fifteen days of the date of acquisition. Formerly, the requirement was that the currency be sold to a commercial bank within seven days of acquisition.

(4) The export of foreign currency is now free of restrictions. However, transactions involving the purchase of immovable property or securities on a foreign stock exchange require the permission of the Bank of Thailand. Furthermore, a commercial bank that sells foreign currency is required to scrutinize the purpose for which it is being bought, and limits are imposed on the amounts of foreign currencies that such a commercial bank may sell to each individual. A limit of U.S. $5 million or its equivalent is imposed for investment in foreign businesses or for lending to subsidiaries. A limit of U.S. $1 million or its equivalent is the maximum sum permitted for remittance to Thai citizens emigrating abroad or to family relatives who live permanently abroad. The earlier regime had permitted Thai residents traveling abroad to take out foreign currency of up to U.S. $1,000, or larger amounts with the prior permission of the Bank of Thailand.

(5) The requirement for the registration of foreign loans to Thai nationals or investments in Thai businesses has now been revoked. However, such foreign exchange remittances must be surrendered to commercial banks or deposited in a foreign currency account in Thailand within fifteen days from the date of their receipt.

(6) Restrictions on the repatriation of investment funds, dividends and profits, loan repayments, and interest payments on loans, net of taxes due thereon, have also been lifted. Also, securities, promissory notes, and bills of exchange may be sent abroad without restrictions.

(7) Restrictions on the opening of foreign currency accounts in Thailand by both Thai nationals and nonresidents without Bank of Thailand approval have also been lifted, subject to various conditions. However, Thai nationals will be subject to an aggregate balance limit of U.S. $500,000 (or its equivalent) for individuals or U.S. $5 million (or its equivalent) for other legal entities, except public agencies, state or governmental organizations, or depositors previously permitted to have foreign currency accounts.

Switzerland*

On April 25, 1991, the Swiss Federal Banking Commission (FBC), in its supervisory capacity, issued its regulation that attorneys, notaries, trust administrators, and money managers were no longer permitted to use the so-called

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Form B when opening a bank account on a fiduciary basis.[1] Until then, these professionals were entitled to open accounts for their customers on a fiduciary basis, that is, without revealing the identity of the beneficial owner of the funds, mostly in the name of an offshore corporation or trust. This decision was inaccurately interpreted by some commentators as the funeral of Swiss banking secrecy. To some degree, the international press unfortunately echoed the assertion and contributed to the spreading of the unfounded rumor.

The FBC's decision to abolish the so-called Form B accounts has, however, neither abolished nor narrowed the protection provided by Swiss banking secrecy. A bank's legal obligation to preserve the confidentiality of its customers remains unchanged.[2] Swiss banks are prohibited from disclosing any information about the identity or the affairs of a customer to any person, agency, or administration, whether it be the tax administration, an administrative agency, or other inquirer. Exceptions to this rule are only possible (as they were prior to the FBC's decision) in the event of criminal proceedings by the Swiss authorities or in the context of international mutual assistance, mainly in criminal matters.

Thus, the decision was only meant to abolish the possibility, for certain professionals, to open bank accounts in a fiduciary capacity without disclosing the identity of the beneficial owner, except in specific circumstances listed in the decision. The issue, therefore, must be analyzed in the context of the Agreement on Due Diligence to be applied by the banks when accepting funds, rather than the context of Swiss banking secrecy laws.

I. The Original Agreement on Due Diligence of 1977 as Amended in 1982[3]

The purpose of the Original Agreement on Due Diligence (Original Agreement) was to preserve the reputation of Switzerland as a financial center and to fight economic criminality by adopting compulsory rules on banking ethics.[4] The Original Agreement was signed by the Swiss Bankers' Association and the Swiss National Bank. Its objectives were to be achieved in part through strict identification of account-holders.[5] In order to comply with the Original Agreement the

1. Decision of the Federal Banking Commission (FBC) of April 25, 1991. *See* ANNUAL REPORT OF THE SWISS BANKERS' ASSOCIATION 1990-1991, at 63.

2. Federal Banking Act (Loi fédérale sur les banques et les caisses d'épargne) of 1934, art. 47, *as amended by* Recueil Systématique du droit fédéral [RS] 952 (1971) [hereinafter FBA].

