

A Primer on DOJ's Swiss Bank Program

a. Background Information

From the outside looking in, it is easy to accuse those who are unfamiliar with the Department of Justice's Swiss Bank Program as living under a rock. But that is presumptuous when you are a tax attorney who is immersed in this work every day. Let's begin with some background information. The Swiss Bank Program was unveiled on August 29, 2013. It provides a path for Swiss banks to resolve potential criminal liabilities in the United States.

In order to participate, Swiss banks had to take the "bull by its horns" and notify the Department of Justice by December 31, 2013 that they had reason to believe that they had committed tax-related criminal crimes in connection with unreported U.S.-related accounts. In other words, they had to "eat crow." Banks already under criminal investigation for shady banking activities (along with any individuals who work for such banks) were deemed ineligible from participating in the program.

In order to be eligible for a non-prosecution agreement, banks must do the following:

- (1) Make a complete disclosure of their cross-border activities;
- (2) Provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest;
- (3) Cooperate in treaty requests for account information;
- (4) Provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed;
- (5) Agree to close accounts of accountholders who fail to come into compliance with U.S. reporting obligations; and
- (6) Pay appropriate penalties.

Why would a Swiss bank succumb to Uncle Sam's heavy-handed demands and enter into a non-prosecution agreement with the U.S. in the first place, especially in a country like Switzerland

where "bank secrecy" is as old as the age of time? There are a number of reasons, chief of which are:

(1) first, to avoid the risk of criminal prosecution; (2) second, to avoid the exorbitant 30% withholding tax; and (3) third, to avoid having to close bank accounts of recalcitrant accountholders.

Foreign banks had to look no further than UBS and Wegelin & Co. for motivation. The U.S. government's treatment of these two banks leaves no doubt that it means business when it says that it will no longer tolerate the non-disclosure of U.S. taxpayer information.

Landlocked Switzerland doesn't get to experience the effects of hurricanes often. But its financial industry was landfall for "Hurricane FATCA," a category 5 storm. Swiss banking powerhouse UBS was the bank that the U.S. government took down first. In order to settle a corporate criminal action for failure to comply, UBS paid a staggering \$780 million dollar fine and agreed to turn over the names and information of 4,000 U.S. taxpayers. To prove its power to bankers who didn't comply after UBS, the DOJ's next target was Switzerland's oldest bank: Wegelin & Co.

It's not clear whether the DOJ was attempting to wound Wegelin, or if they were going for the kill. Nonetheless, the shot proved fatal. Wegelin paid \$74 million in fines, restitution and forfeitures, and ceased to do business to avoid criminal liability.

In August of 2013, Switzerland raised the white flag. That year, one hundred Swiss banks joined in the proposed amnesty deal with the Department of Justice.

b. List of foreign banks that trigger 50% miscellaneous offshore penalty

The number of foreign banks that have entered into deferred prosecution agreements with the United States is growing by leaps and bounds. As of December 28, 2015, noncompliant taxpayers with accounts at any of the banks listed below must pay a miscellaneous offshore penalty equal to 50% of the high value of their accounts:

- a. UBS AG;
- b. Credit Suisse AG, Credit Suisse Fides, and Clariden Leu Ltd.;
- c. Wegelin & Co.;
- d. Liechtensteinische Landesbank AG;
- e. Zurcher Kantonalbank;
- f. swisspartners Investment Network AG, swisspartners Wealth

Management AG, swisspartners Insurance Company SPC Ltd., and swisspartners Versicherung AG;

- g. CIBC FirstCaribbean International Bank Limited, its predecessors, subsidiaries, and affiliates;
- h. Stanford International Bank, Ltd., Stanford Group Company, and Stanford Trust Company, Ltd.;
- i. The Hong Kong and Shanghai Banking Corporation Limited in India (HSBC India);
- j. The Bank of N.T. Butterfield & Son Limited (also known as Butterfield Bank and Bank of Butterfield), its predecessors, subsidiaries, and affiliates;
- k. Sovereign Management & Legal, Ltd., its predecessors, subsidiaries, and affiliates (effective 12/19/14);
- l. Bank Leumi le-Israel B.M., The Bank Leumi le-Israel Trust Company Ltd, Bank Leumi (Luxembourg) S.A., Leumi Private Bank S.A., and Bank Leumi USA (effective 12/22/14);
- m. BSI SA (effective 3/30/15);
- n. Vadian Bank AG (effective 5/8/15);
- o. Finter Bank Zurich AG (effective 5/15/15);
- p. Societe Generale Private Banking (Lugano-Svizzera) SA (effective 5/28/15);
- q. MediBank AG (effective 5/28/15);
- r. LBBW (Schweiz) AG (effective 5/28/15);
- s. Scobag Privatbank AG (effective 5/28/15);
- t. Rothschild Bank AG (effective 6/3/15);

