



Press kit

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Agreement between Switzerland and the USA concerning UBS: Key information and explanations

Between mid-June and mid-August 2009, the delegations of the two governments negotiated the *Agreement between the Swiss Confederation and the United States of America on the request for information from the Internal Revenue Service (IRS) of the United States of America regarding UBS AG*. The Swiss delegation was made up of representatives of the Federal Department of Justice and Police (FDJP), the Federal Department of Foreign Affairs (FDFA), the Federal Department of Finance (FDF), and the Swiss Financial Market Supervisory Authority (FINMA). Altogether a total of six negotiating rounds took place in the USA and Switzerland, each lasting several days. On 11 August 2009, the heads of the negotiating teams of the two delegations initialled the Agreement in Washington D.C. The Federal Council approved the Agreement with its decision on 17 August 2009. The Agreement was signed on 19 August 2009 and enters into immediate effect.

1. Structure and content of the Agreement

The Agreement governs the enforcement of the existing Convention between Switzerland and the United States of America for the avoidance of Double-Taxation in matters concerning UBS. It takes the form of a treaty (Tax Treaty) and contains ten articles. Article 1 governs the Treaty Request (the new administrative assistance procedure). Article 2 contains a clause that obligates Switzerland and the USA to ratify the amended Tax Treaty as soon as possible. Article 3 obligates the USA to withdraw the John Doe Summons (JDS) (court enforcement action). Article 4 sets out the obligations of UBS in the administrative assistance procedure. Article 5 governs the mutual consultation mechanism and contains specific protection clauses. Article 6 lays down the rules of confidentiality. Articles 7 to 10 contain the concluding

provisions concerning entry into force, amendment, duration and termination of the Agreement.

Since the Agreement governs only the execution of the existing Convention for the Avoidance of Double-Taxation between Switzerland and the USA in matters concerning UBS, it can be concluded by the Federal Council in its own authority.

2. Evaluation of the Agreement

The Agreement resolves the conflict over sovereignty with the USA along the lines provided for in the Tax Treaty, which is consistent with the laws of both nations, respecting them in their totality. From the Swiss perspective, this negotiated solution has the following advantages:

- It settles the potential conflict between the respective legal orders of Switzerland and USA now that the USA has agreed to forgo unilateral measures to obtain information and instead has adopted information exchange as set out in the Tax Treaty;
- It safeguards Switzerland's legal order, by ensuring that customer information may only be transferred to the USA via the administrative assistance procedure, that is consistent with legal orders of the two nations.
- The legal protection of those concerned provided for in Swiss law (right of appeal) remains intact since no amendments have been made to existing procedural law.
- It releases UBS from the threat of the JDS and from any possible new penal measures.
- The settlement of the conflict concerning legal orders and sovereignty consolidates Switzerland's relations with the USA (one of Switzerland's major political and economic partners).

3. The most important points in detail

The Agreement provides for an immediate halt to the pending enforcement action before the responsible Miami court in the context of the John Doe Summons in favour of an administrative assistance procedure on the basis of the valid Tax Treaty between Switzerland and the USA. Complete withdrawal of the JDS itself will take place at a later date. The new request for administrative assistance will be based on very specific criteria defined in a model mechanism that, in the UBS case and in the framework of valid Swiss law and judicial practice, enables cases of "tax fraud or the like" to be identified in accordance with the Tax Treaty and relevant information to be delivered to the US tax authorities (IRS) by means of an administrative assistance procedure. According to UBS approximately 4,450 accounts will come under this mechanism.

The exact criteria for processing the request for administrative assistance are governed in an Annex to the Agreement. At the request of the USA, the Annex will be published not earlier than 90 days from the date of signing the Agreement (Article 6) in the interests of a successful execution of the voluntary disclosure program. The rights of the parties concerned remain protected.

Switzerland's obligations:

The Federal Tax Administration (SFTA) must establish a special task force to respond to the new request for administrative assistance (Treaty Request). In this way, it is obliged to render its final decisions concerning the disclosure of demanded information in the first 500 cases within 90 days of receipt of the Treaty Request and in remaining cases no later than 360 days from receipt of the Treaty Request.

The obligations on UBS correspond to this obligation. These are set out in the same way in a separate agreement between it and the IRS.

Obligations of the USA:

The IRS undertakes to withdraw the so-called enforcement action (i.e. the request for enforcement through the court) in the context of the JDS process immediately after the signing of the Agreement, and to refrain from making any further such actions to UBS while the Agreement remains in force. After the signing of the Agreement, the JDS will remain formally pending although it will not be enforced after this point in time.

An important milestone will be the definitive withdrawal of the JDS on 31 December 2009 (i.e. withdrawal with prejudice that excludes the possibility of renewed enforcement) with respect to those accounts that are not covered by the new Treaty Request. From this point in time, the JDS will be limited to those cases for which a request for administrative assistance remains outstanding with the SFTA.

In the event that on or after 1 January 2010, already 10,000 accounts have been disclosed in the framework of the voluntary disclosure program of the IRS (information transferred via the administrative assistance procedure will also be included), pursuant to the Agreement, the JDS must be definitively withdrawn with prejudice for all accounts and/or customers covered by the JDS – which also means for those accounts or customers that fall under the Treaty Request.