3. Agreement Relating to the Due Diligence to be Applied by the Banks When Accepting Funds and to the Practice of Bank Secrecy (entered by and between the Swiss National Bank and the Swiss Bankers' Association on July 1, 1977 (renewed and amended on July 1, 1982)), *reprinted in* 16 I.L.M. 767 [hereinafter Original Agreement on Due Diligence]. This agreement has been referred to also as the Diligence Convention. *See, e.g.*, 25 INT'L LAW. 525 (1991) (recent legal developments in Switzerland).

4. *Id.* art. 1.

5. *Id.* art. 2. The Original Agreement on Due Diligence also dealt with due care in renting safe deposit boxes and prevention of assistance to capital flight and tax evasion. These aspects are not dealt with in this article.

banks had to establish the true identity of the beneficial owner of the deposited funds, whether the holder of the account was an individual, a corporation, foundation, trust, or other entity.[6] This duty extended to the identification of the true beneficial owner of the assets deposited with the bank and, in the case of offshore corporations, to the controlling person.[7]

Article 6 of the Original Agreement reserved for the Swiss holders of professional secrecy (principally attorneys and auditors) the right to open bank accounts, but in a fiduciary capacity.[8] In such circumstances the names of the clients were not disclosed to the bank. The secrecy-bound persons were, however, required to sign the "Form B," by which they acknowledged that they knew the client's name and that they were unaware of any intended use of bank secrecy contrary to the Original Agreement.[9] The impact of the provision was great since the professional secrecy of an attorney could not (and still cannot) be lifted, even in criminal investigations.[10]

Prior to the expiration date of the Original Agreement, the FBC clearly expressed its views on the construction of the privilege granted to the persons bound by professional secrecy. For the FBC it was inadmissible that a client could remain anonymous to his bank by interposing a person bound by professional secrecy.[11] According to the FBC the duty to identify the beneficial owner of the funds deposited with a bank derived from article 3, paragraph 2(c) of the Federal Banking Act of 1934.[12] If, under the FBA, secrecy was subject to federal and cantonal procedural rules regarding the duty to testify, that provision made it a duty for bankers to offer a testimony as informative as possible. Thus, according to the FBC, if the beneficial owner could remain unknown to the bank, this "duty" would be less effective.[13]

Strangely enough, the FBC's position on this topic was reaffirmed on various occasions.[14] In its 1986 Banking Report, the FBC stated that it "could" require the banks under its supervision to identify the clients represented by attorneys-at-law by means of compulsory regulations.[15] In substance, the Commission wanted to eliminate the possibility for lawyers and notaries (who cannot be compelled to testify even in criminal matters) to sign the Form B when their activity involved managing funds on behalf of their clients.[16]

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6. *Id.* art. 3.

7. Implementing Rules of the Original Agreement on Due Diligence by the Swiss National Bank and the Swiss Bankers' Association relating to arts. 3, 4, and 5.

8. *See supra* note 3.

9. Original Agreement on Due Diligence, *supra* note 3, art. 6.

10. Federal Law on Criminal Procedure art. 77, RS 312.0.

11. 1985 FEDERAL BANKING COMMISSION REPORT 23.

12. Article 3(2)(c) of the FBA provides that the persons in charge of the direction and management of the banks are to be of good reputation and shall guarantee irreproachable activity.

13. 1985 FEDERAL BANKING COMMISSION REPORT, *supra* note 11, at 21.

14. *See, e.g.*, letter from the Federal Banking Commission to Dr. Felix H. Thomann, president of the Swiss Lawyers' Association (Oct. 2, 1986).

15. 1986 FEDERAL BANKING COMMISSION REPORT 124.

16. *Id.* page 126.

II. The New Agreement on Due Diligence of July 1, 1987

Under pressure from the FBC, the Swiss Association of Bankers drafted the New Agreement on Due Diligence (New Agreement) dated July 1, 1987, which became effective on October 1, 1987.[17] Since the Swiss National Bank had announced in 1985 that it would no longer be a party to the Original Agreement (claiming that it was responsible for monetary policy, not for banking ethics), the New Agreement was signed by the Swiss Association of Bankers and the signatory banks. The New Agreement restated the essential provisions of the Original Agreement, reinforcing some points and clarifying others. The most drastic amendment, of course, concerned the new conditions under which a person bound by professional secrecy could open an account in a fiduciary capacity for his client, that is, sign the Form B.

According to the New Agreement, the secrecy-bound professional was to confirm, in addition to the previous requirements set forth in the Original Agreement,[18] that he was acting within the scope of his professional capacity as an attorney, a notary, an asset manager, or auditor, and that his mandate was not temporary and not for the principal purpose of keeping the name of the beneficial owner secret from the bank.[19] The new Form B to be signed by attorneys and notaries required them to certify that their mandate was not chiefly targeted toward the management of funds. On the contrary, the new Form B to be signed by auditors and asset managers expressly required them to confirm that the account was opened with a mandate to manage funds.

