



For The Defense

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An Update Regarding The U.S. Government's Foreign Bank Account Enforcement Efforts

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More than 18 months have passed since Swiss banking giant UBS AG entered into a landmark deferred prosecution agreement with the United States government, paying \$780 million in penalties, providing the Internal Revenue Service with the names of nearly 300 U.S. taxpayers suspected of violating U.S. tax law by maintaining undeclared Swiss bank accounts, and admitting to helping U.S. taxpayers hide accounts from the IRS. The signing of the UBS agreement is not the end of the story, however. Indeed, the U.S. government's efforts to identify U.S. taxpayers with undisclosed foreign accounts have intensified and are extending far beyond UBS and far beyond Switzerland.

Background

It is important to note that maintaining an offshore bank account is not illegal. However, all U.S. citizens are required to disclose whether they maintain a foreign bank account by filing an annual reporting form (commonly known as the "FBAR" form) with the Treasury Department on June 30 of each year, as well as by checking off a box and reporting any interest or dividend income on their federal income tax returns. The failure to file the FBAR form and report income from the account can subject the taxpayer to criminal charges, including tax evasion, as well as substantial civil penalties. The civil penalty for a willful violation of the FBAR statute was increased in 2004 to \$100,000, or 50 percent of the highest balance in the account *for each year* that the FBAR form was not filed, whichever is higher.

On February 19, 2009, a day after entering into a deferred prosecution agreement with UBS, the U.S. Department of Justice commenced an action against the Swiss bank in federal court, seeking judicial enforcement of a civil "John Doe" summons

served upon UBS in July 2008. The lawsuit asked the court to order UBS to disclose the identities of 52,000 U.S. clients believed to maintain secret accounts at UBS. The Swiss government promptly intervened, and in August 2009 UBS and the Swiss government reached an agreement with the United States, under which the Justice Department agreed to withdraw its summons enforcement lawsuit in exchange for UBS turning over account information on 4,450 U.S. clients of UBS. A months-long diplomatic standoff followed, as the Swiss Parliament debated ratification of the agreement. As a result, the disclosure of account holders was essentially halted until June of this year.

At the same time the U.S. government was battling to gain access to the UBS account information, the IRS announced an offshore voluntary disclosure initiative, which encouraged U.S. taxpayers to make voluntary disclosures of secret foreign bank accounts in exchange for amnesty from criminal prosecution and a reduction in the usual FBAR reporting penalty to a one-time payment of no more than 20 percent of the highest account value over the past six years, plus taxes and tax penalties. Between the unveiling of the program in March 2009 and the deadline for participation on October 15, 2009, nearly 15,000 U.S. taxpayers stepped forward to disclose undeclared foreign accounts.

Where Things Stand Now—Voluntary Disclosures Remain a Viable Option to Avoid Criminal Prosecution

On June 17, 2010, following months of legal and diplomatic wrangling, the Swiss Parliament voted to approve the agreement between Switzerland and the United States, clearing the last obstacle to disclosure of UBS account information for U.S.

taxpayers. The transfer of the names of UBS account holders began soon thereafter, with information on nearly half of the accounts turned over by the end of August, and the turnover of information on the remaining accounts expected to be completed sometime in October 2010.

Although the offshore voluntary disclosure initiative unveiled in response to the UBS crackdown ended on October 15, 2009, U.S. taxpayers can still make voluntary disclosures to the IRS regarding undeclared foreign bank accounts, including accounts at UBS. Amnesty from criminal prosecution remains available, as long as individuals come forward before the IRS learns their identities by other means, with the difference now being that harsher civil penalties are likely to be imposed.

Meanwhile, the Department of Justice continues to bring criminal charges against select UBS accountholders, underscoring the importance of a prompt voluntary disclosure to the IRS. Most recently, sentences were handed down for two U.S. taxpayers charged in the Southern District of New York with filing false tax returns and related crimes for hiding their UBS accounts from the IRS. In the first, former UBS customer Federico Hernandez had pleaded guilty to five counts of filing false federal income tax returns. He admitted to hiding nearly \$8.8 million in Swiss accounts that he opened in the names of sham British Virgin Islands and Panama corporations and concealing his ownership of the accounts from the IRS. As part of his plea, Hernandez agreed to a \$4.4 million civil penalty. In the contested sentencing, prosecutors sought an 18-24 month prison term. Mr. Hernandez sought a three-month term, home confinement, and 500 hours of community service. On September 17, 2010, the district court sentenced Hernandez to one year in prison, to be followed by six months of home confinement.

A few days later, on September 21, 2010, the court sentenced Jules Robbins, an 84-year-old watch dealer, to twelve months of probation for hiding offshore accounts at UBS, which collectively contained almost \$42 million. As with Hernandez,

Robbins had pleaded guilty to five counts of filing false federal income tax returns. He admitted to setting up a sham Hong Kong corporation that he identified as the holder of the accounts and taking steps to conceal his interest in the accounts. In addition to probation, Robbins was ordered to pay a civil penalty of nearly \$21 million, an amount equal to one-half of the total balance in his UBS accounts.

What Does the Future Hold?

Although enforcement efforts involving UBS appear to be winding down, the government's scrutiny of undeclared foreign bank accounts is gaining momentum worldwide. Even as media attention has been focused primarily on UBS and its account holders, the IRS and Justice Department have long maintained that their interest extends beyond UBS. Reports suggest that other Swiss banks are cooperating in the investigation. It has also been widely reported that the Justice Department has commenced a criminal investigation of U.S. taxpayers with accounts at another large bank, HSBC, in India and Singapore. In addition, last spring the IRS announced plans to hire nearly 800 employees in the coming year specifically devoted to international enforcement and increasing the IRS' ability to crack down on offshore tax evasion, and the IRS has recently opened offices or increased staffing levels at offices in China, Hong Kong, and Panama. With both the IRS and Justice Department ramping up their efforts to curtail offshore tax avoidance and evasion, individuals with undeclared foreign accounts can no longer assume that they will remain undetected or protected by foreign banking secrecy laws.

Individuals with questions about foreign bank accounts, or who are considering making a voluntary disclosure to the IRS regarding foreign bank accounts, should consult experienced tax counsel to understand the benefits and risks of the voluntary disclosure process. Blank Rome LLP has significant experience with IRS voluntary disclosure practice and can assist individuals in navigating the voluntary disclosure process. ■

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