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Client Alert
News Flash

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US Allows Swiss Banks With Undisclosed Accounts To Wipe the Slate Clean

United States Department of Justice issues further information on amnesty program for Swiss banks, including details on the selection of an Independent Examiner.

On November 5, 2013, United States Department of Justice (DOJ) issued a statement strongly encouraging Swiss banks to participate in its *Program for Non-Prosecution or Non-Target Letters for Swiss Banks* and released additional information for Swiss banks and their legal advisers about the Program. The DOJ also issued a stern warning to Swiss banks, cautioning "those [Swiss banks] that have criminal exposure but fail to come forward or participate but are not fully forthcoming do so at considerable risk." The deadline for submitting a letter of intent to participate in the Program is December 31, 2013 for so-called Category 2 banks (banks that believe they have violated US law in connection with undeclared US-related accounts). Eligible Swiss banks should take immediate action to evaluate whether they have committed US tax-related or monetary transaction offenses and, if appropriate, submit a letter of intent to participate in the Program as soon as possible.

Responsibilities of Independent Examiner

The November 5th news release clarifies the process for submitting letters of intent and describes the qualifications and role of a participating bank's "Independent Examiner" under the Program. The DOJ noted "the key issue for a bank in selecting an Independent Examiner is to select one who has the ability to verify and report on the elements required under the Program for that bank… The bank should ensure that an Independent Examiner is not merely qualified, but also competent and capable of meeting his or her responsibilities under the Program for that particular bank." It is critical that banks participating in the Program carefully select an Independent Examiner who can both present a neutral, accurate and credible analysis of the bank's activities with respect to US accountholders and identify US tax-related and monetary transaction offenses.

Banks should select an Independent Examiner who has substantial experience identifying and evaluating potential criminal conduct by the bank and its US account holders under US tax laws. Banks that participate in the Program, but fail to identify or accurately describe US tax-related offenses to DOJ, could be disqualified and ultimately prosecuted. The November 5th news release warns that "if the bank has hidden or misrepresented its activities to obtain a non-target letter [under the Program], it is exposed to increased criminal liability." Banks should expect that the DOJ will compare the information submitted by the bank with the treasure trove of documents and information obtained by the US government through prior voluntary disclosures by the bank's US account holders and other investigations. Thus, the Independent Examiner must be capable of ensuring that the bank's submission to DOJ is accurate and complete in every respect.

Significantly, the DOJ explained that, in the context of the Program, the bank's Independent Examiner will not be acting as a representative, agent or attorney for the bank. The Independent Examiner's communications with the bank will not be protected from disclosure to the DOJ or other third parties under the attorney-client or other privileges. Participating Swiss banks should thus engage *separate* legal counsel (a) to provide legal advice to the bank in a privileged context and (b) to serve as the Independent Examiner. Senior DOJ officials have stated that Independent Examiners who are not qualified to identify US tax noncompliance, lack independence or have a conflict of interest will be rejected, which could lead to the bank being disqualified from the Program.

Participating banks should anticipate that all communications with its Independent Examiner may ultimately be disclosed to the DOJ. Likewise, the DOJ may require the Independent Examiner to produce any documents he or she receives from the bank. Therefore, the bank's Independent Examiner should not be involved in the bank's deliberative process to participate in the Program, or have previously advised the bank on any other sensitive legal matters that may be at issue in the Program. However, once a bank applies to participate, it must ensure that its Independent Examiner is provided with unfettered access to accurate and complete information regarding the bank's potential US tax-related or monetary transaction offenses. DOJ's November 5th statement clarifies that the Tax Division expects participating banks will "cooperate fully and 'come clean' to obtain the protection that is offered under the Program." DOJ and the banks should expect that a bank's Independent Examiner will play a crucial role in the process.

DOJ also cautioned in its November 5th release that banks that incorrectly determine that they qualify for the Program's Category 3 (banks that have not violated any US tax laws) and subsequently identify noncompliance with US tax laws will be approved to participate in the Program under Category 2 "only in extraordinary circumstances." On the other hand, the statement explains that if a bank submits a timely letter of intent under Category 2, and later determines that it qualifies under Category 3 or 4 (described in further detail below), that bank will be permitted to withdraw its original letter of intent, as long as that bank describes why it initially believed it may have committed US tax-related offenses. The DOJ's newly provided information also clarifies that there is no *de minimis* exception "anywhere in the program," and notes that the Program "does not allow a bank that has committed tax-related or monetary transaction offenses to qualify" under Category 4. Consequently, banks that are uncertain whether they have committed US tax-related or monetary transaction offenses should strongly consider submitting a letter of intent by the December 31, 2013 Category 2 deadline, while they continue to evaluate their compliance with US tax laws.

