

SWISS INVESTMENT REPORT* 17

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

The Swiss Investment Report provides background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

Banking and Capital Markets in Switzerland – New laws as of 2016 and an outlook

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Banking and Capital Markets in Switzerland – New laws as of 2016 and an outlook

I. Introduction

In order to maintain its world-leading position in wealth management the Swiss financial center had undergone a profound change and is about to be faced with a fundamental remake of its regulatory framework. No less than three new codes – the Financial Market Infrastructure Act (FMIA), the Federal Financial Services Act (FFSA) and the Financial Institutions Act (FINIA) will replace major parts of the previous regulations.

The internationally controversial regarded Swiss bank secrecy is seizing to exist as we have known it for many years. Following international pressure of the G 20 and the OECD, the Swiss Government decided on 13 March 2009 to adopt the OECD standard on administrative assistance in tax matters under Art. 26 of the OECD Model Tax Convention. Henceforth therefore, Switzerland provides administrative assistance in all tax offenses, including tax evasion. As a result, the previously relevant, but controversial distinction between tax fraud and evasion has become obsolete in relation to foreign customers.

The newly enacted legislation and pending legislation projects show that the financial market supervisory law gets further and further regulated in order to adapt Swiss legislation to international standards and due to legal obligations under international agreements.

This report aims at giving a short and clear overview and outlook on the legislative changes regarding the Swiss financial center.

II. Strengthening of money laundering legislation

The implementation of the recommendations of the *Financial Action Task Force* (“FATF”) lead to a comprehensive revision of the money laundering act and other federal laws. The three most relevant developments are:

- a) The anonymity of legal persons who hold bearer shares in a Swiss corporate was lifted for the sake of more transparency. Shareholders of non-listed companies need to report the acquisition of the shares in the company either to the company or a financial intermediary in terms of the money laundry act.
- b) There is now an increased duty of care in commercial transactions if traders accept more than CHF 100'000 in cash as consideration.
- c) If more than CHF 300'000 is tax evaded per tax period, it is regarded as predicate offense of money laundering.

The transparency regulations for legal persons have been in force since July 1, 2015. The other reforms were enacted as of January 1, 2016.

III. Increase of punishment for breach of bank secrecy

Since July 1, 2015 bank employees can be punished by imprisonment of up to five years if they pass on information about the bank's customer by breaching their professional secrecy, and they or a third party obtain a property gain out of it.

Also, third parties are punished if they obtain possession of bank customer data having knowledge of its illegal origin and distribute or use those to their own advantage. The stricter law was made in order to strengthen the bank customer's trust in the affected bank and the financial centre Switzerland.

The introduction of the automatic information exchange of bank data doesn't make that law obsolete. It will still take a while until Switzerland and the affected states complete the agreements on its implementations. Also it is unlikely that Switzerland will have an automatic information exchange agreement with every state.

IV. The Financial Market Infrastructure Act

The Financial Market Infrastructure Act (FMIA) entered into force on 1 January 2016. The FMIA governs the organisation and operation of financial market infrastructures. Previous provisions from the Stock Exchange Act, the Banking Act and the National Bank Act were repealed in order to govern the changed market conditions and international standards in a single act. Trading venues are more precisely defined and new duties are imposed on operators of organised trading facilities particularly regarding organisation and trading transparency. Those requirements also address the problem of dark pools. The FMIA also contains all of the regulations that apply in relation to securities and derivatives trading for all financial market participants.

The FMIA came into force together with the Federal Council's implementing ordinance (FMIO) which is supplemented by the National Bank Ordinance and the new Financial Market Infrastructure Ordinance. They specify the conditions for approval of the financial market structures and the obligations of financial market participants.

V. Legislative Projects

A. Federal Financial Services Act (FFSA) and Financial Institution Act (FINIA)

On November 4 in 2015 the Federal Counsel presented drafts for a revised Financial Services and Financial Institution Law. FFSA lays down the conditions for the provision of financial services and the offer of

financial instruments. FINIG subordinates financial institutions that operate professional asset management for third parties under a coherent regulatory framework. Both acts take the international standards of the European Union into account. If accepted by the Federal Assembly, these two acts will likely come into force by January 1, 2018.

a) FFSA

FFSA creates equal conditions of competition and improves the customer protection. Relevant consequences would be:

- Strengthening the institution of the Ombudsman
- Compulsory training and further education for financial service providers
- Code of conduct for financial service providers
- Financial service providers have to disclose payments from third parties

b) FINIA

FINIA regulates the supervision of all financial service providers who operate in some form in the asset management business. Also asset managers of pension funds assets, individual client assets and trustees will be under prudential supervision.

