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ALERT

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IRS and DOJ To Build New Tax Fraud Cases Using Data Collected in Voluntary Compliance Programs

On May 8, 2015, the United States Department of Justice announced that it had entered into a "non-prosecution agreement" (NPA) with Swiss bank Vadian Bank AG under the Department of Justice's (DOJ) Swiss bank program. In its press release announcing the NPA, the DOJ said, "the department has opened investigations of culpable individuals and entities based on information obtained from Swiss banks, and will pursue and prosecute those engaged or assisting others in evading their U.S. tax obligations." The very next day, May 9, 2015, a high ranking Internal Revenue Service Criminal Investigations (IRS-CI) official announced at an industry gathering that IRS-CI was using data collected from prior offshore enforcement and will now be targeting banks in other countries. Thus, it is clear that the IRS and DOJ are in the process of collecting evidence and focusing on new targets and jurisdictions in connection with their ongoing offshore tax enforcement regime. International banks that have provided services to U.S. taxpayers need to be aware that enforcement in their jurisdictions is likely.

In recent years, the IRS has repeatedly listed offshore tax enforcement as a top priority for IRS Criminal Investigations (IRS-CI). The term offshore tax enforcement refers to the IRS's crackdown on U.S. taxpayers who hide income and assets outside of the United States. In connection with this crackdown, the DOJ has criminally prosecuted banks and individuals for hiding income and assets in offshore accounts.

At the same time, the IRS and DOJ have employed various offshore voluntary disclosure programs to permit foreign financial institutions and individuals to become compliant, pay fines, and avoid criminal prosecution. These programs require the participants to provide information to United States law enforcement about other institutions and individuals engaged in offshore tax avoidance conduct. For example, in August 2013, the IRS and DOJ announced the Swiss bank program. The purpose of the program is to allow Swiss banks to become compliant and avoid prosecution.

Under that program, Swiss financial institutions were required to agree to pay substantial penalties; make a complete disclosure of their cross-border activities; provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest; cooperate in treaty requests for account information; provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed; and agree to close accounts of account holders who fail to come into compliance with U.S. reporting obligations. The banks are also required to provide information regarding any intermediaries that helped move money from the secret accounts, including asset managers, financial advisors, trustees, nominees, accountants, and lawyers. In exchange, the participating Swiss banks would be eligible to receive a non-prosecution agreement from the Department. It is estimated that 60-70 Swiss banks are participating in the program. So far, the Department has entered into the two non-prosecution agreements, the most recent one with Vadian Bank AG in Switzerland.

With regard to individual U.S. tax-payers, the IRS and DOJ have allowed individuals to report their offshore unreported accounts, limit their civil penalties, and avoid criminal prosecution, through a series of programs commonly referred to as "Offshore Voluntary Disclosure Program" (OVDP). According to the IRS, the OVDP has been successful with more than 45,000 participants and over $6.5 billion in tax and penalties collected. In the ODVP, taxpayers must report the foreign institutions that held their accounts and identify all individuals who assisted them evade U.S. tax, including all foreign bank personnel.

It is clear that the DOJ and IRS are using the data collected in the Swiss bank program and OVDP to build additional cases in other jurisdictions. For example, in April 2013, the IRS served a "John Doe" summons on a U.S. bank for records related to a correspondent bank account held by FirstCaribbean International Bank (FCIB). A "John Doe" summons is a court order that allows the IRS to collect records from third parties that the IRS believes will contain evidence of tax fraud. With regard to FCIB, the DOJ stated that it believed FCIB was aiding U.S. taxpayers in hiding income and assets in accounts located throughout the Caribbean, an area that DOJ referred to as a "part of the world . . . widely known to permit banking services" that would aid in concealing unreported income. In establishing that it believed the records of FCIB would contain evidence of tax fraud, the IRS cited to specific evidence collected through the OVDP program. The "John Doe" summons shows that the data being collected through OVDP will not simply be stockpiled – but it will be used by the IRS to make new enforcement cases in jurisdictions far from Switzerland.

All of this means that that foreign financial institutions and intermediaries need to be vigilant and consider if they have any potential exposure. Likewise, U.S. taxpayers that bank at foreign institutions and are not reporting their bank accounts or assets also need to seriously consider how they can take steps to become compliant. The IRS and DOJ may be winding up their actions in Switzerland, but offshore tax enforcement remains a high priority in virtually any other country across the globe.

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