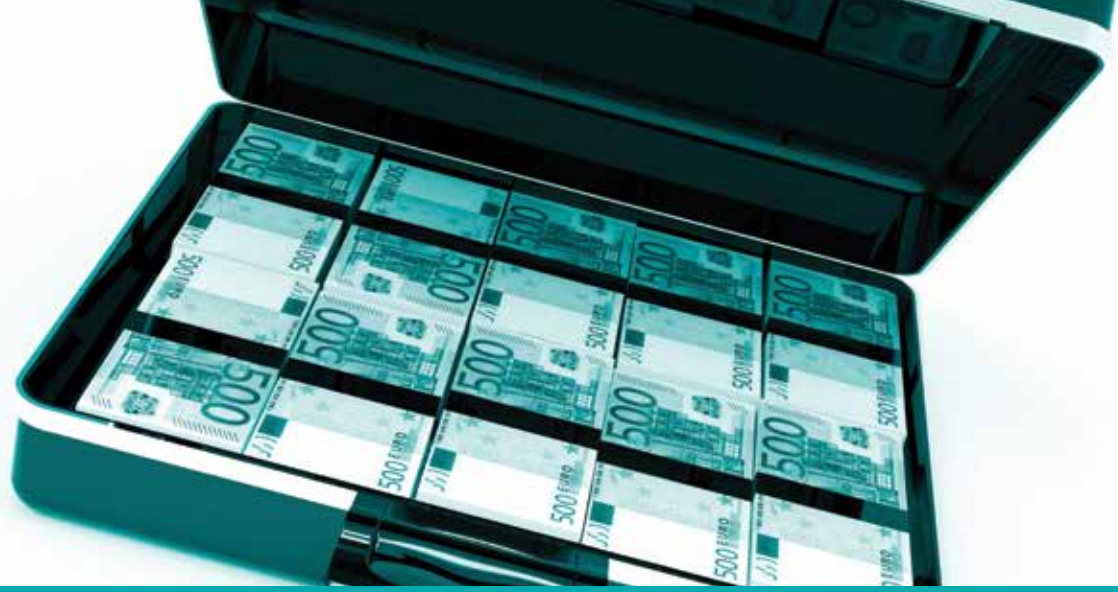

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Business Crime 2016

6th Edition

A practical cross-border insight into business crime

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Business Crime*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of business crime.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting business crime, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in business crime laws and regulations in 31 jurisdictions.

All chapters are written by leading business crime lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Gary DiBianco and Ryan Junck of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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No Place to Hide: the New Normal in Cross-Border Tax Enforcement

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In less than a decade the U.S. Department of Justice (DOJ) and Internal Revenue Service (IRS) have dramatically increased the risks associated with cross-border tax evasion by breaking down the once impenetrable walls of bank secrecy that had been erected by tax haven jurisdictions and relentlessly prosecuting purported tax cheats and the banks and related professionals that serviced them. Regulators from around the world have joined the fight; further pressuring tax havens to change their laws and banks to change their practices. More recently, extensive tax information sharing agreements, such as the U.S. Foreign Account Tax Compliance Act (FATCA), have come into vogue, accelerating a palpable shift to increased transparency in the once dark corners of private banking.

We think the next five years will be more of the same. Enforcement officials will seek to capitalise on the mountains of data that they have obtained from banks and taxpayers seeking to resolve investigations or clarify their tax status, and countries will increasingly join forces to "clean up" the international financial system and repatriate assets hidden offshore through new information sharing agreements and coordinated enforcement. To put it otherwise, the first and biggest dominos in the world of cross-border tax evasion have been knocked down, and only a lack of effort or political desire can stop the rest from falling.

U.S. Enforcement Efforts

1. Offshore Voluntary Disclosure Initiative

Beginning in 2012, the IRS has undertaken a series of Offshore Voluntary Disclosure Initiatives (OVDI), which generally allow U.S. taxpayers with undisclosed foreign assets to report such assets to the IRS without fear of criminal prosecution so long as the reporting taxpayer meets the terms of the programme. OVDI terms include paying back taxes and penalties and providing complete and truthful information regarding the taxpayer's tax situation. To date, over 50,000 U.S. taxpayers have entered into OVDI, leading to the collection of over $7 billion in back taxes, interest and penalties by the IRS.[1]

Beyond benefitting the U.S. Treasury, the data taxpayers have submitted through OVDI has provided the IRS and DOJ with a treasure trove of information on the operations of private banks and bankers around the world, especially in traditional private banking centres such as Switzerland. As discussed further below, such information has served — and will continue to serve — as a basis for investigations of private banks, asset managers and related professionals who U.S. authorities believe may have actively assisted U.S. taxpayers evade their tax obligations.