In the opinion of the FBC,[20] the cases in which the intervention of the holder of professional secrecy was to be admitted were more limited than those stated in the New Agreement. Thus, the future of the new Form B was already uncertain.

III. The Enactment of the New Anti-Money-Laundering "Arsenal"

In 1990, the Swiss Penal Code (SPC) was amended by the introduction of two new articles dealing with money laundering and the lack of vigilance in financial transactions. Articles 305bis and 305ter SPC[21] came into force on August 1, 1990.[22]

17. New Agreement Relating to the Due Diligence to be Applied by the Banks (concluded by and between the Swiss Bankers' Association and the signatory banks on July 1, 1987) [hereinafter New Agreement on Due Diligence].

18. Original Agreement on Due Diligence, *supra* note 3, art. 6.

19. New Agreement on Due Diligence, *supra* note 17, art. 5.

20. 1986 FEDERAL BANKING COMMISSION REPORT, *supra* note 15, at 125–26.

21. Recueil Official des lois et ordonnances de la Conféderation suisse [RO] 1990 1077, 1078; Feuille Fédérale [FF] 1989 II 961; SWISS PENAL CODE [SPC], RS 311.

22. *See* 25 INT'L LAW. 525 (1991) (regional developments summary pertaining to Switzerland prepared by Pierre de Charmant and Nicolas Piérard).

In substance, article 305bis SPC punishes those who receive money or assets that are the product of an offense.[23] This provision penalizes acts that tend to impede the identification of the source and the discovery or the confiscation of assets that the committer knows or should have known were derived from a crime. Article 305ter SPC[24] requires financial intermediaries to implement internal procedures in order to identify the beneficial owner of the assets with which they are entrusted. Under the disposition, an individual who, in the conduct of his profession, accepts, keeps on deposit, helps to transfer, or invests assets belonging to a third party, and who omits to verify with the vigilance commanded by the circumstances the identity of the beneficial owner, will be punished by imprisonment for up to one year, or fined, or both. In contrast to the New Agreement, the new criminal provision applies to all members of the Swiss financial community such as money changers, fiduciary institutions, asset managers, finance companies, and lawyers, among others. The punishable act is the failure to exercise the degree of care required under the specific circumstances in verifying the identity of the beneficial owner of the funds. A violation of the obligation to identify the beneficial owner constitutes an offense under article 305ter SPC even though the funds deposited are not the result of a crime.

The enactment of the new criminal provision was undoubtedly caused by various factors, some of which were not internal to Switzerland. First, the FBC as well as various groups repeatedly claimed that the Original Agreement and the 1987 New Agreement were inadequate in fighting money laundering.[25] This point of view gained support in the wake of various scandals in Switzerland, one of which became known as the "Lebanon Connection."[26]

Second, prior to the enactment of the new provisions, money laundering was not expressly illegal in Switzerland. Thus, mutual assistance in criminal matters could not be granted failing the double incrimination requirement. The Swiss authorities were pressured by various foreign governments, particularly the United States, into adopting provisions that would enable them to pierce Swiss banking secrecy.

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23. SPC art. 305bis states:

    1. He who shall have committed an act tending to impede the identification of the source, the discovery or the confiscation of assets which he knew or should have known to be of criminal origin shall be punished by imprisonment or a fine.

    2. In serious cases, the punishment shall be criminal confinement for no more than five years. The imprisonment shall be concurrent with a fine of up to one million francs. The case is serious, particularly, when the perpetrator:

        a) acts as member of a criminal organization;

        b) acts as member of a gang formed to systematically engage in money laundering;

        c) makes a significant turnover or gain in engaging in money laundering by profession.

    3. The perpetrator shall also be punished when the principal offense has been committed outside of Switzerland and it is also punishable in the country in which it has been perpetrated.

24. SPC art. 305ter states:

    He who, in the conduct of his profession, shall have accepted, kept on deposit, helped to invest or transfer assets belonging to a third party and who shall have omitted to verify with the vigilance commanded by the circumstances the identity of the beneficial owner, shall be punished by imprisonment for at most one year or by arrest and/or a fine.

25. *See* 1986 FEDERAL BANKING COMMISSION REPORT, *supra* note 15.

