

WHATEVER HAPPENED TO SWISS [BANK] SECRECY?

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F Featuring ...



Louise Weihart (Bachelor of Arts, Legal) is the editor of CO. She is an award-winning journalist with some 20 years' experience in both journalism and editing. Weihart was awarded the Bell Prize for Analytical Writing as business writer for The Industry Standard. Over the years she has worked for a number of organisations including IDG Communications, DWR (now AJB Publishing), editor.com and Universal Magazines.



Aubrey Joachim (FCMA, MBA) has been financial manager of a large Australian utility, is currently the Australasian representative of CIMA's governing council (London) and has just been appointed to the executive committee. CIMA is the only UK body whose sole focus is on the training and qualifying of accountants in business. He has over 25 years of financial and management accounting experience with global conglomerates Unilever of the UK and US-based McDermott International Inc, and has worked in Sri Lanka, the Middle

East, London and Singapore prior to migrating to Australia in 1993. Joachim's experience includes all aspects of financial accounting, management accounting and financial management. He is involved in areas identifying opportunities for cost reduction within organisations.



Edge Zarrella is the global partner in charge of KPMG's information risk management group. In this role, Zarrella provides information technology consulting services to a variety of clients in the private and public sectors specialising in the financial, manufacturing and government areas. Zarrella has been involved in a large number of electronic commerce assignments, including EC organisation planning, implementation and security. He has worked in Adelaide, Sydney and Toronto in Canada. Australian-born Zarrella regularly tours the world's executive suites and is

passionate about creating corporate cultures that capitalise on IT.



Beatrice Stuber is a Swiss law consultant at Schweizer Kobras, a law firm specialising in German and Swiss law. Stuber was born in Switzerland and obtained two law degrees from the University of Berne, Switzerland, where she practiced commercial, corporate, tax, and inheritance law, before moving to Australia with her husband Vernon Stuber, who runs an Australian-owned and -made chocolate company. Stuber joined Schweizer Kobras in 2001. She re-qualified as a solicitor and was admitted as a legal practitioner of the Supreme Court of NSW in December

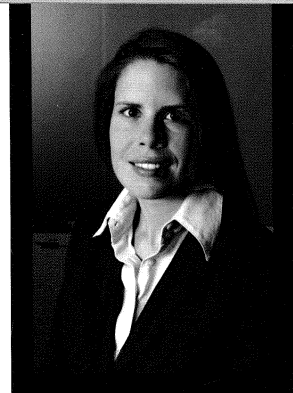
2003. Stuber's areas of expertise include Swiss and Australian commercial, tax, succession, debt recovery, and intellectual property law.



Zilla Efrat has 17 years' experience as a journalist, working for financial publications in Australia as well for South Africa's top newspapers. A former editor of Reed Publishing's Super Review magazine, she is currently a freelancer contributing to a number of well-known Australian publications, including CFO, Superfunds, Management Today, Insto, Australian Doctor and B&T. She also writes newsletters for super funds and edits the journals of the Finance and Treasury Association (Australia) and the Institute of Finance Professionals New Zealand (INFNZ).

The [in] famous

Swiss Bank Secrecy:



Beatrice Stuber

Photo: Schweizer Kobras

Just what is it?

Swiss bank accounts might have had a legendary notoriety for misuse, but those days are over, thanks to the recent introduction of new laws aimed at fighting criminal use of Swiss bank accounts. Just ask Rene Rivkin. Although the Swiss bank system has been criticised for the time it takes to obtain information, the Rivkin case is an example of the law being “successfully applied” and showing that the Swiss government will not tolerate the use of its banks for illegal activities. Beatrice Stuber* explains the new changes in the law and what it now means for people who misuse these bank accounts.

Switzerland has been attacked on many occasions for its bank secrecy. It earned this reputation in part because the ‘bank secrecy’ sometimes led to the illegal use of accounts for money laundering purposes or hiding monies gained from illegal activities, such as drug and arms trafficking or suspected tax fraud.