2. Criminal Enforcement

A. The Swiss Experience

While the U.S. government had tried other attempts to pierce the veil of Swiss banking secrecy,[2] much of its current success can be traced to its action against UBS AG, which should be recognised as the initial — and most important — salvo of the U.S. government's current efforts to root out cross-border tax evasion.

- In February 2009, after a long and hard fought investigation, UBS agreed to pay $580 million to the DOJ as part of a deferred prosecution agreement (DPA) for conspiring with U.S. taxpayers to defraud the United States through tax evasion. As part of that agreement, UBS was required to disclose the identities and account information of certain U.S. customers to the DOJ. In addition, UBS agreed to pay the U.S. Securities and Exchange Commission (SEC) $200 million as part of a settlement concerning unregistered broker-dealer and investment adviser activities in the U.S. that facilitated clients' maintenance of undeclared offshore accounts.[3] The SEC alleged that UBS conducted that cross-border business largely through client advisers located primarily in Switzerland, who were not associated with a registered broker-dealer or investment adviser. These client advisers travelled to the U.S. for the purpose of soliciting and communicating with U.S. clients, and used U.S. jurisdictional means (e.g., telephones, mail and email) to provide securities services to the clients. As it has with subsequent cases, the DOJ built its case by taking advantage of purported whistleblowers, cooperating witnesses and OVDI disclosures, in addition to the aggressive use of material witness warrants and John Doe summonses.

  Building on the UBS investigation, the DOJ has initiated criminal investigations against fifteen other Swiss banks for facilitating tax evasion by U.S. taxpayers. Three of these matters have already been resolved.
- In February 2012, Wegelin was indicted for conspiring with U.S. taxpayers and others in tax fraud. The bank was the first foreign bank to plead guilty to such charges in early 2013 and was ordered to pay a penalty amounting to $74 million.[4] The heavy sentence resulted in the bank having to shut its doors and cease operations.
- In May 2014, Credit Suisse AG pled guilty to a conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS. The bank paid $1.8 billion to the DOJ, $715 million to the New York State Department of Financial Services (NYDFS), $196 million to the SEC and $100 million to the Federal Reserve, and had to admit criminal liability as part of its guilty plea.[5] The financial penalty is almost four times higher than the $780 million handed out to UBS in 2009, which at least partly reflects

the post-financial crisis push by U.S. regulators to impose punitive penalties against financial institutions. Credit Suisse also agreed to disclose details of its cross-border activities and cooperate with treaty requests for account information aimed at facilitating the prosecution of such accountholders.

- In December 2014, Bank Leumi Group settled a DOJ investigation regarding its alleged efforts to help U.S. taxpayers evade U.S. taxes in its offices in Switzerland, Israel, Luxembourg and the United States. As part of the settlement, Leumi agreed to pay $270 million and sign a DPA predicated on tax-related conspiracy charges.[6] Leumi also agreed to disclose the names of over 1,500 U.S. clients to the DOJ and IRS and committed to continue to disclose information regarding its cross-border business.

A settlement with Julius Baer Group Ltd. is expected this year, and analysts have predicted that the bank's fine could exceed the $1 billion mark. The DOJ is also reportedly considering bringing criminal charges against HSBC as part of its investigation into whether the bank's Swiss subsidiary helped U.S. clients evade taxes.

The actions against UBS, Credit Suisse and other banks, helped convince approximately 100 Swiss banks to participate in the Swiss tax programme that was announced by the Swiss and U.S. governments in August 2013 (Swiss Program). In short, the Swiss Program provides a mechanism through which Swiss banks that believe they may have committed tax-related offences under U.S. law by servicing U.S. clients can obtain a non-prosecution agreement (NPA) or non-target letter. Participating banks must pay a fine based on the value of the undeclared accounts that they maintained or opened after August 2008, and disclose a significant amount of information about historical activities and relationships with undeclared U.S. accountholders. With respect to the latter obligation, banks must disclose how their cross-border business was structured, the names and functions of employees and service providers involved in the cross-border business, how undeclared accountholders were serviced, and the number and value of undeclared accounts that existed at various points in time after August 2008. Banks must also agree to shut down the accounts of any "recalcitrant" U.S. accountholders. Generally, these are accountholders who do not comply with U.S. reporting obligations or those who refuse to sign a waiver of rights under Swiss banking secrecy laws.

