



Page 1

1. What is the systemic risk of the deviation of reported data from your tax declaration?
2. What is the risk of reporting to states in which a person has no tax liability?
3. What risks exist for settlors, beneficiaries, trustees, board members and protectors of foundations and trusts?

Page 2

4. How effective is the legal and data protection before the Swiss civil courts respectively the Federal Administrative Court?
5. How can you protect yourself?

AEoI Automatic Exchange of Information – Risks & Legal Protection

Answers to Your 5 most frequent questions

The Swiss Act on Automatic Exchange of Information („AEoI-Act“) will enter into effect on 1st January 2017. During the first 12 months of due-diligence banks have to verify information on their clients through their self-declaration. For the first time financial institutions will in 2018 transfer financial data regarding their clients to the Swiss Federal Tax Authority in Berne which will forward the data to national tax authorities in 37 states. These include the EU member states as well as Gibraltar, Australia, Guernsey, Isle of Man, Island, Japan, Jersey, Canada, Norway and South Korea. Vice versa our cantonal tax authorities will receive information regarding Swiss taxable persons from those countries. With additional 67 countries (including Russia and CIS-countries) Switzerland has concluded multilateral treaties. For taxable persons significant risks may result.

1. What is the systemic risk of the deviation of the reported data from your tax declaration?

Reportable information under AEoI-Act does not include information on taxable income but only pure wealth information (identification, account and financial information). Therefore the nature of the automatic information will not provide foreign tax authorities with the possibility to compare the reported information with the information in the private tax declaration. Regarding the classification of the beneficial owner and the controlling person of a legal entity the Swiss AEoI-Act follows the qualification in the forms A, K, S and T in accordance with the Swiss Bankers Association Guidelines for money laundering prevention (“VSB 16“). As AEoI does not differentiate between dividends, interest and capital gains a distorted picture may result for the tax authorities. It can be expected that AEoI-Exchange may trigger requests to tax taxpayers respectively additional mutual assistance requests to the ESTV or to foreign tax authorities.

2. What is the risk of reporting to tax authorities where a person has no tax liability?

The AEoI-Act imposes an obligation on clients to provide banks with up-to-date information on their tax domicile(s) in a timely manner. Also any changes have to be communicated in a timely manner. If the bank files contain residential or postal address or phone numbers in reportable states the client has to submit an AEoI self-declaration. Unless this can wipe out the AEoI-indications, the client wealth data have to be reported since the non-adjusted AEoI information indicates residency in one or more reportable states. Thereby, it must be considered that a non-timely report of changes will be punished by law in the future. The Swiss Federal Tax Authorities (“ESTV“) prosecutes violations of reporting obligations of bank clients. However, there is the possibility of a voluntary self-disclosure to avoid punishment.

3. What risks exist for settlors, beneficiaries, trustees, board members and protectors of foundations and trusts?

The AEoI classification of foundations or trusts decides whether the bank or the foundation or the trust are under the obligation to report the relevant information. Particularly important is the classification as a professionally managed investment entity (PMIE) or as a passive Non-Financial Entity (NFE) as well as whether the concerned states are participating states, on a White-List or completely non-participating states. In certain cases the bank can decide whether to report the beneficiaries annually with the whole amount of trust assets or only in the case of a distribution with the relevant amount. Settlors, beneficiaries, trustees, board members



Page 1

1. What is the systemic risk of the deviation of the reported data from your tax declaration?
2. What is the risk of reporting to states in which a person has no tax liability?
3. What risks exist for settlors, beneficiaries, trustees, board members and protectors of foundations and trusts?

Page 2

4. **How effective is the legal and data protection before the Swiss civil courts respectively the Federal Administrative Court?**
5. **How can you protect yourself?**

and protectors of foundations and trusts have to be reported as owner of the (full amount of) assets of the trust / foundation. This way the automatically reported information may result quasi overnight in the unjustified creation of millionaires in the eyes of the receiving tax authorities. This creates substantial risks of additional tax payments if the involved persons cannot clarify the misunderstanding created by the automatic exchange of information.

4. How effective is the legal and data protection before the Swiss civil courts respectively the Federal Administrative Court?

Although tax disputes are usually assigned to specialized public courts in Switzerland, the Swiss-AEoI-Act declares civil courts as the competent courts in matters of AEoI. Due to the long duration of proceedings of on average one year or more the ordinary procedure in civil courts is not suitable. Therefore only interim legal protection may be truly effective. It remains to be seen how civil courts will handle these tax disputes. A special brisance may be attached to suing for corrections of date to automatically exchanged since breaches of obligation regarding up-to-date-ness of one's own residency information can be subject to criminal liability. It can be recommendable to simultaneously submit a voluntary disclosure according to Art. 36 AEoI-Act to avoid criminal liability. Only for questions regarding the so-called Ordre Public, i.e. whether financial data are in the foreign state protected by constitutional guarantees, the Federal Administrative Court is competent.

5. How can you protect yourself?

The classification of foundations, trusts and other legal structures due to their flexible structuring may present particular qualification problems that may have far-reaching consequences regarding the AEoI reporting for the involved persons. Therefore it may be recommendable to analyse and potentially amend as well as eventually obtain a suitable legal opinion concerning the classification as early as possible. AEoI reports from partner states to Switzerland and vice versa may render the involved parties such as trustees, foundation board members, settlors, protectors to millionaires in the eyes of tax authorities, although they do not economically own foundation or trust assets. This can lead to Kafkaesque tax proceedings. Therefore it is recommended to supply the cantonal tax authorities in advance with genuine information regarding the function in trust or foundation structures. This also to prevent possible subsequent requests in administrative assistance from tax authorities according to Art. 21 par. 7 Tax Administrative Assistance Act (TAAA).

Do you have any questions? – We are happy to help !