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SPECIAL REPORTS

Pending Approval of UBS Agreement Threatens to Expose U.S. Account Holders of Other Swiss Banks

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As part of the ongoing saga involving Swiss banking giant UBS and the U.S. taxing authorities, an amending protocol (the protocol) was signed on March 31, 2010, to the agreement between the United States and the Swiss Confederation regarding the request by the Internal Revenue Service for information concerning U.S. citizen and resident UBS account holders (the UBS agreement).[1] The UBS agreement as revised by the protocol (the revised UBS agreement) was submitted to the Swiss parliament on April 14, by the Swiss Federal Council for approval, which is to be decided when parliament reconvenes in June.

On the eve of this historic ruling, the fate of many UBS account holders hangs in the balance, potentially facing criminal liability in addition to hefty civil penalties. A critical review of the potential implications stemming from the approval of the revised UBS agreement, however, reveals that the implications may reach much further than simply the affected U.S. customers of UBS. Indeed, the approval by parliament of the revised UBS agreement could open the gates to additional treaty requests by the IRS that could further erode if not eliminate the veil of Swiss bank secrecy and subject thousands of additional U.S. taxpayers to allegations of criminal and civil tax violations.

The UBS Dispute

The historic sequence of events surrounding UBS's troubles with the U.S. tax authorities has been well chronicled.[2] Although many developments were occurring behind the scenes for some time, the controversy first catapulted into the public eye when the federal district court in Miami authorized the issuance by the IRS of a John Doe summons on UBS on July 1, 2008.[3] Since then, the tale has taken many twists, but as we approach the two-year mark of the legal wrangling, the situation is reaching its apex.

UBS Settlement Agreement and Treaty Request

By way of background, UBS entered into a settlement agreement with the U.S. and the IRS on August

[1]The agreement between the United States and the Swiss Confederation was originally executed on August 19, 2009. *See also United States of America v. UBS AG*, No. 09-20423 (S.D. Fla. 2009) (stipulation of dismissal filed), and http://www.justice.gov/opa/documents/us-swiss-agreement.pdf.

[2]*See, e.g.,* William M. Sharp Sr. and Larry R. Kemm, ''The UBS Summons and IRS Voluntary Disclosure,'' *Tax Notes Int'l*, Sept. 22, 2008, p. 1043, *Doc 2008-19459*, or *2008 WTD 186-12*; Sharp and Kemm, ''Voluntary Disclosure Update for U.S. UBS Clients,'' *Tax Notes Int'l*, Nov. 10, 2008, p. 487, *Doc 2008-23454*, or *2008 WTD 219-8*; and Robert F. Katzberg and Sharp, ''Representing U.S. Taxpayers in List or Declined UBS Voluntary Disclosure Cases,'' *Tax Notes Int'l*, Feb. 22, 2010, p. 703, *Doc 2010-957*, or *2010 WTD 34-13*.

[3]*In the Matter of the Tax Liabilities of John Doe et al.*, No. 08-21864 (S.D. Fla. 2008).

19, 2009.[4] The settlement agreement served as the basis for, and was signed contemporaneously with, the execution of the UBS agreement. Under the settlement agreement, UBS agreed to provide information regarding approximately 4,450 accounts of certain U.S. persons to the Swiss Federal Tax Administration (SFTA) in response to a treaty request by the IRS.[5]

In exchange for the agreement to provide information concerning the accounts of certain U.S. persons, the enforcement action pending for the John Doe summons is to be dismissed after the IRS receives all relevant account information concerning 10,000 open or closed undisclosed UBS accounts from any source, including information obtained through:

- the treaty request;
- submissions under the IRS voluntary disclosure practice;
- UBS clients who waive their right to secrecy and instruct UBS or the SFTA to provide their account information to the IRS; or
- the deferred prosecution agreement between the U.S. and UBS dated February 18, 2009.[6]