The Swiss Program calls for division of Swiss banks into the following "categories":

- Category 1 banks against which the DOJ has initiated a criminal investigation; these banks are not eligible to participate in the Program.
- Category 2 banks that have reason to believe that they may have committed a U.S. tax-related offence in their dealings with clients; these banks are eligible to obtain a NPA, albeit once they comply with information disclosure requirements and pay fines.
- Category 3 banks that have not committed any U.S. tax-related offence in their dealings with clients, and that can have this demonstrated by an independent third party; these banks are eligible to obtain a non-target letter.
- Category 4 banks that qualify as "local" financial institution under FATCA; these banks are so eligible to obtain a non-target letter.

The vast majority of Swiss banks participating in the Swiss Program chose to enter as a Category 2 bank. Such participating banks are obligated to provide additional facts that will further enable the DOJ's ongoing pursuit of U.S. taxpayers, financial institutions, bankers and external service providers (e.g., asset managers, attorneys, tax professionals and accountants) that the U.S. government believes may have committed tax-related offences. Although Swiss bank secrecy rules still prevent the direct disclosure of personal data concerning clients, or data sufficient to identify accountholders without their consent, banks must provide non-personalised data concerning "leavers" — undeclared accountholders who moved their account(s) to other banks after August 2008 — including the names of the institutions where any such funds were sent. Participating banks must also provide details about any other banks that transferred funds into undisclosed accounts. This windfall of information will undoubtedly lead to future prosecutions in the U.S. and abroad, as the DOJ and IRS have promised to "follow the money", including to tax havens beyond Switzerland. The aforementioned "leaver lists" will be particularly helpful to their cause, as they spell out where significant amounts of money from closed Swiss accounts were transferred at a time when the DOJ and IRS believes banks and bankers were on notice as to the potential legal implications of accepting undeclared funds.

In addition to "leaver lists", the voluminous data concerning U.S. accountholders gathered by the DOJ under the Swiss Program can be used to obtain U.S. accountholder names and other accountholder records from Swiss authorities pursuant to the U.S. – Switzerland Income Tax Treaty.[7] If participating banks have not been given client consent to disclose particular accountholder names, such treaty requests are the only way for the DOJ to obtain details of Americans who held accounts in Switzerland at any time after August 1, 2008 (even if those accounts have been closed). However, the DOJ has requested from participating banks data sufficient to make very targeted treaty requests and requires participating Swiss banks to cooperate with such requests, thus exponentially increasing their chance of success.

The Swiss government has agreed to encourage banks to participate in the Swiss Program, facilitate data transfers and speedily resolve all treaty requests. As of the time of 4 September 2015, 33 banks have signed NPAs with the DOJ and paid more than $300 million to resolve their cases. Swiss banks that chose not to participate in the Swiss Program may still face prosecution on tax-related charges, as may Swiss banks that withdrew from, or failed to meet the requirements of, the Swiss Program.

B. Prosecutions of Individuals

In addition to targeting Banks, the DOJ has brought criminal charges against more than 40 bankers and related service providers, and ten bankers, lawyers and financial advisers have pled guilty to tax related offences to date. Many of these individuals have cooperated with the DOJ's investigation in the hope of reducing their sentence, including by providing information on former employers, colleagues and clients. A myriad of cooperating witnesses have also provided similar information to the DOJ and IRS.

To date, the only blemish on the DOJ's ongoing efforts to root out cross-border tax evasion concerns the former global head of wealth management at UBS, who was acquitted by a Florida jury in November 2014 of tax conspiracy charges, notwithstanding UBS's admission in its 2009 DPA that it was party to tax evasion by U.S. taxpayers.[8] Despite this verdict, we do not expect many bankers facing charges to press their luck in a U.S. court. Most will continue to plead guilty in the hope of obtaining a reduced sentence or seek to remain in Switzerland or other jurisdictions beyond the reach of the DOJ.

