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SPECIAL REPORTS

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This article provides a summary and update of the U.S. Department of Justice's Swiss bank voluntary disclosure program, an initiative available exclusively to eligible Swiss banks.

Background

On August 29, 2013, the U.S. DOJ and the Swiss Federal Department of Finance executed a joint statement, attached to which is a document entitled the Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks (the program) that provides a path by which all Swiss banks not currently under DOJ criminal investigation may bring closure to specified U.S. criminal exposure by reason of having maintained Swiss bank accounts on behalf of noncompliant U.S. taxpayers during the period from August 1, 2008, through December 31, 2014 (the applicable period).

The program is the first DOJ voluntary disclosure program targeted to a specific industry (banks) in a specific country (Switzerland) and is designed to benefit both the U.S. and Switzerland. From a Swiss point of view, the program enables the Swiss government and its banks to finally resolve potential U.S. criminal uncertainties related to undeclared U.S. accounts in a manner that accommodates the existing legal framework of Switzerland, particularly relating to section 271 of the Criminal Code and the country's data protection laws.

From a U.S. point of view, the DOJ is seeking to obtain information regarding the conduct of Swiss banks and their undeclared U.S. account holders that, but for the program, would not have been readily available. In terms of U.S. account holders, the joint statement notes that the Swiss Financial Market Supervisory Authority intends to encourage regulated Swiss banks to send letters to U.S. persons with U.S.-related accounts, informing them of the program and drawing their attention to the Internal Revenue Service's offshore voluntary disclosure program.

While much of the program, as discussed below, contains defined terminology for Swiss banks and their representatives to follow, like any new regime, the program leaves a number of important matters to be determined in its actual implementation. Further complicating matters, Swiss banks and their Swiss counsel necessarily view the program from the Swiss perspective, although it is based on U.S. law, and, most importantly, U.S. criminal law, and the Foreign Account Tax Compliance Act.

In essence, under the program, if an eligible Swiss bank voluntarily comes forward, it can avoid potential DOJ criminal investigation and potential prosecution for events taking place within the applicable period (that is, August 1, 2008, through December 31, 2014) provided the bank meets and complies with the terms and conditions of the program. The program addresses

only potential criminal liability that may be pursued by the DOJ and does not address civil issues.[1]

An eligible Swiss bank encompasses a Swiss depository or custodial financial institution, which includes a financial institution organized under Swiss law or any branch or head office of a financial institution organized outside Switzerland (but not a Swiss investment entity or a specified insurance company), as defined in the Swiss-U.S. intergovernmental agreement.

An eligible Swiss bank voluntarily participates in the program by coming forward in one of three categories by either requesting a letter of intent (LOI) for a nonprosecution agreement (NPA) under category 2 or a non-target letter (NTL) under category 3 or 4, provided that in each case the bank satisfies the eligibility requirements of the applicable category. Thus, a Swiss bank that comes forward and provides significant information about its activities related to the U.S. persons and its U.S. account holder and, in some cases, pays a penalty, can obtain an NPA or an NTL.

The categories referred to in the program are as follows:

- Category 1 encompasses 14 Swiss banks that are under criminal investigation by the DOJ regarding their operations as of August 29, 2013 (the date the program was announced). These banks are not eligible for participation in the program.
- Category 2 (C-2) encompasses Swiss banks that have ''reason to believe'' that they may have committed tax-related or monetary transaction offenses in connection with undeclared U.S.-related accounts held by the Swiss bank during the applicable period and are not a category 4 bank.
- Category 3 (C-3) encompasses Swiss banks that have not committed any tax-related or monetary transaction offenses in connection with undeclared U.S.-related accounts held by the Swiss bank during the applicable period and are not a category 4 bank.
- Category 4 (C-4) encompasses Swiss banks that satisfy the requirements of a registered deemed-compliant ''financial institution with local client base'' under the Swiss IGA, as modified by the program.
- So-called category 5 banks (C-5) are those Swiss banks that opt not to participate in the program.

