



Guidance Note on the Swiss Model Order of July 3, 2013

Issued by the Swiss Federal Department of Finance, July 2013, and to be addressed individually to any Swiss Bank asking for an authorization pursuant to art. 271 of the Swiss Criminal Code. The objective of this Guidance Note is to specify central elements of the Model Order.

I. General comments

The objective of the Swiss Model Order is to authorize Swiss Banks to cooperate with the US Department of Justice (DOJ), in particular to participate in the voluntary DOJ Program providing a path for Swiss Banks that are not currently the target of a criminal investigation authorized by DOJ's Tax Division, to obtain resolution of any uncertainty concerning their status in connection with on-going investigations, and to assist the DOJ in its law enforcement efforts.

The Swiss Government's authorization granted to a Swiss Bank pursuant to art. 271 of the Swiss Criminal Code will put that Bank in a position to cooperate with the DOJ within the existing legal framework and thus to participate effectively in the DOJ Program.

It is understood that the sole participation by the Swiss Banks in the DOJ Program does not prejudice the DOJ decisions.

This Guidance Note applies *mutatis mutandis* to the authorizations for the Banks already under criminal investigation authorized by the DOJ.

II. Specifications

1. With reference to paragraph 1.1 of the Model Order:

- a) It is understood that the terms "general information and documentation" include all relevant information as requested in Paragraph II.D.1 of the DOJ Program.
- b) It is understood that the terms "U.S. Person" as referred to in this para. include legal entities (corporations, partnerships, trusts).

2. With reference to paragraph 1.2 of the Model Order:

It is understood that the terms "bank client data" only cover personal identifiers of the bank client (name, address, social security number, account number).

3. With reference to paragraph 1.3 of the Model Order:

It is understood that the terms "Leaver lists" include all relevant information as requested in Paragraph II.D.2 of the DOJ Program.

4. With reference to paragraph 1.5 of the Model Order:

An Agreement was signed between the Association of Swiss Bank Employees, the Association of Swiss Bank Employers and the Swiss Banking Association on 29 May 2013. It will enter into force on the date of the announcement of the Program. The condition set forth in para 1.5 is thus fulfilled.



[Date]

Federal Council Model Order

in the matter of

Bank X

Applicant

represented by [...]

regarding

Request dated [...] for an authorisation pursuant to Art. 271 of the Swiss Criminal Code of 21 December 1937 (SCC, SR 311.0)

(Informal translation by MoF, 8 July 2013)

I. Facts of the case

1. *Option 1: Due to business conducted with persons subject to taxation in the United States of America, the Applicant has been involved in criminal proceedings since [...], commenced by the US authorities in respect of a potential violation of US law. To date, it has not made any request for an authorisation pursuant to Art. 271 SCC. / It was previously granted authorisation pursuant to Art. 271 SCC on 4 April 2012, which this authorisation is intended to replace.*

Option 2: The Applicant intends to take part in the Department of Justice (DOJ) programme to settle the tax dispute between the Swiss banks and the United States of America and in this context requests an authorisation pursuant to Art. 271 para. 1 SCC.

2. [Subject matter of the request]