- u. Banca Credinvest SA (effective 6/3/15);
- v. Societe Generale Private Banking (Suisse) SA (effective 6/9/15);
- w. Berner Kantonalbank AG (effective 6/9/15);
- x. Bank Linth LLB AG (effective 6/19/15);
- y. Bank Sparhafen Zurich AG (effective 6/19/15);
- z. Ersparniskasse Schaffhausen AG (effective 6/26/15)
- aa. Privatbank Von Graffenried AG (effective 7/2/15);
- bb. Banque Pasche SA (effective 7/9/15);
- cc. ARVEST Privatbank AG (effective 7/9/15);
- dd. Mercantil Bank (Schweiz) AG (effective July 16, 2015);
- ee. Banque Cantonale Neuchâteloise (effective July 16, 2015);
- ff. Nidwaldner Kantonalbank (effective July 16, 2015);
- gg. SB Saanen Bank AG (effective 7/23/15);
- hh. Privatbank Bellerive AG (effective 7/23/15);
- ii. PKB Privatbank AG (effective 7/30/15);
- jj. Falcon Private Bank AG (effective 7/30/15);
- kk. Credito Privato Commerciale in liquidazione SA (effective 7/30/15);
- ll. Bank EKI Genossenschaft (effective 8/3/15);
- mm. Privatbank Reichmuth & Co. (effective 8/6/15);

- nn. Banque Cantonale du Jura SA (effective 8/6/15);
- oo. Banca Intermobiliare di Investimenti e Gestioni (Suisse) SA (effective 8/6/15);
- pp. bank zweiplus ag (effective 8/20/15);
- qq. Banca dello Stato del Cantone Ticino (effective 8/20/15);
- rr. Hypothekarbank Lenzburg AG (effective 8/27/15);
- ss. Schroder & Co. Bank AG (effective 9/3/15);
- tt. Valiant Bank AG (effective 9/10/15);
- uu. Bank La Roche & Co AG (effective 9/15/15);
- vv. Belize Bank International Limited, Belize Bank Limited, Belize Corporate Services Limited, their predecessors, subsidiaries, and affiliates (effective 9/16/15);
- ww. St. Galler Kantonalbank AG (effective 9/17/15);
- xx. E. Gutzwiller & Cie, Banquiers (effective 9/17/15);
- yy. Migros Bank AG (effective 9/25/15);
- zz. Graubundner Katonalbank (effective 9/25/15);
- aaa. BHF-Bank (Schweiz) AG (effective 10/1/15);
- bbb. Finacor SA (effective 10/6/15);
- ccc. Schaffhauser Kantonalbank (effective 10/8/15);
- ddd. BBVA Suiza S.A. (effective 10/16/15);
- eee. Piguet Galland & Cie SA (effective 10/23/15);
- fff. Luzerner Kantonalbank AG (effective 10/29/15);

- ggg. Habib Bank AG Zurich (effective 10/29/15);
- hhh. Banque Heritage SA (effective 10/29/15);
- iii. Hyposwiss Private Bank Genève S.A. (effective 10/29/15);
- jjj. Banque Bonhôte & Cie SA (effective 11/3/15);
- kkk. Banque Internationale a Luxembourg (Suisse) SA (effective 11/12/15);
- lll. Zuger Kantonalbank (effective 11/12/15);
- mmm. Standard Chartered Bank (Switzerland) SA, en liquidation (effective 11/13/15);
- nnn. Maerki Baumann & Co. AG (effective 11/17/15);
- ooo. BNP Paribas (Suisse) SA (effective 11/19/15);
- ppp. KBL (Switzerland) Ltd. (effective 11/19/15);
- qqq. Bank CIC (Switzerland) Ltd. (effective 11/19/15);
- rrr. Privatbank IHAG Zürich AG (effective 11/24/15);
- sss. Deutsche Bank (Suisse) SA (effective 11/24/15);
- ttt. EFG Bank AG (effective 12/3/15);
- uuu. EFG Bank European Financial Group SA, Geneva (effective 12/3/15);
- vvv. Aargauische Kantonalbank (effective 12/8/15);
- www. Cornèr Banca SA (effective 12/10/15);
- xxx. Bank Coop AG (effective 12/10/15);

