Standard-bearers

JEAN-LUC BOCHATAY AND **FABIANNE DE VOS BURCHART** WARN THAT THERE ARE RISKS TO BOTH UNDER- AND OVER-COMPLIANCE WITH THE COMMON REPORTING STANDARD FOR SWISS INSTITUTIONS

SWITZERLAND HAS IMPLEMENTED the Common Reporting Standard (CRS) in its domestic legislation. The CRS calls on participating jurisdictions to obtain information from their financial institutions (FIs) and exchange it with other jurisdictions on an annual basis.

The *Automatic Exchange of Information Act* (AEIA) and the *Automatic Exchange of Information Ordinance*, which both came into force on 1 January 2017 – as supplemented by the *Guidance on the Standard for the Automatic Exchange of Financial Account Information Under the CRS*, issued on 17 January 2017 by the Swiss Federal Tax Administration (the Tax Administration) – make up the foundations of CRS implementation in Switzerland.

FI DUTIES

Swiss FIs are now under a legal obligation to undertake due diligence on their financial accounts and account holders, and to make annual reports to the Tax Administration on the value of those financial accounts and the identity of any account holders residing in another CRS-participating jurisdiction. Swiss FIs have until 1 January 2018 to review and gather all relevant information on their individual high-value accounts, and until 1 January 2019 to do the same for their individual low-value and entity accounts. The first reports will be sent by 30 June 2018. On receiving these reports, the Tax Administration will forward the information to the designated tax authority of the relevant participating jurisdiction, which shall be permitted to use it for its own tax-gathering activities and detection of tax evasion by its residents.

Although the system seems relatively straightforward, it becomes more complex once a Swiss FI attempts to determine what information must be communicated and to what extent. The AEIA's criminal provisions – sanctions of up to CHF250,000 for any intentional violation by an FI of its due-diligence and reporting obligations – make the task daunting.

CRS CLASSIFICATION

The CRS classifies entities into two broad categories: FIs, which have a reporting obligation towards their designated tax authority; and non-financial entities (NFEs), which do not have any reporting duty, but must disclose information about themselves and, depending on their specific setup, their 'controlling persons' (for passive NFEs) to the FIs holding their financial accounts. A given 'type' of entity, such as a trust, may be categorised as an FI, an active NFE or a passive NFE, depending on the nature of its activities, its type, the kind of assets it holds and how it is managed.[1] Although classification under the CRS is not intuitive and must be determined on a case-by-case basis, it holds great meaning, as an entity's obligations and its resulting liability exposure depend on it.

As the AEIA is aimed at Swiss FIs, acting in this respect as agents of the Tax Administration, only they may incur criminal sanctions for a breach of their duties, in particular with respect to their reporting and due-diligence obligations[2] – insofar as any breach is committed intentionally, as sanctioning of negligent violations was disputed and eventually removed during the AEIA's consultation period.

CONFLICTS IN DUTY

The specific case of non-banking Swiss FIs, such as certain types of investment entity (IE), deserves closer attention, as they often have a close or personal relationship with the financial account holders[3] on which they report – e.g. trusts managed by corporate trustees whose financial account holders are, *inter alia*, their settlors and beneficiaries.

More than other FIs, IEs may face conflicting obligations, as they are under the legal duty to report on the entity and their clients/principals, but still owe fiduciary or contractual duties to those same clients/principals, in particular the duties of loyalty and care. Non- or under-compliance with legal duties may result in criminal liability under the AEIA, while over-compliance, such as communicating too much or non-reportable information, may expose them to fiduciary or contractual liability. Exclusion of liability for communication of information shall only occur when said communication is carried out pursuant to an overriding legal obligation (such as the IE's reporting duties under the AEIA) and insofar as it remains within the obligation's limits.

Although not directly subject to the CRS, administrators and/or directors of NFEs that inaccurately qualify an entity or, in the case of passive NFEs, disclose erroneous information about their controlling persons, notably on their tax residence, may incur liability for a breach of their contractual duties towards their clients.

All stakeholders must therefore ascertain the exact content and extent of the information they are required to report. In matters of the CRS, more is not better, and over-compliance for fear of criminal retribution may very well end up backfiring.

1 *Guidance on the Standard for the Automatic Exchange of Financial Account Information Under the CRS*, s2.2.3.4
2 See AEIA, article 32
3 Holders of an equity and/or debit interest

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