

# MUTUAL ASSISTANCE IN SWITZERLAND

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**INTRODUCTION:** Evidence may be obtained in Switzerland in civil, criminal and administrative matters under applicable Treaties (i.e. the Hague Evidence Convention, the Treaty in Criminal Matters and the Double Taxation Treaty) and implementing Swiss legislation. Further, Switzerland permits service of process in civil matters (under the Hague Service Convention).

In contrast, the Swiss penal code, art. 271, provides that attorneys attempting to take a deposition or serve process in Switzerland outside of these authorized methods are subject to arrest on criminal charges.

## A. CIVIL MATTERS

### 1. THE HAGUE EVIDENCE CONVENTION

**Request:** The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters concluded March 18, 1970 (UST 2555, TIAS No 7444, SR/RS 0.274.132) codifies the taking of evidence on notice and commission and the compulsion of evidence pursuant to a letter of request. Under the Convention, a judicial authority in the United States sends a letter of request to the appropriate Swiss Central Authority in accordance with the following model letter of request:

<p><b>Letter of Request</b></p> <p><b>I. Items to be included in all Letters or Request</b></p> <p>1. Sender (<i>identity and address</i>) _____ _____</p> <p>2. Central Authority of the Requested State (<i>identity and address</i>) _____ _____</p> <p>3. Person to whom the executed request is to be returned (<i>identity and address</i>) _____ _____</p> <p><b>II. Items to be included in all Letters or Request</b></p> <p>4. In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:</p> <p>5. a Requesting judicial authority (article 3, a) (<i>identity and address</i>) _____ _____</p> <p>b To the competent authority of (article 4, a) (<i>the requested State</i>) _____ _____</p>
--

6. Names and addresses of the parties and their representatives (article 3, b)
- a Plaintiff \_\_\_\_\_
  - b Defendant \_\_\_\_\_
  - c Other parties \_\_\_\_\_

7. Nature and purpose of the proceedings and summary of the facts (article 3, c)

\_\_\_\_\_

\_\_\_\_\_

8. Evidence to be obtained or other judicial acts to be performed \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**III. Items to be completed where applicable**

9. Identity and address of any person to be examined (article 3, e)

\_\_\_\_\_

\_\_\_\_\_

10. Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (article 3, f) (*or see attached list*)

\_\_\_\_\_

\_\_\_\_\_

11. Documents or other property to be inspected (article 3, g) (*specify whether it is to be produced, copied, valued, etc.*)

\_\_\_\_\_

\_\_\_\_\_

12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (article 3, h) (*In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence*)

\_\_\_\_\_

\_\_\_\_\_

13. Special methods or procedure to be followed (articles 3, i and 9)

\_\_\_\_\_

\_\_\_\_\_

14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)

\_\_\_\_\_

\_\_\_\_\_

15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (article 8)

\_\_\_\_\_

\_\_\_\_\_

16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, b)