II. Legal considerations

3. Pursuant to Article 31 of the Ordinance of 25 November 1998 on the Organisation of the Government and the Federal Administration (GAOO; SR 172.010.1) the departments and the Federal Chancellery may make decisions, within their designated areas, with regard to granting authorisations under Art. 271 para. 1 SCC to carry out activities on behalf of a foreign state. In accordance with Art. 31 para. 2 GAOO, any matters of political or other fundamental importance must be referred to the Federal Council.
4. Art. 271 para. 1 SCC provides that any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority or public official, is liable to a custodial sentence not exceeding three years or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year (sub-paragraph 1). Any person who carries out such activities for a foreign party or organisation (sub-paragraph 2) and any person who encourages such activities (sub-paragraph 3) is also liable to penalty. For an activity to qualify as an "activity on behalf of a foreign state" within the meaning of Art. 271 para. 1 SCC, it is sufficient for the activity to be carried out in the interests of the foreign state and for it to be intended for that foreign state (MARKUS HUSMANN in Basler Kommentar Strafrecht II, 3rd edition, Basel 2013, Art. 271 N 43). According to the position adopted by the Swiss courts on the application of Art. 271 para. 1 SCC, it is also necessary for the activity to be characterised as an official act, based on its nature or purpose (decision of the Federal Supreme Court 6B 402/2008, finding no. 2.3.2; BGE 114 IV 130).
5. The activities on Swiss territory to be assessed in this case essentially consist in the collection, processing and forwarding of information and documents to the Department of Justice (DOJ). This is intended to ensure that the US authorities obtain the information and documents requested by them with a view to effecting settlement without bringing charges. The activities of the Applicant, which are at issue in this case, relate to foreign proceedings and are therefore carried out in the interests of a foreign authority. Ultimately, the activities concerned are of an official nature and are carried out on behalf of a foreign state.
6. Art. 271 para. 1 SCC does not give any indication or guidance as to the conditions for determining whether an authorisation may be granted. The interest in maintaining Swiss territorial jurisdiction and sovereignty must be weighed against the interest in cooperating with foreign authorities, while giving due consideration to the interests of any private individuals affected.
7. The collection and transfer of information to the US authorities by reason of the Applicant's business dealings with persons subject to taxation in the United States of America, due to a potential violation of US law, does not constitute any undue encroachment

upon Swiss sovereignty. On the other hand, the Applicant has a considerable interest in cooperating with the US authorities. Ultimately, the purpose of the information to be collected and transferred by the Applicant is to avoid prosecution by the DOJ. Any prosecution brought would have far-reaching consequences for the Applicant in its business dealings with the USA. The Applicant risks being cut off from conducting transactions in US dollars. The resulting operational and financial restrictions could materially prejudice the Applicant or even jeopardize its continued existence as a going concern.

8. An authorisation pursuant to Art. 271 para. 1 SCC merely precludes prosecution for an offence under this provision. However, the authorisation does not release a party from complying with other provisions of Swiss law including, but not limited to, compliance with applicable business and bank-client confidentiality requirements, data protection provisions and employer obligations. Such an authorisation therefore permits cooperation with the US authorities solely within the framework of Swiss law.
9. In weighing the interests involved, the personal rights of any current and former employees of the Applicant and any third parties who may be affected must be taken into account through the obligation to provide information and the right to information. Provision must also be made for more extensive welfare obligations and adequate protection against discrimination for current and former employees. Affected third parties also include the beneficiary banks set out in the leaver lists. Leaver lists are lists containing non-personalised data in connection with the closure of accounts and the associated transfer of funds to another bank in Switzerland or abroad.
10. Client data are not covered by this authorisation. Any such data may only be supplied by way of administrative assistance within the scope of existing agreements with the USA in the area of double taxation. Under these circumstances, there are no apparent overriding interests of third parties to preclude granting an authorisation.
11. Authorisations pursuant to Art. 271 para. 1 SCC must be time limited. In this case, the authorisation is granted for a period of one year. The authorisation may be extended upon submission of a duly substantiated request. In addition, the authorisation may be revoked if any obligations or conditions are breached.
12. Pursuant to Art. 2 para. 1 of the General Fees Ordinance (GFeeO) of 8 September 2004 (SR 172.041.1), any party who causes an order to be issued or who uses a service is required to pay a fee. In this case, the fee is set at CHF [...].

On the basis of the foregoing, the Federal Council **issues the following order**:

1. Pursuant to Art. 271 para. 1 SCC, the Applicant and the natural persons acting in fact on its behalf are authorised to cooperate with the relevant US authorities in connection with resolving its legal situation with the USA in compliance with Swiss law. The authorisation is granted in respect of the following areas and under the following conditions:

- 1.1 Relevant data

The authorisation includes general information and documentation on the business conducted by the Applicant as well as information on business relationships involving US persons as defined in Art. 2 para. 1 sub-para. 26 of the Agreement of 14 February 2013¹ between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA (Foreign Account Tax Compliance Act).