[1]As to potential civil penalty exposure, a senior IRS official indicated on December 13, 2013, that the IRS will not pursue Swiss banks for civil penalties or charges that they violated qualified intermediary agreements as long as they enter into the program and otherwise comply with FATCA. *See* Amy S. Elliott, ''IRS Outlines Path to Closure for Swiss Banks,'' *Tax Notes Int'l*, Dec. 23, 2013, p. 1090.

What Is a DPA, NPA, and NTL?

Deferred prosecution agreements (DPAs) and NPAs have been used in cases involving a wide variety of federal criminal statutes. In the context of entity investigations, these agreements are designed to allow a company to remain in business, so as to preserve jobs and shareholder value, and increase the likelihood that victims will receive prompt restitution. The government seeks to achieve general and specific deterrence typically by requiring substantial changes to the company's governance and operations, requiring regular reports on the progress of those reforms from a compliance monitor or the company itself, and reserving the power to revive criminal charges if the company is deemed to be noncompliant.

In a deferred prosecution, the government charges the corporation through a criminal information, which it agrees to dismiss at the end of a specified term if the entity has complied with the terms of the DPA. A DPA is a public document because it is filed with a court of competent jurisdiction. By contrast, an NPA does not arise from the filing of criminal charges, and the agreement will not be made public unless the prosecutors seek to publicize the result of their investigation or the company is required to disclose the agreement. DOJ policy leaves the specific provisions of DPAs and NPAs to the discretion of the office conducting the investigation.

At this stage, the DOJ has not published a general format for a DPA and NPA under the program. However, by reference to past practices, most DPAs and NPAs include the following provisions:

- acceptance of a statement of facts describing illegal acts or an admission of wrongdoing;
- agreement that the company, its employees, and agents will not publicly contradict the statement of facts;
- cooperation with the government for the duration of the agreement, including the provision of documents and efforts to secure employee testimony;
- remedial efforts such as the enhancement of compliance programs, a corporate integrity agreement, or monitorship;
- fines and penalties;
- obligation to report future violations of the law;
- waiver of the statute of limitations; and
- acknowledgement that the government has sole discretion to determine whether the agreement has been breached, and, upon the breach, the agreed statement of facts will be admissible in a prosecution of the company.

Note that DPAs can be from two summary pages, containing scant underlying factual information, to many pages longer, specifically setting forth underlying

criminal activities in painful detail. The contrast reflects different policies of the federal prosecutorial offices involved and the factual differences of each matter.

In the context of the program, this leaves open the prospect that Swiss banks, having engaged in an expensive and time-consuming undertaking to comply with all of the program's requirements, may ultimately be presented with a document that contains a detailed recitation of illegal conduct under U.S. law and thus receive more than they bargained for. Publication of this document could adversely affect the institution's reputation. Moreover, given that the NPA does not cover civil exposure, the document providing relief from criminal exposure might become a roadmap to civil or regulatory exposure.

An NTL is a letter from the U.S. government attesting that the client is not, based on the information then known to the prosecutor, currently considered a target of a grand jury investigation or other criminal investigative proceeding. Such letters are generally heavily caveated, making it clear that the client could readily find itself in jeopardy upon the discovery of new inculpatory fact or allegation.

Actions Taken Through December 31, 2013

From the program's release date of August 29, 2013, through December 31, 2013, there has been frenetic activity in Switzerland in connection with the program. As an initial matter, Swiss banks, Swiss and U.S. legal advisers, and forensic consultants had to familiarize themselves with the detailed content of the program and the subsequent formal comments by the DOJ, issued on November 5, 2013 (the November 5 comments).

Swiss banks then had to assemble an internal team, appoint external legal and other advisers, and design and implement a work plan to ascertain:

- whether an entity qualified as an eligible Swiss bank (as discussed above);
- whether it had U.S.-related accounts during the applicable period; and
- whether the bank or employees engaged in possible U.S. criminal culpable behavior.

