



DOJ's Swiss bank program may put some U.S. taxpayers at risk

Here's what those who hold accounts in Swiss banks need to know.

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On Aug. 29, 2013, the U.S. Department of Justice (DOJ) and the Swiss Federal Department of Finance signed a [joint statement](#) aimed at resolving tax compliance issues unique to Switzerland. As part of this combined enforcement effort, the DOJ announced a new program that is intended to provide a path for Swiss banks that are not currently under a DOJ Tax Division criminal investigation to obtain resolution of their status in connection with the DOJ's overall investigations and to assist the DOJ in its law enforcement efforts.

Switzerland simultaneously announced that it welcomes the DOJ's efforts and encouraged Swiss banks to participate in the program. The Swiss bank program does not apply to individuals or to any Swiss bank currently under formal criminal investigation, referred to as "Category 1 Banks."

Under the Swiss bank program, a Swiss bank is a "Category 2 Bank" if the bank has reason to believe that it may have committed tax-related offenses under U.S. Code title 18 (the U.S. criminal code); U.S. Code title 26 (the Internal Revenue Code); or monetary transaction offenses under Section 5314 (reporting requirements) or Section 5322 of title 31 of the U.S. Code, which governs financial activities in connection with an undeclared U.S.-related account. Category 2 Banks may request a nonprosecution agreement from the DOJ. Category 2 Banks also must agree to disclose information and evidence, perform certain due-diligence steps verified by an independent examiner, and pay a penalty that can range from 20% to 50% of the aggregate maximum value of their undisclosed U.S. accounts.

If a Swiss bank has not committed any tax offenses, it may request a nontarget letter from the DOJ without paying a penalty. A nontarget letter provides some measure of relief because it informs the Swiss bank that it is not currently the target of a criminal investigation authorized by the DOJ Tax Division for violations of any tax-related offenses. These banks are called Category 3 or Category 4 banks.

Under pressure from both the DOJ and the Swiss authorities, Swiss banks will likely perform their own internal investigation and risk assessment to determine if it makes sense to step forward and enter the Swiss bank program. Banks seeking to participate must have already contacted the DOJ Tax Division by Dec. 31, 2013.

Letters to U.S. account holders

To identify U.S. account holders, the Swiss Federal Department of Finance announced that it intends to encourage all banks in Switzerland to send a letter to U.S. persons or entities with U.S.-related accounts informing them of the Swiss bank program and drawing their attention to the IRS's Offshore Voluntary Disclosure Program (OVDP). Paragraph 3 of the Joint Statement reads:

The signatories take note that the Swiss Financial Market Supervisory Authority intends to encourage, within its supervisory powers, all Swiss Banks to send a *letter* to U.S. Persons or Entities with U.S. Related Accounts at those Swiss Banks *informing them of the Program and drawing their attention to the Internal Revenue Service Offshore Voluntary Disclosure Initiative.* [Emphasis added.]

Americans who have not disclosed their accounts in Switzerland should note that this means the Swiss government is encouraging Swiss banks to contact U.S. account holders about their undisclosed accounts.

How Swiss banks identify U.S. account holders

A key aspect of the Swiss bank program is that the participating bank must fully cooperate and disclose information to the DOJ, including, for example, its cross-border business. It also must engage an independent examiner to verify the information provided to the DOJ.

The Swiss bank program applies to U.S.-related accounts that exceeded \$50,000 in value at any time during the applicable period (i.e., between Aug. 1, 2008, and a certain cutoff date). A U.S.-related account is any account for which indicia exist that a U.S. person or entity has or had any of the following over the account:

- A financial or beneficial interest;
- Ownership;
- Signature authority (whether direct or indirect); or
- Other authority (including authority to withdraw funds; to make investment decisions; to receive account statements, trade confirmations, or other account information; or to receive advice or solicitations).

This means that the Swiss banks will not just look at who is listed as the owner to determine whether the account must be disclosed to the DOJ, but will perform an internal investigation to determine if an American has signature authority over the account, the ability to withdraw funds, or even just receives bank statements. An American could be swept up into the Swiss bank program without actually owning funds in the Swiss bank account but merely by having signature authority over the account.

The term “U.S. person” is defined broadly and includes not only U.S. citizens but also U.S. residents, which means that an individual residing in the United States, who is not a U.S. citizen, and U.S. citizens living overseas who have otherwise cut their ties to the United States, are both at risk if they own accounts at Swiss banks. The term “U.S. person” also includes corporations and partnerships organized in the United States. If an individual owns stock in a corporation that in turn owns an account at a Swiss bank, the shareholder may have exposure.

Swiss banks must follow due-diligence procedures for identifying and reporting on U.S. accounts. For example, the bank must perform an electronic search of its records to see if any of the following U.S. indicia are present:

- U.S. citizen or resident;
- U.S. place of birth;
- U.S. mailing or residence address;
- U.S. telephone number;
- Power of attorney or signature authority granted to a person with a U.S. address; or
- An “in-care of” or “hold mail” address that is the sole address that the Swiss bank has on file for the account holder.

If *any* of the U.S. indicia are discovered, the Swiss bank must treat the account as a U.S. account under the Swiss bank program, unless exceptions apply. If an individual instructed the Swiss bank to not send financial statements to the person’s address in the United States, this could be a red flag. Enhanced review procedures, such as a search of paper records, apply if the account balance exceeds \$1 million as of Dec. 31, 2013, or Dec. 31 of any subsequent year.

Closed accounts

Americans often mistakenly believe that simply closing their Swiss bank account will solve their compliance problems. However, Swiss banks also must provide information for “U.S.-related accounts” that were closed during the applicable period. So, even if an American closes a Swiss bank account and transfers the funds back to the United States, the Swiss bank nevertheless may be obligated to disclose information to the DOJ.

Swiss banks’ motivation to contact Americans

As part of the Swiss bank program, the Swiss banks must agree to pay a penalty of a percentage of the maximum aggregate dollar value of all U.S.-related accounts during a certain time period.

The banks, however, may reduce the penalty by the dollar value of each account that they can demonstrate was disclosed to the IRS (see Swiss Bank Program, Part II, H).

The ability to reduce the amount of the penalty gives the banks a financial incentive to contact Americans with Swiss accounts and pressure them to obtain proof that the Americans declared the accounts to the IRS. This contact may take the form of a letter from the Swiss bank seeking a signed statement that the American has disclosed the account through the IRS’s OVDP. Alternatively, the Swiss bank may simply disclose the account information directly to the IRS, to reduce the amount of the penalty. This penalty abatement places individuals with undisclosed Swiss accounts at peril if they have failed to take action to resolve any tax noncompliance issues with their offshore accounts. The U.S. government is on the lookout for Swiss bank clients who failed to disclose their accounts.

Conclusion

U.S. taxpayers with undisclosed Swiss bank accounts face a greater risk of detection than ever before in light of the DOJ's Swiss bank program. Individuals who fail to report foreign financial accounts and/or income from foreign sources risk substantial civil penalties and possibly an IRS criminal investigation. Taxpayers with undisclosed offshore accounts and unreported income from foreign sources would be wise to seek the advice of competent tax counsel, who can evaluate the case, explain the options, and develop a defense strategy.

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