

Update

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The entry into force of the 2009 Protocol to the Swiss / US treaty is likely to generate new (group) information requests

Almost ten years after its signature, the 2009 protocol to the Swiss-US treaty should enter into force. The main change provided for by the treaty relates to the exchange of information provision pursuant to which the parties will be in a position to obtain information without having to meet the "tax fraud or the like" criterion.

On September 23, 2009, the United States and Switzerland concluded a Protocol amending the 1996 Tax Treaty. In order for this Protocol to come into force, it had to be ratified by the US Senate. Rand Paul, a US senator, blocked the ratification of several international tax treaties, including the Protocol, for years. Business groups and the current US administration have recently been able to overcome this obstacle. As a result, the Protocol could come into force in 2019. The Protocol provides for three changes to the Treaty. The dividend provision is amended so as to provide for a full exemption from US withholding tax for certain pension schemes, and the mutual agreement procedure provision is supplemented by an arbitration provision.

Most importantly, Article 26 on the exchange of information has been amended to correspond to the OECD Model template.

Until today, an exchange of information was possible upon request in cases of suspicion of "tax fraud or the like". As is well known, the United States has lodged based on that provision

a number of group requests seeking information about US persons holding Swiss bank accounts via offshore companies in cases where, in particular, corporate governance had not been respected and the account held US securities. The Swiss Federal Tax Administration (FTA), as well as the Federal Administrative Court and the Supreme Court, have accepted these requests considering that such a fact pattern allowed to suspect a "tax fraud or the like" behavior.

The text of the new provision provides that a request for information may now be lodged in order to ensure the correct application of the internal tax laws of the requesting State. This lower threshold is in line with the OECD Model standard that Switzerland has now implemented in most of the international tax treaties to which it is a party.

As from the date of the entry into force of the Protocol, the United States may make requests for information without having to demonstrate that the situation corresponds to a "tax fraud or the like". The text of the revised Treaty now in

principle allows the US Internal Revenue Service (IRS) to make information requests relating to any period after September 23, 2009.

It is expected that the IRS will use this provision to lodge group requests in connection with FATCA. Indeed, the agreement concluded between Switzerland and the United States on the implementation of FATCA ("Swiss IGA") allows the United States to lodge a group request in application of the Treaty provision to obtain all information relating to non-consenting US accounts and foreign reportable amounts paid to non-consenting non-participating financial institutions as reported to the FTA by a Swiss financial institution.

These requests for information may be lodged for time periods starting on or after the entry into force of the Swiss IGA, namely June 2, 2014.

It is also likely that US information requests will be made to obtain information held by Swiss banks relating to accounts held by US taxpayers

prior to June 2014 and potentially going back as far as September 23, 2009. Group requests are allowed in this context, provided that they do not amount to a fishing expedition as this term is defined in the case law of the Federal Administrative Court and the Supreme Court.

In conclusion, it is likely that the entry into force of the 2009 Protocol will trigger a new stream of information requests lodged by the United States both for FATCA purposes, as well as in a broader context. Swiss financial institutions which had non-consenting US accounts and/or accounts for non-consenting nonparticipating financial institutions should consult the specifics for producing information to the FTA upon an information request being made by the IRS under the Swiss IGA and the 2009 Protocol (see here: <https://www.estv.admin.ch/estv/en/home/internationales-steuerrecht/fachinformationen/amts-und-rechtshilfe/amtshilfe-nach-fatca.html>).

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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