26. *See* FF 1989 II 977.

A Account No.: _____ Holder: _____

Declaration on opening an account or securities account
(Form A as per Art. 3 and 4 CDB)

The undersigned hereby declares:
(mark with a cross where applicable)

☐ **as holder of the account,**

☐ that he is the beneficial owner of the assets to be deposited with the bank,

☐ that the beneficial owner of the assets to be deposited with the bank is:

Full name (or firm) Address/Domicile/Country (or location of head office)

_____

☐ **as representative of the account holder,**
that the following person(s) is/are the beneficial owner(s) of the assets to be deposited with the bank:

Full name (or firm) Address/Domicile/Country (or location of head office)

_____

The undersigned takes due note that:

–the banking secrecy privilege protected by Art. 47 of the Federal Law on Banks and Savings Banks of November 8, 1934/March 11, 1971 is not unrestricted. The officers, employees and mandataries of the bank are liable to provide evidence and information vis-à-vis the authorities when required to do so under federal or cantonal laws (such as during a criminal proceeding). Such an obligation also exists vis-à-vis foreign authorities, insofar as the Swiss Confederation grants judicial assistance to the country concerned;

–the system of numbered or coded accounts and deposits is a purely internal measure of the bank and in no way affects the obligation to provide evidence or to testify to the authorities.

_____
Full name, or firm, if applicable

_____
Exact address

_____
Place and date Signature

IV. The FBC's Circular Letter of April 25, 1991

While the FBC's opinion regarding the exemption resulting from the New Agreement was one factor in the "demise" of the so-called Form B accounts, the enactment of article 305ter SPC certainly accelerated the decline of the exemption provision. In the circular letter, the FBC restated that the obligation for the banks to identify the beneficial owner of the funds deposited was anchored in the legal requirement of irreproachable activity found in article 3 of the Federal Banking Act.[27] After having described the obligations under article 305ter SPC and the exemption applicable to certain professionals under the New Agreement,[28] the FBC concluded that the latter was incompatible with the legal obligation set forth in article 305ter SPC.[29] According to the Commission the recourse to the Form B could be reconciled neither with the letter nor with the purpose of the criminal provision. Therefore, as of July 1, 1991, banks were prohibited from accepting Form B in the context of the opening of a bank account. Furthermore, banks were given until September 30, 1992, to replace all outstanding Forms B by either a new Form A or a declaration by an attorney or notary consistent with the new regulation.[30]

V. The Form A: The Remaining Cases Where Fiduciary Accounts Are Allowed

Contrary to the New Agreement,[31] banks now have the obligation, when in doubt, to identify the real beneficial owner of the funds deposited by an intermediary. This identification is to occur by means of Form A. The name and address of the beneficial owner must be indicated to the bank even when the account is opened by an attorney, a notary, an auditor, or asset manager.

However, in light of the professional secrecy sanctioned in the SPC[32] and the principle of proportionality, banks are entitled not to question the identity of the beneficial owner of the assets deposited by attorneys and notaries in a limited set of recognizable circumstances. Without abolishing completely the privilege granted under the New Agreement, the FBC largely restricted its scope and the persons entitled to keep secret the identity of their clients. Only lawyers and notaries may now do so in the following four cases:[33]

(1) omnibus clients' trust accounts for the handling of advance payments to attorneys for fees, court fees, indemnifications, and the like;
(2) deposit of assets belonging to an estate during the settlement thereof (the estate must be identified);

27. FBC Circular Letter, para. 1.1 (dated April 25, 1991) [hereinafter 1991 Circular Letter].
28. *Id.* paras. 1.2 & 1.3.
29. *Id.* paras. 2.1 & 2.2.
30. *Id.* para. 4.2.
31. New Agreement on Due Diligence, *supra* note 17, para. 5.
32. SPC art. 321.
33. 1991 Circular Letter, *supra* note 26, para. 3.

(3) deposit of assets in connection with a separation or divorce (the couple must be identified); and
(4) escrow accounts for the deposit of advance payments and of assets in which the ownership is disputed, both in connection with pending litigation, arbitration, bankruptcy, or composition of creditors' proceedings (the litigation must be identified).