There’s no doubt that Swiss bank secrecy is one of the strictest in the world and is several centuries old. The reason for the Swiss’ introduction of ‘Swiss bank secrecy’ may lie, among other reasons, in the Swiss having a liberal approach to the confederation and placing a high value on privacy. Swiss bank secrecy means that Swiss bankers are obliged to keep all information regarding Swiss bank accounts strictly confidential. The bank secrecy is regulated by both civil and criminal law. But – beware – violation of Swiss bank secrecy can lead to civil and criminal liabilities.

Switzerland has reacted to the

negative connotations of its privacy policy by introducing several laws to fight criminal use of Swiss bank accounts and lifting the bank secrecy where necessary. The Rene Rivkin & Co case was very good for Switzerland and its reputation because it seems that the Swiss authorities fully complied with the requests made by the Australian authorities and that the Australian authorities are pleased with the documents already received from Switzerland and further deliveries promised by the Swiss. As a Swiss citizen, it is good to see that the legislation is successful and contributes to a better reputation of Swiss banks. I think we showed the world that people can no longer hide money in Swiss bank accounts.

The most important new legislations to combat the ill use of Swiss bank accounts are the Swiss Criminal Code, the Money Laundering Act and the Banking Act. They impose an obligation on all Swiss banks to ask questions about the source of

the money and the identity of the (beneficial) account holder. So, it is no longer possible for people to just walk into a Swiss bank with a suitcase full of cash. The banker now has to ask a list of questions to satisfy him/herself that the source of the money is legal and that he/she knows exactly who is entitled to the money. If there are any doubts about either, he/she has to immediately inform the bank’s supervising body.

The new legislation aims to prevent criminal acts like money laundering, insider trading and tax fraud. It is important to note that the Swiss legislation makes a distinction between tax fraud and tax avoidance. Tax avoidance is unlawful, but not a criminal act under Swiss law. Therefore, the Swiss authorities will not assist overseas authorities regarding simple tax avoidance cases. As a general rule, it is the individual’s duty to pay income tax and assets tax in Switzerland or other countries, but it is not the bank’s duty to ensure that all customers pay

their taxes (not taking into account the role of the withholding tax on all income). Banks only have to disclose confidential information if it seems that an individual has committed tax fraud (and not just tax avoidance) or other criminal acts, such as insider trading.

As specialists of Swiss law in Australia, Schweizer Kobras has many clients who enquire about how to open a Swiss bank account. There are many misconceptions about opening a Swiss bank account. For example, it is not easier or more secret than opening an account in Germany or Austria; or even for a Swiss person to open up a bank account in Australia. And the Swiss withholding tax on the income of monies in such bank accounts amounts to 35 percent, which is much higher than the withholding tax on the income of monies kept by foreigners in Australian accounts.

The bank secrecy is based on the contractual commitment made by the banker to the client to keep all information about the client's situation confidential. There is a so-called duty of confidence between banker and client. By breaking this duty, the banker violates its obligation and may be subject to civil action for damages by the client.

The Swiss Criminal Code also protects bank secrecy by making the disclosure of confidential business information and the breach of occupational confidentiality a criminal offence. Punishments range from monetary fines to imprisonment.

The Banking Act 1934 considers the banker's duty of confidence as a professional duty – a violation of which must be punished by criminal law. A banker who breaches his/her duty towards his/her client is also punishable by fine or imprisonment. The obligation to maintain bank secrecy is unlimited in time. In other words, it is still valid after the closure of a Swiss bank account. However, bank secrecy is not an obstacle in the fight against crime!

The circumstances in which Swiss bank secrecy obligations can be lifted are strictly regulated by statutes. They can be lifted if criminal acts, such as drug trafficking, arms trade, tax fraud, insider trading, or money laundering take place, or in private matters such as inheritance claims and divorces (not very often as the plaintiff has to prove that an account exists or existed).

