Developments in AEOI and FATCA Auditing 2019

Potential and Advice

Audit review experiences

For trustees, the processes and procedures applying to AEOI and FATCA audits vary significantly from those affecting banks and insurance institutions. Although two different systems are involved, a legal entity is often classified according to the same criteria. A divergence between AEOI and FATCA classification should be subject to close scrutiny.

For example, under FATCA a foundation is always to be classified as a financial institution (FFI) if one of its bodies is itself an FFI. The additional AEOI requirement, whereby a body must manage the assets at its own discretion, does not apply under FATCA.

Whereas some financial intermediaries prepare their own forms and checklists, in some cases hardly any documentation concerning self-certification is to be found. However, under Art. 7 para. 13 of the AEOI Act (Liechtenstein Act on the International Automatic Exchange of Information in Tax Matters, AIA-Gesetz), evidence of the reasonableness of self-certification must always be provided. For this purpose, companies must obtain up-to-date annual financial statements and evidence of residence for natural persons. In the case of complex structures, relevant organograms and balance sheets of subsidiaries, as well as loan contracts and other contracts are additionally required. We have incorporated this improvement potential at various times into the audits.

Material complaints arising from audits of trust companies in 2019

1. Classification
   a. Absence of FATCA classification
   b. No audit compliant documentation
   c. Classification as passive NFE not communicated to banks
   d. Different internal and external classifications
   e. Classification as active NFE although legal entity is not tax-exempt
2. Due diligence obligations
   a. Absence of self-certification
   b. Self-certification not evidenced as reasonable, and invalid
3. Reporting obligations
   a. No reporting or failure to report within specified period
   b. False registrations

There should be constant monitoring of whether changes experienced by the client require new self-certification to be obtained. A change in the ownership structures of a company also often require an updating of documentation for AEOI and FATCA. We therefore urge our clients to critically examine and adapt their own internal processes. We would be pleased to assist in this respect.

If a legal entity (e.g. a foundation) classifies itself as an investment entity, lenders are also to be reported as account holders. Self-certification must likewise be obtained from these "debt interest holders", and examined. If on the other hand the foundation grants a loan, this need not be reported by the foundation. However, if the loan – usually repaid at the end of the term – is to be netted with a distribution, the distribution must be reported even if no money in fact flows. For passive non-financial entities (NFE), for which the reporting obligation lies with the bank, the risk of omitted reporting is therefore great. Since no transfer is instructed at the bank, unless there is a communication from the foundation the bank knows nothing about the distribution.

Effects on future audits

The tax administration will place greater focus upon the reasonableness of self-certification. In particular, customer documentation provided must be adequate and up-to-date. As AEOI and FATCA base identification in accordance with the Due Diligence Act (SPG), a complaint concerning the SPG audit is often relevant for the AEOI and FATCA audits, and requires close cooperation between the auditors under the various Acts: SPG, AEOI, FATCA and AstA [Agreement between Liechtenstein and Austria on Tax Cooperation].

A valuable contribution towards an efficient auditing framework can be made by companies investing in their own internal audits and processes. In each case, an accurate analysis of complaints arising from the SPG audit is a necessary preparatory measure for the AEOI/FATCA audit.

Under the AEOI law, there must be reasonable self-certification on the opening of an account. It is therefore important that such reasonableness and the time of self-certification is noted, and that the 90-day time limit is complied with, since the account will otherwise be frozen for all money inflows and outflows.

Further developments

In the case of 19 states offering a "citizenship or residence by investment", normal audits are insufficient, since in this the OECD sees a high risk of avoiding data exchange under the AEOI. The OECD therefore recommends enhanced declarations and, in the case of companies' own client bases, there should be an analysis of whether there are additional risks for the company's own business arising from the cooperation.

At the beginning of 2020 the OECD will carry out a comprehensive audit (Peer Review) to implement the AEOI in Liechtenstein, and prepare a detailed report. In this connection, the possibility of an opt-in (voluntary classification as a financial institution) can be explored, which although practised in Liechtenstein is not envisaged by the OECD in the Common Report Standard (CRS).

There are also occasionally deviations from the CRS in Switzerland, where accounts of foundations are exempted from the reporting obligation. Despite a recommendation of the Global Forum, this exemption has for the time being not been adapted – with the risk that this will be entered on an international proscription list.

There may also be additional adaptations to the AEOI and FATCA audits, and a revision of the AEOI guidance is being undertaken by the tax administration.

It will be very interesting to see whether further regulatory adjustments are deemed necessary in Liechtenstein, as was the case in 2018. As established auditors and experts in SPG, AEOI and FATCA matters, we will follow developments with great interest and will be pleased to advise you.

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