Attorneys and notaries are now required to submit a written declaration guaranteeing their compliance with these accepted exceptions.[34]

Lastly, the regulation states that banks will have to cease all business relationships if they are unable to identify before September 30, 1992, the beneficial owner of the assets deposited, whether by a Form A or a declaration by a lawyer or notary.[35]

VI. Swiss Banking Secrecy Unchanged

Bank secrecy lies in a client's right to an agreement with his banker that all his relationships with the bank will be kept confidential from third parties.[36] The bases on which banking secrecy lies are to be found in the Swiss Civil Code, the Swiss Code of Obligations, the FBA, and the SPC.[37] However, banking secrecy was never meant to allow a client to hide his identity from the bank itself. This confusion was and still is the main cause of the misunderstanding behind the FBC's regulation prohibiting the use of the Form B accounts. Thus, the existence of a relationship between the bank and the client, the nature of the latter, the information given by the client on his financial situation, his relationship with other banks, and information concerning operations with third parties are certainly protected by banking secrecy; but the disclosure to the bank of the client's identity is not so protected.

The question of the full submission to the FBA is of the utmost importance since it is through article 47 of the FBA that banking secrecy is placed under the protection of criminal law. Article 47 is only applicable when a client has established a relationship with an entity subject to the FBA.[38] Consequently, relationships maintained with the following entities are not protected by the banking secrecy: stock exchange agents and stock exchange firms that merely trade in securities and do not engage in regular banking transactions; private investment managers and notaries (except when they invest on a regular basis the

34. *Id.*
35. *Id.* para. 4.3.
36. FBA art. 47.
37. SWISS CIVIL CODE art. 28, RS 210 (1907); FEDERAL CODE OF OBLIGATIONS arts. 394, 398, RS 220 (1911); FBA art. 47; SPC art. 321.
38. According to article 1 of the FBA the concept of banks (at large) includes banks (in the narrow sense), private bankers (partnerships) and savings banks. Finance companies that solicit deposits from the public are also regarded as banks.

funds of their clients for their own account or their names, in which case they are subject to the FBA); bank-like finance companies and other financial companies not soliciting the public for deposits. Thus, in case of violation of the professional secrecy by such persons, the penalty set forth in article 47 FBA is not applicable.

Persons who may incur the penalty if they breach the obligation of confidentiality due to a client include the following:[39] (1) officers (directors, managers, private bankers, partners of a partnership); (2) employees at large (all the persons employed in a bank); (3) mandataries (agents), persons to whom the bank gives a mandate in the course of its commercial activity; (4) liquidators or commissioners; (5) experts, representatives of the FBC; and (6) officers and employees of an auditing firm. On a civil-law level, the individuals or corporations subject to banking secrecy can be held liable for the damages incurred by the client that result from the violation of banking secrecy.[40]

VIII. Limits of Banking Secrecy

A. Vis-à-Vis the Swiss Authorities

Article 47 of the FBA specifically reserves the application of federal and cantonal regulations regarding the obligation to testify and to furnish information to the authorities. The nature of the proceeding determines the scope of the obligation to assist the authorities.

1. *Civil Procedure*

The obligation to testify or submit documents before a civil court will mainly be determined by the rules of civil procedure of the specific canton, since the cantons have jurisdiction under the Swiss Constitution to regulate their own courts and the proceedings brought before them.[41] The Swiss Federal Tribunal[42] does not review the facts established in lower court proceedings, nor does it hear witnesses or documentary evidence not submitted to the lower court.[43] At the cantonal level, solutions differ from one canton to another. Geneva recognizes the right for any person bound by a legal obligation of confidentiality, including bankers, to refuse to testify. In Zurich, it is within the judge's discretion to decide whether the case or the interests involved dictate that the person under duty of confidentiality be required to testify.

39. FBA art. 47.

40. *See* Federal Code of Obligations arts. 41, 97 (containing general principles of responsibility).

41. Bundersverfassung [Constitution] art. 64(3); RO 16 824, 827; RS 101 (1874); *reprinted in* 27 Constitutions of the World 52 (Albert P. Blankstein & Gisbert H. Flanz eds.) (Jurg K. Siegentheler, trans.) (1982) (in English).

42. The Federal Tribunal is the Swiss Supreme Court.

43. Federal Law on Judicial Organization, arts. 41, 42, 43, RS 173.110 (1943).

2. *Criminal Procedure*

The only persons entitled not to testify are priests, doctors, lawyers, public notaries, chemists, and midwives and their assistants.[44] This exemption applies at the federal level as well as in most cantons. Therefore, a banker has to testify when required to and must produce all the documents that appear to be necessary to the procedure. In this respect, Swiss bankers now have the obligation to know the origin of the funds deposited, the identity of the client, and the name of the beneficial owner of the assets. Thus, it is clear that banks must reveal such information if asked.

