June 5, 2014

The Tax Division's further comments about the *Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks*

Authorization of formal criminal investigation (Program I.A and V.A). The period during which the Department of Justice would not authorize formal criminal investigations of additional Swiss banks expired on Dec. 31, 2013. The Tax Division may authorize at any time a formal criminal investigation of any Swiss bank that did not submit a timely letter of intent to participate in Category 2 of the Program or any Swiss bank that submitted a timely letter of intent and then withdrew from, or failed to meet the requirements of, the Program. Such authorization may be made without regard to whether a Swiss bank intends to, or does, request consideration for a non-target letter under Categories 3 or 4 of the Program.

Coverage of the non-prosecution agreement (Program II.C and II.J). Category 2 of the Program is intended for Swiss banks that have reason to believe they may have committed tax-related offenses under Titles 18 or 26 of the U.S. Code, or monetary transaction offenses under §§ 5314 or 5322 of Title 31. The department expects that all Category 2 Swiss banks will provide complete explanations of all such conduct occurring at the bank pursuant to Part II.D.1 of the program. The non-prosecution agreement will not cover any conduct that is not fully disclosed by the Swiss bank to the Tax Division. With the exception of penalty mitigation, as described below, Swiss banks participating in Category 2 of the Program are expected to provide all information required to execute the non-prosecution agreement no later than June 30, 2014.

Maximum aggregate dollar value and penalty mitigation (Program II.H.) Part II.H.1 of the program provides that the Swiss bank will pay as a penalty "for U.S. Related Accounts that existed on Aug. 1, 2008, an amount equal to 20% of the *maximum aggregate dollar value* of all such accounts during the Applicable Period." (Emphasis added.) Similar language is found in II.H.2 and II.H.3. For each of these three categories of accounts, the "maximum aggregate dollar value" is calculated at a single date (typically using end-of-month information) when the bank's book of those U.S. Related Accounts is at its highest point. Additionally, that same date is used for all penalty mitigation calculations, and a reduction in maximum aggregate dollar value will only be permitted for accounts in existence on that date and in the amount that was included in the maximum aggregate dollar value. Although the Program does not require the maximum aggregate dollar value to be verified by an independent examiner, the Tax Division may accept such verification. In the alternative, the Tax Division may request, pursuant to Part II.D of the Program, further explanation or materials relating to the calculation of this figure to ensure that the Swiss bank demonstrates to the satisfaction of the Tax Division that the determination of the maximum aggregate dollar value is correct.

Alternatively, Category 2 Swiss banks may elect to use a maximum aggregate dollar value definition equal to the aggregate of the maximum dollar value of each U.S. related account at its highest point during the relevant period. In other words, this figure would not be computed at a single date during the relevant period, but the dates at which each U.S. related account was at its maximum value. In these circumstances, penalty mitigation calculations would similarly be based on the highest point of that U.S. related account.

Identities of third parties involved in structuring, operating, and supervising cross-border business (Program II.D.1). The Program requires a Category 2 Swiss bank to provide, prior to the execution of the non-prosecution agreement, information as to how its cross-border business for U.S. Related Accounts was structured, operated, and supervised, including the names and functions of individuals involved in that activity. Such disclosures are not limited to individuals who are employees or former employees of the Swiss bank. Rather, to the extent that the Swiss bank attracted U.S. Related Accounts through third parties, such as external asset managers, the Program requires that such third parties be identified, and that documents and explanatory material relating to that cross-border business be provided to the Tax Division pursuant to Part II.D.1 of the Program. The Swiss Federal Department of Finance published a Model Order in July 2013 noting that Swiss banks are permitted to disclose the "personal data of (former and current) employees who structured, operated or supervised business relationships within the bank … *as well as the personal data of third parties who performed similar functions* in connection with such business relationships." (Emphasis added.)