- yyy. Crédit Agricole (Suisse) SA (effective 12/15/15);
- zzz. Dreyfus Sons & Co Ltd, Banquiers (effective 12/15/15);
- aaaa. Baumann & Cie, Banquiers (effective 12/15/15);
- bbbb. Bordier & Cie Switzerland (effective 12/17/15);
- cccc. PBZ Verwaltungs AG (effective 12/17/15);
- dddd. PostFinance AG (effective 12/17/15);
- eeee. Edmond de Rothschild (Suisse) SA (effective 12/18/15);
- ffff. Edmond de Rothschild (Lugano) SA (effective 12/18/15);
- gggg. Bank J. Safra Sarasin AG (effective 12/23/15);
- hhhh. Coutts & Co Ltd (effective 12/23/15);
- iiii. Gonet & Cie (effective 12/23/15);
- jjjj. Banque Cantonal du Valais (effective 12/23/15);
- kkkk. Banque Cantonale Vaudoise (effective 12/23/15).

What does this mean for U.S. taxpayers with unreported accounts at these financial institutions? Such taxpayers are facing pressure on two fronts: from their bank and from their government. With respect to the former, banks have begun sending their U.S. accountholders letters reminding them of their U.S. tax and disclosure obligations and urging them to come into compliance. Sometimes, these letters are couched in terms of a request to complete a W-8 or W-9 and return it to the bank by a fixed date.

Contrary to popular belief, the fact that a taxpayer has an unreported account at a bank on this list does not automatically disqualify him from participating in the IRS Offshore Voluntary Disclosure Program (OVDP). However, it raises the price of admission dramatically – from 27.5% to a whopping 50%. Taxpayers who think that they can “talk their way” out of this conundrum will fair no better than the vain Jordan Belfort¹ during his rendez-vous with FBI agents in the epoch yacht scene. Very simply, the miscellaneous offshore penalty is *not* negotiable.

To the extent that the taxpayer has already submitted his OVDP letter and attachments and is now having second thoughts about forking over such a large chunk of change, the only way out of this quagmire is to “opt out” of the OVDP.

To eliminate any confusion, although a taxpayer with an unreported account at one of the banks mentioned above must pay a stiffer offshore penalty, this does not render such a taxpayer ineligible from participating in the Offshore Voluntary Disclosure Program.

However, such taxpayers should heed the following. Under the terms of a non-prosecution agreement, foreign banks must turn over the names and account information of their U.S. clients to the U.S. government. To the extent that a cooperating bank has already exchanged this information with the U.S. government and the U.S. government has identified an OVDP applicant as the owner of an unreported foreign account at that respective bank, any hope of participating in the Offshore Voluntary Disclosure Program may be all but lost.

If there is any doubt in your mind that the IRS will continue to play the role of Caesar when it comes to stomping out international tax evasion by rooting out those who evade offshore disclosure laws, look no further than the comments of Richard Weber, Chief for the IRS-Criminal Investigation (CI). These comments were made in a press release on the heels of four additional banks signing onto a NPA with the U.S. government:

“These four additional bank agreements signal a change in terrain for offshore banking. No longer is it safe to hide money offshore and expect that it will not be discovered. IRS CI Special Agents will continue to follow the money to find those who circumvent the offshore disclosure laws and hold them accountable.”

c. Swiss Banks Unite And Fire Back at the Department of Justice

In September of 2014, the DOJ released the terms of the amnesty agreement to participating Swiss banks. Shockingly, it appears that the DOJ may have attempted to slide a couple of extra provisions into the non-prosecution agreement, including:

- Cooperate fully with the DOJ, the IRS, and any other domestic or foreign law enforcement agency designated by the DOJ regarding all matters related to the NPA.
- Assist the DOJ or any designated domestic or foreign law enforcement agency in any investigation, prosecution, or civil proceeding arising from or related to the NPA.
- Provide testimony as needed to enable the U.S. to use the information and evidence

provided by the bank under the NPA.

- Provide the DOJ all requested information, documents, records, or other tangible evidence, not protected by legal privilege, regarding the covered conduct.
- To retain all records relating to its U.S. cross-border business for a period of 10 years from the NPA's termination date.
- The agreement also describes the circumstances under which the DOJ may determine that a bank has violated the NPA and may be prosecuted.

Seventy-three banks responded in a joint letter saying they would not sign the NPA as proposed. The banks' objections are fairly simple:

- a. Since when does the United States Department of Justice have the authority to make a foreign institution cooperate in investigations by other foreign governments?
- b. The fact that the NPA contains language basically saying the DOJ reserves the right to change its mind and prosecute anyway. So, is that really a non-prosecution agreement or a license for a fishing expedition that may lead to prosecution anyway?

Stay tuned. This is going to get interesting.

ⁱ "The Wolf of Wall Street"