3. *Administrative Procedure*

This topic deals only with the possible inquiries of the tax administrations. As a general principle, tax authorities, in the ordinary course of taxation proceedings, have no right to obtain from third parties information or documentation regarding a taxpayer. Consequently, the tax administration has no power to investigate directly or require a bank to provide information or documents regarding a client (the bank would breach its duty to the client by merely acknowledging that the taxpayer has or had a bank account).

However, Swiss law makes a distinction between tax evasion and tax fraud, both at the federal and cantonal levels. Tax evasion is generally defined as being the nonreporting of income or capital, that is, the simple failure to report taxable items or pay taxes.[45] Tax fraud, on the other hand, is a more serious offense and is realized when a taxpayer uses deception to mislead the tax authorities.[46]

At the federal and cantonal levels, tax evasion is only an administrative offense punishable by a fine.[47] In this context, tax administrations are not empowered to require information to be given by third parties bearing a professional or legal duty of secrecy.[48] Thus, the confidentiality of all information covered by banking secrecy is guaranteed, and banks are under no obligation to testify or assist the authorities. Tax fraud, on the other hand, is qualified as a criminal offense[49] and must be pursued through a criminal procedure, either by the ordinary criminal courts or by the administrative authorities[50] (according to criminal administrative law). Tax fraud is considered to be a criminal offense by the most important federal statutes governing taxes and duties.[51] At the cantonal level, the qualification differs from one canton to another. However, the most important cantons in banking matters (Zurich, Geneva, and Basel) all prosecute

44. Federal Law on Criminal Procedure, art. 77, RS 312.0 (1939).
45. Federal Decree on Federal Income (AIFD, in French), art. 129, RS 642.11 (1940).
46. *Id.* art. 130bis.
47. *Id.* art. 129(1).
48. *Id.* art. 90(b).
49. *Id.* art. 133bis.
50. Criminal Administrative Procedure Law, RS 313.0 (1974).
51. Federal Law on Stamp Tax art. 50, RS 641.10 (1973); Federal Law on Withholding Tax art. 67, RS 642.21 (1965); Importation Duty Law art. 41(1), RS 641.20 (1941).

tax fraud through criminal proceedings. In these situations bankers will have to testify and produce documents if so requested. Banking secrecy will thus be lifted in a procedure for tax fraud. Furthermore, the authorities may directly investigate in the banks and seize relevant documents.[52]

B. International Assistance

Article 271 SPC prohibits the unauthorized execution of foreign acts of state on Swiss territory and punishes the offenders by imprisonment. Therefore, a foreign authority wishing to obtain information, documentary evidence, or testimony from a resident of Switzerland, has to request the authorization of the Swiss authorities. Such authorization will rarely be granted. Thus, a foreign authority must usually resort to judicial and administrative assistance.

1. *Assistance in Criminal Matters*

Switzerland is a party to the European Convention on Judicial Assistance in Criminal Matters.[53] Switzerland's cooperation is granted to the contracting states when there are criminal proceedings falling within the competence of judicial authorities. Switzerland nevertheless refuses to assist foreign countries when it considers that the offense is of a political or tax nature.[54] In all cases where the cooperation requested involves the use of coercion (seizure of documents, search in someone's premises, and the like), Switzerland will grant assistance provided the acts prosecuted in the foreign state also constitute a criminal offense under Swiss law.[55] Lifting of banking secrecy always implies coercion and, therefore, the assistance allowed by Switzerland will be limited to acts criminal under its internal legislation.[56]

A Treaty on Mutual Assistance in Criminal Matters between Switzerland and the United States was signed on May 25, 1973, and entered into force on January 23, 1977.[57] The treaty is not applicable where the offense prosecuted is of a political, military, tax, or antitrust nature.[58] Furthermore, when the request for assistance implies measures of coercion, Switzerland will assist the United States if the acts described in the request contain the elements of an offense that would be punishable under the law in Switzerland if the offense were committed within

52. Criminal Administrative Procedure Law, art. 50.

53. European Convention on Mutual Assistance in Criminal Matters, Apr. 20, 1959, 472 U.N.T.S. 1851 RS 0.351.1.

54. *Id.* art. 2(a). *But see* part VII.B.2. *infra* as to tax fraud.

55. *Id.* art 5(1)(a).

56. *Id.* arts. 2, 5.

57. Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, RS 0.351.933.6 [hereinafter Criminal Assistance Treaty].