\_\_\_\_\_

\_\_\_\_\_

17. The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by (*identity and address*) \_\_\_\_\_

\_\_\_\_\_

**IV. Items to be included in all Letters of Request**

18. Date of request \_\_\_\_\_

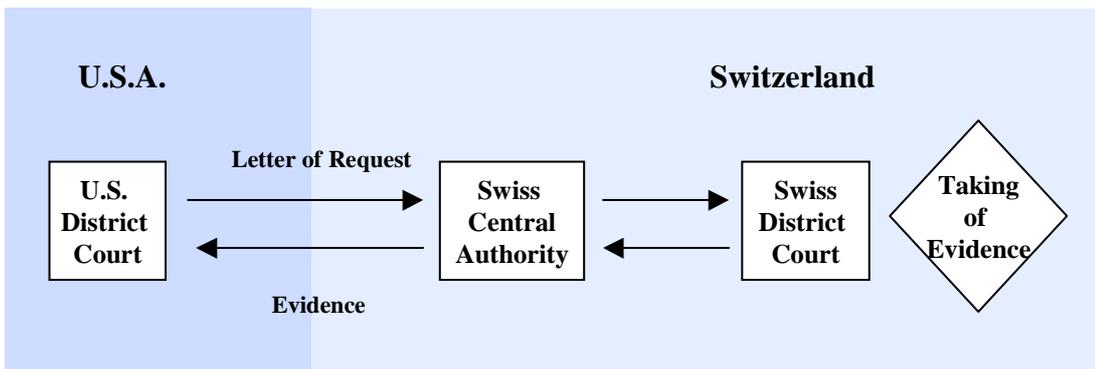
\_\_\_\_\_

19. Signature and seal of the requesting authority \_\_\_\_\_

\_\_\_\_\_

A letter of request should be addressed to the appropriate Swiss Central Authority in the official language of that authority (i.e., French, German, or Italian; see hereinafter list of Swiss Central Authorities for guidance on the appropriate language).

The documents establishing the execution of the letter of request will be returned by hat same means that the original request was sent.



**Pre-trial Discovery:** In a reservation made at the time of ratification of the Convention, Switzerland declared that letters of request issued for the purpose of obtaining pre-trial discovery of documents will not be executed if:

- a. the request has no direct and necessary link with the proceedings in question; or
- b. a person is required to indicate what documents relating to the case are or were in his/her possession or keeping or at his/her disposal; or

- c. a person is required to produce documents other than those mentioned in the request for legal assistance, which are probably in his/her possession or keeping or at his/her disposal; or
- d. the valid interests of the person from whom evidence is requested may be compromised.

## 2. THE HAGUE SERVICE CONVENTION

In Switzerland, documents may only be served through the appropriate Swiss Central Authority under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters concluded November 15, 1965 (20 UST 361; TIAS no 6638, SR/RS 0.274.131), to which the U.S. is a signatory, or by means of letters rogatory. The Swiss Penal Code, art. 271, provides that attorneys attempting to serve process are subject to arrest on criminal charges.

The Hague Service Convention provides a convenient method of obtaining service by a foreign judicial authority. The party seeking service or the party's attorney should obtain two copies of the Request for Service form (USM-94) from any U.S. Marshal's office. Service is requested by sending the completed forms with the documents to be served and any appropriate translations, in duplicate, directly to a foreign Central Authority. In their accession to the Convention, the Swiss noted that service by mail directly to the parties involved is not permitted.

Switzerland, in a reservation to its accession to the Convention, declared that in cases where the addressee does not voluntarily accept a document, it cannot officially be served on him or her in accordance with art. 3(1), unless it is in the language of the authority addressed, i.e. in German, French or Italian, or accompanied by a translation into one of these languages, depending on the part of Switzerland in which the document is to be served.

Switzerland has declared that it objects to service by consular or diplomatic channels on its territory (art. 8). Furthermore, officers of the Foreign Service of the United States are prohibited by Federal regulation (22 CFR 92.85) from serving others to do so, any state law to the contrary notwithstanding.

On ratification, Switzerland declared that it objects to the use of the methods of service referred to in art. 10, including service by postal channels.

As a general rule, the U.S. favors the use of service through the Convention Central Authority in other countries party to it. If service of process by registered mail is effected in a country like Switzerland which may not consider such service valid, enforcement of a U.S. judgment in that or a third country may be difficult.

## 3. OTHER HAGUE CONVENTION INFORMATION

**Time Frame:** The length of time required to effect service by the Government of Switzerland varies by case and Canton, but will generally go fairly quickly. Because fewer bureaucratic steps are involved, service and taking of evidence under the Hague Conventions will likely be faster than the three months or longer required when using the letters rogatory method.

**Translations:** Switzerland made specific reservations regarding translations at the time it deposited its instruments of accession to the Conventions. Unless the party to be served will accept service voluntarily, the documents to be served must be accompanied by a translation into the language of the authority addressed, e.g. German, French or Italian, depending on the part of Switzerland in which the document is to be served. With the taking of evidence, letters of request and any accompanying documents must be in the language of

the authority requested to execute them or translated into the appropriate language. Documents confirming execution will be drawn up in the official language of the requested authority.