The definition of U.S.-related accounts in general encompasses accounts to which indicia exist that a U.S. person, directly or indirectly (through a non-U.S. entity), had a financial, beneficial interest in, signature authority, or other powers over the account. The definition of the term ''U.S.-related accounts'' is somewhat broader than under FATCA and the Swiss IGA; the due diligence procedures for identifying low-value and high-value accounts is generally taken from Annex I of the IGA, as modified by the program.

Once U.S.-related accounts were identified, the Swiss bank had to (or will have to) evaluate its conduct and the conduct of its relationship managers (under a civil law ''strict liability'' standard) regarding the opening, maintenance, and closing of these accounts and determine whether it had reason to believe that it or its relationship managers may have had criminal culpability through the commission of tax-related or monetary transaction offenses, particularly through conspiracy, aiding or abetting, or conscious avoidance (a judicial doctrine that expands the definition of knowledge to include closing one's eyes to the high probability a fact or conduct exists). In conjunction with the foregoing, the Swiss bank likely sent letters to its U.S. account holders requesting information about their U.S. tax and information reporting compliance and informing those who are noncompliant of the availability of the offshore voluntary disclosure program. These letters were sent to inform the bank of the compliance of its U.S. account holders, particularly for purposes of the C-2 penalty payment offset.

These inquiries were and continue to be labor intensive, time consuming, and complicated because of real or perceived definitional ambiguities and because legal advisers may have different views over when U.S. criminal culpability may arise in a particular fact pattern. Swiss banks and their management group then would have had to evaluate the circumstances to determine whether to participate in the program and, if so, in which category. The evaluation would have had to have been made by reference to possible criminal culpability as determined under U.S. law (C-2) or lack of culpability (C-3 or C-4), even though under Swiss law tax evasion (in contrast to tax fraud) is not a crime in Switzerland.

If a Swiss bank opted to proceed in the program as a C-2 bank, it also would have had to determine as precisely as possible the amount of its penalty, the amount of which is computed by reference to when the U.S.-related account was opened, subject to specific offsets, to the extent accepted by the DOJ, as discussed in more detail below.

A principal reason for the foregoing frenetic activity is that the DOJ imposed a deadline of December 31, 2013, for a Swiss bank to request an LOI as a C-2 bank under the program. In its LOI, the Swiss bank had to:

- include a plan to comply with the C-2 requirements;
- identify the independent examiner (IE);
- state that the Swiss bank will maintain all records required for compliance with the terms of an NPA (to include all records that may be sought by treaty request); and
- waive any statute of limitations defenses.

The DOJ recently announced that 106 banks filed an LOI for C-2 status; however, a number of these LOIs may have been filed by institutions that may be found not to be eligible, either because the institution is not a bank or is not a Swiss bank. Further, apparently a number of the filing institutions reserved the right to

withdraw their LOI as a C-2 bank and file subsequently as a C-3 bank. As noted below in more detail, a Swiss bank that so filed can withdraw its C-2 LOI and thereafter submit a timely LOI for C-3 status as long as specific conditions are satisfied.

For those Swiss banks that determined to file under C-3 or C-4, no LOI was required to be filed in 2013 because the program prohibited filing an LOI for these categories before July 1, 2014, as explained in more detail below.

Finally, a Swiss bank that opted to file under C-4 would have had to take certain actions effective January 1, 2014, to fulfill the requirements of the local client base category, assuming it otherwise qualified for that category. This specifically included the implementation of certain monitoring and reporting provisions regarding nonqualifying account holders and the adoption of policies or practices to avoid discrimination against the opening or the maintenance of accounts for individuals who are defined specified U.S. persons and resident in Switzerland.

Actions in 2014

Participating Swiss banks, regardless of their category selection, will continue to have a busy time in 2014. In this part, we identify the principal actions that Swiss banks, their advisers, and IEs must take to comply with the various program categories, namely C-2, C-3, and C-4. Banks that opt for the so-called C-5 have no obligations under the program but are well advised to institute a detailed review of their activities during the applicable period and the basis for the conclusions reached as to their conduct during that period under U.S. law in the event that the DOJ targets such institutions in the future.