58. *Id.* art. 2(1)(c). Note, however, assistance may be possible for offenses involving customs and tax laws when they constitute violations of gambling and betting regulations, or drugs, weapons, and explosives regulations. *Id.* art. 2(1)(c)(5). The same is true when the offenses are connected with organized crime. *Id.* art. 2(2).

its jurisdiction and if it is listed in the schedule annexed to the treaty or is described in item 26 of the schedule.[59] A schedule of the offenses for which measures of coercion may be taken is annexed to the treaty.[60] However, in the case of an offense not listed in the schedule, the central authority of the requested state (in Switzerland the Federal Police Department) shall determine whether the importance of the offense justifies the use of compulsory measures.[61] Furthermore, differences in technical designation and constituent elements added to establish jurisdiction can be ignored. If any of the conditions mentioned above have not been met, assistance can still be granted but without the use of compulsory measures. Thus, banking secrecy may be lifted pursuant to a request of assistance under the treaty.[62]

Lastly, Switzerland has adopted a Federal Act on International Assistance in Criminal Matters, which entered into force on January 1, 1983.[63] The main feature of the Act was to spell out for the first time that international assistance is to be made available in cases of tax fraud offenses.[64] All countries, including those that have entered into a treaty with Switzerland, may request the assistance of the Swiss authorities through the Act.[65] However, Swiss cooperation is discretionary.[66] The Act also incorporates another fundamental principle derived-from Switzerland's internal laws: the refusal to provide any assistance when the acts prosecuted constitute a tax evasion offense or a violation of the regulation concerning the monetary, commercial, or economic policy of the foreign state.[67]

As mentioned previously, cooperation may be granted in case of tax fraud offenses. In that case, the assistance is limited to the transmitting of information, documents, and testimonies but does not include extradition by Switzerland.[68] Tax fraud is defined under the federal administrative criminal law.

The Act on Assistance contains various provisions on the delicate issue of the protection of the private sphere. Article 9 of the Act refers to the Swiss provisions

59. *Id.* art. 4(1).

60. *See generally id.*

61. *Id.* art. 2(2)-(3).

62. One should point out that the Swiss Federal Police Department has not in the past shown any particular restraint in providing assistance to the U.S. authorities. Thus, banking secrecy will often be lifted in these proceedings.

63. Federal Act on Assistance in Criminal Matters, RS 351.1 (1981).

64. *Id.* art. 3(3).

65. Jeannine Gremaud, *Entraide administrative et judiciaire en matière fiscale*, 30 ETUDES SUISSES DE DROIT EUROPÉEN 187, 207 (1986).

66. For example, Switzerland may refuse to cooperate with countries whose concept of criminal law is in complete contradiction with essential Swiss legal principles. Federal Act on Assistance in Criminal Matters, art.1.

67. *Id.* art. 3(1), 3(3).

68. *Id.* art. 3(3). It provides that assistance in case of tax fraud is given according to the third part of the law. Extradition and enforcement of foreign decisions are respectively set forth in the second and fifth parts of the law. Thus they are excluded from the scope of the assistance given for tax fraud offenses.

concerning the right to refuse to testify.[69] Accordingly, in a criminal pursuit, priests, lawyers, and doctors have the right to refuse to testify. Other persons (bankers, for example) are obliged to testify and to produce documents if required. Lastly, Switzerland has always required that the use of the evidence and information obtained through the procedure of cooperation be limited to the prosecution of the offense upon which the assistance was granted.[70]

2. *Administrative Assistance*

International administrative assistance in tax matters is primarily based on the double taxation treaties entered into by Switzerland. The treaties signed with Austria, Belgium, Canada, Denmark, France, Great Britain, Italy, New Zealand, and Germany all include a clause providing for the exchange of such information as is necessary for carrying out the provisions of the treaty.[71] In practice, Switzerland agrees to transmit information that is proven to be necessary for the proper application of a double taxation treaty even if the latter does not expressly provide for the exchange of such information.[72] However, information will not be exchanged for the purpose of assisting the foreign state in applying its own tax legislation. Furthermore, the treaties that provide for an exchange of information all contain a limitation in the sense that no information revealing a business, industrial, or professional secret or trade process may be disclosed.[73] The treaties with Austria, Belgium, Germany, Denmark, France, and Italy mention bank secrecy expressly.[74] However, it has always been held that business and professional secrets include bank secrecy. According to the practice of the Swiss Federal Tax Administration, international administrative assistance is exclusively granted in the form of a so-called "official report," which contains the results of the examination conducted by the Federal Tax Administration. This means that

