White Collar Crime - Switzerland

Government proposes to tighten legislation on money laundering and tax crime

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Introduction

On February 27 2013 the government passed two draft bills proposing new legislation to combat money laundering and prevent tax evasion.(1) The first set of proposed rules aims primarily at implementing the Financial Action Task Force (FATF) recommendations (revised February 2012) into national legislation. The second set of proposed rules - a key element of Switzerland's 'white money strategy' - introduces new diligence duties for banks and other providers of financial services in order to keep untaxed money away from the Swiss financial sector.

Revised FATF recommendations

The draft bill on the implementation of the revised FATF recommendations provides for a number of key points.

Enhancement of transparency of legal entities

The draft bill aims to allow the Swiss authorities to identify the shareholders of Swiss companies at any time and without great effort, and to render it impossible to hold major participations in Swiss companies anonymously, either directly or by a fiduciary. It provides that anyone who acquires bearer shares in a stock company which is not listed on a stock exchange is obliged to disclose his or her identity to the company.(2) In turn the company must register the holders of bearer shares. Further, if a shareholder acquires bearer or registered shares of an unlisted company exceeding 25% of the share capital or voting rights, he or she is obliged to disclose the beneficial owner of the shares regarding the company.

The company may opt for the disclosure of holders of bearer shares and beneficial owners to be made to a financial intermediary licensed under the Anti-money Laundering Act(3) (eg, a bank or asset manager). The registration duties would then be incumbent on such a financial intermediary.

Similar disclosure and registration duties regarding the holders of an interest exceeding the 25% threshold shall apply to partners in limited liability companies and members of cooperatives.

Violation of the disclosure and registration duties may entail severe civil law consequences (eg, suspension and forfeiture of shareholder's rights), as well as criminal law penalties (eg, a fine).

Restriction of cash payments

The draft bill also provides in regard to sale and purchase transactions concerning real estate, as well as movable property, that the purchase price may be paid in cash only, up to Sfr100,000. Any excess must be settled through the intermediary of a financial institution subject to the Anti-money Laundering Act. Notaries shall henceforth be prohibited from notarising purchase contracts on real estate properties which fail to expressly define payment terms.

Infringement of the prohibition of cash payments exceeding the Sfr100,000 threshold shall be subject to criminal law penalties (eg, imprisonment for up to one year or a monetary penalty).

New predicate offences to money laundering

In February 2012 the FATF added "punishable tax offences (in connection with direct

and indirect taxes)" to its list of offences which automatically constitute predicate offences to money laundering. However, without providing for a specific definition of the relevant tax offences, such a definition must be made in domestic law. In accordance with FATF Recommendation 3, the government proposes that only serious tax crimes shall be considered as predicate offences to money laundering.

As far as direct taxes (in the first instance taxes on profits or income) are concerned, the draft bill thus provides for the introduction of an aggravated form of tax fraud into Swiss tax law. It specifies that tax fraud (ie, evasion of taxes by making use of forged documents or through deliberate and malicious deception of the tax authorities) shall no longer constitute a mere misdemeanour but a serious crime - provided that the taxable elements (eg, income) concealed from the tax authorities is at least Sfr600,000. Only such an aggravated form of tax fraud shall qualify as a predicate offence to money laundering.

In the area of indirect taxes (eg, customs duties and value added tax (VAT)), the existing definition of 'serious crime' shall be extended to cover not only cross-border traffic in goods, but also taxes on domestic transactions (notably Swiss VAT or withholding tax) .

Mere tax evasion (as opposed to tax fraud) will not become a predicate offence to money laundering in Switzerland.

Rules on politically exposed persons

While current Swiss anti-money laundering legislation considers an individual who is or has been holding a leading public position abroad as a politically exposed person, the draft bill proposes (in keeping with the revised FATF recommendations) to extend the definition also to cover national politically exposed persons - persons entrusted with a leading public function in Switzerland and exponents of international organisations. Moreover, the draft clarifies that persons closely associated with a politically exposed person(4) shall be treated for the purposes of the Anti-money Laundering Act as if they were themselves politically exposed persons.