Category 2 Banks

Swiss banks that filed a C-2 LOI in 2014 will have 120 days from December 31, 2013, to implement a plan for complying with the program's C-2 requirements. For purposes of computing the 120-day deadline, the LOI will be deemed submitted on December 31 unless the bank requested otherwise. The 120-day deadline is subject to a one-time 60-day extension upon a showing of ''good cause.''

These C-2 requirements, in general, involve full cooperation with the DOJ and the provision of detailed and expansive information and undertakings (as explained in detail below):

- ''prior to the execution of an NPA'';
- ''upon execution of an NPA'';
- ''as a condition of any NPA''; and
- based on the ''terms of an NPA.''

A clear way to explain the foregoing is by reference to the chronology of the information that a C-2 bank must provide and actions and undertakings that a C-2 bank must perform, which is enumerated below:[2]

- A Swiss bank that has met all of its obligations set forth in the NPA to the satisfaction of the DOJ will not be prosecuted for any tax-related or monetary transaction offenses in connection with undeclared U.S.-related accounts held by the Swiss bank during the applicable period. The program provides that each NPA may take into account factors specific to the particular Swiss bank.
- The DOJ may decline to enter into an NPA, if in its sole discretion the DOJ determines that any information or evidence provided by the Swiss bank is materially false, incomplete, or misleading. Also, the DOJ may pursue its legal remedies against the Swiss bank if after entering into an NPA it determines that the Swiss bank provided materially false, incomplete, or misleading information or evidence, or has otherwise materially violated the terms of the NPA. Further, by executing the NPA, the Swiss bank agrees that any prosecutions will not be time-barred by the applicable statute of limitations. Finally, if the DOJ determines, upon a review of the information provided by the Swiss bank, that the Swiss bank's conduct demonstrates ''extraordinary culpability,'' the DOJ reserves the right to require that the Swiss bank enter into a DPA instead of an NPA.

Chronology of Actions and Undertakings

Before Execution of an NPA

The Swiss bank must provide information on:

(i) how its cross-border business for U.S.-related accounts for the applicable period was structured, operated, and supervised (including the bank's internal reporting and communications among management);

(ii) the names and functions of individuals who structured, operated, or supervised the activities in (i);

(iii) how clients were attracted and serviced;

(iv) an in-person presentation and documentation of (i)-(iii); and

(v) with follow-on cooperation as needed and the total number of U.S. related accounts and maximum dollar value of accounts (in aggregate) that existed on August 1, 2008; opened between August 1, 2008, and February 28, 2009; and after February 28, 2009.

[2]The ''chronological'' provision of information and action was coined and suggested by attorneys at the Swiss law firm of Bratschi Wiederkehr & Buob.

Upon Execution of an NPA

The Swiss bank must provide for all U.S.-related accounts closed during the applicable period information to include:

- the total number of accounts;
- as to each account:
  - — the maximum dollar value;
  - — the U.S. persons or entities affiliated or potentially affiliated with each account and the relationship of each U.S. person to such account; namely, through a financial interest, beneficial interest, ownership, signature authority, or other authority;
  - — whether the relationship to the account was held directly or indirectly, or through other authority;
  - — whether the relationship was held in the name of an individual or an entity;
  - — whether the account held U.S. securities at any time;
  - — the name and function of any relationship manager, adviser, trustee, fiduciary, nominee, attorney, accountant, or other person functioning in a similar capacity known to the bank to be affiliated with the account; and
  - — information concerning the monthly transfer of funds into and out of the account, including:
    - whether funds were deposited or withdrawn in cash;
    - whether funds were transferred through an intermediary and the name and function of any such intermediary;
    - the identification of any financial institution and residence of such institution that transferred funds into or received funds from the account; and
    - any country to or from which funds were transferred.