Following the execution of the settlement agreement and the UBS agreement, the U.S. authorities formally submitted a request to the Swiss government for the UBS account information as agreed on under the terms of such agreements (the treaty request). On November 17, 2009, a copy of the annex to the UBS agreement was publicly released, which sets forth the criteria used to determine the selection of accounts comprising the 4,450 accounts to be turned over to the U.S. (the annex).[7]

The annex sets forth two principal categories of U.S. persons for whom the requirements of a request for information are considered to be satisfied for purposes of the treaty request. The first category involves U.S.-domiciled clients of UBS who directly held and beneficially owned undisclosed custody accounts and banking deposit accounts (that is, no Form W-9 was provided) that had a balance in excess of CHF 1 million at any time during the period of years 2001 through 2008, and for which a reasonable suspicion of ''tax fraud or the like'' can be demonstrated. The second category involves U.S. persons (without regard to domicile status) who were beneficial owners of an account held through an offshore company during the years 2001 through 2008 for which a reasonable suspicion of ''tax fraud or the like'' can be demonstrated. The annex further set forth the agreed-on criteria for determining ''tax fraud or the like.'' For U.S. persons in the first category (that is, U.S.-domiciled direct account owners), tax fraud or the like includes either (i) activities presumed to be fraudulent conduct, such as concealment activities and underreporting of income based on a scheme of lies or submission of incorrect and false documents, or (ii) acts of continued and serious tax offenses, which includes situations when the U.S.-domiciled taxpayer failed to give a Form W-9 for three years (including at least one year within the period covered by the request), and the UBS account generated revenue of more than CHF 100,000 on average for any three-year period (again with one year within the period covered by the request). Most important, an account that had less than CHF 1 million in assets, but at least CHF 250,000 in assets, will nevertheless be included within the group of persons covered by the treaty request in the case of activities presumed to be fraudulent conduct.

For U.S. persons in the second category (that is, owning an account through an offshore company, regardless of where domiciled), tax fraud or the like includes either (i) activities presumed to be fraudulent conduct, such as concealment activities and underreporting of income based on a scheme of lies or submission of incorrect and false documents, or (ii) acts of continued and serious tax offenses, which include situations when the offshore company was in existence three years or more (including one year within the period covered by the request) and the UBS account generated revenue of more than CHF 100,000 on average for any three-year period (again with one year within the period covered by the request). Similar to accounts in the first category, an account that had less than CHF 1 million in assets, but at least CHF 250,000 in assets, will nevertheless be included within the group of persons covered by the treaty request in the case of activities presumed to be fraudulent conduct.

Assuming that the criteria for either of these categories can be shown (that is, for U.S.-domiciled direct account owners, or for U.S. persons (domiciled anywhere) owning an account through an offshore company), the annex expressly states that ''the name of the UBS United States clients do not need to be mentioned in this request for information.'' Accordingly, the annex overrides usual treaty exchange of information procedures that require specific identification of a particular U.S. taxpayer.

At issue now is whether the requested information, as detailed under the criteria of the annex, satisfies the requirements for an exchange of information under article 26 of the Switzerland-U.S. income tax treaty, and whether such information can be disclosed by UBS and the SFTA without violating Swiss bank secrecy rules.

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[4] *See supra* note 1.

[5] Settlement agreement, para. 2.

[6] Settlement agreement, para. 8(a). For a discussion of the UBS accounts disclosed under the February 18, 2009, deferred prosecution agreement, see Katzberg and Sharp, *supra* note 2.

[7] *See* http://www.financialtaskforce.org/2009/11/17/annex-to-the-swiss-us-agreement-in-ubs-case/.

Swiss Court Ruling Causes Setback

Procedurally, the SFTA generally cannot disclose bank account information without first concluding that the relevant subject of the request has committed ''tax fraud or the like'' within the context of the exchange of information provisions of the Switzerland-U.S. income tax treaty.[8] Further, even if the SFTA has determined that a disclosure is warranted, the account holder has the right to appeal this determination through the Swiss Federal Administrative Court (SFAC).

