

Latest Swiss Cross-Border Tax Investigation Reflects Wider US Enforcement Agenda

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Ryan D. Junck
Palo Alto
650.470.4641
ryan.junck@skadden.com

Sean P. Shecter
New York
212.735.3459
sean.shecter@skadden.com

* * *

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

525 University Avenue, Palo Alto, California 94301
Telephone: +1.650.470.4500

Four Times Square, New York, NY 10036
Telephone: +1.212.735.3000

WWW.SKADDEN.COM

Authorities in the U.S. continue to crack down on foreign financial institutions that have allegedly aided U.S. taxpayers in evading their tax obligations. On May 19, 2014, Credit Suisse AG pled guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service. Credit Suisse will pay a total of \$2.6 billion in fines in connection with the plea — \$1.8 billion to the Department of Justice, \$100 million to the Federal Reserve and \$715 million to the New York State Department of Financial Services (NYDFS). This is in addition to the \$196 million fine Credit Suisse paid to the Securities and Exchange Commission as part of a settlement in February 2014 for engaging in unregistered brokerage and investment advisory services.

The Credit Suisse plea comes nearly six years after UBS AG entered into a deferred prosecution agreement (DPA) with the DOJ in 2008, paying \$780 million in fines to the DOJ and SEC to resolve allegations that it had conspired with U.S. taxpayers to evade their tax obligations. In between these two actions against Switzerland's largest banks, U.S. law enforcement has pursued U.S. taxpayers with undeclared offshore accounts zealously, as well as the banks and financial advisors that purportedly aided them in establishing and maintaining such accounts. For example, as we previously discussed in *Insights*:¹

Since 2009, the DOJ has brought criminal charges against more than 35 banking professionals and nearly 90 U.S. account holders for violations concerning their offshore banking activities. More than 60 U.S. taxpayers and eight bankers and financial advisors have pled guilty, and 12 taxpayers have been convicted at trial. Recognizing the risk of prosecution, approximately 43,000 U.S. taxpayers have participated in the IRS's offshore voluntary disclosure program (OVDI) and paid over \$6 billion in back taxes and penalties. Most, if not all, of these individuals likely have provided potentially inculpatory evidence against their former banks, bankers and service providers.

In January 2013, Wegelin & Co., a Swiss private bank, pled guilty to felony tax charges and subsequently ceased operations after paying \$74 million in fines. Public reports have identified more than a dozen other Swiss banks under criminal investigation for facilitating tax evasion by U.S. taxpayers, and the DOJ has undertaken public actions in various other countries, including India, Israel, Luxembourg and the Cayman Islands.

More than 100 banks are reported to be participating in the DOJ's voluntary disclosure program for Swiss banks (Swiss Program). Generally speaking, the Swiss Program, announced in August 2013, provides Swiss banks that have reason to believe they may have committed a tax- or monetary-related offense under U.S. law with an opportunity to obtain a nonprosecution agreement in exchange for (i) paying a substantial fine based on the value of undeclared accounts that it maintained or opened after August 2008 (when the UBS DPA became public) and (ii) disclosing a significant amount of information about its historical activities and relationships with undeclared U.S. ac-

1 See "Government Enforcement: Aggressive Efforts Continue Around the Globe" (Jan. 16, 2014), available at <http://insights.skadden.com/>.

count holders. In its June 5, 2014, update to the Swiss Program, the DOJ stressed that it may authorize at any time a formal criminal investigation of any Swiss bank that did not participate in the Swiss Program or any Swiss bank that withdrew from, or failed to meet the requirements of, the program.

Looking Beyond Switzerland: What Banks Can Expect

The DOJ and IRS have repeatedly emphasized that their enforcement efforts extend beyond Switzerland, and that they plan to follow the trail of undeclared money around the world. Financial institutions in known private banking centers, including Hong Kong, Singapore, Dubai, Luxembourg, Monaco, Lebanon, Panama and elsewhere, should take such threats seriously since the authorities have and will continue to obtain substantial amounts of potentially incriminating evidence against financial institutions through the Swiss Program, the OVDI program, cooperating witnesses, whistleblowers and investigations of other banks. In addition, as part of the Foreign Account Tax Compliance Act, more than 77,000 foreign banks and other financial institutions have agreed to share information about U.S. account holders with the IRS.²

Banks that may have maintained undeclared accounts for U.S. taxpayers should heed these warnings and move quickly to evaluate their situations and take appropriate steps. Indeed, the DOJ made a point to claim in the Credit Suisse plea agreement that the bank failed to conduct a timely investigation, preserve relevant documents and interview potential witnesses, which the DOJ contended had the effect of encumbering its investigation.

Banks that become subject to an investigation should assume the DOJ will react aggressively when presented with evidence of wrongdoing, including by seeking substantial penalties, broad-based compliance reforms and (potentially) guilty pleas. The SEC, Federal Reserve and NYDFS also may play a role in future investigations of certain multinational banks, thereby setting the stage for even larger fines and penalties against such banks. It is not clear, however, whether such agencies will undertake any efforts — as they did with Credit Suisse — to limit the potential fallout of a criminal charge or guilty plea by, for example, seeking assurances from the Federal Reserve and NYDFS that neither will revoke a bank's charter, which would effectively prohibit a non-U.S. bank from operating in the United States. Less systematically important institutions may be forced to feel the full brunt of a criminal admission, especially as the DOJ, Federal Reserve and NYDFS continue their efforts to demonstrate that, in the view of a skeptical Congress and American public, no bank is “too big to jail.”

2 See “Financial Institutions Wrestle With FATCA Implementation,” available at <http://insights.skadden.com/>.