

Current News

Swiss Bank Secrecy: Hide or Disclose but do not Panic!

The 1934 Swiss Banking Secrecy Law has not been changed and will not be changed. This was repeated by the Swiss Finance Minister and published on the official site of the Swiss government on March 14, 2009¹. The law provides for imprisonment (up to 5 years) for any bank employee who divulges confidential client information as well as for anyone who attempts to persuade such an employee to violate banking secrecy (art. 47.1a and 1b, and 47.3 LB. The prosecution takes place even if no individual client has filed a criminal complaint². This is what continues to make Swiss Banking Secrecy so special even today and the authorities (FINMA and Ministry of Justice) have signaled in recent cases that they do take Banking Secrecy seriously. All communications to foreign governments by regulated Swiss entities subject to secrecy rules may, and are, only tolerated if routed through and under the supervision of Swiss authorities and private client information is not disclosed to foreign supervisory authorities even when they are doing on site inspections in Switzerland of banks for which they are responsible on a consolidated basis.

However, foreign clients should worry about the most recent developments in tax matters because the Swiss secrecy law also provides that bank secrecy does not apply when there is a statutory duty to inform the Swiss authorities (art. 47.5 LB). And such a duty exists now, not only in relation to US tax payers, but whenever a foreign tax administration asks for information in the context foreseen by the tax treaties, if Switzerland has concluded such a treaty with the requesting state.

Even if the Federal Law on International Judicial Assistance in Penal Matters still excludes judicial assistance in tax matters which are not frauds under Swiss criminal law (Art. 3.3 EIMP), Switzerland will grant administrative assistance in relation to facts that have occurred after January 2010 under some of the treaties concluded to avoid double taxation.

This is what has changed, since the Swiss Federal government has publicly stated that the distinction between tax evasion or avoidance and tax fraud will be abandoned in the new tax treaties negotiated by Switzerland³. Information may now be exchanged on a case-per-case basis in response to specific and justified requests for administrative assistance in tax evasion matters.

The government has however also stated that the changes will only enter into force once the treaties have been renegotiated, and without retroactive effect, i.e. **information will be exchanged if and when a new treaty or the amended tax treaty enters into force, but not for matters regarding the period before the new treaty was agreed (no retroactive effect to the period before the new rules were made public)**. The need for the Swiss government to define strategic principles for a clear line of defense, including the "non-retroactive" principle has been advocated particularly forcefully by Dr. Konrad Hummler of Bank Wegelin & Co⁴ and is indeed necessary to reestablish the credibility of Switzerland as a country where the rule of law is to govern, as opposed to countries where decisions are made on the basis of the political necessity of the moment. As a rule, and excluding USA related matters, it is therefore safe to assume that no Swiss banking information will be released to foreign tax authorities relating to the tax period before the revised or new treaty was signed and its content made public⁵.

In practice, the date from when on the new provisions on exchange of information apply is normally the year following the entry into force of the new or revised treaty⁶, unless otherwise stated in the agreement. Such a different date is for instance provided for in the case of the treaty with France, which provides that the exchange of information will apply already to facts related to the tax period following the signature of the revised agreement. Since the agreement with France was signed and published on 27.08.2009, information will be exchanged as of the tax year 2010, provided the revised treaty is ratified and enters into force in the future⁷.

¹ Bank secrecy remains intact
<http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25889>

² Loi fédérale sur les banques et les caisses d'épargne
http://www.admin.ch/ch/fr/952_0/a47.html

³ Switzerland to adopt OECD standard on administrative assistance in fiscal matters
<http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=25863>

⁴ The Wegelin Investment Commentary No. 264 "States under Stress"
http://www.wegelin.ch/download/medien/presse/Wegelin_Investment_Commentary_264_Media_release.pdf

⁵ Procedure to amend the treaty obligations of Switzerland to provide information to foreign tax administrations
<http://www.efd.admin.ch/00468/index.html?lang=en&msg-id=28889>

⁶ See official comment re: Switzerland and Austria sign revised double taxation agreement
<http://www.efd.admin.ch/00468/index.html?lang=en&msg-id=28889>

⁷ La Suisse et la France signent une convention révisée de double imposition
<http://www.admin.ch/aktuell/00089/index.html?lang=fr&msg-id=28729>

As the Swiss government promised, the new exchange of information rules in relation to tax matters will have no retroactive effect. Several months will lapse from the moment the new rules have been made public (27.08.2009) and the moment confidential bank information will become accessible for the first time to foreign tax authorities, if, and only if, the revised treaty enters into force.

Before the Treaty enters into force, it will have to be examined and ratified by the Swiss Parliament and thereafter a Swiss referendum may even be launched against such amended treaties to give the opportunity to all Swiss voters to decide whether or not to accept these new terms.

Of course, as long as the treaty is not in force, no information is provided, but even when it will be in force, information relating to facts before the tax year 2010 will not be available to the foreign tax authorities in the absence of ordinary fraud as defined by Switzerland alone. Therefore, the new exchange of information policy will not enter into force overnight. Foreign clients should accordingly not panic, even if the renegotiated treaties are likely to be accepted by the Swiss voters, because nothing will be changed for the Swiss residents. Statements by members of foreign governments suggesting immediate access to bank client data existing before 2010 are false (except in the case of US Tax payers) are only intended to scare their residents enough to lead them to voluntary disclose hidden assets. Even once in force, the exchange of information will only apply to serious cases because neither the requesting states nor the requested state have the human resources to handle many cases at the same time.

