntary disclosure procedures initiated before the start of data collection (supra, i.) or between start of data collection and start of data exchange (supra, ii.) if the pre-requisites for an exemption from punishment under Swiss law are not met.

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 their duties arising from the Swiss AEOI legislation or to represent them in proceedings with the SFTA.

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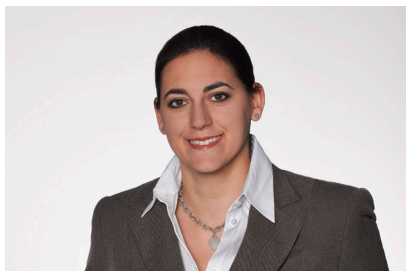


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