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Priority and E-mail

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Reference: 1107

Contact: Schaefer Rupert

Bern, 26 August 2013

Response to Request for Advice

Dear Mr. Cogan,

We refer to your letter dated 23 July 2013 requesting a written response, on behalf of your members, regarding the circumstances under which reporting of certain information to a swap data repository ("SDR") or to the United States Commodity Futures Trading CFTC (the "CFTC") in accordance with CFTC regulations is prohibited under the statutes and regulations applicable in Switzerland.

As a general remark, we believe that the issues in question should primarily be handled by direct cooperation between competent authorities. This would also allow for a more specific response which takes into account the particularities of individual situations.

Concerning the information requested, you will find attached a copy of the Swiss relevant legislation applicable to this issue (Art. 271 Swiss Penal Code, Art. 47 Swiss Banking Act and Art. 4 para. 3 and Art. 6 Data Protection Act).

In Switzerland, reporting by a Swiss-based counterparty to a foreign authority, be it directly or indirectly through a trade repository is not permitted until the Swiss derivatives legislation providing a basis for such reporting is in place. In the transitional period, however, authorisation by the competent Swiss authorities might be obtained to disclose such information.

Further, reporting information about a third party – particularly about a bank client – to trade repositories or the CFTC could trigger violations of privacy laws unless a waiver from the client is obtained.

It is important to note that the above mentioned Swiss laws do apply to Swiss domiciled entities. They are not extraterritorial in nature and do not apply to foreign entities regarding their activities out-side Switzerland.



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However, excluded is a positive collection of proof (investigation) in Switzerland for purposes of a specific foreign proceeding, which is reserved to Swiss authorities by means of legal and administrative cooperation.

Reference is also made to previous responses provided by the Swiss authorities to the Financial Stability Board on the national framework applicable to reporting to trade repositories.

Should you have any question on the above matter, please do not hesitate to contact us.

Yours sincerely,

Swiss Financial Market Supervisory Authority FINMA
Strategic Services Division



Nina Arquint
Head Strategic Services



Rupert Schaefer
Head International Affairs

cc: Ms Sarah E. Josephson, Director, Office of International Affairs, U.S. Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581

encl: Art. 271 Swiss Penal Code; Art. 47 Swiss Banking Act; Art. 4 paras. 3 and 6 Data Protection Act

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Annex

Article 47 Swiss Banking Act

According to Article 47 Swiss Banking Act any person who deliberately disclose a secret that is entrusted to him in his capacity as body, employee, appointee or liquidator of a bank, as body or employee of an audit company or that he has observed in this capacity or attempts to induce such an infraction of the professional secrecy may be punished by imprisonment of up to three years or a fine up to CHF 1,080,000.

Federal Act on Banks and Savings Banks (Banking Act)¹

Art. 47

1. Imprisonment of up to three years or fine will be awarded to persons who deliberately:
 - a. disclose a secret that is entrusted to him in his capacity as body, employee, appointee, or liquidator of a bank, as a body or employee of an audit company or that he has observed in this capacity;
 - b. attempts to induce such an infraction of the professional secrecy.
2. Persons acting with negligence will be penalized with a fine of up to 250'000 francs.
3. In the case of a repeat within five years of the prior conviction, the fine will amount to 45 day rates at a minimum.
4. The violation of the professional secrecy also punishable after conclusion of the licensed or official responsibilities or the professional exercising duties is punishable.
5. The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information to an authority remain reserved.
6. Prosecution and judgment of offences pursuant to these provisions are incumbent upon the cantons. The general provisions of the Swiss Penal Code are applicable.

Articles 4 para. 3 and 6 Swiss Data Protection Act

According to Article 4 paragraph 3 and Article 6 Data Protection Act, personal data may not be disclosed abroad, if the privacy of the data subjects would be seriously endangered by such transmission, in particular due to the absence of legislation that guarantees adequate protection in the foreign jurisdiction, except if the person concerned consents to such data transfer. The Data Protection Act does not only refer to banking client data, but extends to all personal data of any third party. Personal data includes data of natural and legal persons.

¹ Unofficial translation.

Reference: 1107

Federal Act on Data Protection (DPA)²

Art. 4 Principles

- 1 Personal data may only be processed lawfully.
- 2 Its processing must be carried out in good faith and must be proportionate.
- 3 Personal data may only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law.
- 4 The collection of personal data and in particular the purpose of its processing must be evident to the data subject.
- 5 If the consent of the data subject is required for the processing of personal data, such consent is valid only if given voluntarily on the provision of adequate information. Additionally, consent must be given expressly in the case of processing of sensitive personal data or personality profiles.

Art. 6 Cross-border disclosure

- 1 Personal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of legislation that guarantees adequate protection.
- 2 In the absence of legislation that guarantees adequate protection, personal data may be disclosed abroad only if:
 - a. sufficient safeguards, in particular contractual clauses, ensure an adequate level of protection abroad;
 - b. the data subject has consented in the specific case;
 - c. the processing is directly connected with the conclusion or the performance of a contract and the personal data is that of a contractual party;
 - d. disclosure is essential in the specific case in order either to safeguard an overriding public interest or for the establishment, exercise or enforcement of legal claims before the courts;
 - e. disclosure is required in the specific case in order to protect the life or the physical integrity of the data subject;
 - f. the data subject has made the data generally accessible and has not expressly prohibited its processing;
 - g. disclosure is made within the same legal person or company or between legal persons or companies that are under the same management, provided those involved are subject to data protection rules that ensure an adequate level of protection.
- 3 The Federal Data Protection and Information Commissioner (the Commissioner, Art. 26) must be informed of the safeguards under paragraph 2 letter a and the data protection rules under paragraph 2 letter g. The Federal Council regulates the details of this duty to provide information.

² Unofficial translation.

Reference: 1107

Article 271 Swiss Penal Code

Under Article 271 Swiss Penal Code, any action for a foreign state is prohibited if (i) the action undertaken in Switzerland is, according to a Swiss legal perception, by its nature an act reserved to a Swiss authority or public official, irrespective whether the action is undertaken by a private person or a foreign authority and if (ii) such act is performed without authorization. Any facilitation of such actions for a foreign state is separately prohibited by Article 271 Swiss Penal Code.

Swiss Penal Code³

Art. 271 Unlawful activities on behalf of a foreign state

1. 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,
any person who carries out such activities for a foreign party or organisation,
any person who encourages such activities,
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.
2. Any person who abducts another by using violence, false pretences or threats and takes him abroad in order to hand him over to a foreign authority, party or other organisation or to expose him to a danger to life or limb is liable to a custodial sentence of not less than one year.
3. Any person who makes preparations for such an abduction is liable to a custodial sentence or to a monetary penalty.

³ Unofficial translation.