**Costs:** There are generally no costs incurred in connection with service through the Central Authority under the Convention. However, if personal service is made and the person to be served resides in some remote location, some fees may be charged. The fees will be billed to the requesting party.

**U.S. Central Authority:** If you have any additional questions please address them to the U.S. Central Authority, for the Conventions:

Department of Justice  
Office of International Judicial Assistance  
Civil Division  
Washington, D.C. 20530

Phone: (202) 307-0983  
Fax: (202) 514-6584

This office is also known as the Office of Foreign Litigation.

#### **4. LIST OF SWISS CENTRAL AUTHORITIES**

In accordance with the Hague Service Conventions, art. 21 (1) (a), and the Hague Evidence Convention, art. 35 (a) Switzerland designates the Cantonal authorities as Central Authorities as referred to in the respective Conventions. Requests for the service of documents, the taking of evidence or the execution of any other judicial act may also be addressed to:

The Federal Justice and Police Department  
Federal Office of Justice  
International Legal Assistance Division  
Bundesrain 20  
CH-3003 Bern  
Switzerland

Phone: 011-41-31-322-11 20  
Fax: 011-41-31-322-5380  
URL:

[http://www.bj.admin.ch/content/bj/de/home/themen/sicherheit/internationale\\_rechthilfe.html](http://www.bj.admin.ch/content/bj/de/home/themen/sicherheit/internationale_rechthilfe.html)

This Office will provide the competent Swiss authorities with the request. Transmission of civil requests through the channels of the Federal Office of Justice might be considered as a subsidiary way of transmission. The office will forward the requests for service to the Central Authority in the appropriate Canton.

One may also send one's request for service or evidence under the Hague Conventions directly to the Central Authority for the appropriate Canton. The list below provides the Canton, official language of the Canton, address and telephone number.

## Authorized Swiss Central Authorities for Each Canton

<b>Canton</b>	<b>Official Language</b> (G=German) (F=French) (I=Italian)	<b>Address</b>	<b>Telephone Number</b>
Appenzell Ausserrhoden	G	Kantonsgericht Appenzell A.Rh., 9043 Trogen	011-41-71-343-6399
Appenzell Innerrhoden	G	Kantonsgericht Appenzell I.Rh., 9050 Appenzell	011-41-71-788-9551
Aargau	G	Obergericht des Kantons Aargau, 5000 Aarau	011-41-62-835-3850
Basel-Landschaft	G	Obergericht des Kantons Basel- Landschaft, 4410 Liestal	011-41-61-925-5796
Basel-Stadt	G	Appellationsgericht Basel-Stadt, 4051 Basel	011-41-61-267-8181
Bern	G/F	Justizdirektion des Kantons Bern, 3011 Bern	011-41-31-633-7676
Fribourg	F/G	Tribunal cantonal, 1700 Fribourg	011-41-26-305-3910
Genève	F	Parquet du Procureur general, 1211 Genève 3	011-41-22-319-2111
Glarus	G	Obergericht des Kantons Glarus, 8750 Glarus	011-41-55-645-2525
Graubünden	G	Justiz-, Polizei- und Sanitätsdeparte- ment, Graubünden, 7000 Chur	011-41-81-257-2121
Jura	F	Département de Justice, 2800 Delémont	011-41-32-420-5111
Luzern	G	Obergericht des Kantons Luzern, 6003 Luzern	011-41-41-228-6261
Neuchâtel	F	Département de Justice, 2010 Neuchâtel	011-41-32-889-6160
Nidwalden	G	Kantonsgericht Nidwalden, 6370 Stans	011-41-41-618-7950
Obwalden	G	Kantonsgericht des Kantons Obwalden, 6060 Sarnen	011-41-41-666-6235
St. Gallen	G	Kantonsgericht St. Gallen, 9001 St. Gallen	011-41-71-229-3241
Schaffhausen	G	Obergericht des Kantons Schaffhausen, 8200 Schaffhausen	011-41-52-632-7422
Schwyz	G	Kantonsgericht Schwyz, 6430 Schwyz	011-41-41-819-1124
Solothurn	G	Obergericht des Kantons Solothurn, 4502 Solothurn	011-41-32-627-7324
Tessin	I	Tribunale di appello, 6901 Lugano	011-41-91-815-5111
Thurgau	G	Obergericht des Kantons Thurgau, 8500 Frauenfeld	011-41-52-724-1818
Uri	G	Gerichtskanzlei Uri, 6460 Altdorf	011-41-41-875-2244
Valais	F/G	Tribunal cantonal, 1950 Sion	011-41-27-606-5300