69. Criminal Administrative Procedure Law art. 69.

70. Federal Act on Assistance in Criminal Matters art. 67.

71. Agreements Concerning the Avoidance of Double Taxation (along with citations to certain information exchange clauses):

- Jan. 30, 1974, Switz.-Aust., art. 26(1), 980 U.N.T.S. 119, RO 1974 II at 2085);
- Aug. 28, 1978, Switz.-Bel., art. 27(1), RO 1980 II at 1456P; see IBFD, Amsterdam, European Taxation, Sup. Service Section C.
- Aug. 20, 1976, Switz.-Can., art 25(1), RO 1977 II at 1526; see IBFD, Amsterdam, European Taxation, Sup. Service Section C.
- Nov. 23, 1973, Switz.-Den., 958 U.N.T.S. 27, RO 1974 II at 1720;
- Sept. 9, 1966, Switz.-Fr., art. 28, 772 U.N.T.S. 275, RO 1967 II at 1119;
- Sept. 30, 1954, Switz.-U.K., art. xx, 209 U.N.T.S. 197 RO 1955 II at 329;
- Mar. 9, 1976, Switz.-Italy, art. 27(1), RO 1979 I at 461; see IBFD, Amsterdam, European Taxation, Sup. Service Section C.
- June 6, 1980, Switz.-N.Z., art. 24(1), RO 1981 II at 1812;
- Aug. 11, 1971, Switz.-Germany, art. 27, RO 1972 II, at 3128; see IBFD, Amsterdam, European Taxation, Sup. Service Section C.

72. *See* Gremaud, *supra* note 65.

73. *See supra* note 71.

74. *Id.*

documents are not normally produced and witnesses' depositions are not transmitted to a foreign authority.[75]

The Double Taxation Agreement entered by and between Switzerland and the United States in 1951[76] contains a clause on the exchange of information with a larger scope than those examined above. Article XVI provides that the competent authorities will also exchange such information as is necessary for the prevention of tax fraud and the like in relation to the taxes that are covered by the treaty. The Swiss Federal Tribunal held in 1970 that, under this clause, bank information was basically obtainable; consequently, and in order to satisfy U.S. requests related to information necessary for the prevention of tax fraud, bank secrecy could not be invoked.[77] This decision was criticized by a majority of legal authors,[78] who have noted that according to article XVI of the agreement, professional secrecy, including bank secrecy, should prevail over the general mutual assistance obligation. In 1975 the Swiss Federal Tribunal specified the limits of the cooperation that could be granted under the Swiss-U.S. Agreement and stated that article XVI called for the exchange of information in the form of a written report, but did not prescribe actual judicial assistance, which would include the deposition of witnesses.[79] On this occasion, the Swiss Federal Tribunal ordered the Federal Tax Administration not to grant the extended assistance requested by the Internal Revenue Service.[80] The scope of the assistance set forth in article XVI has become a relatively moot issue since the enactment of the Federal Act on International Assistance in Criminal Matters,[81] which allows cooperation in cases of tax fraud offenses.

VIII. Conclusion

As one may see, the FBC's decision of April 25, 1991, to prohibit the opening of Form B accounts must be dissociated from the obligations and privileges derived from banking secrecy. In this context and in view of the relative complexity of these and related issues, the circular letter of the FBC was meant to restrict the ability of a bank to receive funds without having to inquire into the origin and the beneficial owner of the assets. The new regulation was not designed to narrow the scope of banking secrecy and has not produced that result. Any revision of the Swiss bank secrecy laws would require an amendment of the Federal Banking Act by parliament or by national referendum.

75. 75b CAHIERS DE DROIT FISCAL INTERNATIONAL [C.D. FISC. INT'L], 499ss (1990).

76. Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1951, U.S.-Switz., 2 U.S.T. 1751, RO 1951 at 895.

77. Judgment of Dec. 23, 1970 (X. c. Administration fédérale des contributions), Schweizerisches Bundesgericht [Federal Tribunal], [1971] JdT 571.

78. MAURICE AUBERT, JEAN-PHILIPPE KERNER & HERBERT SCHONLE, LE SECRET BANCAIRE SUISSE 390 (1982).

79. Judgment of May 16, 1975 (X-und Y-Bank gegen Eidgenossische Steuerverwaltung) Schweizerisches Bundesgericht [Federal Tribunal] ATF 101 Ib at 160.

80. *Id.*

81. *See supra* part VII.B.1.