Banking secrecy will continue to protect the privacy of Swiss taxpayers against inquiries from the Swiss tax authorities in the absence of tax fraud because all Swiss source dividend or interest income is subject to a 35% withholding tax (one of the highest withholding rates worldwide), without loopholes, contrary to what is the case in most other countries. Taxes on Swiss interest or dividend income are therefore collected very efficiently. This is why Switzerland has been resisting for so long the pressure from other less efficient tax administrations, insisting that they should rather become more efficient than focusing on more disclosure of confidential client information⁸.

Residents around the world with Swiss bank accounts do therefore not need to worry for their assets at the present time, except for US tax payers, since in their case the systematic large scale tax evasion may be considered by the Swiss courts as "fraudulent - like" activity per se, therefore subject to administrative assistance under the existing Swiss - US Tax Treaty. This point is however not yet fully settled by a Court decision and no similar provisions exist in the treaties concluded by Switzerland with other countries.

All clients of Swiss banks should however seek advice as to ways to improve their protection in light of the new Swiss policy. Even if nothing about their confidential asset holdings will be disclosed by Switzerland in the near future to their home tax authorities, they need

to consult their advisors sooner rather than later to adjust to the new situation, i.e. before the period for which foreign tax administrations will be able to seek information, i.e. anytime after January 1, 2010 in some cases.

Once the new treaties enter into force, the Swiss authorities will be bound to order Swiss banks to put at the disposal of the Swiss authorities even information not needed for Swiss domestic tax purposes. The Swiss tax administration will therefore become the long arm of foreign tax administrations around the world.

Indeed, whenever judicial or administrative assistance is granted, the Swiss banks are ordered to put at the disposal of the Swiss authorities copies of all banking documents, including the names of the beneficial owner, settlor, protector, and beneficiaries, if in the bank's files. This is followed by a review by the Swiss administration of what documents are relevant to meet the request for information presented by the foreign state.

The Swiss authorities will not check if the request is legitimate, but only if the request meets the formal requirements for assistance and if the banking documents are potentially relevant in the context of the investigation described by the foreign state.

The legal owner of the bank account may then object to the forwarding of the information, for instance if it discloses the names of third parties, who may have made payments on the account or who may have received funds from said account, but who are totally unrelated to the foreign investigation.

Such objections will however only be successful if the information is obviously outside the scope of the investigations described by the foreign authorities.

An appeal for judicial review of the Swiss administrative decision is possible, but only very few appeals are upheld in practice, because the Swiss courts have been extremely lax in their interpretation of what was a fishing expedition.

The Swiss government has insisted that the practice of requiring the name of the person investigated must be maintained in the future in respect to countries other than the USA. The agreement signed on August 27, 2009 with France is however already the subject of differing interpretations between Switzerland and France⁹.

The evolution of this exchange of information upon specific request and the way it will be interpreted by the Swiss administration and the Swiss courts will have to be monitored closely during the years to come.

A separate article¹⁰ deals with what is considered as "similar to fraud" by Swiss Courts in the context of information requested by the US authorities¹¹ and yet another memorandum deals with ways to protect efficiently privacy and confidentiality¹² under the new Swiss regime as it emerged during the spring of 2009^{13 14 15}.

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⁸ In the address by Swiss President Hans-Rudolf Merz at OECD High Level Conference on September 9 in Lucerne he publicly declared once more: "I strongly believe that it is a serious mistake for political actors to focus one-sidedly on a minority of tax evaders. Such a policy omits the vast majority of (law-abiding) taxpayers, who diligently and properly contribute their share to public finances. It is a poor reflection of the State if it distrusts its citizens and places them under a blanket of suspicion. Moreover, there is a risk that citizens for their part lose their trust in the State. It is hard to oppose more clearly openly and adamantly the policy advocated by France, Germany and the USA."

⁹ La Suisse et la France signent une convention révisée de double imposition
<http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=28729>

¹⁰ Swiss Bank Secrecy: why USA Taxpayers are more in trouble than others
<http://www.stswiss.com/shared/publications/Swiss%20Bank%20Secrecy%20Why%20US%20taxpayers%20are%20more%20in%20trouble%20than%20others.pdf>

¹¹ USA requests administrative assistance in UBS case
http://www.admin.ch/aktuell/00089/index.html?lang=en&msg-id=28799&print_styl

¹² Swiss Bank Secrecy: Protect your assets!
<http://www.stswiss.com/index.php?cat=4>

¹³ International double taxation – Swiss government press releases
<http://www.efd.admin.ch/index/index.html?action=id&id=137&lang=en>

¹⁴ Banking secrecy – Swiss government press releases
<http://www.efd.admin.ch/index/index.html?action=id&id=117&lang=en>

¹⁵ Geneva newspaper comment
<http://www.tdg.ch/actu/economie/historique-suisse-rogne-secret-bancaire-2009-03-13>