Background Regarding Swiss Bank Amnesty Program

On August 29, 2013, the DOJ announced a path forward for Swiss banks that are facing the prospect of criminal prosecution in the United States. To avoid that consequence, Swiss banks have been offered a brief opportunity to participate in an amnesty program that resembles the US Internal Revenue Service's (IRS) successful Offshore Voluntary Disclosure Initiative (OVDI).

Importantly, this Program is likely to serve as a template for the DOJ in other jurisdictions; thus, non-Swiss banking institutions confronting similar issues should also seriously consider conferring with US tax counsel regarding the opportunity to resolve these issues with the DOJ. Justice Department assistant attorney general Kathryn Keneally described the DOJ Program "as a way to follow the money for account holders who chose to move their money to other jurisdictions." Ms. Keneally went on to say, "This will let us know where the money went and where to look next."

DOJ Program is the Culmination of Years of Challenges to Swiss Bank Secrecy

Prior efforts to achieve a global resolution between the US and Switzerland with respect to undisclosed accounts held by US persons have been frustrated by the Swiss Parliament and Swiss courts, which have previously rejected measures to allow Swiss banks to make disclosures with respect to suspected US tax evaders. Moreover, the US Senate failed to ratify a 2009 protocol that would have facilitated Swiss banks handing over data on suspected tax cheats. As reflected in the timeline below, this logjam has led to investigations, prosecutions, and increasingly harsh treatment of individuals and institutions determined not to be in compliance with US law.

- February 2009 — UBS entered into a deferred prosecution agreement and paid $780 million to the US government
- April 2010 — Seven UBS clients were charged with hiding over $100 million in secret accounts
- July 2011 — A Swiss financial advisor was indicted in the US for conspiring to hide over $184 million in Swiss accounts on behalf of US depositors
- January 2013 — Swiss bank Wegelin & Co., subsequent to the US's seizure of US-domiciled correspondent accounts, pleaded guilty to felony tax charges and eventually ceased business operations
- April 2013 — A federal district court authorized the IRS to issue a "John Doe" summons seeking information about unidentified US taxpayers with undeclared accounts at CIBC FirstCaribbean International Bank
- May–June 2013 — The Swiss Parliament rejected a bill that would have allowed Swiss banks to disclose additional information to the US government
- September 2013 — The Swiss bankers association issued an apology for actions by Swiss banks that helped individuals evade tax. The apology, issued shortly after the announcement of the DOJ Program, signalled interest in the Program.

The DOJ's Program provides a relatively short period in which a bank must notify the DOJ of its intention to participate and within which it must gather and produce significant amounts of data and agree to cooperate with its Independent Examiner, disclose information about other banks and advisers, and pay a substantial penalty. Failure to comply with the terms of the program brings with it the material risk of criminal prosecution.

DOJ Program Requires Urgent Analysis and Action

The Program requires careful consideration of US and Swiss laws and contemplates undertaking a considerable effort within an abbreviated period. The key terms of the Program include:

- The Program divides banks into several categories, the most pertinent being:
  - Banks that believe they may have violated US law in connection with undeclared US-related accounts and wish to avoid US criminal prosecution and secure a non-prosecution agreement (NPA), called "Category 2."
  - Banks that do not believe they have violated US law but wish to avoid US criminal investigation and secure a "non-target letter," classified as "Category 3."
  - Banks that satisfy certain criteria for deemed compliance with the Foreign Account Tax Compliance Act (FATCA) (*i.e.*, those that have a local client base) and wish to secure a non-target letter, known as "Category 4."

- For banks that believe they may have violated US law (Category 2 above), the deadline to submit a letter of intent to participate is December 31, 2013. In a statement issued on November 5, 2013, DOJ noted that letters of intent from banks wishing to participate under Category 3 and 4 will not be accepted prior to July 1, 2014.

- The letter of intent for Category 2 banks must include a plan for complying with the terms of the Program, the identity and qualifications of each bank's Independent Examiner, a statement regarding record retention, and a waiver of the statute of limitations from the date of the announcement of the Program until the NPA is issued. In its November 5th statement, DOJ encouraged banks to "submit their letters of intent as early as possible so that they may begin discussions with the Tax Division."

- For Category 2 banks, the Program requires detailed disclosures and the payment of penalties. In order to avoid prosecution and enter into a NPA, a participating bank must:

  - Provide information, including: (i) a description of how the bank's cross-border account business was structured, operated and supervised; (ii) names of individuals who oversaw the cross-border account business; (iii) the bank's method of attracting and servicing account holders; (iv) an in-person presentation to DOJ regarding the cross-border business; and (v) the total number and aggregate dollar value of cross-border accounts
  - Pay an escalating penalty of between 20 and 50 percent of the aggregate undisclosed account balances, depending upon when the accounts were opened
  - Present its records and Program submissions for review and verification by an Independent Examiner
  - Retain all relevant records for a period of 10 years from the termination date of any NPA
  - Close the cross-border accounts of recalcitrant account holders (*i.e.,* account holders who will not provide information regarding whether their accounts are held by US persons and, if so, the identifying information of such persons, or will not provide a waiver allowing their information to be disclosed to US authorities)

- In a statement issued on November 5, 2013, the DOJ explained that the Program requires a participating bank to provide specific information about each US-related account. The DOJ noted that aggregate data will not be sufficient.

