

Memorandum

to

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from

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Automatic exchange of information and the banks' obligation to produce documents

I. Background

In connection with increased tax transparency, the Canadian tax authorities might learn from the existence of undisclosed accounts at Swiss banks. The Quebec tax authorities might, as a consequence, order a tax payer to produce all bank records. Alternatively, the Quebec government might ask for international administrative assistance.

II. Questions

1. Which documents will the banks be required to provide to the taxpayer following a request by the customer? Is the bank obliged to produce the KYC file, the account opening forms and Form A? For what period of time will the bank provide information and documents, *e.g.* account statements?
2. If the Quebec government decides to initiate international administrative assistance proceedings: What is the legal process? How long will it take for the government to obtain the requested information? Which information is covered by the proceedings?

III. Answers

1. The banks' obligation to produce documents to the customer

a) Legal basis for the customer's right to information

(1) Article 400 CO

In Swiss case law and doctrine, banking contracts are generally regarded as mandate agreements or as contractual relationships similar to mandate agreements. Accordingly, the rules of the Swiss Code of Obligations (CO) governing mandate agreements regularly apply to customer-bank relationships.

Article 400 para. 1 CO forms part of the law on mandates and grants to the principal the contractual right to request information from the agent and to ask for the production of related documents. The provision reads as follows:

Article 400 *Account of agency*

¹The agent is obliged at the principal's request, which may be made at any time, to give an account of his agency activities and to return anything received for whatever reason as a result of such activities.

The purpose of the accountability and disclosure obligation is to allow the principal to control the agent's performance of the mandate.

The information right pursuant to Article 400 CO is a contractual right that merely exists between the parties to the contract. Thus, only the account holder may request information and documents from the bank; the beneficial owner is not entitled to ask for information about an account held with the bank by a third party on his behalf.¹

If the account holder dies and the banking relationship continues, the contractual rights under Article 400 CO are automatically passed on to the customer's heirs, who may submit a request for information on the customer's behalf.

¹ Decision of the Swiss Federal Supreme Court 5A_638/2009 of 13 September 2010, para. 4.1.

(2) Article 8 FADP

An alternative to the contractual right pursuant to Article 400 CO is the statutory right to information under Article 8 of the Federal Act on Data Protection (FADP). The provision reads as follows:

Article 8 Right to information

¹ *Any person may request information from the controller of a data file as to whether data concerning them is being processed.*

² *The controller of a data file must notify the data subject:*

- a. of all available data concerning the subject in the data file, including the available information on the source of the data;*
- b. the purpose of and if applicable the legal basis for the processing as well as the categories of the personal data processed, the other parties involved with the file and the data recipient.*

³ *The controller of a data file may arrange for data on the health of the data subject to be communicated by a doctor designated by the subject.*

⁴ *If the controller of a data file has personal data processed by a third party, the controller remains under an obligation to provide information. The third party is under an obligation to provide information if he does not disclose the identity of the controller or if the controller is not domiciled in Switzerland.*

⁵ *The information must normally be provided in writing, in the form of a printout or a photocopy, and is free of charge. The Federal Council regulates exceptions.*

⁶ *No one may waive the right to information in advance.*

Article 8 FADP can – and is – regularly used to obtain information and documents from the banks. Unlike Article 400 CO, Article 8 FADP offers a right to information outside of a pre-existing contractual relationship. Furthermore, there is no need for the requesting party to give reasons for the request for information.

The scope of application of the FADP is quite broad. The information right covers any personal data that a controller of a data file (e.g. the bank) processes, that is, all information relating to an identified or an identifiable person. The person concerned has the right to receive a copy of the information (free of charge).

However, please note that there are two limitations to the right to information pursuant to Article 8 FADP:

First, the FADP – and thus the right to information – does not apply to pending civil proceedings, criminal proceedings, international mutual assistance proceedings and proceedings under constitutional or under administrative law (Article 2 para. 2(c) FADP). Hence, the customer loses his right to request the production of documents by the bank if he or she becomes a party to court or administrative proceedings. In this case, the procedural rules governing these proceedings are deemed to regulate the production of documents and disclosure of information.

Second, the controller of the data file can refuse, restrict or defer to give the requested information if there are overriding public or private interests for not providing the information (including his own interests), or if there is a right to refuse under a Federal Statute (Art. 9 FADP). However, only legitimate interests can be considered when weighing the interests of the requesting party's against the refusing party's interests.

b) Documents to be produced by the bank

Pursuant to Article 400 CO, the bank is obliged to provide to the customer full and true information and to produce any documents relating to the performance of the mandate agreement.²

According to the Swiss Federal Supreme Court, this includes telephone recordings and minutes taken by bank employees as well as notes about meetings and conversations with the customer. Such recordings or documents need to be disclosed to the customer if requested.³

Excluded from the accountability and disclosure obligation are merely internal documents, such as draft contracts that have never been used.⁴

Given the broad interpretation of Article 400 CO by the courts, the disclosure obligation also includes account opening forms, the Form A and account statements. As these are standard documents signed by the customer, the bank will be fine with producing these documents at the customer's request.

