

Tax Evasion

Swiss Banks Under Pressure as Deadline Nears for DOJ Program to Find U.S. Accounts

The pressure on Swiss banks to turn over information on their U.S. clients to the Department of Justice is increasing as a Dec. 31 deadline nears for a program that lets the banks pay penalties and avoid prosecution, with many expected to participate, tax attorneys said.

“The Justice Department is putting pressure on these banks to turn in their clients, who still remain in the dark,” Jeffrey A. Neiman, a former assistant U.S. attorney now in private practice, told Bloomberg BNA Dec. 17. “If the banks don’t come in and comply, they’re going to be in hot water. If the customers don’t come in and the banks turn them in, they’re going to be dealing with some serious headaches.”

Announced by the DOJ in August, the program requires banks to disclose their cross-border activities and provide detailed information on accounts in which U.S. taxpayers have a direct or indirect interest. Participating banks would have to pay substantial penalties, but would avoid prosecution (169 DTR I-2, 8/30/13).

Combined with the U.S. government’s other efforts on multiple fronts to find taxpayers hiding accounts offshore, both those people and the banks could be in trouble if they don’t come in and make disclosures, attorneys said.

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KEVIN PACKMAN, PARTNER AT HOLLAND & KNIGHT LLP

Time Shrinking. “Time is quickly dwindling,” Kevin Packman, a partner at Holland & Knight LLP, told Bloomberg BNA Dec. 20. “If the individuals with those accounts don’t come in they’re going to get found out one way or another.”

Many U.S. taxpayers are now receiving letters from their Swiss banks that their information may be handed over to the Justice Department, practitioners said.

“Those folks are mostly in a state of shock,” Dennis Brager, a former IRS senior trial attorney who now heads Brager Tax Law Group APC in Los Angeles, said Dec. 16.

Neiman said taxpayers who think the banks are looking out for their interests are “fooling themselves. The reality is that it’s pretty clear that if you’re an American with an account in Switzerland, your information is going to be turned over somehow, somewhere.”

Practitioners said many banks are expected to participate in the program, which has a Dec. 31 deadline for financial institutions to tell the DOJ they plan to take part.

“The Swiss banks are paying attention and they’re very active,” Josh O. Ungerman, a partner with Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP in Dallas, told Bloomberg BNA Dec. 19. “There are many Swiss banks who are working very diligently. Many are grateful for the opportunity to address this issue with the IRS and obtain closure. U.S. taxpayers who once felt secure in their anonymity are having second thoughts.”

Ungerman chairs the Civil and Criminal Tax Penalties Committee of the American Bar Association Section of Taxation.

IRS Hunting Tax Cheats. Internal Revenue Service Deputy Commissioner (International) Michael Danilack said Dec. 13 that the IRS is closely monitoring the information that comes out of the program and will use it to pursue tax cheats (241 DTR G-10, 12/16/13).

Scott Michel, a member of Caplin & Drysdale, Chartered, said Dec. 19, “We expect that a number of Swiss banks will be submitting letters of intent in the coming days.” He said the DOJ’s Tax Division will be processing “some fairly complex submissions beginning next spring as banks move toward obtaining non-prosecution agreements.”

Banks are in the process of determining which category they fit into under the program, practitioners said.

At least 14 Swiss banks are under formal criminal investigation and the program isn’t available to them. They are classified as Category 1 banks under the Justice Department program. The 14 include such giants as Credit Suisse Group AG, Julius Baer Group Ltd., and Pictet & Cie.

Category 2 is generally for those banks that think they may have committed offenses related to taxes or

monetary transactions. Category 3 is for banks that don't believe they have committed any offenses.

Category 4 is for those banks that are "deemed compliant" with Switzerland's agreement to participate in the Foreign Account Tax Compliance Act. FATCA is U.S. legislation that requires foreign financial institutions to report their U.S.-owned accounts to the IRS or face, in some cases, a 30 percent withholding tax.

Swiss Scrutiny. Any developments in the process are being carefully scrutinized in Switzerland, according to Mark Matthews, a former chief of the IRS criminal investigations division and now a member of Caplin & Drysdale, Chartered.

"The DOJ program and each subsequent statement by DOJ officials has been closely followed by the Swiss banking and financial community, and it is clear that from the first announcement in August they have taken this offer very seriously," Matthews said.

Several practitioners interviewed by Bloomberg BNA said it isn't too late for taxpayers with Swiss accounts to go into the IRS's Offshore Voluntary Disclosure Initiative (OVDI), a program that allows individuals to share information about their offshore accounts in return for a set penalty structure and the chance to avoid criminal prosecution.

Taxpayers "need to think long and hard about whether they're going to keep sticking their heads in

the sand [and] just hoping this whole thing will go away," Brager said.

Taxpayers Coming Forward. Neiman said he has seen "a rather brisk uptick" in clients coming forward to participate in the program, even though he said it is inherently unfair because the same penalties may be faced by severe offenders and those who simply didn't understand their reporting responsibilities.

"Built into that unfairness is the golden ticket—no criminal prosecution," Neiman said.

Ungerman said the DOJ program for Swiss banks differs from the OVDI because it has different levels of penalties based on the seriousness of the bank's offense. "Banks appreciate that the agreement does provide for differentiation between different financial institutions and their circumstances," Ungerman said.

By contrast, the OVDI is "one size fits all," and the least culpable and the most culpable get the same penalty, he said.

Bryan Skarlatos, a partner at Kostelanetz & Fink LLP, said Dec. 18 that "Banks are determining what level of certainty they want from the DOJ in exchange for the costs and potential penalties of the program."

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