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Time Extensions Welcome Under Swiss Non-Prosecution Program, Attorneys Say

BNA Snapshot

Key Development: Swiss banks welcome DOJ extensions of deadlines under program to work out agreements to avoid prosecution for tax violations.

Key Takeaway: More taxpayers entering IRS's Offshore Voluntary Disclosure Program as a result of bank initiative.

By Alison Bennett

June 6 — Swiss banks will be grateful for the time extensions the Department of Justice is providing as part of its program to negotiate non-prosecution agreements for banks that may have helped U.S. account holders conceal assets from the U.S. tax authorities, tax practitioners tell Bloomberg BNA.

At the same time, attorneys said, the program is likely to result in more individual taxpayers telling the Internal Revenue Service about their foreign assets through the Offshore Voluntary Disclosure Program, where they can pay a set penalty in exchange for the chance to avoid criminal prosecution.

Practitioners made their comments in a series of interviews June 6, one day after the DOJ Tax Division said it was extending the time to July 31 for Swiss banks to show that accounts weren't undeclared or were properly disclosed to the IRS.

Banks also will have until Sept. 15 to show that an account was disclosed to the IRS through the Offshore Voluntary Disclosure Program as long as the bank can show, by June 30, that it has provided assistance with treaty requests (109 DTR G-10, 6/6/14).

With that June 30 deadline approaching, the extensions are "most welcome," Scott Michel, a member of Caplin & Drysdale Chartered in Washington, said. "There's a herculean effort on both sides of the Atlantic to try to achieve as much penalty mitigation as possible."

Flexibility Sought

"Banks are doing everything they can to comply with the program and this is welcome relief. I hope the DOJ will continue to be flexible," Bryan Skarlatos, a partner with Kostelanetz & Fink LLP in New York, said June 6.

The non-prosecution program requires banks to turn over information on U.S. accounts and a host of associated information to U.S. tax authorities and pay hefty penalties in order to avoid criminal prosecution. The Tax Division announced the extension and other changes in comments made on the DOJ's website.

Skarlatos said that while any extension is “very, very helpful,” it would be even more helpful if the government had also decided to extend the deadline to Sept. 15 for banks to prove their accounts weren't undeclared or were disclosed to the IRS.

“There are a lot of issues with communicating with banks' former customers,” he told Bloomberg BNA. “It would be helpful to have more time.”

Identification Issues

Practitioners said, however, that other parts of the June 5 Tax Division commentary stand out as potentially raising some issues.

For example, the government said its requirement that Category 2 banks give information on how their cross-border businesses for U.S.-related accounts are structured, operated and supervised is extensive.

These disclosures aren't limited to employees or former employees of the bank, the Justice Department said. Banks have to identify any third parties they used to attract these accounts, such as external asset managers. In addition, banks have to turn over any documents and other materials related to the cross-border business.

Michel said that the demand that every relationship manager has to be identified is a difficult one to meet. “Some of these banks have 150,000 accounts,” he said. “But the Tax Division took its position that it wants every name and so be it.”

He told Bloomberg BNA that the non-prosecution program is “creating a bit of an employee relations issue in the Swiss banking community.”

Skarlatos also said that the requirement for information on so many people associated with the banks is “one of the things that stands out to me.”

More Takers for OVDP

Michel and Skarlatos also said the non-prosecution program for banks is likely to generate more takers for the individual OVDP.

Skarlatos said a lot of taxpayers are going into the program as the banks are reaching out to depositors to inquire about their compliance and telling them the OVDP is available.

For the big picture, as banks try to meet the requirements of the program, “As long as the DOJ is willing to be somewhat flexible, I think that this can get done,” Skarlatos said.

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