An IE, at the Swiss bank's expense, must verify the information listed above. The IE also must confirm that the due diligence standards to identify U.S.-related accounts were applied in collecting the subject information.

The Swiss bank must agree to pay a penalty for U.S.-related accounts that may be reduced by certain offsets, provided the Swiss bank can demonstrate the offset to the satisfaction of the DOJ.

Penalty Payment. The penalty payment is equal to the sum of:

- 20 percent of the maximum aggregate dollar value of all U.S.-related accounts if the account existed on August 1, 2008, during the applicable period;
- 30 percent of the maximum aggregate value for all U.S.-related accounts that were opened between August 1, 2008, and February 28, 2009; and
- 50 percent of the maximum aggregate value for all U.S.-related accounts that were opened after February 28, 2009.

Offsets. The penalty payment is reduced by the dollar value of accounts in the following three categories:

- Declared accounts.
- Accounts disclosed by the Swiss bank to the IRS.
- Accounts disclosed to the IRS through an announced offshore voluntary disclosure program or initiative following notification by the Swiss bank of such a program or initiative to its account holders and before the execution of the NPA (all forms of voluntary disclosure are acceptable as well as the August 31, 2012, streamlined filing compliance program).

As a Condition of an NPA

The Swiss bank promises to provide all necessary information for the U.S. to draft treaty requests to seek account information; cooperation will include, but is not limited to, the development of appropriate search criteria.

The Swiss bank will undertake to collect and maintain all records that are potentially responsive to such treaty requests to facilitate prompt responses.

Terms of an NPA

The Swiss bank will agree to retain all records relating to its U.S. cross-border business for a 10-year period from the termination date of the NPA.

The Swiss bank, upon request, will provide testimony of a competent witness or information as needed to enable the U.S. to use the information and evidence obtained under a provision of the program or separate treaty request in any criminal or other proceeding; and assist in identification and translation of significant documents at its expense.

The Swiss bank will close all accounts of ''recalcitrant account holders'' (as defined in section 1471(d)(6) of the Internal Revenue Code of 1986, as amended) and implement procedures to prevent its employees from assisting recalcitrant account holders to engage in acts of further concealment in connection with closing any account or transferring any funds. (Compare this requirement with article 7 of the Swiss IGA, which generally does not require account closure.)

The Swiss bank agrees not to open any U.S.-related accounts except under conditions that ensure that the

account will be declared to the U.S. and will be subject to disclosure by the Swiss bank.[3]

Category 3 and 4 Banks — In General

Swiss banks that believe they qualify as a C-3 bank or a C-4 bank must file their LOIs no earlier than July 1, 2014, and no later than October 31, 2014.

The program does not provide for any de minimis exception. Thus, a Swiss bank evaluating its eligibility for category 3 or category 4 must conclude that it does not have any criminal culpability regarding undeclared U.S.-related accounts. This will require judgment calls as to whether the Swiss bank conspired, aided or abetted, or acted with ''willful'' blindness in connection with its undeclared U.S. accounts, based on a strict liability standard, which is a civil law concept. In that regard, however, it must be emphasized that under U.S. law, there must be the intention (*mens rea*) to commit a crime, as a crime cannot be committed through inadvertence or non-willfulness.

Category 3 Banks

A bank seeking to qualify as a C-3 bank must be certain that it has not committed any tax-related or monetary transaction offenses in connection with undeclared U.S.-related accounts held by the bank during the applicable period. This undertaking will in general require that the bank:

- prepare the due diligence filters necessary to identify the U.S.-related accounts during the applicable period;
- review the conduct of its relationship managers related to any undeclared U.S.-related accounts, including reviewing records and where appropriate interviewing the relationship managers (and others) dealing with such accounts and evaluating their conduct through the prism of U.S. criminal law; and
- review and update the bank's compliance program, which optimally should include compliance with Swiss anti-money-laundering/know-your-customer requirements, Swiss IGA requirements, program requirements, qualified intermediary requirements (if applicable), and U.S. SEC requirements (if applicable).

