

What Should I do if I receive a “Declaration of Consent” Form from My Swiss Bank?

Picture this. You have an offshore account with a Swiss Bank that, for whatever reason, you haven’t gotten around to reporting on your U.S. tax return or on a FBAR. One morning, as you are sipping your coffee and checking your email inbox, you come across an ominous email from your Swiss Bank.

The subject line of the email immediately grabs your attention. It reads: “Important Information for U.S. Persons.”

You open up the email and read the first three paragraphs:

“We have identified you as the beneficial owner of an account that is subject to FATCA. Participating foreign financial institutions such as ours are required to identify and report information on U.S. Persons to U.S. government agencies.

In this regard, we have the legal obligation to obtain your consent to provide this information. We would appreciate receiving the attached waiver signed by you no later than _____, 2014.

Please note that under FATCA, any U.S. Person who does not consent to his/her identity being reported will be identified as recalcitrant. Swiss Banks must close the accounts of recalcitrant account holders, resulting in them showing up on the leaver list of the Program. This disclosure will be made on a no-name basis. However, the identity of the beneficial owner(s) can be pursued through a U.S. treaty request for further information.”

You skip to the authorization form on the last page. If you sign the form, you discover that you will be waiving any protection under Swiss bank-client confidentiality laws and authorizing the bank to do the following:

- Report all required information regarding your account(s) to U.S. government agencies, including the United States Internal Revenue Service, the United States Department of Justice, and the United States Department of Justice Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks. All required information includes virtually all information that the bank has on record. For example, it includes: (1) your name and address; (2) the data contained in IRS

Form W-9; (3) the identity of holders of power of attorney for the account; (4)

details of any account transactions; (5) the nature, balance, and composition of assets held in the account; and (6) any other information pertaining to the account which may be requested or required.

- The information disclosed can be used for law enforcement purposes, including criminal proceedings and tax proceedings.

Your heart skips a beat. “Did I read that correctly? The information can be used by law enforcement to prosecute me?” As this all begins to sink in, you begin to ask yourself the following questions, (1) “What is this form?” (2) “Must I sign it?” (3) “If I don’t sign it, can the bank still report my account information directly to the IRS?”

The form that you received and have been asked to sign is called a “Declaration of Consent.” What gives your Swiss bank the right to seek your consent to disclose your account information to the IRS in the first place? The answer lies in Article 3 of the Swiss-U.S. FATCA agreement:

Switzerland shall direct all “Reporting Swiss Financial Institutions” to:

b) with respect to Preexisting Accounts identified as U.S. Accounts,

(i) request from each Account Holder the Account Holder’s U.S. TIN and a consent, covering irrevocably the current calendar year and automatically renewed for each successive calendar year ... to report and simultaneously inform the Account Holder through a letter of the Swiss Federal Tax Administrator (FTA) that, if the U.S. TIN and such consent are not given ...

Must you sign this dreadful form? The short answer is, “no.” In other words, even if your account passes the “duck test” for being a reportable U.S. account (i.e., “If it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck”), you can still refuse to sign the declaration of consent. Absent your consent, the bank cannot report your account directly to the IRS.

However, as is usually the case when it comes to intergovernmental agreements, the devil is in the details and the consequences of refusing to consent can be severe. “Non-Consenting U.S. account holders” are subject to the following parade of horrors:

- Under the FATCA agreement, Swiss banks must close the accounts of all recalcitrant account holders.
- Pursuant to Article 5 of the FATCA Agreement, the IRS may issue a group request to the Swiss Federal Tax Administration (FTA). A group request is a request made

by the IRS for specific information pertaining to a non-consenting U.S. account. The information typically sought includes accountholder information, specifically the identity of the beneficial owner(s) of the account. Such requests are based on Article 26 of the Convention for the Avoidance of Double Taxation (the “Convention”) between Switzerland and the United States, as amended through the Protocol of September 23, 2009.

A group request does not automatically mean that the Swiss Taxing Authority will release your account information to the IRS. Instead, it begins what can best be described as an excruciating, drawn out review process.

May a Taxpayer Mount an Offensive to a FATCA Group Request in Swiss court?

Nary a day goes by that I don’t get an email from a concerned client wanting to know if it is possible to challenge a FATCA group request in Swiss court. The drafters anticipated that the group request provision would be “tested” as soon as the first wave of accountholders became herded up like cattle in an IRS group request.ⁱ

Certainly there are arguments, one of which centers on the scope of the term, “group.” Under the Swiss Tax Administrative Assistance Act, passed by Swiss Parliament in 2012, the definition of “group” is much “narrower than the definition of group under the FATCA regulation.”ⁱⁱ Thus, a compelling argument can be made that group requests should be barred under the Tax Administrative Act.ⁱⁱⁱ

But for those who see this as a loophole that can be exploited by a clever tax attorney, don’t get too excited. The probability that Swiss courts will rule in favor of a U.S. taxpayer is slim to remote. Why? Because of what is explicitly stated in the Swiss-U.S. Model 2 Agreement – namely, that “a group request based on aggregate reports is admissible.”^{iv}

And lest you think that the Swiss-U.S. Model 2 Agreement is not binding on Swiss courts, you would be mistaken. On the contrary, the Swiss Parliament’s approval of the Model 2 Agreement establishes a legal foundation for FATCA group requests that is *binding* on Swiss courts.^v

But even for those who are eternally optimistic and live their lives pursuant to the proverb, “Hope Springs Eternal,” looming out in the distance is the other shoe that is waiting to drop. Experts predict that it is no longer a matter of “if” but “when” the Swiss Parliament will approve the Model 1 Agreement with the United States. If ratified by Swiss Parliament, the U.S.-Swiss automatic tax exchange program could begin as early as 2018. Even earlier, in 2017, the Swiss will participate in a similar program that’s limited to EU countries.

When this happens, raising any challenge to the release of accountholder information on the grounds of a narrow interpretation of a single word will be like trying to row a canoe up the Amazon River in a monsoon. Why? Because a group request is not needed under a Model 1 Agreement to obtain a U.S. accountholder's complete information. Instead, this information is *automatically* released in an exchange of information between the Swiss taxing authority and the IRS.

For this reason, taxpayers can learn a valuable lesson from Harry Potter and Ron Weasley. And that lesson is this: Don't miss the first sound of the Swiss Model 1 train approaching the FATCA station! If you do, you might find yourself in as dire a predicament as Harry and Ron after missing the Hogwarts Express in "Harry Potter and the Chamber of Secrets": lost in the Forbidden Forest while stuck inside a flying car and being pounded mercilessly by a "Whomping Willow."

Be sure to seek legal advice before responding to a declaration of consent.

The Swiss government will soon be transitioning to a Model 1 Treaty, whereby the Swiss government will be exchanging information directly to the IRS and other countries' taxing authorities.

ⁱ William Byrnes and Robert Munro, FATCA and Switzerland: Model II, LexisNexis Guide to

ⁱⁱ Id.

ⁱⁱⁱ Id.

^{iv} Id.

^v Id.