C. Beyond Switzerland

While Switzerland represents the biggest target of DOJ's and IRS's current efforts against cross-border tax evasion given its rich private banking history and significant offshore bookings, it is not the only jurisdiction in the crosshairs, as investigations have been reported in the Caribbean, Panama, Israel, Luxembourg and India, among other places. For example, in December 2014, the DOJ announced

an investigation into a Panamanian legal and administrative service provider that is alleged to have assisted U.S. clients evade taxes through the establishment and operation of offshore entities and undeclared accounts.[9] More recently, in July 2015, the Wall Street Journal reported that the IRS has launched a probe into a Singaporean asset manager for allegedly accepting transfers from undeclared Swiss accounts closed by U.S. taxpayers.[10]

D. Other Regulators Get in on the Act

Not content to let DOJ and IRS garner all the headlines, other state and federal regulators have joined the enforcement party. In the UBS and Credit Suisse cases, for example, the SEC fined both institutions for unregistered brokerage and investment advisory services. Similarly, the Federal Reserve Board and NYDFS fined Credit Suisse $100 million and $715 million respectively, for unsafe and unsound banking practices connected to the bank's inadequate risk-management and compliance programme. Bank Leumi was also required to pay an additional $130 million fine to the NYDFS in relation to allegations that it helped U.S. taxpayers hide assets and income in unreported accounts in Israel and around the world. As part of the NYDFS settlement, Leumi agreed to terminate and ban certain employees who purportedly engaged in misconduct, install an independent monitor and to conduct a review of the bank's compliance programme.

The U.S. Congress has also been focused on cross-border tax evasion. A number of bills designed to crack down on purported tax havens have been put forward in Congress, and the Senate Permanent Subcommittee on Investigations has been actively involved in investigating Swiss banks and pushing the DOJ and IRS to take a more aggressive approach towards perceived wrongdoers. The Subcommittee conducted a number of hearings that involved taking testimony from senior banking officials and ultimately produced a report on offshore tax evasion.

Banks under investigation in the future should expect the involvement of multiple regulators, thereby setting the stage for a more complex investigation and more significant penalties.

International Enforcement Efforts

Recognising the political and financial benefits of aggressive enforcement, European regulators have begun pursuing their own investigations. The French, for example, have been quite active in this space:

- In July 2014, France commenced formal investigations against UBS AG for money laundering in connection to a wider tax evasion probe.[11] UBS faces the potential for significant penalties and a bond of EUR 1.1 billion to cover potential penalties was upheld by the highest French appeals court.
- JPMorgan Chase was placed under investigation in May 2015 for acting as an accessory to tax evasion, as part of a wider three-year probe into the investment firm Wendel.
- Following the leak of HSBC bank data by Hervé Falciani, an IT expert at HSBC's Swiss bank, France placed the bank under formal investigation. The leaked files purported to reveal that HSBC's Swiss private bank routinely allowed clients to withdraw cash, often in foreign currencies, marketed schemes likely to enable wealthy clients to avoid European taxes and allegedly colluded with some clients to conceal undeclared accounts from their domestic tax authorities. Falciani was arrested in Geneva in December 2008 but, after being let out on bail, fled to France with the files, where French authorities refused an extradition request, and proceeded to launch their own investigation into unlawful customer registration in France and complicity in laundering the proceeds of tax fraud. The French authorities have shared data from the leaked filed with authorities around the world.

The leaking of the Falciani files have led to arrests in Greece, Spain, Belgium, Argentina and the United States. In Brazil, authorities have launched an investigation into whether accounts included in the HSBC files were linked to the Petrobras corruption scandal and Mexican authorities are similarly reported to be reviewing the names for potential investigation targets. Indian authorities raided HSBC's Mumbai headquarters and are reportedly preparing to file a complaint against the bank for abetting tax evasion by operating Indian-related accounts in its Geneva branch.

Beyond the HSBC scandal, regulators outside of the U.S. are launching investigations into other private banking institutions and bankers. In November 2014, Israel arrested 14 individuals, including a senior UBS investment advisor, as part of an investigation into the holding of undisclosed UBS accounts by Israeli citizens. In February 2015, following a series of high profile tax scandals, Germany opened a probe into Coutts & Co for complicity in tax evasion.

Not content to simply bring the "stick" of enforcement, nations around the world have recognised the benefits of offering a "carrot" in the form of voluntary disclosure programmes that track the IRS's OVDI programme in spirit, if not in practice. To date, 47 governments, including the UK, South Africa, France, Belgium, Germany and Russia, have announced tax amnesty programmes, whereby taxpayers can disclose their undeclared offshore accounts in a manner similar to OVDI. The UK offshore disclosure programme has raised approximately £2 billion from 5,887 disclosures; Germany's voluntary disclosure programme was used by almost 40,000 taxpayers in 2014, raising €1.3 billion; and the French Finance Ministry expects its current crackdown on offshore income and amnesty programme to raise €2 billion in 2015.