On January 21, 2010, the SFAC ruled, in the context of the specific facts at issue, that the UBS agreement did not change the standard for the exchange of taxpayer information under the current Switzerland-U.S. treaty. As a result, the court concluded that the Swiss government could not turn over account information to the U.S. except in those situations when the case involves tax fraud as defined under Swiss law.[9]

The case on which the SFAC ruled involved a UBS account in which:

- the account holder maintained U.S. residency;
- the account holder failed to provide a Form W-9 for a period of at least three years during the 2001 to 2008 time frame;
- the account balance exceeded CHF 1 million at some point in time; and
- the account generated revenues in excess of CHF 100,000 on average for three consecutive years.

In the context of the annex criteria, this represented an account holder falling within Category 2.A.b. and deemed to have engaged in ''acts of continued and serious tax offense'' for which the Swiss authorities may obtain information under its laws and practices. However, the SFAC concluded that these criteria alone did not satisfy the requirements of article 26 under the Switzerland-U.S. treaty that must be met in order to justify sharing information with the IRS. In its judgment, the SFAC determined that the mere noncompliance with the obligation to provide Form W-9 does not qualify as ''tax fraud or the like,'' regardless of whether such failure was intentional or merely negligent.

Although the SFAC decision involved the appeal of a single account holder, its impact was far-reaching because judgments of Swiss courts, especially those of last resort, constitute legal precedents for equivalent cases. As a result, the SFTA is bound by the SFAC's judgment relative to its decisions on similarly situated cases, and thus would be unable to treat such similarly situated cases as involving tax fraud or the like. It was reportedly anticipated that the court ruling could affect as many as 4,200 of the 4,450 cases whose account information was to be disclosed (that is, preventing the disclosure of information for such accounts).

The SFAC decision's impact was far-reaching because judgments of Swiss courts constitute legal precedents for equivalent cases.

The SFAC ruling seriously jeopardized the turnover of information agreed upon by UBS under the settlement agreement. To the extent that UBS is barred from providing information on the 4,450 cases, its ability to satisfy the terms of the settlement agreement is doubtful.[10]

The consequences of UBS's failure to comply with the terms of the settlement agreement are not entirely clear, particularly because the SFAC's decision and its consequences do not appear to trigger a contractual breach of the settlement agreement. However, at a minimum, such consequences would likely involve the reactivation of the pending John Doe summons case.[11] Furthermore, such a failure to comply could have a

[8] *See* article 26 of the Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, signed October 2, 1996 (the Switzerland-U.S. treaty). *See also* Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 (Exchange of Information of the Swiss-U.S. Income Tax Convention of October 2, 1996) (the 2003 mutual agreement).

[9] For an additional discussion of this court ruling, see Katzberg and Sharp, *supra* note 2, at 708.

[10] Based on unofficial reports, apparently only approximately 4,000 to 5,000 U.S. citizen or resident UBS account holders have entered the U.S. voluntary disclosure program. This is surprising, given the number of voluntary disclosure cases submitted as publicly reported by the IRS (approximately 14,700 as of October 15, 2009). However, this could simply reflect a disconnect because UBS has no means of independently verifying whether its U.S. customers have entered the U.S. voluntary disclosure program. Recently, civil revenue agents within the IRS have begun sending requests to participants in the voluntary disclosure program to sign a waiver to UBS to provide the taxpayer's account information to the IRS. Such a request for waiver was expressly required under article 1.4 of the UBS agreement. Because the account holders and the IRS have already received account records and financial data for a large number of these pending voluntary disclosures, this potentially represents an attempt by UBS to assemble an accurate tally of the number of UBS customers who have entered the voluntary disclosure program. As noted above, this information is important to UBS, given that the summons will be dismissed as soon as the IRS receives relevant account information regarding 10,000 open or closed accounts.

[11] *See supra* note 1.

collateral impact on the deferred prosecution agreement. Finally, it could also ultimately lead to Switzerland being included on a blacklist of uncooperative tax havens.