Enhanced due diligence requirements

The second draft bill, forming a key element of Switzerland's strategy to preserve the integrity of the country's financial industry, aims to prevent the acceptance of untaxed assets by Swiss financial intermediaries.

The proposed law imposes an obligation on financial intermediaries (ie, banks, insurers, securities traders, asset managers or fiduciaries)(5) to verify, when accepting assets from new or existing customers, whether these assets are taxed or will be taxed in the relevant jurisdiction (regularly the country of domicile of the customer). The scope of investigations to be carried out by a financial intermediary in accordance with his or her diligence duties shall be wider or narrower depending on the specific risk of non-compliance with tax laws involved with a particular business relationship (risk-based approach). The bill proposes to stipulate in the Anti-money Laundering Act a non-exhaustive catalogue of indicators of increased risk, as well as indicators of reduced risk of non-compliance.

An increased risk shall exist in case of:

- investments through complex structures - namely offshore companies - without a valid reason;
- a client insisting on particular measures to maintain confidentiality about the relationship without a valid reason;
- frequent cash transactions;
- pending investigations for suspected non-compliance with tax laws or a court decision having found the client guilty of a tax offence;
- investments in predominantly tax-exempt instruments; and
- a client waiving accounting by the financial intermediary in a format as would be required by the client to meet its tax reporting obligations.

A reduced risk may be indicated by:

- a formal declaration by the client that its assets and proceeds are taxed or will be taxed in the relevant jurisdiction;
- the authorisation of the financial intermediary by the client to provide tax information to the relevant authorities;
- *prima facie* evidence provided by the client suggesting that the assets at issue are taxed in the relevant jurisdiction;
- purely domestic transactions among Swiss residents; and
- the existence of a treaty between Switzerland and the country of residence or domicile of the client, providing for the collection of withholding tax by Switzerland or for facilitated access to tax information.(6)

The draft bill further stipulates an express obligation of financial intermediaries to decline the opening of a new business relationship and not to accept assets if they know, or have reason to suspect, that the assets at issue are not taxed in the relevant jurisdiction. If in the case of an existing client relationship a financial intermediary becomes aware of circumstances which prompt justified suspicions that the client's assets are not tax compliant, the financial intermediary must ask the client to furnish proof of tax compliance within a reasonable timeframe (such a timeframe can be determined by the financial intermediary in consideration of the given the circumstances). If the client is unable to supply the requested proof,(7) the business relationship must be terminated.

Comment

The proposed new legislation contains certain groundbreaking novelties:

- It eliminates the anonymity of holders of bearer shares and introduces a general obligation of companies to identify their beneficial owners.
- It restricts the admissibility of cash payments in sales and purchase transactions to the amount of Sfr100,000.
- It makes tax fraud (in its aggravated form) a predicate offence to money laundering.
- It imposes diligence duties on financial intermediaries to prevent tax evasion, which are comparable to those applicable in the field of combatting money laundering and terrorist financing.

However, the draft bills are not yet set in stone. Cantonal governments, political parties and relevant public and private organisations will have the opportunity to file comments until June 15 2013. It remains to be seen which proposals will be eventually contained in the definitive bills submitted to Parliament for approval.

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Endnotes

(1) For the official press release please see www.news.admin.ch/message/index.html?lang=en&msg-id=47934.

(2) The proposed legislation must apply to unlisted entities only, as transparency of ownership of listed companies is already secured by the notification and publicity requirements as stipulated in the Federal Act on Stock Exchanges and Securities Trading.

(3) The Federal Act on Combating Money and Terrorist Financing in the Financial Sector.

(4) The relevant closeness, according to the draft, may result from not only family or business ties but also friendship.

(5) Article 2 of the Anti-money Laundering Act.

(6) For example, the proposed agreement with the United States on the implementation of the Foreign Account Tax Compliance Act.

(7) Acceptable proof would be not only evidence that the relevant assets had been duly reported to the tax authorities in the past, but also that the client is in the process of regularising the assets in cooperation with the tax authorities (eg, within the frame of a voluntary disclosure process).