Vaud	F	Tribunal cantonal, 1014 Lausanne	011-41-21-316-1511
Zug	G	Obergericht des Kantons Zug, Rechts- hilfe, 6300 Zug	011-41-41-728-5250
Zürich	G	Obergericht des Kantons Zürich, Rechtshilfe, 8001 Zürich	011-41-1-257-9191

## B. CRIMINAL AND ADMINISTRATIVE MATTERS

### 1. THE TREATY IN CRIMINAL MATTERS

The American-Swiss Treaty on Mutual Assistance in Criminal Matters (27 UST 2019, TIAS No. 8302; SR/RS 0.351.933.6) entered into effect as of January 1, 1977. The Treaty covers all methods of gathering evidence such as, in particular, the production of documents and the taking of testimonies.

**Principle of dual criminality:** Switzerland is granting such assistance on the basis that the crime under investigation in the US must be an offence under Swiss law as well. This is the so called requirement of dual criminality. The rationale behind this principle is that the gathering of evidence for use in foreign proceedings is only possible if this would be equally possible in local proceedings.

**Lodging the Request:** A request to gather evidence in Switzerland may be made not only by prosecutors and courts but also on behalf of the defendant. The defense attorney, however, may not directly lodge such request to the US Department of Justice but much rather will have to file a motion to the US court. The court may then endorse the motion and forward it to the Department of Justice. Particular care should be taken that the request meets the specific information necessary under the Treaty (art. 29), such as, for instance:

- The name of the authority conducting the investigation.
- The subject matter and nature of the investigation.
- A description of the essential acts or omissions (summary of facts).
- An indication of the principal need of the information sought.
- Identifying data with respect to the person from whom information is sought.
- The particular procedure to be followed.
- Whether sworn or affirmed testimony is necessary.
- A description of the information sought.
- A description of the information to be produced.
- A description of the appropriate person to produce such information.

**Central Authorities:** Any requests by US investigators and courts are to be channeled through the US Central Authority, i.e.:

Department of Justice  
Criminal Division  
Office of International Affairs  
Washington, D.C. 20038 733

Phone: (202) 514-0000  
Fax: (202) 514-0080

The US Department of Justice will then pass on the request to the Swiss Central Authority, i.e.:

The Federal Justice and Police Department  
Federal Office of Justice  
International Legal Assistance Division  
Bundesrain 20  
CH-3003 Bern  
Switzerland

Phone: 011-41-31-322-11 20

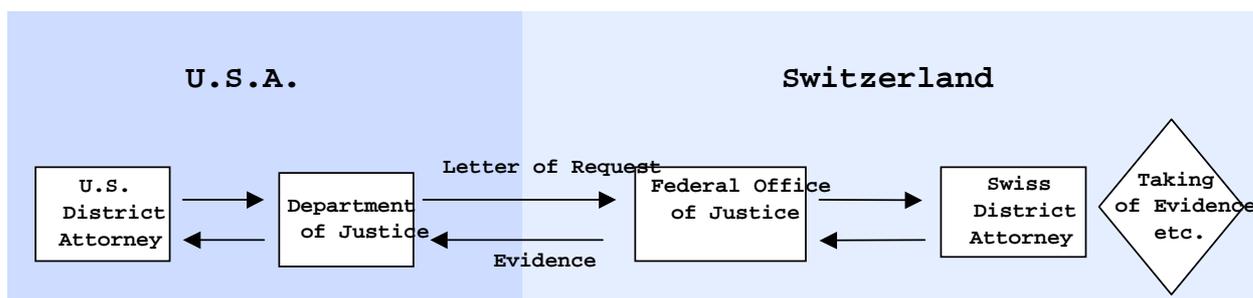
Fax: 011-41-31-322-5380

URL:

[http://www.bj.admin.ch/content/bj/de/home/themen/sicherheit/internationale\\_rechthilfe.html](http://www.bj.admin.ch/content/bj/de/home/themen/sicherheit/internationale_rechthilfe.html)

The Federal Office of Justice will examine whether the request meets the requirements of the Treaty, such as the principle of dual criminality and the specific details necessary. If appropriate it will then forward the request to the competent prosecutor who will gather the evidence under local rules of criminal procedure.

The documents establishing the execution of the letter of request will be returned by the same means that the original request was sent.



## 2. TAX MATTERS

**Administrative Assistance:** The Swiss-American Convention for the Avoidance of Double Taxation on Income entering into effect as of January 1, 1998/February 1, 1998 ([2] UST [1760], TIAS No [2326]; SR/RS 0.672.933.61) obliges Swiss tax authorities to furnish information to U.S. tax authorities for use in cases concerning tax fraud preventing falling under the Convention (see, above all, art. 26 of the Convention). Under an amendment of Ordinance implementing the Convention that came into effect on January 1, 2001, the Federal Tax Administration may impose compulsory measures on banks that do not furnish the information requested, it may search localities and seize bank records and other pieces of evidence. The Convention and the implementing Ordinance are only applicable when income tax is concerned.

On September 23, 2009, Switzerland and the US have signed a Protocol which contains important changes in the administrative assistance (see below: **Protocol of September 23, 2009**).

Requests for assistance may be sent directly to the relevant Swiss tax administration, i.e.:

Federal Tax Administration

Division for International Affairs

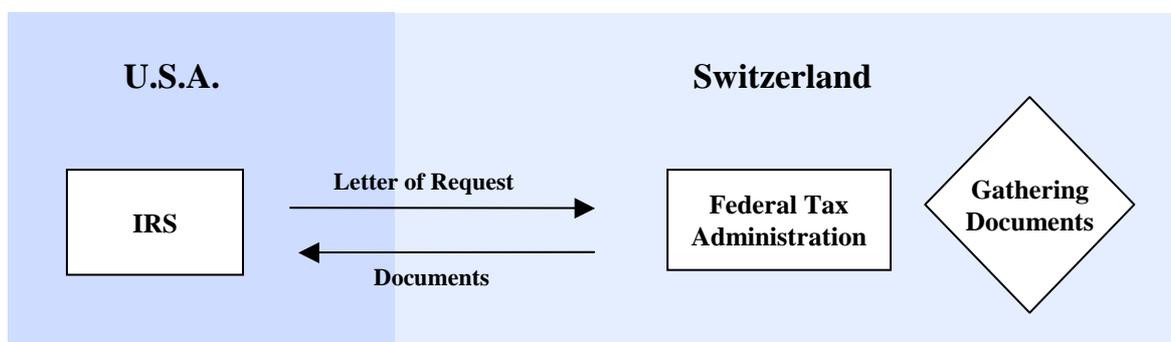
Eigerstrasse 65  
CH-3003 Bern  
Switzerland

Phone: 011-41-31-322-7129

Fax: 011-41-31-324-8371

URL: <http://www.estv.admin.ch/intsteuerrecht/aktuell/index.html?lang=de>

The documents establishing the execution of the letter of request will be returned by the same means that



the original request was sent.