Identities of relationship manager, client advisor, asset manager, etc. (Program II.D.2.v). The Program requires a Category 2 Swiss bank to provide "the name and function of any relationship manager, client advisor, asset manager, financial advisor, trustee, fiduciary, nominee, attorney, accountant, or other individual or entity functioning in a similar capacity known by the Bank to be affiliated" with the U.S. Related Account during the Applicable Period. The Program contains no *de minimis* number of accounts with which that person must be affiliated before that person is identified. Moreover, the Program requires the identities of such persons or entities located not only in Switzerland, but in any country outside of Switzerland, including the United States.

Information concerning transfers of funds into and out of the account (Program II.D.2.vi). The Program requires a Category 2 Swiss bank to provide the identities of intermediaries and financial institutions related to the transfers of funds into and out of the U.S. Related Accounts, including the transfer of securities, precious metals, or other account assets. The Swiss bank must also provide the identities of such intermediaries and financial institutions located not only in Switzerland, but in any country outside of Switzerland, including the United States.

Receipt of Independent Examiner verification (Program II.B and II.D.3). The Program requires that an Independent Examiner verify the information to be provided by the Swiss Bank pursuant to Part II.D.2 of the Program. The date by which that verification of the II.D.2 information must be received is extended to July 31, 2014.

Assistance with treaty requests (Program II.D.4). As soon as is practicable, the Tax Division intends to submit to the Swiss authorities, through the Competent Authority, requests for assistance under Article 26 (Exchange of Information) of the Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income signed at Washington, October 2, 1996, together with a Protocol to the Convention. A Category 2 Swiss bank that wishes to extend the time in which it may demonstrate that an account was disclosed to the IRS through an announced Offshore Voluntary Disclosure Program, as described in the following paragraph, must provide information by June 30, 2014, to the satisfaction of the Tax Division, relating to its accounts for which there is a

reasonable suspicion that the U.S. accountholder has engaged in conduct such that Swiss authorities may provide assistance under the 1996 Convention and Protocol. Notwithstanding this June 30, 2014, deadline, the Swiss bank's obligation to cooperate with the preparation of requests for assistance under the 1996 Convention and Protocol, or such later Convention or Protocol that may enter into force, is a continuing one as described in Part II.D.4 of the Program.

Extension of deadlines relating to mitigation of penalty amounts (Program II.H). The Program currently requires, in Part II.B.1, Category 2 Swiss banks to be in a position to produce all II.D information and all II.H information no later than June 30, 2014 (assuming that an extension has been given). To the extent that Swiss banks have been advised that the deadline applies only to information referred to in Part II.D.1 of the Program, that advice is incorrect.

The Tax Division recognizes the difficulty that some Swiss banks have encountered in obtaining proof that an account was not an undeclared account or was timely disclosed by the Swiss bank to the IRS. Therefore, the time in which a Swiss bank may demonstrate to the satisfaction of the Tax Division that an account was not an undeclared account or was disclosed by the Swiss bank to the IRS in the manner required by the Program is extended to July 31, 2014.

In addition, Swiss banks have requested additional time to demonstrate to the satisfaction of the Tax Division that an account was disclosed to the IRS through an announced Offshore Voluntary Disclosure Program following notification by the Swiss bank of such a program. The Tax Division will extend the time in which a Swiss bank may make this showing from June 30, 2014, to Sept. 15, 2014, on the condition that the bank demonstrates, no later than June 30, 2014, to the satisfaction of the Tax Division, that it has provided assistance with respect to treaty requests as described in the previous section of these comments.

Publicity of non-prosecution agreements. The Tax Division intends to publicly release the fact that the Tax Division has entered into a non-prosecution agreement with a Category 2 bank. The Tax Division reserves the right to publicly release any non-prosecution agreement in whole or in part provided that doing so does not jeopardize any ongoing matter before the department or a participating law enforcement agency. As provided in Part V of the Program, the personal data provided by Swiss banks under the Program will not be made public as a matter of course but may be used and disclosed only for purposes of law enforcement or as otherwise permitted by U.S. law.

Categories 3 and 4 Deadlines (Program III.B and IV.B). The time in which a Swiss bank may submit a letter of intent to the Tax Division under categories 3 and 4 of the Program is extended from Oct. 31, 2014, to Dec. 31, 2014. Letters of intent may not be submitted prior to July 1, 2014.