A bank requesting an NTL as a C-3 bank must provide an LOI to the DOJ in which the bank:

- sets forth a plan to comply with the C-3 requirement within a reasonable period, but not to exceed 120 days from the LOI;
- identifies the IE;
- states that it will maintain all records required for compliance with the terms of an NTL (to include all records that may be sought by treaty request); and
- waives any applicable statute of limitations defenses.

The IE retained by a C-3 bank must conduct an independent internal investigation. At the conclusion of that investigation, the bank and the IE must:

- verify the percent of the bank's account holdings and assets under management that are U.S.-related accounts;
- verify that the bank has an effective compliance program (accompanied by a description of the compliance program); and
- provide the DOJ with a report (prepared in English) from the IE that includes:
  - — a list of the witnesses interviewed by the IE and summary of the information provided by each witness;
  - — an identification of the files reviewed by the IE;
  - — the IE's factual findings; and
  - — the IE's conclusions.

A bank requesting an NTL as a C-3 bank must agree to:

- maintain all documents created, prepared, or reviewed by the IE for a 10-year period from the date of the NTL;
- close all accounts of recalcitrant account holders and implement procedures to prevent the bank's employees from assisting recalcitrant account holders to engage in acts of further concealment in connection with closing any accounts or transferring any funds (which undertakings go well beyond the Swiss IGA);
- not open any U.S.-related accounts except under conditions that will ensure that the account will be declared to the U.S. and will be subject to disclosure by the bank; and
- agree that if the DOJ, in its sole discretion, determines that the bank has provided materially false, incomplete, or misleading information or evidence to the U.S., or has otherwise materially violated the terms of any agreement with the U.S., the DOJ may pursue any and all legal remedies against the bank, including instituting criminal charges and that any such prosecution will not be time-barred by the applicable statute of limitations.

Following submission of the IE's internal investigation, the DOJ may either inform the bank that it is eligible for an NTL or request additional information from the bank before making its determination. The DOJ may decline to provide an NTL if the requested information is not provided.

[3] *See* article 3.1.c. of the Swiss IGA, which requires a Swiss bank as a condition of the opening of a new U.S. account (as of July 1, 2014) to obtain from each account holder a consent to report, consistent with the requirements of a foreign financial institution agreement as a condition of account opening.

In terms of timing, the DOJ will endeavor to provide the determination or the request for additional information within 270 days from the receipt of the IE's report. If the DOJ requests additional information, it will endeavor to provide a determination within 90 days of the receipt of the information. If the DOJ is unable to act within these time periods, it will provide notice to the bank of its expectations as to the additional time that will be needed to complete its review.

The DOJ may decline to provide an NTL to any bank if it determines:

- that the bank has committed any tax-related or monetary transaction offenses in connection with undeclared U.S.-related accounts during the applicable period;
- that any information or evidence provided by the bank is materially false, incomplete, or misleading; or
- that the DOJ has information that contradicts the verification or report of the IE, or that otherwise demonstrates criminal culpability by the bank.

Category 4 Banks

A bank seeking to qualify as a C-4 bank must satisfy the conditions of a Swiss financial institution with a local client base, based on the 10 requirements contained in Annex II of the Swiss IGA, as modified by the program's requirements.

Of principal importance are the program's requirements that the bank does not have any U.S. account holders who were not resident in Switzerland, either directly or indirectly through an entity, as of August 1, 2008. The DOJ apparently will not permit a bank to cure its ''bad'' account holders under subparagraph (g) or (h) of the local client base category, even though Annex II of the Swiss IGA explicitly permits such a ''cure'' provision. Also, the bank must meet the 98 percent test of subparagraph (e) on two dates, December 31, 2009, and August 29, 2013. Further, the bank must have implemented the monitoring and cure provisions of subparagraph (g) no later than January 1, 2014, and the U.S. specified person antidiscrimination provision no later than January 1, 2014. Thus, category 4 will be of extremely limited application as interpreted by the DOJ.

