

## Scott Michel Discusses U.S. Non-Prosecution Agreements Not Protecting Related Companies

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*Tax Notes*

At the American Bar Association's National Institute on Criminal Tax Fraud and Tax Controversy conference in Las Vegas, Caplin & Drysdale's Scott D. Michel and Nanette Davis, senior litigation counsel in the Tax Division, discussed the status of the Justice Department's investigation into Swiss and other financial institutions, including the DOJ's position that just because a Swiss entity of a multinational banking group received a non-prosecution agreement (NPA) through the DOJ Swiss bank program does not mean that the other related entities are in the clear with the U.S. tax authorities. To read the full article, please visit *Tax Notes'* website.

*Excerpt taken from the article "U.S. Non-Prosecution Agreements Will Not Protect Related Companies" by Nathan J. Richman for Tax Notes.*

Terra-Lynn Zentara, attorney, IRS Criminal Investigation division, said that one of the NPA conditions requires the banks to draft treaty requests and to collect and retain the potentially responsive documents. Scott D. Michel of Caplin & Drysdale Chtd. emphasized the banks' role in drafting the treaty requests.

Zentara said that the treaty requests have been governed by the "fraud or the like" standard in the 1996 U.S.-Switzerland tax treaty, which is the last tax treaty the United States maintains with that limited standard. Michel said that Switzerland ratified a new treaty in 2009, but the Senate has not yet passed it.

Michel asked if the use of third-country holding entities, such as accounts held by Liechtenstein foundations or Panama companies, would be more likely to meet the "fraud or the like" standard than mere use of a numbered account. Zentara confirmed that has been her general experience because those cases allow evidence of conflicting documents to show fraud or the like.

### Further Investigations

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After Michel said the Tax Division has provided a large welcome mat for banks and other organizations concerned about their past behavior, such as having accepted leaver accounts, Davis said that those concerned are free to contact her directly. "We have had inquiries of entities and we have had presentations by offshore providers who have decided that the best defense is an offense, and so they are coming in proactively and will end up in a better place than they would have if they were on the receiving end of a treaty request or a material witness detainer at the border or an arrest warrant," she said.

## **Attorneys**

Scott D. Michel

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