Protocol Executed to Override Legal Constraints

Because of the potentially dire consequences associated with UBS's inability to comply with the terms of the settlement agreement, the Swiss government initiated extraordinary measures to alter the status of the UBS agreement. On March 31, 2010, Switzerland entered into the new protocol with the U.S. amending the UBS agreement. The protocol adopts provisions to elevate the UBS agreement to the level of an international treaty. As a result, the revised UBS agreement takes precedence over the existing Switzerland-U.S. treaty.

In the process of adopting the revised UBS agreement, the Swiss government effectively lowered the Swiss legal standard of what constitutes ''tax fraud or the like'' in order to warrant the disclosure of confidential bank information under the guise of the exchange of information article of the Switzerland-U.S. treaty.[12]

Details of the Amending Protocol

The protocol is brief, composed of three articles and spanning barely more than three pages.[13] Its effect, however, is enormous by conveying international treaty status on the UBS agreement.

The recitals to the protocol note that the Swiss and U.S. authorities have to date complied with their obligations under the UBS agreement. Further, the recitals state that Swiss and U.S. authorities desire to conclude the protocol in order to reassure the implementation of the UBS agreement and reaffirm its obligations in a manner that can be approved by the Swiss parliament.

Presented as highlights, the protocol:

- creates the necessary legal basis for the SFTA to issue final decisions even in cases of continued and serious tax evasion;
- states that the UBS agreement is not simply a competent authority interpretation, but constitutes a binding international agreement;
- ensures that the UBS agreement can be implemented after its approval by parliament (through provisional application of the treaty request);
- ensures that the SFTA will not hand over any UBS account information before the UBS agreement is approved by parliament;
- does not govern future treaty assistance relations with the U.S. in the general, abstract sense; and
- resolves only a special case in the legal and sovereignty conflict with the U.S. and should not be subject to an optional referendum.

Parliamentary Approval Required

On April 14, 2010, the revised UBS agreement was submitted to parliament for approval.[14] In taking this step, the Swiss government through a press release stated:

> Implementing the UBS agreement between Switzerland and the U.S. is the only way to ensure that the legal and sovereignty conflict with the US can be set aside, that client details can be disclosed through a constitutionally sound process, and that risks for the Swiss economy can be avoided.

Thus, this statement essentially acknowledges that the disclosure of account details poses threats to existing constitutional principles, but that the countervailing risks to the Swiss economy associated with the U.S. attacks on UBS may outweigh those constitutional considerations. It is this fundamental tension that tears at the heart of Swiss culture and raises considerable doubt that an optional referendum could pass in order to ensure the implementation of the UBS agreement.

The submission of the UBS agreement to parliament for approval appeared as the only workable solution for UBS to comply with the UBS agreement and provide account information on certain U.S. persons.[15] Otherwise, rulings by the SFAC, such as the January 21 ruling noted above, present an obstacle to the disclosure of individual account information. If the UBS agreement is characterized as an international treaty, however, the agreement will override the existing exchange of information article in the Switzerland-U.S. treaty and cannot be defeated by a ruling of the SFAC.

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[12]Most if not all of the 14 hypothetical examples of Swiss ''tax fraud or the like'' as set forth in the 2003 mutual agreement seem to have a much higher standard.

[13]The protocol amending the UBS agreement should not be confused with either the 1996 protocol to the Switzerland-U.S. treaty (entered into force December 19, 1997), or to the 2009 protocol to the Switzerland-U.S. treaty that is currently pending ratification (signed on September 23, 2009).

[14]*See* ''Swiss Government takes UBS to Parliament,'' *available at* http://genevalunch.com/blog/2010/04/14/swiss-govt-takes-ubs-treaty-to-parliament/.

[15]Under Swiss procedures, the adoption of a new treaty that contains important new provisions may be submitted by parliament for an optional referendum. However, in the public press release made at the time the protocol was submitted to parliament, the Swiss Confederation noted that the revised UBS agreement ''does not contain any key provisions that establish new law and should therefore not be subject to an optional referendum.''

