

MORE SWISS BANKS REACH RESOLUTION UNDER D.O.J.'S SWISS BANK PROGRAM

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Tags

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Swiss Banks Program

The U.S. Department of Justice's ("D.O.J.") "Swiss Bank Program" (officially called the "Program For Non-Prosecution Agreements"), was announced in August 2013 and provided a path for Swiss banks to resolve potential criminal liabilities in the U.S.

Swiss banks eligible to enter the program were required to advise the D.O.J. by December 31, 2013 that they had reason to believe that they had committed tax-related criminal offenses in connection with undeclared U.S.-related accounts. Banks that were already under criminal investigation related to their banking activities were expressly excluded from the program.

The Swiss Bank Program also provided a path to resolution for Swiss banks that were not engaged in wrongful acts with U.S. taxpayers, but nonetheless wanted a resolution of their status. Under the Program, a small group of banks were allowed to show that they met certain criteria for deemed-compliance under the Foreign Account Tax Compliance Act ("F.A.T.C.A."), and thus could be granted a "non-target letter."

The Swiss Bank Program borrows many concepts from the Intergovernmental Agreement ("I.G.A.") between Switzerland and the U.S., which was signed on February 14, 2013. However, rather than applying prospectively, as F.A.T.C.A. does, the Program looks back to 2008. Additionally, the Swiss Bank Program applies more extensive obligations to participating banks. For example, it provides that all banks (other than the small group that is eligible to claim deemed-compliance under F.A.T.C.A., see above) must close "recalcitrant accounts." In contrast, under the I.G.A., the closing of accounts is not required.

As many as 106 banks have entered the Swiss Bank Program. Under the Program, banks are required to provide the D.O.J. with information about their cross-border business, agree to cooperate in any related criminal or civil proceedings, demonstrate their implementation of controls to stop misconduct, and pay penalties in exchange for the D.O.J.'s agreement not to prosecute them for tax-related criminal offenses.

Since the Swiss Bank Program was implemented, 15 Swiss banks reached an agreement with the D.O.J., agreeing to pay a combined \$268.17 million. The first bank to reach a resolution was BSI S.A., on March 30, 2015. It agreed to pay a penalty of \$211 million. Most recently, on July 2, 2015, the D.O.J. reached a resolution with Privatbank Von Graffenried AG.

While most U.S. taxpayers who enter the Internal Revenue Service's Offshore Voluntary Disclosure Program ("O.V.D.P.") to report previously unreported foreign accounts will pay a penalty of 27.5% on the highest year's aggregate value of their foreign accounts, those taxpayers who have an account at any of the banks that reached an agreement with the D.O.J. will have to pay a higher penalty. This is because the I.R.S. announced in August 2014 that if, at the time that a taxpayer initiates his offshore voluntary disclosure, a foreign bank with which the taxpayer had an account was publicly identified to be under investigation, the penalty under the O.V.D.P. will be increased to 50% of the value of the account.