A new introduction would also be the proposed “license cascade” and the inclusion of asset managers in that regime. A license granted for a specific level also includes the approval to perform all activities allowable at lower levels. A bank would not longer need to have an additional securities dealer licence in order to conduct the related activities.

VI. Towards an automatic exchange of information

A. Automatic exchange of information (AEOI)

Since October 2014 Switzerland is negotiating with partner states, the EU and the US about the introduction of AEOI, following the global OECD standards.

The AEOI should ensure that the participating countries can also tax their taxpayers funds abroad according to their own national taxing rules. With the introduction of AEOI, the banking secrecy will be lifted in the international scope. The AEOI will be bilaterally activated and Switzerland can decide about the introduction of AEOI for each state separately.

B. Agreement with the EU

Switzerland signed with the EU an agreement on the introduction of the global AEOI standards on May 27, 2015. They intend to collect and exchange account information, once the necessary legal bases are created. The information includes names, addresses, taxation number, birth date and bank balance.

The agreement is formally an amendment to the existing interest tax agreement between the Switzerland and the EU. Though, the current withholding tax exemption of cross-border payments of dividends, interests and royalty payments made between related companies remains.

Currently the Federal Council is preparing the submission of the signed agreement to the parliament for approval. The enactment is planned by January 1, 2017.

C. FATCA

The current FATCA-agreement in force between Switzerland and the USA regulates that the Swiss financial institutes report the account

data of affected customers with their consent to the American tax authorities. The data of customers who do not cooperate has to be requested by the USA through ordinary formal procedure.

Currently Switzerland and USA are negotiating on a new agreement which also includes an automatic exchange of information. However, the new agreement will probably not be in force before 2018.

D. Tax information exchange based on stolen data

On September 2, 2015, the Federal Council sent a partial revision of tax information exchange law into consultation with the objective to loosen the Swiss practice regarding stolen data. Newly, assistance requests should also be accepted in case a state has acquired stolen data on an ordinary mutual administrative assistance or from sources accessible to the public. According to the draft of the revised tax information exchange law only assistance is prohibited, if the requesting state has actively acquired stolen data outside of an ordinary administrative assistance proceeding. Exemptions from international information exchange should only rarely be granted.

VII. Protection of bank secrecy domestically?

The revision of the tax criminal law planned by the Federal Council got suspended due to a popular petition, which wants to add the protection of “financial privacy” as an individual right into the Federal Constitution. The popular petition does not specifically mention the bank secrecy but salary, wealth and bank account data would fall under the term “financial privacy”.

Consequently, the popular petition would aim at upholding and strengthening the domestic bank secrecy. The Federal Council regards it as unnecessary and harmful to the reputation of the Swiss financial center. Firstly, it will be discussed in the parliament and in the following

year the popular vote will determine which direction Switzerland would take regarding the protection of the bank secrecy domestically.

VIII. Conclusion

The FATCA law which has been in force since 2014 will eventually lead to automatic information exchange between Switzerland and the USA by 2018. The treaties regarding the AEOI recently signed with the EU and Australia will likely enter into force, and consequently, Switzerland will soon start providing data from European and Australian clients of Swiss financial institutes including names, interest income, dividend income, sales income, financial assets and account balances to their countries of origin. In return, the Federal Tax Administration will likely receive corresponding data on Swiss taxpayers from the partner countries. For the AEOI with other states Switzerland will have to conclude additional specific agreements.

There is also a possibility of an ex post facto law. If a State receives AEOI data and if those aren't sufficient for a reassessment, it is possible to make a request to the partner State for additional information. In accordance with all relevant double taxation agreements (DTA) those requests may include incidents that go back to their entry into force or even until the signing of the respective DTA.

Switzerland has so far signed more than 50 DTA's according to youngest OECD standards. Many of those DTA's entered from 2011 to 2014 into force. This means that in the future Switzerland can make requests based on AEOI for administrative assistance for information dating back several years.

In recent years, stronger regulation of financial intermediaries has become a key strategic consideration for the governments in an increasingly connected world in order to prevent another crisis like the financial crisis of 2008/2009. The new laws and the still pending legal projects introduced in this report indicate that the Swiss authorities are continuing to further evolve the regulation of financial supervisory law. The regulations mainly serve the purpose of adapting the national rules to the international standards, which

Switzerland agreed to in international agreements. Some changes were also made voluntarily, but still for the sake of a free access to the European market.

It's difficult to forecast if those regulations really increase the competitiveness of the Swiss financial center. A positive consequence is the increased legal certainty. Also, the competitive conditions correspond more or less to the international environment. There were no rules implemented which are stricter than the ones in the European Union. A negative aspect is the various new tasks and obligations which are imposed on financial institutions.

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