In order to attain international treaty status, however, the UBS agreement must be approved by parliament.[16]

Protocol Conveys Treaty Status

To ensure international treaty status and that the turnover of information under the terms of the revised UBS agreement will not be prevented by the terms of the existing Switzerland-U.S. treaty, the protocol makes various changes to the language of the UBS agreement. For instance, as drafted, the August 19, 2009, UBS agreement provided that ''[t]he Swiss Confederation shall process, pursuant to the existing Tax Treaty, a request by the United States for information regarding US clients of UBS AG.'' Under revised language provided in the protocol, however, the words ''pursuant to the existing Tax Treaty'' were stricken from the agreement (including conforming changes to similar language in the annex).

The most significant change in this regard is contained in a new article 7a to the agreement dealing with conflicting provisions:

> For purposes of processing the Treaty Request, this Agreement and its Annex shall prevail over the existing Tax Treaty, its Protocol and the Mutual Agreement in case of conflicting provisions.

Thus, the protocol (or revised UBS agreement) abrogates those provisions within the existing Switzerland-U.S. treaty that would otherwise bar the Swiss authorities from providing information that is not authorized under the existing treaty. (See discussion of criteria for the exchange of information under the treaty below.)

Based on its status as an international treaty agreement, UBS would be permitted to disclose the U.S. account holders' information despite the legal impediments otherwise presented by Swiss bank secrecy law or the long-standing Swiss interpretation of article 26 (exchange of information) of the Switzerland-U.S. treaty.

Under the final provision of the protocol, article 3.2 provides that the protocol ''shall provisionally apply upon signature'' and will enter into force on notification by the Swiss Confederation that all domestic procedures have been completed for entry into force. As a result, the revised UBS agreement is being applied on a provisional basis, subject to the pending parliamentary approval in June 2010.

The provisional application of the revised UBS agreement is significant because this enables UBS and the SFTA to complete the process of making a ruling or determination on whether the identified 4,450 accounts may be disclosed under the treaty request (that is, whether such accounts satisfy the criteria set forth in the annex to the UBS agreement). From a timing perspective, this means that the SFTA will be positioned to promptly provide the account information assuming approval is given by parliament. Under the terms of the settlement agreement, UBS is obligated to provide the account information to the IRS by August 24, 2010.[17] If UBS and the SFTA were required to wait until parliament approves the protocol in order to process the 4,450 accounts, there likely would not be sufficient time to complete such processing before the August 24 deadline.

Validity of Provisional Application Upheld

On April 19, 2010, the SFAC ruled on an appeal to the disclosure of UBS account information as determined by the SFTA. As a test case following the execution of the protocol, this most recent ruling by the SFAC validates the provisional application of the revised UBS agreement and acknowledges that the SFAC will have no ability to prevent the disclosure of confidential account holder information once the protocol is approved by parliament.

In its ruling, the SFAC held that, because of the provisional application of the protocol, any decision to turn over account data and any irreparable damage or detriment caused by such a decision ''cannot be corrected by decision now.'' Thus, the court ruling validates the legal impact of the revised UBS agreement as an international treaty that will take precedence over other potentially applicable Swiss law, subject, of course, to the approval by parliament.

Ammunition for More Treaty Requests

IRS Collects Significant Data

As efforts of the U.S. authorities to obtain information on U.S. account holders progressed (including the execution of a deferred prosecution agreement on February 18, 2009), many UBS customers began to come forward through the IRS voluntary disclosure program to seek to avoid criminal prosecution and to minimize

[16]Interestingly, in a letter sent by UBS AG to members of parliament, UBS AG encouraged parliament to approve the protocol to the UBS agreement. Many ex-UBS customers have stated that UBS bankers repeatedly assured their U.S. customers that their account information would remain completely confidential and never disclosed in this light; accordingly, this express request by UBS AG for parliamentary approval of the disclosure could be viewed as the ultimate betrayal by many U.S. account holders. Many of these customers believe that despite having been loyal customers who generated significant fees for the bank, these individuals have been kicked out of the bank and many forced to liquidate their investments at an inopportune time. Now the very institution that eagerly solicited their business in the past is serving them up to U.S. authorities for potential criminal prosecution.