If this is not achieved, however, the JDS will be definitively withdrawn within 370 days of the signing of the Agreement also for those customers or accounts which fall under the Treaty Request.

Constellation of cases falling under administrative assistance in accordance with the valid Tax Treaty between Switzerland and the USA

The new Treaty Request is based on very specific criteria set out in a mutually agreed-upon mechanism to enable the exchange of information as is necessary for the prevention of “tax fraud and the like” that derives from UBS AG’s special legal situation (in particular the existence of a deferred prosecution agreement in which the collusive conduct of the bank and its customers are acknowledged). This mechanism facilitates both the identification of specific cases of tax fraud and the like in accordance with the Tax Treaty as well as the disclosure of requested information – under the condition of a successful administrative assistance procedure that meets constitutional requirements. As a result of the adequate scope for identification, according to valid law and the most recent practice of the Swiss Federal Administrative Court (decision of 5 March 2009) in relation to the USA, it is permissible to disclose account information in individual cases even without the IRS being in possession of the name of the bank customer in question at the time of submitting the request.

In accordance with Article 26 of the Tax Treaty between Switzerland and the USA, the competent authorities are to exchange the information to be disclosed in accordance with the tax legislations of the two Contracting Parties that is necessary for the prevention of tax fraud or the like in relation to the taxes falling under the Agreement.

The Agreement is based on an interpretation of the term “tax fraud or the like” which in relation to the USA together with cases of fraudulent behaviour also includes serious tax offences as cases eligible for administrative assistance.

Since US law does not recognise the decisive distinction between tax evasion and tax fraud made in Swiss law, in section 10 of the Protocol to the Tax Treaty, there are further explanatory comments on Article 26 of the Tax Treaty between Switzerland and the USA. In particular, the term tax fraud is described in greater detail. This term includes in accordance with par. 1 of the above section in the Protocol “fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of tax paid to a Contracting State”.

This definition of the term tax fraud, as applied in the Treaty, is broader than that that defined in domestic criminal law, which presupposes deceitful conduct. The provision mentioned in the Protocol does not presuppose “deceitful” conduct but only “fraudulent” conduct.

Thus “fraudulent conduct” is understood on the one hand, in accordance with section 10 par. 2, first sentence, as conduct that involves forged or falsified documents and/or scheme of lies constructed to deceive tax authorities. On the other hand, according to the express wording of section 10, par. 2, third sentence, the term “fraudulent conduct” also includes such conduct in the area of taxation for which the requested contracting state can collect information in accordance with its law or its

administrative practice. According to the teleology of the Protocol to the Tax Treaty, the tax authorities of the requesting State ought to be accorded at least the same information rights as those which the authorities of the requested State are accorded in domestic law. For the rest, the list according to section 10, par. 2 second sentence has been compiled solely for the purpose of providing examples and is not exhaustive.

Thus, the definition of tax fraud in the meaning of the Tax Treaty between Switzerland and the USA for the constellations of cases considered eligible for administrative assistance not only covers conventional acts of fraud with the aim of deceiving the tax authorities as defined in criminal law relating to tax offences (counterfeiting of documents, deceitful conduct through schemes of lies) but also tax offences for which national law or practice provides for the tax authorities to obtain information by coercive means. The definition of tax fraud in the Tax Treaty would apply in cases of serious tax offences such as continuous tax evasion involving large amounts.

Once the new Tax Treaty between Switzerland and the USA is in effect, this interpretation of “fraud or the like” is no longer relevant because the new standard of administrative assistance according to the OECD Model Agreement in relation to tax evasion in any case goes further than that used in the current Tax Treaty.

Consultation mechanism and safeguard

Article 5 of the Agreement contains a control and consultation mechanism. As a confidence-building measure, the establishment of a joint assessment to take place on a quarterly basis has been agreed to ensure that outstanding problems are identified in good time and discussed.

In addition, it is stipulated that either of the two parties can at any time demand additional consultations on the implementation, interpretation or application of the Agreement, and that this must take place within a period of 30 days.

In this way immediate consultations can be demanded on appropriate measures in order to ensure fulfilment of the Agreement if it appears that one party cannot fulfil, or cannot fulfil in time, an obligation.

Finally, a rebalancing mechanism can be applied in the event that the actual and anticipated results differ significantly from what can reasonably be expected within 370 days after signing the Agreement. In this case the US government could - after all channels for consultation and the possibility existing at any time to renegotiate an agreement have been exhausted - take appropriate measures to restore the balance between the rights and obligations under the Agreement. In this sense, a prolongation of the time until the definitive withdrawal of the JDS process in particular could be envisaged.

Unilateral declarations by the contracting parties

In a unilateral declaration the USA makes the assurance that in the application of any rebalancing measures in accordance with Art. 5 it would take into consideration the totality of the circumstances and fully recognise the compliance and cooperation of UBS with the terms of this Agreement. In this way any further criminal measures taken against UBS would be disproportionate and not permissible providing UBS has fulfilled its contractually agreed obligations.

For its part, Switzerland declares that it would consider and address any further requests for administrative assistance if these were based on a similar “fraud or the like” model of conduct such as that in the UBS case. Switzerland would in any case be obligated to treat any such additional requests on the basis of the current Tax Treaty and its Protocol.