- 1.2 Bank client data

The authorisation does not extend to bank client data. Any such data may only be transferred to the US authorities based on a request pursuant to Art. 26 of the Convention of 2 October 1996² for the Avoidance of Double Taxation with respect to Taxes on Income and the Protocol of 23 September 2009³ amending the Convention.

- 1.3 Leaver lists

- a. Leaver lists are lists containing non-personalised data in connection with the closure of accounts and the associated transfer of funds to another bank in Switzerland or abroad.
- b. Banks with a registered office in Switzerland that feature on such lists must be notified of any data concerning them no later than 20 days before such data are due to be released to the US authorities. A copy of the letter containing such notification must be sent to the Swiss Financial Market Supervisory Authority (FINMA).
- c. Leaver lists handed over to the US authorities must not contain any information that discloses the identity of bank clients.
- d. If any leaver lists contain information disclosing the identity of (former and current) employees or third parties, the conditions set out in sections 1.4 and 1.5 must be met.

- 1.4 Personal data of employees and third parties:

- a. The only data that may be disclosed are the personal data of (former and current) employees who structured, operated or supervised business relationships within the bank, as described in section 1.1, as well as the personal data of third parties who performed similar functions in connection with such business relationships.
- b. Personal data of (former and current) employees and third parties may only be disclosed if the persons affected are notified about the scope and type of data, as well as the period to which they relate, no later than 20 days before the data are due to be released to the US authorities.

¹ BBI 2013 3243

² SR **0.672.933.61**

³ BBI **2010** 247; ratified by Switzerland but not yet in force

- c. If data are to be disclosed contrary to the wishes of the persons affected, the Applicant must advise such persons of their right to bring an action under Art. 15 of the Swiss Data Protection Act. It may transfer personal data affecting such persons no earlier than ten days following notification, provided that no action is pending to prohibit the disclosure of the data, or any such action has previously been dismissed by final judgment.

1.5 Agreement with employee associations

Prior to transferring any data concerning (former and current) employees, an agreement must be concluded with any employee associations with a view to securing maximum protection for those employees. Any such agreement must:

- a. set out the general contractual duty to have regard to the welfare of staff, including the payment of legal costs, with a view to safeguarding the interests of employees;
 - b. contain a hardship clause for the benefit of employees who, as a result of the transfer of their data, are placed in a difficult position on a personal, financial or economic level;
 - c. provide protection against discrimination precluding banks, for example, from making enquiries of job applicants as to whether they would be affected by data transfers to the US authorities;
 - d. provide protection against dismissal where an employee provides prima facie evidence of discrimination in connection with a business relationship with a US person.
2. The authorisation is limited to a period of one year. It is possible to extend this period upon submission of a duly substantiated request. The authorisation may be revoked in the event of non-compliance with the conditions set out in section 1 above.
 3. *[This authorisation replaces the authorisation issued by the Federal Council on 4 April 2012.]*
 4. Having been granted this authorisation, the Applicant will not be deemed to have committed a criminal offence under Art. 271 SCC provided it has complied with the conditions set out in section 1 above. However, the Applicant is not released from its obligation to comply with other applicable provisions under Swiss law relevant for the facts and circumstances of this case. In the event that it fails to comply with the conditions set out in section 1, the Applicant may also be liable to payment of a fine pursuant to Art. 292 SCC.
 5. The applicant is required to pay a fee in the amount of CHF [...] in relation to this order. The fee must be remitted within 30 days and will be invoiced separately.

To be issued to:

- the Applicant, through its legal representative (by registered letter)

Copy to:

- Office of the Attorney General of Switzerland, Taubenstrasse 16, 3003 Bern