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Swiss To Share UBS Account Information; IRS May Gain Access To 4,450 Accounts

◆ *IR-2009-75, U.S.-Swiss Confederation Agreement, IRS-UBS Agreement*

High-level negotiations between the U.S. and Switzerland have resulted in an out-of-court settlement in the IRS's dispute with Swiss banking giant UBS AG over the identities of U.S. account holders. The U.S. and Switzerland agreed to resolve the dispute under the framework of their existing tax treaty. The Swiss Federal Tax Administration (SFTA) will expeditiously process requests for information on the bank's U.S. account holders. At the same time, the IRS is reminding taxpayers of the short window to take advantage of its voluntary offshore disclosure initiative.

■ **CCH Take Away.** "The IRS has left the door open for UBS account holders or anyone with an undeclared foreign account regardless of location to come forward," James Mastracchio, partner, Caplin Drysdale, Chartered, Washington, D.C., told CCH. The IRS's offshore voluntary disclosure initiative is scheduled to end September 23 and top agency officials have indicated it will not be extended.

■ **Comment.** Contrary to some reports, UBS is not turning over account information directly to the IRS. The SFTA, the Swiss equivalent of the IRS, will vet the requests and decide if the account should be disclosed.

for information on certain UBS accounts. The IRS, UBS and the SFTA estimate that 4,450 accounts will be within the scope of the treaty request.

■ **Comment.** "The precise criteria for selecting accounts are being kept confidential at the request of the U.S.," Neil Sullivan, CPA, chair, American Institute of Certified Public Accounts (AICPA) FBAR Task Force, told CCH. The criteria will be made public 90 days after the effective date of the agreement.

The Swiss Ministry of Justice explained that the requests will draw on criteria in a framework that allows cases of tax fraud and the like to be identified within the confines of Swiss law and judicial practice. This reflects Article 26 of the U.S.-Switzerland tax treaty, which provides for the exchange of information as is necessary for the prevention of tax fraud and the like. "The term tax fraud or the like is not restricted to conventional forms of fraud involving falsified documents or schemes of lies. Information may also be obtained with regard to serious tax offenses, specifically the continued evasion of large sums of tax," the Swiss Justice Ministry explained. "Account information may also be released, through treaty request channels, even if the IRS does not yet know the name of the bank client concerned when it submits its request."

Value of accounts

IRS Commissioner Douglas Shulman acknowledged that the agency can only

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Treaty request

The U.S.-Swiss agreement calls for the IRS to submit a treaty request to the SFTA

Route to: _____

Offshore

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estimate the total value of funds in the 4,450 accounts. Some accounts have already been closed. "These accounts held over \$18 billion at one time," Shulman said. Shulman also sought to downplay reports that the IRS had sought information on 52,000 UBS accounts. "This is a number reported by UBS as all of their accounts with any U.S. connection. Many of these accounts were held by U.S. taxpayers who had complied with the law."

Task force

The SFTA will create a special task force to process the requests for account information. The agreement gives the SFTA 360 days to make a final decision on whether the requested information may be issued in each of the 4,450 cases. The SFTA will issue final decisions on the first 500 cases within 90 days of the request being received. Account holders may contest the SFTA's final decisions in the Swiss courts.

■ **Comment.** Account holders who appeal to the Swiss courts must serve notice of the appeal on the U.S. Attorney General.

UBS agreement

The IRS and UBS also negotiated a separate agreement to resolve their dispute over the John Doe Summons that was served on the bank last year. For the time being, the case will remain pending to prevent any future claims expiring under U.S. law but the IRS will not seek enforcement of the John Doe summons. The civil case will be withdrawn in stages, provided that UBS has complied with various obligations.

UBS agreed to produce account information to the SFTA on a rolling basis. Within 60 days after UBS receives notice from the SFTA of the IRS's treaty request, the bank will provide account information on the first 500 cases.

■ **Comment.** The agreement between the IRS and UBS includes a draft notice to account holders. The notice informs affected account holders that their accounts "appear to be within the scope" of the IRS treaty request and if the SFTA determines that the information is required to be furnished to the IRS under the U.S.-Swiss tax treaty, the SFTA will turn over the account information to the IRS.

■ **Comment.** The agreement also resolves issues related to alleged breaches by UBS of the Qualified Intermediary Agreement.

Disclosure initiative

The IRS's voluntary disclosure initiative is running at the same time as the SFTA begins reviewing UBS accounts for disclosure to the U.S. The initiative, which the IRS launched in March, is targeted to taxpayers with undisclosed offshore accounts. The IRS is offering a reduced penalty framework in exchange for full disclosure of unreported foreign accounts.

■ **Comment.** "We have heard reports that some taxpayers are running the numbers to determine if the risk of being caught outweighs the voluntary disclosure initiative," John McDougal, counsel, IRS Small Business and Self-Employed (SB/SE) Division, said on August 20. Taxpayers who decline to participate in the initiative risk civil and criminal penalties, McDougal cautioned, including fraud penalties, a penalty for failing to file a tax return, a penalty for failing to pay the amount of tax shown on the return, and an accuracy-related penalty.

UBS agreed to encourage participation in the IRS offshore voluntary disclosure initiative. Notification from UBS that a customer's account information may be subject

to the treaty request does not prevent the individual from participating in the voluntary disclosure initiative. However, the opportunity to participate in the initiative closes once the SFTA decides to disclose the account information to the U.S.

■ **Comment.** "If a (UBS) customer gets this notification in the next few weeks, there is still time for the customer to come in before the September 23 voluntary disclosure deadline. However, once the Swiss government sends us the names (of UBS customers), all bets are off," Shulman said.

■ **Comment.** The IRS has updated its frequently asked questions (FAQs) about the offshore initiative on its web site. The updated FAQs explain that a UBS account holder becomes ineligible to make a voluntary disclosure under the offshore VDP at the time the IRS receives information from any source, including from the SFTA, UBS, an informant, or otherwise, relating specifically to the account holder's undisclosed foreign accounts or undisclosed foreign entities.

More banks

On August 20, the IRS announced that a former executive at Neue Zuercher Bank (NZB), a Swiss private bank had been indicted for conspiracy to defraud the U.S. According to the IRS, the banker allegedly encouraged U.S. clients to transfer assets from UBS to NZB because NZB was less likely to be pressured by the IRS to disclose the identities of its U.S. clients.

■ **Comment.** The IRS has declined to reveal if it intends to request information on accounts at other Swiss banks. "The Swiss government is prepared to work with us regarding similar U.S. requests, if any, involving other financial institutions," Shulman said. Switzerland has agreed to review and process additional treaty requests from the IRS under Article 26 if the requests are based on a pattern of facts and circumstances that are equivalent to those of the UBS AG case.

Reference Key

FED references are to *Standard Federal Tax Reporter*
 USTC references are to *U.S. Tax Cases*
 CCH Dec references are to *Tax Court Reports*
 TRC references are to *Tax Research Consultant*