- Swiss banks that do not believe they have violated US law (Category 3 above) or that are in compliance with FATCA (Category 4 above) must submit a letter of intent to participate after July 1, 2014 but before October 31, 2014. Qualifying banks in these categories can avoid criminal investigation and obtain a non-target letter by complying with a less onerous set of disclosures and obligations.

After a bank submits a letter of intent, it has 120 days to produce the required information in translated form and obtain the necessary verifications of an Independent Examiner. A one-time extension of 60 days is available upon a showing of good cause. DOJ's November 5th statement clarified that for purposes of the computation of the 120-day deadline, early submissions will be computed as if the letter of intent were submitted on December 31. Therefore, banks that submit early Letters of Intent will have additional time to prepare their final submissions. The Program's compressed timeline requires immediate action by banks wishing to participate.

The Program's Impact for Swiss Banks and US Individuals

The DOJ encouraged eligible Swiss banks with US operations to strongly consider participation in the Program. In addition, authorities have indicated that even those banks that confine their operations to Switzerland should consider participating, especially in light of the recent indictment of Wegelin & Co. — a Swiss bank that had no US-based operations or employees — and Wegelin's resulting guilty plea, forfeiture and payment of fines, including from US correspondent accounts.

A potential participant must consider Swiss as well as other foreign law implications because of the Program's requirements to disclose information about advisors, employees, customers, individuals and banks in other countries that received funds from accounts closed by the participating bank. The business and other risks associated with entering the Program should be weighed against the risk of prosecution for banks that choose not to participate in the Program.

DOJ has expressed the view that a participating bank's penalty exposure will be based on the maximum aggregate dollar value of all undisclosed US-related accounts. The Program allows, however, for reductions in the computation of the aggregate dollar value for previously disclosed accounts. Disclosure for this purpose means the account was previously declared by the US account holder or was disclosed by the US account holder after the Swiss bank provided notice of the OVDI, or was separately disclosed by the Swiss Bank to the IRS. As recently noted by the DOJ's Kathryn Keneally, "[b]anks won't get credit for people who did the right thing when the bank was not taking steps to make that happen." While other theories for penalty reduction may be available and should be explored, prior disclosure is the only mechanism identified by the Program materials for reducing the penalty's impact.

Swiss banks that are familiar with the IRS' OVDI and its complexity should consider that this Program is within the jurisdiction of the DOJ, not the IRS. Further, unlike the IRS' OVDI, only banks are eligible to participate in this Program, not individuals, and any data provided to the DOJ may be used for law enforcement in the US or as otherwise permitted by US law. The IRS and DOJ routinely share information and will be able to use previously gathered information from the OVDI to reconcile and verify that the submissions by participating Swiss banks are accurate and complete. DOJ has stressed that full cooperation and disclosure will be essential to successfully completing the new amnesty Program.

For those US taxpayers that have undeclared Swiss accounts, this latest effort by the DOJ is another significant signal that compliance with US law is unavoidable. When viewed in the context of the US government's multi-faceted crackdown on offshore tax evasion, including recent announcements of intergovernmental cooperation around the world, this Program reflects the continued retrenchment of bank secrecy laws. US Deputy Attorney General James Cole noted in connection with the US/Swiss joint announcement, "This program will provide us with additional information to prosecute those who used secret offshore bank accounts and those here and abroad who established and facilitated the use of such accounts." The IRS' offshore voluntary disclosure program and a related program for non-US residents are still open for US taxpayers wishing to return to tax compliance.

Banks Wishing to Participate Should Contact Legal Counsel Immediately

Given the complexity of the DOJ Program and the abbreviated timeframe, banks should engage legal counsel as soon as possible to discuss the benefits and risks of the amnesty program and to explore whether it may present a workable solution for resolving issues associated with undisclosed cross-border accounts. Banks entering the Program should also engage an Independent Examiner who will be perceived by DOJ as truly independent and capable of providing an accurate and credible analysis of the bank's activities with respect to US accountholders. It is critical that both the bank's legal counsel and the

bank's Independent Examiner have deep experience identifying and analyzing US tax-related and monetary transaction offenses.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult. Latham & Watkins' Tax Controversy Practice Group has the experience and global resources to advise Swiss banking clients on this amnesty program and serve as an Independent Examiner.

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