A bank requesting an NTL as a C-4 bank must provide an LOI to the DOJ that:

- includes a plan to comply with the C-4 requirements within a reasonable period but not to exceed 120 days from date of the LOI;
- identifies the IE;
- states that it will maintain all records required for compliance with the terms of the NTL (to include all records that may be sought by treaty request); and
- waives any applicable statute of limitations defenses.

To obtain an NTL, a bank must:

- provide verification executed by the bank and its IE that the bank has satisfied the C-4 requirements;
- agree to maintain records sufficient to establish the basis for verification as a C-4 bank for a 10-year period from the date of the NTL; and
- agree that if the DOJ, in its sole discretion, determines that the bank has provided materially false, incomplete, or misleading information or evidence to the U.S., or has otherwise materially violated the terms of any agreement with the U.S., the DOJ may pursue any and all legal remedies against the bank, including instituting criminal charges, and that any prosecutions will not be time-barred by the applicable statute of limitations.

Upon acceptance of verification of a bank's status as a C-4 bank, and the agreement of the bank to the terms of C-4, the DOJ will provide the bank with an NTL. However, the DOJ may decline to provide an NTL if it determines that:

- any information or evidence provided by the bank is materially false, incomplete, or misleading; or
- it has evidence that contradicts the verification of the IE or otherwise demonstrates criminal culpability by the bank.

Changing Categories

The program provides guidance as to certain changes of categories; specifically, from C-2 to C-3 and from C-3 to C-2. It does not provide guidance relating to changes related to or from C-4.

C-2 to C-3

A bank that has submitted an LOI as a C-2 bank and belatedly determines that it should have applied under C-3 may withdraw its LOI and later timely submit an LOI under C-3; it is likely that the DOJ will inquire why the bank initially believed that it may have committed tax-related or monetary transaction offenses. Further, it is not clear whether such a change would fully insulate the changing bank from all C-2 penalty exposure.

C-3 to C-2

A change from C-3 to C-2 is seemingly more difficult. This change will be approved by the DOJ only in ''extraordinary circumstances'' and subject to the limitations as set out in the program, as contained in Section III.C of the program.

The Role of the Independent Examiner

Banks that enter the program under C-2, C-3, or C-4 must appoint an IE; that is, a qualified independent attorney or accountant, regardless of where licensed. The DOJ will not preapprove an IE, but retains the

right to object to an appointment but not unreasonably withhold approval. An IE may rely on the assistance of his staff when conducting the required examination.

The DOJ has provided that the key issue for a Swiss bank in selecting an IE is to select a person who has the ability to verify and report on the elements required under the program for that bank; thus, a bank should ensure that an IE is not merely qualified, but also competent and capable of meeting his responsibilities under the program for a particular bank.

An IE is not an advocate, agent, or attorney of either the bank or the DOJ; communications with the IE are not considered confidential or protected by any privilege or immunity; and an IE is not disqualified merely because of a preexisting relationship with the bank.

The IE must provide a neutral, dispassionate analysis of the bank's activities. The IE's report must be substantive, detailed, and address the requirements of the particular category as set forth in the program. The DOJ does not require that the IE's written report (which must be in English) be made in any particular format; flexibility exists in the contents of a report so long as it is complete.

Although the undertakings of the IE are different in the various categories, it may be that the IE will find it necessary to retain experts to assist the IE in performing its tasks; for example, a U.S. white-collar counsel to assist a Swiss IE in evaluating a Swiss bank's conduct for C-3 or a forensic consultant if the bank has numerous accounts.

Conclusion

As the foregoing exposition reflects, Swiss banks and their advisers will be busy in 2014. Whether a Swiss bank falls within C-2, C-3, or C-4, each participating bank will have much to do in terms of complying with the program and with the entry into force of FATCA through the implementation of the Swiss IGA. ◆