Money laundering, in particular, is a procedure to cover-up the illegal source of monies (such as monies stemming from drug trafficking, arms trade or corruption). Money laundering is not new. It is, in fact, as

old as criminality itself. Criminals have always had an interest in covering (illegal) tracks and in providing a plausible source for the proceeds of their crimes. But, in the past 30 years, the problem of money laundering activities has become more and more public because of the globalisation of organised crime and the explosive growth of drug trafficking.

The Swiss financial market place, like many other foreign financial market places, has often been used to hide such monies because of bank secrecy as well as its stability and quality of service. But, the Swiss legislative has reacted and incorporated the following measures for the fight against money laundering:

- * Provisions in the Swiss Criminal Code against money laundering and related criminal acts.

- * A 'code of due diligence', issued by the Swiss Bankers Association, subjecting Swiss banks to self-regulation rules. This agreement primarily concerns ethical issues and establishes a duty to identify the contracting party.

- * The Banking Act, which established an independent supervisory body called the Federal Banking Commission (FBC), which is in control, granting and withdrawing the authorisation to practice a banking activity. The FBC has also developed a 'policy on the prevention and fight against money laundering'.

- * The Money Laundering Act (Federal Act on the Prevention of Money Laundering in the Financial Sector, 'MLA') was enacted on 1 April 1998. According to the MLA, Swiss banks (or foreign banks trading in Switzerland) have organisational duties such as training of personnel and internal controls, and have policy duties such as verification of identity of the contracting partner and beneficial owner, and clarification of the economical background of a transaction.

If a banker has suspicions regarding the source of any monies, the contracting party and/or the beneficial owner of the account, then he/she must immediately inform the Federal Reporting Office for Money Laundering (which is attached to the Federal Office of Police). They then instigate the necessary proceedings and appoint a Swiss magistrate to examine the matter and perform a search. Such a magistrate has the power to conduct a surprise search, freeze a suspect's bank account and/or question the banker in charge.

When it comes to tax fraud in

particular, bank secrecy can also be lifted in cases of tax fraud (which constitutes a criminal act under Swiss law). However, Swiss law makes a distinction between tax fraud and simple tax evasion, such as non-disclosure of assets or under-reporting of income or assets). The latter is not considered to be a criminal offence, but merely an administrative delict, which can lead to civil punishment. Because tax evasion is not considered to be a criminal offence, Switzerland cannot grant administrative assistance to foreign countries regarding tax evasion, but only regarding tax fraud and other criminal acts such as insider trading.


This is an idiosyncrasy of Swiss law, which has often led to misunderstandings and a misconception of the Swiss readiness and willingness to fight criminal acts and to assist foreign governments in such a fight. It is interesting to note that INTERPOL (International Criminal Police Organisation) is based on the same principle and only starts an investigation if actual fraud is involved.

Switzerland's fight against organised crime on an international level involves:

- * INTERPOL: Switzerland is a member of INTERPOL and therefore participates in the exchange of information between police authorities.

- * The Basle Committee on Banking Supervision, which created the first international code of conduct for banks with the aim of preventing the misuse of Swiss banks for money laundering purposes. Switzerland played an active part in concluding the Declaration of the Basle Caltan on Banking Supervision in 1988.

- * The Financial Action Task Force on Money Laundering (FATF): This is an inter-governmental body set up in 1989 in Paris and open to most members of the OECD. Switzerland is a member. FATF implements recommendations on how to fight money laundering activities, which all members are encouraged to adopt.

- * Treaty between Australia and Switzerland on Mutual Assistance in Criminal Matters dated 25 November 1991: This treaty provides for extensive cooperation in fighting criminal acts between Australia and Switzerland. 

*** Beatrice Stuber is a solicitor and Swiss law consultant of legal firm Schweizer Kobras, and the confidential solicitor to the Swiss Embassy and Consulates in Australia.**