² Decision of the Swiss Federal Supreme Court ATF 139 III 49 of 19 November 2012, para. 4.1.3.

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As a matter of law, the bank is further obliged to provide to the customer the KYC documentation as these records clearly relate to the performance of the banking contract. Furthermore, the customer may invoke Article 8 FADP to obtain access to the KYC file as such documentation typically contains personal data about the customer. However, the banks often refuse the disclosure, arguing that the KYC file relates to merely internal inquiries and thus is not to be produced to the client. It may therefore be quite onerous for the customer to obtain the KYC file and he or she may need to insist on his or her rights, possibly by initiating court proceedings against the bank.

Of course, the willingness to produce documents depends on the banks' internal policies and the particular customer relationship. Except for the rulings mentioned above, there are no authorities by the Swiss Federal Supreme Court specifying in detail which documents are to be produced by the bank.

Please further note that the courts may deny the customer's right to ask for disclosure of the relevant documents if the request violates the principle of good faith, *e.g.* if the customer has the documents ready at hand or if the customer could easily obtain the requested information from his or her own files.

c) Time limits to the disclosure obligation

The bank's accountability and disclosure obligation is subject to a limitation period of 10 years, running from the termination of the banking relationship.⁵

As a matter of principle, this means that

- in *ongoing* banking relationships, the customer may at any time request information and documentation for the entire duration of the mandate;
- in *closed* banking relationships, the customer may request information for the entire duration of the mandate, but needs to submit his request within 10 years after the account was closed;
- if the account was *closed more than 10 years ago*, the bank is no longer obliged to provide the (former) customer with information and documents regarding the banking relationship; it can refuse the production of documents without giving reasons.

⁵ Article 127 of the Swiss Civil Code; Decision of the Swiss Federal Supreme Court 5C.305/2005 of 18 April 2006, para. 2.2.

The bank may not refuse disclosure on grounds of inconvenience or disproportionate expenses, but may pass the costs of the document production on to the customer.⁶ Whether or not the bank requires the customer to pay for the documents, again, depends on the bank's policies and the relationship with the client.

In any case, it is a precondition for disclosure that the relevant information and documents are still available with the bank. Accordingly, Swiss courts acknowledge that the bank is released from its duty to produce documents if the documents no longer exist.⁷

According to Article 958f CO, Swiss companies are required to keep their accounting records, the accounting vouchers, the annual reports and the audit reports for ten years. Depending on the circumstances at hand, the duty to preserve records may extend to correspondence and other documents that are relevant to assess the bank's financial situation. After ten years, however, the companies are allowed to destroy their records.

Many companies as a matter of fact keep a considerably larger number of documents for a longer period of time than requested by law. Moreover, banks will rarely destroy documents in an ongoing banking relationship (and possibly still during the general limitation period of 10 years) as they may want to defend themselves in case of a dispute.

Yet, there is the risk that the bank refuses to produce documents relating to a time period which goes more than 10 years back, arguing that the requested material was – legitimately – destroyed. It is then for the customer to furnish proof that the requested information is, in fact, still available with the bank and that the bank's argument is a mere pretext for not disclosing information. This will regularly be hard to establish.

d) Conclusion

In an ongoing banking relationship the customer should be able to obtain from the bank the account opening documentation, the Form A and account statements for the entire duration of the banking relationship. It may be more complicated but still possible to obtain the KYC file.

If the documents are available, the bank is obliged to produce such documents even if they date back more than 10 years. The bank may not refuse disclosure on grounds of inconvenience or expenses. However, it may request the customer to bear the respective costs.

⁶ ZR 64 (1965) No. 136, consid. 3; confirmed in ZR 101 (2002) p. 101.

⁷ Decision of the Swiss Federal Supreme Court 5A_638/2009 of 13 September 2010, para. 3.5.

The same applies if the bank account is closed. In this scenario, however, the request for document production needs to be submitted within 10 years after the account was closed, otherwise the bank can refuse to provide information by invoking the statute of limitations.

If the bank account is closed, it may further be difficult to obtain documents that date back more than 10 years from the request, as the bank might have destroyed the documents – or, at least, might submit that the documents were destroyed.

2. International administrative assistance proceedings

a) Administrative and mutual assistance in tax matters

On the international level, Switzerland has two routes for providing assistance in tax matters. For tax proceedings, information is exchanged within the framework of administrative assistance. If criminal proceedings are pending in the foreign state, information is exchanged within the framework of mutual assistance.

