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## It's Not Just the Swiss

**Banks far from Switzerland should know what institutions there disclose.**

### From the Experts

*Justin S. Weddle*

Financial institutions outside Switzerland may be tempted to think that the U.S. Department of Justice's focus and pressure on Swiss banks in recent years leaves them in the clear. And, indeed, the DOJ has had great success in targeting these institutions far from U.S. shores. It has levied monetary penalties exceeding \$3.3 billion to resolve criminal charges against two big Swiss banks, and has created a voluntary disclosure program that has so far attracted participation from more than 100.

But non-Swiss banks should also take heed. They would be well-advised to pay close attention to the information that the Swiss banks are disclosing because, in all likelihood, the Justice Department's aim is about to expand. And when it does, the department is likely to follow the flow of money from the Swiss banks to their non-Swiss counterparts.

All potential targets would be wise to begin preparing how they intend to respond.

#### **DOJ's Ramped-Up Enforcement**

The U.S. began cracking down on Swiss banks and bankers involved in facilitating U.S. tax evasion in 2008. These efforts have resulted in convictions of a number of indi-

viduals and institutions, including bankers, U.S. customers and even banks. By 2009, UBS had entered into a deferred prosecution agreement, admitted its participation in evading U.S. taxes and paid approximately \$780 million in financial penalties and restitution. Most recently, Credit Suisse pled guilty in May and agreed to pay a total of approximately \$2.6 billion to the DOJ and other regulators.

In the course of this effort, the department announced a "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks," in August 2013. The program is complicated, but in broad strokes it instituted a procedure for Swiss banks to obtain amnesty from prosecution. The price, however, is not cheap. It involves substantial fines that are calculated based on the high balances of U.S.-owned accounts. More important, participant banks must make extensive and detailed disclosures to the DOJ. The banks are not required to disclose the actual names of the beneficial owners of the disclosed accounts. But they have to reveal plenty of other data. Among other things, for each U.S. related account that was closed between Aug. 1, 2008, through 2014, section II.D.2(b)(vi) of the program

requires that banks disclose:

Information concerning the transfer of funds into and out of the account during the Applicable Period on a monthly basis, including (a) whether funds were deposited or withdrawn in cash; (b) whether funds were transferred through an intermediary (including, but not limited to, an asset manager, financial adviser, trustee, fiduciary, nominee, attorney, accountant or other third party functioning in a similar capacity) and the name and function of any such intermediary; (c) identification of any financial institution and domicile of any financial institution that transferred into or received funds from the account; and (d) any country to or from which funds were transferred.

The program requires that all participating banks be in a position to produce this information for the roughly six-year period no later than June 30, 2014. According to public statements by DOJ officials, more than 100 Swiss banks (approximately a third of all that were eligible) have elected to participate. The ineligible banks include those that were under criminal investigation as of Aug. 29, 2013. Media reports indicate that 14 banks were subject to this exclusion. Even

for excluded banks, substantial information has been disclosed, and more may be coming in the future as they resolve their investigations. For example, Credit Suisse's agreement expressly cross-references the program in defining the bank's required disclosures.

### **FATCA Disclosures Are Different**

An additional piece of the puzzle is, of course, the Foreign Account Tax Compliance Act (FATCA), which has forced the creation of a FATCA compliance structure at financial institutions worldwide. FATCA requires foreign financial institutions to disclose to the U.S. Internal Revenue Service information about their U.S. related accounts, or be subject to withholding on all U.S.-source income of 30 percent. FATCA went online July 1, 2014, and disclosures will begin in 2016.

These FATCA disclosures are different from those required of Swiss banks under the DOJ's program. First, FATCA disclosures will be massive—there are currently more than 80,000 registered foreign financial institutions, and each is required by FATCA to provide to the IRS the name, tax identification number, annual bank balance and gross receipts and withdrawals for all U.S.-related accounts. Second, the FATCA disclosures focus on the clients of the financial institutions, not the institutions themselves. In other words, the disclosures help the IRS identify Americans who should be reporting their overseas accounts and income, but they do not help identify foreign institutions that are holding those Americans' assets.

### **What Could Be in Store for Non-Swiss Institutions**

The detailed monthly in- and out-flow information that Swiss banks are prepared to provide in order to obtain amnesty will produce im-

mediate leads for further investigations. Indeed, shortly after the program was announced, Kathryn Keneally, then-assistant attorney general in charge of the Tax Division, said, "We see this as a way to follow the money for account holders who chose to move their money to other jurisdictions. ... This will let us know where the money went and where to look next." (Quoted in "ABA Meeting: U.S. Believes Swiss Bank Program Will Reveal Accounts in Other Jurisdictions," 2013 Tax Notes Today 185-8 [9/14/13].)

In other words, while the bulk of the attention to date has been focused on Switzerland, the completion of the program's nonprosecution agreements likely will provide an immediate means for the DOJ to pick its next targets elsewhere around the world. This is because a prosecutor on the receiving end of the Swiss bank disclosures can readily put the disclosures in a single database and sort the data to identify the non-Swiss financial institutions that are the biggest money-movers (either value-wise or frequency-wise) with these suspect Swiss accounts. Doing this is simple, predictable and likely to result in the immediate targeting of financial institutions that have sent or received money identified by Swiss banks.

So, what can financial institutions that may find themselves in the crosshairs do to prepare? A good place to start would be asking themselves the following questions:

#### **1. "What is the DOJ learning from Swiss banks about my financial institution?"**

It should be possible, with some effort, to reverse-engineer the information DOJ is receiving by compiling money flows that have traveled between your institution and Swiss banks over the period covered by the program (approximately 2008 to

the present). Cross-referencing those money flows with any available information suggesting that the account holders are U.S. persons should provide a good approximation of the information DOJ will be receiving. Financial institutions that are now FATCA-compliant are likely already tracking indications that accounts that are U.S.-related. Cross-referencing the money flows against these U.S. indicia provides an efficient way to perform this analysis.

#### **2. "What will our answer be when the DOJ asks whether these money flows reflect accounts that are complying with, or violating, U.S. tax laws?"**

If your institution's U.S. tax compliance systems are effective, there should be ready evidence that the financial institution is fully compliant with U.S. tax law and FATCA for the accounts involved in these money flows. If a review does not provide this evidence, your financial institution would be well-advised to seek immediate counsel to investigate and correct any issues, and to prepare for any contact from the DOJ. After all, if the Swiss banks' information can lead the DOJ to your institution's door, you don't want to let the knock take you by surprise.

*Justin S. Weddle, a former federal prosecutor in the Southern District of New York, is a partner in the white-collar defense and government investigations group at Brown Rudnick.*