[17]Under paragraph 8(b) of the settlement agreement, account information for the identified 4,450 accounts must be provided no later than 370 days from the date of the settlement agreement (that is, from August 19, 2009).

civil liabilities for back taxes and penalties. Because of the unprecedented number of taxpayers entering the voluntary disclosure program, the IRS announced temporary penalty guidelines on March 23, 2009, that gave taxpayers some assurance of the tax and penalties faced upon coming forward.[18]

Due in part to the announced penalty framework coupled with the increasing likelihood of some turnover of account information by UBS, approximately 14,700 submissions to the voluntary disclosure program were generated before the October 15, 2009, deadline (extended from September 23, 2009).[19] Also, the IRS reportedly has received more than 2,000 further voluntary disclosure submissions since October 15, 2009.[20] In each of these voluntary disclosure cases, the IRS collects a wealth of information concerning other non-U.S. banks, fiduciaries, bankers, lawyers, and other foreign-based advisors, all of which is being organized in a central database in the IRS Offshore Identification Unit in Philadelphia. A significant amount of detail in a voluntary disclosure case is submitted through a standardized optional format letter that the IRS introduced during the summer of 2009.

The optional format letter specifically requests detailed information concerning all foreign banks in which the taxpayer has held undisclosed accounts, including information about bankers and investment advisers who were involved in establishing or maintaining the offshore account. As the IRS identifies banks, client advisors, independent asset managers, and other professional advisers, such as attorneys or accountants, whose names appear on a number of occasions in the database, the IRS will most certainly target such institutions or individuals to obtain yet further information concerning other U.S. taxpayers with undisclosed foreign accounts. Indeed, according to comments of a top attorney in the U.S. Department of Justice at the end of February 2010, U.S. tax prosecutors at that time were already examining more than 7,000 accounts from foreign banks beyond UBS, including other Swiss banks.[21]

Formulating Attacks on Other Swiss Banks

As noted above, the Swiss government announced that the new protocol together with the UBS agreement was adopted in order to resolve a special case in the legal and sovereignty conflict with the U.S. concerning UBS clients, and that the revised agreement does not govern future treaty assistance relations with the U.S. Nevertheless, the inescapable conclusion to be drawn from the application of the revised UBS agreement is that the floodgates will most certainly open for similar requests of U.S. account data from other Swiss financial institutions.

The floodgates will most certainly open for similar requests of U.S. account data from other Swiss financial institutions.

The reason for this possible attack on other Swiss banks lies in the fact that the IRS has collected the same type of information on other Swiss banks, if not more, than that used to successfully attack UBS and provide the support for the treaty request. No matter how the Swiss government attempts to characterize the isolated agreement reached regarding UBS accounts, if parliament in the end approves the revised UBS agreement, the Swiss government will have essentially lowered the standard required in order to support a treaty request for taxpayer information.

Under the Switzerland-U.S. treaty, the exchange of information under article 26 is restricted to situations involving ''tax fraud or the like.'' The difficulty, however, lies in the fact that the U.S. generally defines ''tax fraud'' much more broadly than is construed under Swiss law. Moreover, for purposes of complying with a request for information under the treaty, the contracting state from which the documents are being requested makes the determination of whether tax fraud exists under the laws of its country.

For U.S. tax purposes, a person may be viewed to commit tax fraud based on the failure to complete an act,[22] for example, concealment, regardless of whether such person has affirmatively engaged in a fraudulent

[18]For a background discussion of this program, see William M. Sharp Sr. and Larry R. Kemm, ''News Analysis: IRS Reduces Penalties on Offshore Voluntary Disclosures,'' *Tax Notes Int'l*, April 6, 2009, p. 7, *2009-7193*, or *2009 WTD 64-6*; and Sharp and Kemm, ''IRS Guidance on Offshore Voluntary Disclosures: Further Refinements,'' *Tax Notes Int'l*, May 18, 2009, p. 595, *Doc 2009-10774*, or *2009 WTD 95-8*.

