

CDB 2016 and in relation with the AEOI

Executive Summary

Efforts at international level (in particular OECD, G20 and EU) to fight tax evasion and the corresponding implementations (FATCA, AEOI and CRS, new Art. 26 OECD Model Convention, OECD administrative assistance convention) have delayed the enactment of the new CDB from 2013 to 2016.

The connection between AIA and CDB is given by the CRS stating that “for the purposes of determining the Controlling Persons of an Account Holder, a Reporting Financial Institution may rely on information collected and maintained pursuant to AML/KYC Procedures”.

The reporting obligation of the AIA applies not only to individuals, companies and corporations, but also to other bodies of persons or other entities which are treated as a body corporate for tax purposes. Moreover, the „Look-through-approach“ demands the identification of the “Controlling Persons”. Therefore, the required information relates to the legal and beneficial ownership of companies, partnerships, trusts, foundations and other persons, in the case of trusts, information on settlors, trustees, protectors and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries.

The introduction of the principle of the “actual address of domicile” in the broader fiscal sense, the concept of controlling persons (new form K), the extension of the scope of the form T (now applicable also for revocable and irrevocable, non-discretionary trusts) and the introduction of forms S for foundations and I for “insurance wrapper” meets requirements of the AEOI (and FATCA) relating to personal data to be reported. The initially foreseen possibility to integrate into the CDB a “fiscal self-declaration form” has been discarded.

Part of the reportable personal data within the AEOI are the tax identification number (TIN) and the place of birth. Both pieces of information are not mandatory data fields in the CDB sample forms. While in the case of individual accounts with account holder(s) being itself (themselves) beneficial owner(s) additional mandatory fields can be added in the opening forms, this solution is more difficult to implement in the other cases. An effective solution would be to integrate in all CDB forms the additional data fields “Tax Identification Number” and “birth”.

With CDB16, the correct categorization of domiciliary and operating, not quoted companies, does require even more attention as the rule for establishing the controlling person in form K (the so-called “Clarification cascade”) could potentially be abused.

The most important innovations of VSB16

Principle of the “actual address of domicile”

A foreign-domiciled account holder could provide his holiday home’s address and thus meet the CDB08’s requirements, provided he regularly stayed there and hence written communication was actually possible. According to this understanding, the provided address didn’t have to be his center of vital interests and thus his fiscal domicile. However, most banks began to apply the concept of “actual address of domicile” during the implementation phase of the withholding tax agreements with European states in 2012.

Concept of controlling persons of operating, not quoted legal entities

Up to now, Switzerland did consider operating companies to be the sole beneficial owners of their assets. In contrast, other countries, for example Germany, required the establishment of the controlling persons as this is the case in the CRS. With the new form K (in addition to form A) CDB and the CRS are now aligned.

Challenges of the new form K

The clarification cascade for the establishing of the controlling persons has the following stages:

- Are there person(s) holding 25% or more of the contracting partner's shares (capital shares or voting rights)?
- if not, is the controlling partner controlled in other ways by one or more persons?
- if not, the managing director(s) are listed on form K

The correct categorization of domiciliary companies and operating, not quoted companies requires particular attention as the rule for establishing the controlling person in form K might be abused. This could happen with an erroneous classification as operating company, with shareholder quotas held below 25% and an alleged lack of effective control, which leads to the general manager being documented as the controlling person. Accordingly, such a categorization should be met with caution and assigned to a high risk category, if necessary.

Indeed, an operating, not quoted company, which has no persons exerting control over it, might be a rare case.

Extended scope of form T and the new forms S and I

- form T is now also applicable for revocable and irrevocable, non-discretionary trusts
- form S is the form for foundations, analogue to form T
- form I is applicable for "insurance wrappers". However, the leading practice for banks already required a Form I for insurance wrappers.

Reportable personal data according to CRS

The reportable data of a person are its name, address, tax identification number, date and place of birth.

Type of account holder	Reportable data related to		
	Account holder	BO (Form A)	Controlling person(s) (Form K)
Individual	Yes	If BO is a third party	N/A
Operating company	Yes	N/A	Yes
Domiciliary company	Yes	Yes	N/A
Trusts/Foundation	The classification of the trust determines the reportable institution and "controlling persons" (Settlor(s), Trustee(s) and potentially Beneficiaries and Protectors)		

Conclusion

The VSB allows banks to create their own version of the CDB-Forms, provided that their specifications are formally and materially fulfilled. Accordingly, additional data fields for the "Tax Identification Number" (e.g. a supplementary line) and "place of birth" (which could be integrated in the birth data's line) could be integrated in all CDB-Forms.

A Form K listing the managing director(s) should be met with caution and the relating client relationship assigned to a high risk category, if necessary.

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