**Tax Fraud:** Note should be taken that, according to Swiss law, no assistance is granted as a rule if the subject of the foreign proceedings is a tax offence. According to Swiss legislation, assistance in income tax matters can basically only be granted if the subject of the foreign proceedings is an offence which would be regarded in Switzerland as a tax fraud. According to Swiss law, there is tax fraud whenever the fraudulent evasion of tax was committed with the use of false, forged or untrue documents. The granting of assistance in such cases is subject to the condition that the description of the matter under investigation leaves no doubt that the elements of that offence under Swiss law are given. In particular, it should be evident that the element of malice exists, for example because the offender used false documents or induced another person to give false confirmations or make false statements in his favor.

**Judicial Assistance:** Requests for assistance in criminal tax matters may also be transmitted to the Federal Office of Justice. This Office may submit the request to the Federal Tax Administration for comments as to whether or not the facts outlined in the request would constitute tax fraud under Swiss law. Even though, in general, the American-Swiss Treaty on Mutual Assistance in Criminal Matters does not apply with respect to tax matters, based on art. 38 para. 1 of the Treaty, in certain cases criminal tax request may be carried out under domestic legislation. This would be the case if the request meets the requirements of tax fraud set up by art. 3 para. 3 of the Federal Act on International Mutual Assistance in Criminal Matters.

**Specialty:** In criminal matters, it is of great importance for Switzerland that the evidence gathered in Switzerland under the Swiss-US Treaty on Mutual Assistance in Criminal Matters is being used only for the purpose of the investigation for which assistance has been permitted. This principle of specialty is being made by the Federal Office of Justice when the evidence is transmitted to the US Department of Justice. The reservation includes wording that any direct or indirect use of the documents and the information in fiscal proceeding is excluded and any further use of the documents and the information is subject to explicit and previous authorization by the Federal Office of Justice.

The Swiss-US Convention for the Avoidance of Double Taxation on Income, on the other hand, contains a much broader definition of specialty: Information shall be disclosed to any persons or authorities involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention.

**Protocol of September 23, 2009:** On September 23, 2009, a Protocol amending the Swiss-US Convention for the Avoidance of Double Taxation on Income has been signed (<http://www.news.admin.ch/NSBSubscriber/message/attachments/16933.pdf>). The Protocol is not yet in force, but ready to be ratified.

The Protocol follows Article 26 (exchange of information) of the OECD Model Tax Convention. Unlike under the existing treaty, exchange of information is not restricted by tax fraud or the like. Bank information can be obtained from the date of signature of the Protocol, i.e. September 23, 2009. The exchange of information will only be granted upon request. It must be noted that the automatic or spontaneous exchange of information has been explicitly excluded. Fishing expeditions are not allowed. Therefore, the tax authorities of the requesting state are explicitly obliged to substantiate an information request with the following:

- Name and address of the tax payer (if possible also other information, such as date of birth, marital status, tax identification number).
- The time period for which the information is requested.
- Substantiation as to why the information is "foreseeably relevant".
- Name and address of the information holder (e.g. the name of the bank).
- Description of the information requested.

The Protocol also determines that administrative assistance procedures will be respected. This means, from a Swiss point of view, that client data information would be only transmitted to the IRS if the tax payer has exhausted all administrative procedural rules. For example, it will be possible to appeal against the decision of the Swiss Federal Tax Administration as to whether or not the information sought should be transmitted to abroad. Only if this appeal is rejected by the Federal Administrative Court, can information pass the Swiss frontier.

From a Swiss point of view, the question of stolen banking data is very sensitive. In 2009 a former employee of a private bank in Geneva stole client data that was handed over to the French authorities. Also, some stolen Swiss bank data that were contained in several CDs purchased by the German authorities were passed on to other countries. Based on such experiences, the Swiss parliament has decided that the Swiss Federal Council must declare to its treaty partners not to exchange information in case of stolen bank data.

On September 1, 2010, the Federal Council adopted the Administrative Assistance Ordinance, which governs the implementation of administrative assistance provisions in new or revised double taxation agreements. In the Swiss-US relation, this Ordinance will be applicable as soon as the Protocol amending the Swiss-US Tax Treaty enters into force.

