SwissBanking

Key points in brief on the Federal Council's offer to negotiate on administrative assistance in tax matters made on 13 March 2009

The SBA's press release on the decisions relating to administrative assistance in tax matters is available from www.swissbanking.org

What sort of offer Switzerland has Switzerland made?

The Swiss government is to take over the OECD standard on administrative assistance in tax matters according to Article 26 of the OECD's Model Tax Convention and use it as the basis for revising double taxation agreements. More details can be found in the Swiss government's press release available on www.efd.admin.ch.

What is the content of the OECD model agreement, specifically Art. 26?

The OECD provides a model double taxation agreement (for cross-border tax issues) for its 30 member states. This agreement represents neither applicable law nor valid legislation. Rather, it is merely a **model text** that can be used as a basis for state treaties as negotiated and signed by the relevant countries.

Comprising 31 articles, the model agreement regulates various taxation issues relating to a number of topics. Article 26 provides a definitive ruling on information exchange, i.e. administrative assistance among tax authorities of the signatory countries. OECD members Belgium, Luxembourg, Austria and Switzerland have voiced their reservations about the content of Art. 26. Specifically, Switzerland has not yet fully recognized this article, as it has only been willing to guarantee administrative assistance among tax authorities in cases of tax fraud and the like, but not in cases of tax evasion.

States that have implemented Art. 26 in its standard form agree to the exchange of information upon request, but not to the automatic disclosure of information. This means that the country seeking information must produce a substantiated request, naming the taxable person and the specific bank or describing them in sufficient detail.

What will happen to Swiss bank-client confidentiality if Switzerland accepts Art. 26 of the OECD's model agreement?

Bank-client confidentiality, as set down in Art. 47 of the Swiss Banking Act of 1934, guarantees a confidential relationship between client and bank. Nothing about this will change. The Swiss government has made it clear that there will be no so-called "fishing expeditions". Bank-client confidentiality and protection of privacy for domestic and international clients is an important feature and will remain intact.

Article 26 of the OECD Model Agreement deals with bank-client confidentiality in taxation matters, which to date has meant that Switzerland has not handed over bank documents with regard to tax evasion, but has done so for tax fraud offences.

Moreover, Art. 26 is **not directly applicable** on its own, i.e. it must first be made part of international agreements between Switzerland and other countries. In other words,

Switzerland must first negotiate with its double taxation agreement partners on the respective agreements. Finally, the amended double taxation agreement must come into force for the contents of Art. 26 to be applicable, thus permitting requests for information. Conditions regarding administrative assistance will be negotiable for each double taxation agreement.

Does Article 26 mean that tax authorities can now make automatic account inquiries or conduct investigations at random?

No. Only the provisions of the relevant double taxation agreement are authoritative. Information will only be provided by the tax authority of one country upon receipt of a written request from another. There must be sufficient grounds for the request including an adequate description of the person and bank in question. “Fishing expeditions” (i.e. random, indiscriminate searches) are not permitted under Art. 26 in any way.

What are the specific requirements for administrative assistance?

Under the currently applicable regulations and in future, the following conditions must be met:

- the foreign tax authority must submit a written request, indicating sufficient grounds for suspicion of tax evasion (tax fraud was already covered, but tax evasion is new);
- the taxable person must be identified in the request;
- the facts of the tax evasion must be adequately described;
- a specific bank or branch must be named.

Taxable persons who do not consent to administrative assistance may appeal against the process.

What are the Swiss Bankers Association’s conditions for future negotiations?

Switzerland is a sovereign nation. The SBA has called upon the Federal Council to defend the principles of our constitutional state in its forthcoming bilateral negotiations of new double taxation agreements. International standard practice forbids new double taxation agreements from taking retroactive effect. In other words, information from the years preceding the amended double taxation agreements will not have to be provided. The SBA also demands that unilateral pressure be excluded by contract ("exclusivity"). Finally, the SBA requests that other jurisdictions – particularly those that come under the influence of the EU and USA – rapidly take similar action.

Are Swiss clients affected by this arrangement?

No. The Federal Council has stipulated that nothing will change for Swiss taxpayers. As before, minor tax offences in Switzerland will not be treated as a criminal offence, but they will be subject to heavy fines. Bank-client confidentiality will continue to be lifted only if there is a suspicion of serious tax offences (tax fraud).

Why are foreign clients being treated differently from Swiss clients?

The Federal Council concluded that due to increased international pressure in the wake of the financial crisis, Switzerland had to offer to negotiate. The SBA is of the same opinion and welcomes the Federal Council's decision. As a result, there will no longer be a distinction between tax evasion and tax fraud for clients domiciled outside of Switzerland, depending on the form of the new double taxation agreements. The key point is that bank-client confidentiality remains in place for all foreign clients not under suspicion.

Will Switzerland lose market share as the largest provider of offshore banking services?

Switzerland is the world leader in cross-border wealth management, with a global market share of 27%. The core values of Swiss banking are expertise, stability, an international focus, and discretion. All of these values will hold steady as the Federal Council pursues its forward strategy. Financial privacy will still be guaranteed to foreign clients not under suspicion. This is a key asset in a world where personal privacy is constantly dwindling. "Fishing expeditions" will not be permitted under the new double taxation agreements that are negotiated. Administrative assistance will only be provided if there is justified suspicion that tax evasion or tax fraud has taken place.

Why is Switzerland the only country that has to do this? What about other countries with bank-client confidentiality?

Switzerland is not the only country to do this. Due to the financial crisis, international pressure has increased on many countries with similar legislation over the last few months. Based on our analysis, many jurisdictions have recently taken similar steps, or indicated that they will soon do so. Examples include Singapore, Hong Kong and Liechtenstein, which have said they will adopt the content of Art. 26 of the OECD's Model Agreement.

The SBA will make great efforts to ensure that the double taxation agreements to be negotiated take ongoing international developments into account. This will allow Switzerland to maintain a level playing field with other countries while protecting its leadership status in cross-border wealth management. We would like to single out such issues as the lack of disclosure rules for beneficial owners in the USA, trust laws in the UK, and Delaware corporations, also in the USA.

Why has Switzerland succumbed to international pressure so quickly?

Time and again, Switzerland has examined its tax laws and the implementation of administrative assistance with regard to tax issues. In the wake of the financial crisis, the international situation has changed so rapidly that the G20 group of the most important industrialised nations increased pressure on countries with bank-client confidentiality laws in tax matters. The main reason for this is that remedies for the economic crisis continue to cost huge sums, which in turn has caused countries to consider the availability of tax revenues. Once the G-20 nations threatened to blacklist Switzerland as a tax haven, it had to consider the potential risks to its entire economy and decided to proceed with this forward strategy.

What steps has the Swiss Bankers Association taken?

The SBA quickly realised that international pressure on countries with bank-client confidentiality would continue to grow. Over the last six months, it held extensive discussions about potential scenarios and solutions. Ultimately, the SBA's Board of Directors decided that the forward strategy could and should be implemented for the benefit of Switzerland.

What happens next?

In the coming months, Switzerland will re-negotiate its double taxation agreements with different countries if requested to do so. The OECD model agreement, along with the guidelines listed in the answer to Question 1, will serve as a starting point for these negotiations.