[19]For background concerning the IRS voluntary disclosure program and various aspects of the John Doe summons case involving UBS, see Sharp and Kemm, ''The UBS Summons and IRS Voluntary Disclosure,'' *supra* note 2; Sharp and Kemm, ''Voluntary Disclosure Update for U.S. UBS Clients,'' *supra* note 2.

[20]*See* comments of Linda J. Osuna, IRS special agent in charge of the Tampa field office, in Pascal Fletcher, ''IRS Agent — New UBS-Style Bank Prosecution 'Shortly,''' Reuters (Mar. 15, 2010).

[21]*See* Jason Rhodes and Mike Nesbit, ''UBS Urges Parliament to Back U.S. Tax Deal: Report,'' Reuters (Mar. 12, 2010).

[22]*See*, *e.g.*, IRC sections 7201, 7203, 7205, 7206(1), and 7207.

act. In contrast, Swiss law generally requires that a person commit an affirmative act that rises to the level of tax fraud, such as falsifying documents or forging an instrument.[23]

Historically, the Swiss concept of ''tax fraud or the like'' does not include tax evasion when no affirmative acts of fraudulent activity have been committed.[24] Under U.S. tax law, however, a person who intentionally conceals information or fails to affirmatively report items of taxable income may be considered to commit tax evasion rising to the level of tax fraud. Thus, under the Swiss interpretation, ''tax fraud or the like'' generally requires some level of conduct well beyond the U.S. standard required to find tax fraud.

In the context of the annex that defines the criteria on which information is to be provided by UBS to the IRS, a person can be deemed to have engaged in ''tax fraud or the like'' merely by failing to take certain actions, in addition to engaging in affirmative acts of fraudulent activity. In particular, as described above, this may include persons who merely failed to provide Forms W-9, or who maintained an offshore company account, for at least three years (including one year during the period covered by the treaty request), assuming that the account reached a threshold value of CHF 1 million and generated average yearly revenues of CHF 100,000 for any three-year period (including one year within the period covered by the request). For persons falling into the category involving affirmative acts of fraudulent activity, the characterization of the situation as ''tax fraud or the like'' appears more apparent.

Importantly, as noted above, if an account falls into one of the categories of situations involving a U.S. person, the names of the UBS clients do not need to be mentioned in the request for information as a condition to the information exchange. This represents a significant departure from the historic application of the exchange of information article 26 of the Switzerland-U.S. treaty, whereby the target of a request for information must be specifically named in order to prevent fishing expeditions for evidence on unidentified persons.

The revised UBS agreement is significant because it enables the IRS to access information on unidentified persons and supports the exchange of information on persons for which no affirmative acts of tax fraud (as historically construed under Swiss law) have been shown.

By extension, the principles underlying the information exchange authorized by the revised UBS agreement will surely support the exchange of information by other Swiss financial institutions for which the IRS has now gathered substantial data. In particular, the IRS may be in a position to demonstrate a pattern of account holder activity that fits within the agreed-upon criteria for determining ''tax fraud or the like'' under the annex.[25] As noted above, apart from the more obvious situations that involve a ''scheme of lies'' or the submission of incorrect and false documents, this would include ''acts of continued and serious tax offense,'' such as the mere failure to provide a Form W-9 for a period of at least three years when the Swiss account generated revenues of more than CHF 100,000 on average per annum for any three-year period (or similarly in the context of an offshore company when the account was in existence for at least three years and generated revenues of more than CHF 100,000 on average per annum for any three-year period).

Assuming that the IRS can substantiate a pattern of account holders fitting within such criteria, it would seem reasonable to believe that other U.S. accounts exist (or existed) within the same particular Swiss bank, thereby potentially warranting a request for information of all U.S. account holders beyond those for which the IRS already possesses data. Because the Swiss government already has established precedent by virtue of disclosing information regarding UBS account holders (assuming that parliament approves the protocol), such information presumably could be provided without even mentioning the names of U.S. customers in the request for information exchange. And because the Swiss government has agreed to exchange information in circumstances that do not involve affirmative acts of fraudulent activity, there no longer appears to be a per se objection to the exchange of information based on conduct amounting to mere tax evasion that historically could not support an exchange of information under Swiss law.