### 3. TRADING IN SECURITIES

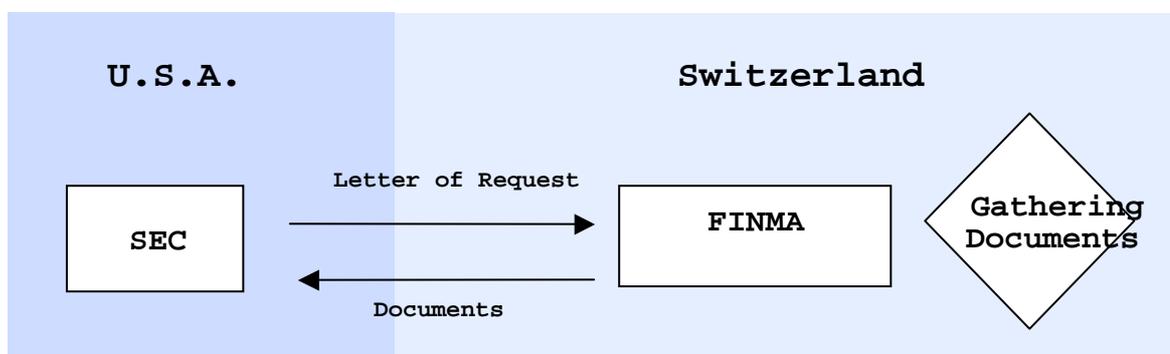
**Administrative Assistance:** Under the Swiss Federal Act on Stock Exchanges and Securities Trading (SESTA), art. 38, Swiss supervisory authorities may grant administrative assistance to foreign supervisory authorities if the following conditions are met:

- The request must be lodged by a foreign authority that is supervising stock exchanges and the trading in securities. The following foreign authorities have been recognized as supervisory authorities: The U.S. Securities and Exchange Commission (SEC), the British Securities and Investment Board and the Department of Trade and Industry, the German "Bundesaufsichtsamt über den Wertpapierhandel", the French "Commission des opérations de bourse", the Spanish "Comision National de Mercado de Valores", and the Italian "Comissione Nazionale per le societa e la Borsa" (CONSOB).
- The request for assistance has to be addressed to the Swiss supervisory authority, i.e.:

Swiss Financial Market Supervisory Authority FINMA  
Administrative Assistance  
Einsteinstrasse 2  
CH-3003 Bern  
Switzerland

Phone: 011-41-31-327 91 00  
Fax: 011-41-31-327 91 01  
URL: <http://www.finma.ch/e/finma/internationales/amtshilfe/pages/default.aspx>

The documents establishing the execution of the letter of request will be returned by the same means that the original request was sent.



- **No fishing expedition:** The request must be substantiated and specify the information sought and explain why such information is relevant for the foreign authority in supervising the stock exchanges and the trading in securities (no fishing expeditions). In the field of insider trading, administrative assistance is granted if the foreign authority sufficiently shows a "first suspicion", such as the trading in securities that increase in price and/or volume, followed by a restructuring of the company.
- **Principle of Confidentiality:** Administrative assistance is only granted if the foreign supervisory authority is bound by official or professional secrecy. Recently the Federal Tribunal, i.e. the highest court of Switzerland, decided that the SEC does not qualify as a foreign authority fulfilling the principle of confidentiality and thus cannot be granted administrative assistance (BGE/ATF 126 II 126 et seq.). The decision was primarily a result of the following written statement by the SEC:

*"When the SEC files an enforcement action, the names of defendants and the other information contained in the complaint or amended complaint become part of the public record and therefore are available to any interested party. In addition, it is the SEC's practice to issue a litigation release, and such releases are available on the SEC website."*

On December 20, 2001 the Federal Tribunal reconfirmed that the conditions for granting administrative assistance to the SEC under art. 30 SESTA were not met for two reasons: (1) The SEC cannot

itself impose sanctions against investors which are not subject to its supervision, rather it has to file a law suit in a civil court. Pursuant to the US Constitution such court procedure is public. The Federal Tribunal ruled that this public procedure violates both the principle of confidentiality and the principle of speciality since the publicly available information on the customer may be used by third parties for other purposes, especially in tax matters. (2) The SEC publishes the introduction of its court actions in so called litigation releases, thereby disclosing the name of the defendants and of the suspected violations, and posts the releases on its website. The Federal Tribunal ruled that this is a blatant violation of the principles of confidentiality and speciality, respectively, as the website can be accessed from all over the world, e.g. from the tax authorities of the customers' country of residence.