Enhanced Cross-Border Cooperation

Since the 1990s, the Organization for Economic Cooperation and Development (OECD) has encouraged the exchange of information between tax authorities through information sharing agreements under bilateral tax treaties. Historically, these treaties required the exchange of information between two countries upon request, while permitting, but not requiring, the automatic exchange of information. Accordingly, until recently, in order to receive information about an individual taxpayer from a jurisdiction that restricted the exchange of information, the enforcement jurisdiction needed to know the taxpayer, the financial institution, and have a credible suspicion of tax evasion in order to obtain information on the taxpayer's purported offshore accounts. Moreover, until 2008, most tax haven countries had refused to sign bilateral tax treaties.

The enactment of FATCA in 2010 has proven to be a watershed moment for international information exchange policy and the prevention of tax evasion. Beginning in 2015, FATCA requires foreign financial institutions to automatically report to the IRS or their local tax authority information about financial accounts held by U.S. taxpayers (or by foreign entities in which U.S. taxpayers hold a substantial ownership interest) or face a 30% withholding tax on certain payments with respect to U.S. investments. The United States has entered into "inter-governmental agreements" with over 100 countries, which implement FATCA, and address any bank secrecy, data protection or other local restrictions that would otherwise prevent the disclosure of account information to the United States. Such agreements also provide for the automatic bilateral exchange of information between the two governments. Under FATCA, more than 77,000 foreign banks and other financial institutions have agreed to share information about U.S. accountholders with the IRS directly or with their local tax authorities, which will automatically exchange the information with the IRS.

The OECD has recently taken further steps to improve global cross border tax compliance by releasing the Common Reporting Standard (CRS).[12] The CRS is not law, but rather a set of global standards (based in large part on FATCA and its inter-governmental agreements) for the exchange of financial information by financial institutions with the tax authorities of the jurisdictions in which the institutions' customers are resident for tax purposes. The key difference between the CRS and FATCA is the multilateral nature of the CRS among countries other than the U.S., and thus its reach is potentially greater than the FATCA regime. Over 100 countries have publically pledged to adhere to these standards, with many formally committing to be early adopters in January 2016. On 9 December 2014, the EU's Economic and Financial Affairs Council adopted the Directive on Administrative Cooperation (DAC), requiring implementation of the CRS in all EU Member States by 31 December 2015. The tax authorities' exchange of information is set to begin by 30 September 2017.

Of further note are the agreements signed by the United Kingdom's Crown Dependencies and British Overseas Territories in early 2013 to automatically exchange information on taxpayers with the UK (known as "UK FATCA"). This is largely modelled on U.S. FATCA, but does not rely on levying back-up withholding tax on UK source payments. It is envisioned that UK FATCA will be replaced by CRS for 2016 and beyond.

Conclusion

Increased enforcement and information sharing agreements have had a measurable impact in curbing cross-border tax evasion during the past decade. Both trends seem unlikely to change in the near future as the snowball effects from increased transparency, data availability and information sharing make cross-border tax enforcement easier and cross-border tax evasion more costly and risky.

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12. The OECD is also near to completing a project intended to tackle base erosion and profit shifting (BEPS) by multinational enterprises, which includes certain recommendations reliant on the ability of tax administrations to obtain directly, or through information sharing, information from other jurisdictions on the revenue, profit and tax of multinational enterprises. In practice, it is likely that the implementation of CRS will enable such information exchange.

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The authors would like to acknowledge the assistance of their colleagues Caroline Wojtylak and Trevor Allen in the preparation of this chapter. Caroline is an associate in the Corporate Investigations Group in London, and regularly represents corporations in internal investigations and regulatory investigations and enforcement proceedings (including under the U.K. Bribery Act 2010 and the U.S. FCPA). Trevor is an associate in the Tax Group in New York, and advises clients on a wide range of U.S. and cross-border tax matters, including U.S. reporting and disclosure requirements for foreign financial assets. Caroline and Trevor currently represent the Firm's Swiss bank clients that are participating in the DOJ's programme for Swiss banks.

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