CORPORATE TAX - SWITZERLAND

Are Swiss crypto companies subject to FATCA and the automatic exchange of information?

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Introduction

The introduction of the US Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standard (CRS) has established a new standard for the automatic exchange of information (AEOI) in tax matters and led to a high level of tax transparency. These two complex and comprehensive instruments are an effective way to combat tax evasion on a global basis.

Due to the recent increase in the use of innovative financial products, the Organisation for Economic Cooperation and Development (OECD) announced that the CRS will be expanded in 2021 to cover cryptoassets and virtual currencies. However, until there is formal guidance in this regard, the question remains as to whether and to what extent FATCA and the CRS apply to cryptoassets and virtual currencies and Swiss companies that develop, use, exchange or invest in such digital assets.

What is FATCA?

Enacted by the United States in 2010, FATCA aims to prevent and combat tax evasion by US persons holding non-US financial accounts. To achieve this aim, FATCA requires foreign financial institutions (FFIs)(1) and other foreign entities (non-financial foreign entities (NFFEs)) to report information on US accounts and substantial beneficial ownership interests to the US Internal Revenue Service (IRS) on an annual basis. As the IRS has limited power over foreign entities, it accomplishes its goal through indirect means and requires payors to levy a comprehensive 30% withholding tax on numerous US source payments to foreign entities which cannot be reduced or eliminated under tax treaties. To avoid the 30% withholding tax on US source payments, an FFI must register and, where applicable, enter into an agreement with the IRS. Under this agreement, the FFI must identify US accounts held by US persons or by non-US entities with substantial US owners and periodically report information about these US accounts to the IRS. Further, the FFI must withhold 30% from withholdable payments to so-called 'recalcitrant account holders' which do not supply the FFI with the necessary information and documentation to establish whether the account holder is a US person. NFFEs, on the other hand, must comply with certain due diligence requirements and can avoid the 30% withholding tax only by reporting information on their substantial US owners to the US withholding agents.

What is the CRS?

In 2014 the OECD, together with G20 countries and in close cooperation with the European Union, developed the Standard for Automatic Exchange of Financial Account Information in Tax Matters to facilitate cross-border tax transparency on financial accounts held abroad. Similar to FATCA, the CRS encompasses provisions that require financial institutions to report information on reportable accounts and follow due diligence procedures. Unlike FATCA, reportable accounts are accounts held not only by individuals, but also entities, requiring them to look through passive non-financial entities to report the controlling persons as well.

FATCA and the CRS adopt a similar approach with regard to the classification of entities.

How are Swiss companies affected and what does this mean for crypto investors?

Until there is formal guidance on the treatment of cryptoassets and virtual currencies for the purposes of FATCA and the CRS, Swiss companies must comply with the current regulatory framework that was enacted without digital assets and innovative financial products in mind.

Thus, all Swiss companies that are active in the field of cryptoassets and virtual currencies must consider the potential impact of FATCA and the CRS. In addition to a company's general operations, a company's fundraising method may also trigger reporting obligations under FATCA or the CRS since raising capital using initial coin offerings or initial token offerings may involve trading, investment or custodial activities.

Information on crypto investors which trade on an unregulated cryptocurrency exchange may still be disclosed under the FATCA and CRS regimes. If the respective investments in cryptocurrencies or assets and taxable income derived therefrom have not been properly declared in the individual tax return, the taxpayer must be aware that the exchanges or intermediaries involved may need to report the respective investments to the competent tax authorities sooner than the taxpayer thinks. Hence, taxpayers should check whether it is still possible to correct the tax return or file a voluntary declaration in order to avoid any criminal proceedings and penalties, as well as administrative costs.

For further information on this topic please contact Fabienne Limacher or Maurus Winzap at Walder Wyss by telephone (+41 58 658 58 58) or email (fabienne.limacher@walderwyss.com or maurus.winzap@walderwyss.com). The Walder Wyss website can be accessed at www.walderwyss.com.

Endnotes

(1) In this context, the term 'FFI' is broad and includes banks, brokerage firms, clearing organisations, insurers, trust companies, retirement plan administrators, hedge funds, private equity and venture capital funds and mutual funds.