- **Specialty:** Administrative assistance is only granted if the foreign authority will use the information exclusively for the purpose of direct supervision of the stock exchanges and the trading in securities. However, information may be passed on to other supervisory authorities with the prior consent of the FINMA thereby ensuring that this authority will never lose control of the delivery of information to other foreign authorities (principle of the long hand). Information may be passed on to foreign criminal authorities only if the requirements of judicial assistance in criminal matters would be fulfilled (the Federal Banking Commission shall decide on this issue, in particular on the requirement of dual criminality, in consultation with the Federal Office of Justice). Transmission of information to foreign tax authorities is, in any event, not permissible. Recently, the Federal Tribunal ruled that the SEC does neither meet the principle of confidentiality (see above) nor the principle of speciality and the principle of the long hand (BGE/ATF 126 II 126 et seq.).

**Judicial Assistance:** Requests for assistance in cases relating to insider trading or market manipulation may also be transmitted through the channels of the American-Swiss Treaty on Mutual Assistance in Criminal Matters. Assistance under the Treaty in Criminal Matters is more complex and time consuming but may be indispensable if compulsory measures such as searching, confiscation or submission of documents, objects or assets are sought. The Swiss Federal Tribunal has a long standing practice pursuant to which administrative enquiries of the SEC qualify as criminal matters even though, in most cases, no criminal proceedings are initiated by the SEC (BGE/ATF 109 Ib 47). Note should be taken that under the Treaty in Criminal Matters (other than under SESTA) the Swiss authorities have a duty to grant assistance to the SEC.

#### 4. APPEAL PROCEDURE

After having collected the information requested by the U.S. authority, the Swiss authority (Federal Office of Justice, Federal Tax Administration, FINMA, as the case may be) will issue a formal decision that is subject to appeal to the Federal Tribunal. Generally, the bank and the account holder (but neither the beneficial owner nor the U.S. authority) can appeal against the decision and bring the matter before the Federal Tribunal. In tax matters, the person concerned, the information holder and the particularly affected third parties under the conditions of Article 48 of the Federal Act on Administrative Proceedings of 20 December 1968 are entitled to appeal.

In criminal matters, various motions are permissible, such as, for instance:

- The foreign enquiries do not qualify as a criminal matter.
- The crime under investigation in the U.S. is not an offence under Swiss law (no dual criminality).
- The request is not adequately specified but rather a fishing expedition.
- The request contains obvious errors, contradictions or omissions.
- The decision of the Federal Office of Justice is granting more information than actually sought by the U.S. authority.
- Information on persons who are manifestly not involved in the subject matter is at stake.

- Foreign procedural rules, such as cross examinations, are being sought by the U.S. authority.

In administrative matters, several motions are permissible, such as, for instance:

- The foreign authority is not bound by official or professional secrecy (violation of confidentiality principle).
- The information may be used for other purposes than the investigation for which assistance has been granted (violation of the specialty principle and the long hand principle).
- The request is not sufficiently specified but rather a fishing expedition.
- The information sought is not foreseeably relevant.
- The request is based on stolen data.

Any unofficial transfer of information outside the scope of criminal or administrative assistance is prohibited under the Swiss Penal Code, arts. 271 and 320, except for so-called "spontaneous assistance" which permits both the Federal Office of Justice and the Federal Banking Commission to spontaneously transfer information to foreign authorities even though there is no request for assistance (BGE/ATF 125 II 74 et seq.).

Acknowledgment: This outline has been authored by Dr. Peter C. Honegger, Attorney at Law, Zurich and Andreas Kolb, Attorney at Law, Zurich

*January 2011*