Although the Swiss government *may* be positioned to comply with further treaty requests based on the precedent that may be set if parliament approves the revised UBS agreement, it is also possible that the Swiss government could turn its back on the U.S. for smaller, lesser-known Swiss banks that have no physical presence in the U.S. In that case, the U.S. tax authorities could seek an order from a U.S. court ordering the disclosure of U.S. account information, but in the end there may be no jurisdictional basis upon which to enforce a court order. The question then may become whether the U.S. has other means of leverage to put pressure on those Swiss banks (for example, through limitations on access to U.S. equity markets and exchange clearing houses).

[23] *See*, *e.g.*, the 14 hypothetical examples contained in the 2003 mutual agreement.

[24] *See* 2003 mutual agreement.

[25] The IRS could use this same discovery tactic in other treaty-covered jurisdictions (for example, Luxembourg).

Beyond the analogy of the UBS situation to other Swiss banks based on similar circumstances, the IRS will be further armed with credible evidence obtained on specific banks, bankers, trust companies, fiduciaries, foreign attorneys and tax advisers, and other professional advisers that was elicited through the voluntary disclosure program. This damaging evidence will enable the IRS to exert additional leverage on the banks, bankers, and professional advisers to compel the disclosure of account information, and likely serve as evidence of potential ''tax fraud or the like'' to support a request for information exchange under the Switzerland-U.S. treaty.

Of course, the ultimate risk lies with those U.S. persons who continue to maintain or have recently exited from an account with one of these Swiss banks. Based on publicly stated commitments of high-level officials within the Department of Justice and IRS to eradicate the pervasive use of secret offshore accounts, these U.S. persons with undisclosed foreign accounts cannot rest easily. The best strategy for persons in this position is to proactively take steps to bring themselves into compliance with U.S. tax law through the IRS voluntary disclosure program before being discovered by the U.S. authorities.[26]

Summary

If the protocol to the UBS agreement is approved, Swiss bank secrecy as it has been held sacred for decades will no longer exist with the same level of government support. Moreover, the Swiss government will have established new precedent for the disclosure of information under a request by the U.S. relative to historic interpretations of ''tax fraud or the like'' under Swiss law.

Given the agreed-on criteria for determining ''tax fraud or the like'' in the case of the UBS agreement, it seems that the Swiss government would be hard-pressed to deny future treaty requests when the same level of supporting information is provided by the IRS concerning the activities of specific Swiss banks.

Armed with data gathered from the thousands of voluntary disclosure submissions made during the past year, the IRS now has the names of numerous banks and individual bankers who actively facilitated the creation and maintenance of undisclosed offshore financial accounts on behalf of U.S. taxpayers. This data will enable the IRS to seek information directly from other Swiss banks as well as through requests for the exchange of information under article 26 of the Switzerland-U.S. treaty under circumstances that are potentially as strong (if not stronger) as those underlying the treaty request involving UBS.

The Swiss government has attempted to disassociate its agreement to process a request for UBS information from future treaty requests, stating that the revised UBS agreement serves only to resolve a special case in the legal and sovereignty conflict with the U.S. From a practical perspective, however, there would be no logical basis on which the Swiss government could reject similar treaty requests, assuming that equivalent or stronger information is supplied regarding other Swiss banks than that which was provided as underlying support for the request of UBS information.

Based on data accumulated through the voluntary disclosure program, the IRS without question has damaging ammunition to penetrate other Swiss banks. As the U.S. government applies increasing pressure on those institutions, U.S. taxpayers who have continued to lie low without taking corrective compliance steps will become increasingly subject to significant risk of being exposed. ◆

[26]The ''timeliness'' condition of the voluntary disclosure program is of key importance in the context of the imminent Swiss parliament vote in June 2010. As that day of reckoning approaches, the likelihood of the IRS taking the position that a given taxpayer's voluntary disclosure application is not timely (and hence not truly voluntary) escalates.