Mutual assistance is rendered on the basis of multi- and bilateral mutual assistance agreements, as well as in accordance with the Federal Act on International Mutual Assistance in Criminal Matters (IMAC).

Given the background and the purpose of this memorandum, we will hereinafter confine our discussion to administrative assistance proceedings.

b) Legal basis for administrative assistance

Switzerland and Canada are both parties to the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 25 January 1988, as amended by the 2010 Protocol (hereinafter referred to as the "**Convention**"). For Canada, the Convention came into effect on 1 March 2014, for Switzerland it entered into force on 1 January 2017.

The Convention stipulates that the parties shall provide administrative assistance to each other in tax matters. Such assistance, *inter alia*, includes the exchange of information between foreign tax authorities (Article 1 Convention).

As to the exchange for information, the Convention provides for (i) the exchange of information upon request, (ii) the automatic exchange of information and (iii) the spontaneous exchange of information. We understand that the scenario dealt with in this memorandum concerns the exchange of information upon request, *i.e.* the request of the Canadian authorities to the Swiss authorities for information regarding a bank account held by a Canadian taxpayer with a Swiss bank.

Assuming that the account holder is subject only to Canadian taxes but not to taxation in Switzerland, the Swiss (tax) authorities would not have detailed documentation on the taxpayer's bank account available in their files. They would merely know the information submitted to them by the banks in the course of the automatic exchange of information, such as the name, address, date of birth, account number and name of the bank, account balance and income statements (*cf.* Section 2.2 of the Multilateral Competent Authority Agreement On Automatic Exchange Of Financial Account Information, as entered into force for Switzerland on 1 January 2017).

Should the Canadian tax authorities wish to obtain further information and documents such as the account opening forms, the Form A, the KYC file etc., they would need to apply for administrative assistance in tax matters with the Swiss authorities. According to Article 5 para. 2 of the Convention, the requested state shall take all relevant measures to provide the requesting state with the information requested.

The Convention does not specifically refer to document production requests directed to banks holding assets of foreign taxpayers. It states, however, that the Convention shall in no case *"be construed to permit a requested State to decline to supply information solely because the information is held by a bank or other financial institution"* (Article 21 para. 4 of the Convention).

The provisions of the Convention are implemented in Swiss national law through the Federal Act on International Administrative Assistance in Tax Matters (Tax Administrative Assistance Act, TAAA).

According to such act, information that is in the possession of a bank or other financial institution may only be requested by the foreign state if the applicable international agreement provides for the transfer of the information (Article 8 para. 2 TAAA).

Although the Convention does not explicitly refer to information requests to banks and financial institutions, it is, in our view, evident from the construction of the Convention (in particular Article 21 para. 4 of the Convention) that the foreign authorities shall be permitted to request the relevant information from banks and financial institutions.

Hence, the Canadian authorities may use the administrative assistance proceedings to obtain further information and documentation from the bank, irrespective of whether the Canadian taxpayer is suspected of tax fraud or tax evasion.

c) Process

In Switzerland, the Federal Tax Administration (FTA) is in charge of administrative assistance based on requests by foreign states.

Requests from a foreign state must be made in writing in one of the official languages of Switzerland (German, French, Italian) or in English and include the information required by the applicable international agreement (Article 6 para. 1 TAAA). In the present set-up, the Canadian authorities would need to include in their request the information set forth in Article 18 of the Convention.

Article 21 para. 2(g) of the Convention specifies that the Convention shall not be construed so as to impose on the requested state the obligation "*to provide administrative assistance if the applicant State has not pursued all reasonable measures available under its laws or administrative practice*". Hence, the Canadian authorities first need to exhaust all regular sources of information available under their domestic tax procedure before applying for administrative assistance with the Swiss authorities.

Moreover, the foreign state's request for assistance will not be considered by the Swiss Federal Tax Administration if (Article 7 TAAA)

- a. it constitutes a fishing expedition;
- b. it requests information not covered by the administrative assistance provisions of the applicable agreement; or
- c. it violates the principle of good faith, particularly if it is based on information obtained through a criminal offence under Swiss law.

If the request by the foreign authority complies with the requirements set out in the Convention and the TAAA, the FTA will conduct the assistance proceedings with recourse to the general rules on administrative procedures. The TAAA stipulates that the assistance shall be carried out swiftly (Article 4 para. 2 TAAA). The law, however, does not set a time frame for the authorities to complete the administrative assistance proceedings.

