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NEWSLETTER

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Automatic Exchange of Information

Dear Sir or Madam,

On 19 November 2014 the Federal Council decided that Switzerland will join the multilateral agreement about the automatic exchange of information regarding tax matters. This agreement, developed by the OECD and modelled after the American FATCA model 1 in order to prevent tax evasion across borders, will be crucial for the future introduction of the cross-border automatic exchange of information. However, Switzerland still has to create the legal basis and negotiate further agreements with partnering nations. Should parliament and if required the voters pass this, 2017 would see the start of the collection of data, and the first data exchange could then take place in 2018. This ambitious timetable of the Federal Council is due to the pressure of the G20 member states and the EU's introduction of first data transfers in 2017 (with exemption of Austria who follows in 2018).

As far as financial information to be exchanged is concerned, the standard should be all-encompassing (incl. trusts). The criteria for registering any person subject to tax should be the national anti-money-laundering regulations, to identify contractual parties and to identify beneficial owners. The model contract is based on mutuality and provides that the information exchanged may be used solely for those purposes agreed by both parties. Confidentiality and data protection are equally included. Uniformity is to be achieved and ensured via a joint reporting standard, a model agreement between two nations, an accompanying commentary on interpretation, and basic data of an IT solution to assist the authorities. A review by the Global Forum, an authority designed and created by the G20 member states, is meant to ensure an efficient implementation of those standards.

Prime importance for the implementation in Switzerland are the EU and its member states as well as the USA. Next to this, countries with close economic and political ties will receive priority treatment. The Federal council has emphasized that regularisation of the past (e.g. voluntary declaration to avoid punishment, final withholding tax) and market entry should be requested and strived for. Negotiations with the EU referring to this will probably supplement the current negotiations about the extension of the bilateral agreement on the taxation of savings income, or even make them redundant. As the USA are relying on the finalised FATCA agreement and therefore sees no necessity for new agreements, Switzerland's only option is to change to FATCA model 1; however, in the case of companies and trusts, the full view of the beneficial owner is not possible, due to the restrictions on reporting about a "settlor" and for professionally managed trusts. Thus the USA will strengthen its position as a reliable and secure haven for tax evaders the world over. In this realm there are lively discussions in the United Kingdom about how to organise trusts in the future so they still provide protection in line with these OECD standards. This must be avoided with more precise definitions. Equally, the minimum levels set for reporting obligations open the doors for abuse through account splitting.

Apart from banks and other credit institutions, financial institutions subject to reporting include asset managers, trustee (custodians), stockbrokers, funds / investment companies and specific insurance companies that offer redeemable insurance policies or annuity contracts. Whether a financial institution is actually subject to reporting needs to be determined by a multitude of criteria, as the authors of the regulations are applying a circular reasoning: "financial institutions subject to reporting are all those who are not financial institutions not subject to reporting." This casuistic approach makes the regulations as complicated as the FATCA model.

In principle, financial institutions not subject to reporting (with the exception of payments connected to commercial financial activities) are national entities, international organisations and central banks, listed companies, pension funds, other legal entities with reduced risks of abuse leading to tax evasion and all those that are explicitly exempt from the duty to report, exempt organisms for the joint investment of securities. When determining the financial institutions or the accounts that are not subject to reporting, the national legislators have some leeway; added to which there is a catalogue listing criteria for exemption (provisions up to a limit of annual contributions of USD 50'000, tax reliefs, reporting requirements to tax authorities, withdrawals attached to certain conditions, accounts are subject to supervision for other purposes than retirement plans, rental deposit accounts, etc). In these cases, the question arises as to which national tax law should be adhered to.

The following data will be reported by financial institutions subject to reporting to the Federal Tax Administration, who passes the data on automatically to the equivalent authority abroad (as opposed to the present exchange of information on request):

- Name, address, country of residence, tax identification number, date of birth and birthplace.
- Where a legal entity is the account holder: name, address, tax identification number of the legal entity, plus data of all persons subject to reporting
- Account number, name and, if applicable, identification number of reporting financial institution
- Account balance or account value (including cash or surrender value) in case of redeemable insurance policies or pension insurances at the end of the calendar year or at the time of the closing of the account
- Total gross earnings of interests, dividends and other revenue.
- Total gross earnings of divesting or redemption of tangible or intangible assets.

After proclaiming the white-money strategy Switzerland via a constructive and active cooperation to develop a global standard tried to ensure that its financial centre would not suffer a competitive disadvantage. Thus, it is of importance that financial centres like Singapore, Dubai or the USA adhere to these standards, just as Switzerland adheres to them, and do not circumvent them via fund management structures like trusts. This means strong international pressure is necessary, particularly towards the USA, to achieve this. It also seems difficult to reach a painless settlement for past tax obligations. For forgetful persons a voluntary disclosure as quick as possible seems inevitable, as regulations for voluntary disclosure will be tightened in most countries the closer the introduction of automatic exchange of information comes. Any concession in this matter towards one partner will also be sending a signal to all other future contract partners. National regulations regarding money laundering differ so much with regard to quality and quantity that it will affect the quality of data exchanged. Not only does this new OECD standard constitute the burial for banking secrecy, the financial institutions have also been made vicarious agents of the tax authorities. The Swiss Bankers Association (SBA) estimates the costs for the implementation of this bureaucratic monstrosity between CHF 500m and 800m, and reckons the implementation will take two years. Whether the OECD standard really becomes a global standard remains to be seen. At the joint declaration to accept the standard, the USA and other Asian and Latin-American countries were conspicuous by their absence. The main interested parties are mostly highly-indebted, industrialised, high-tax countries trying to rebalance the national budget. To attain an effective global standard, emerging and developing nations must also be integrated, otherwise assets will be transferred to non-participating countries or beneficial owners will seek residence in such countries. Additionally, there are no sanctions provided, which means there is a risk that all these assets will simply be diverted to other channels.

Kind regards
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