For the procurement of information from banks, the following process applies (*cf.* Article 10-221 TAAA):

1. Request by the FTA to the bank

- The FTA requests the bank to produce the information that is likely to be necessary to respond to the foreign authority's request. It sets a deadline to the bank for the delivery of the requested information.
- The FTA informs the bank of the content of the foreign authority's request insofar as this is necessary for the procurement of information.
- The FTA may issue its order to the bank under the threat of a criminal penalty for non-compliance. In this case, the bank is liable to a fine of up to CHF 10,000 if it fails to comply with the FTA's document production order.
- The FTA may use the following compulsory measures to obtain the requested information from the bank: (i) the search of rooms or of objects, documents and records; (ii) the seizure of objects, documents and records; and (iii) the enforced appearance of duly summoned witnesses.

2. Notification of the persons concerned

- If the person concerned by the request is a resident of Switzerland, the FTA notifies the person about the main parts of the request.
- The FTA notifies any other persons with residence in Switzerland whom it must assume on the basis of the files are entitled to appeal against the administrative assistance procedure.
- If the person concerned resides abroad, the FTA asks the bank to send a letter to the customer requesting him or her to designate a person in Switzerland who is authorised to accept service. It sets a deadline to the bank to do so.
- The FTA may directly inform a person concerned who is resident abroad if (i) the state of residence of the person concerned allows the service of documents by mail or (ii) the requesting authority expressly consents to this procedure in the case at hand.
- If the person concerned cannot be reached, the FTA notifies them via the requesting authority or by means of publication in the Swiss Commercial Gazette. It requests the person to designate a person in Switzerland who is authorised to accept service; the FTA sets a deadline of 10 days to do so.

3. The bank provides the FTA with the requested information and documents

- The bank must produce to the FTA all relevant information that is in its possession or under its control.
- The persons concerned may participate in the proceedings and access the files, unless access to the files is refused based on the foreign authority showing reasons for keeping the files secret.

4. Transmission of documents in simplified procedure or final order by the FTA

- If the persons concerned consent to the transmission of the information to the requesting authority, they shall notify the FTA in writing. In this case, the simplified procedure applies and the FTA concludes the proceedings by transmitting the information to the requesting authority.
- If the persons concerned do not agree with the transmission of the information, the FTA serves each person concerned with the final order, stating why administrative assistance is provided and specifying the extent of the information to be transmitted.
- If the persons concerned reside abroad, the FTA notifies them via the person authorised to accept service in Switzerland or directly, if permitted by law. Otherwise, it notifies the persons concerned by means of public publication in the Swiss Commercial Gazette.

5. Appeal against the final order

- The persons concerned may appeal against the final order within 30 days from the service of the order.
- The appeal has suspensive effect, meaning that the procured information cannot be transmitted to the foreign authority until the appeal is decided in a final and binding manner.

6. Transmission of information to the foreign authority

- Once the final order or appeal decision has become final and binding, the FTA transmits the information to the requesting authority.
- Information that is likely to be immaterial may not be transmitted. The FTA shall remove or redact such information.
- Exceptionally, the FTA notifies the persons concerned about the foreign authority's request only after the information has been transmitted, provided

that the requesting authority demonstrates that the purpose of the administrative assistance would be defeated and the success of its investigation would be thwarted by prior notification. In this scenario, the FTA imposes an information ban on the bank.

d) Documents to be produced by the banks

As mentioned earlier, the banks are obliged to produce to the FTA all relevant information that is available.

In order to avoid a fine for non-compliance with the FTA's order, the bank will most probably comply with the order and produce all documents that were requested by the foreign authority, including account opening forms, the Form A, the account statements and the KYC file if such documents are considered relevant in the foreign tax proceedings.

However, the Swiss authorities are not allowed to support fishing expeditions by foreign tax authorities. Such requests will not be considered and the administrative assistance denied.

Moreover, it shall be noted that the TAAA prohibits the transmission of information about persons other than the taxpayer, (i) if such information is likely to be irrelevant for the assessment of the taxpayer's tax situation or (ii) if legitimate interests of third parties outweigh the interests of the requesting authority in the transmission of the information (Article 4 para. 2 TAAA). This limitation may be of particular relevance if the account holder is not the beneficial owner of the funds, *e.g.* in the case of structures and trusts.

e) Conclusion

International agreements and Swiss law provide for administrative assistance in tax matters, irrespective of whether the foreign taxpayer is suspected of tax crimes. In such proceedings, the foreign tax authority may ask the Swiss Federal Tax Authority to procure information and documents from banks holding assets of the foreign taxpayer.

Provided that the foreign authority's request complies with the requirements set forth in the international agreements and Swiss statutes, the bank will provide the FTA with the requested documents. In order to avoid fines for non-compliance with the FTA's order, the banks may choose to disclose rather too much than too little information. The

information procured by the FTA is likely to include account opening forms, the Form A, the account statements and other documents that are considered relevant to assess the taxpayer's tax situation.

The persons concerned are, in general, granted the possibility to appeal the FTA's final order before the documents are transmitted to the foreign authority. During the appeal proceedings, the FTA is not permitted to transmit any information.