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UBS Strikes a Deal: The Recent Impact of Weakened Bank Secrecy on Swiss Banking

I. INTRODUCTION

Through the abuse of offshore tax havens, the United States loses roughly \$100 billion in tax revenue annually.¹ Frustrated with this revenue loss, the Internal Revenue Service (IRS) and the Department of Justice (DOJ) have pressured Switzerland, a well-known tax haven, to be more cooperative with American tax collection efforts, resulting in controversial settlement agreements² between the United States and Switzerland and the United States and the Union Bank of Switzerland (UBS),³ Switzerland's largest bank.⁴ The United States may be emboldened by this success and pursue similar efforts to reduce tax avoidance by American customers in other tax haven jurisdictions. In early 2009, the DOJ announced that UBS had entered a deferred prosecution agreement with the DOJ and the Securities and Exchange Commission (SEC) whereby UBS agreed to provide the IRS with the names of American citizens holding offshore accounts that meet certain specified criteria in order to avoid charges of "conspiring to defraud the United States by impeding the Internal Revenue Service."⁵

1. STAFF OF SUBCOMM. ON INVESTIGATIONS, 100TH CONG., *TAX HAVEN BANKS AND U.S. TAX COMPLIANCE* 1 (2008) [hereinafter *U.S. TAX COMPLIANCE*].

2. Daniel Pruzin, *Swiss Court Orders UBS to Notify Clients Before Turning Account Details Over to U.S.*, *BNA BANKING DAILY*, Sept. 25, 2009, <http://lawlib.proxy2.unc.edu:2061/bdln/> (search "Swiss Court Orders UBS to Notify Clients Before Turning Account Details Over to U.S.") [hereinafter *UBS to Notify Clients*].

3. See *Deferred Prosecution Agreement* at Exhibit C p. 1, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla., Feb. 18, 2009) [hereinafter *Deferred Prosecution Agreement*] ("UBS provides banking, wealth management, asset management and investment banking services . . .")

4. Press Release, U.S. Dep't of Justice, *UBS Enters Into Deferred Prosecution Agreement* (Feb. 18, 2009), <http://www.justice.gov/opa/pr/2009/February/09-tax-136.html> [hereinafter *U.S. Dep't of Justice*].

5. U.S. Dep't of Justice, *supra* note 4; accord, *UBS Agrees to Reveal U.S. Tax Shelter Clients*, *WEB CPA.COM*, Feb. 19, 2009, <http://www.webcpa.com/news/30782-1.html> (describing UBS Agreement with the DOJ).

The recent changes in the interpretation of Swiss bank secrecy laws, as evidenced by the Deferred Prosecution Agreement with UBS, will likely cause: (1) irreparable harm to Swiss banking industry; (2) virtual elimination of tax avoidance techniques previously available to American depositors in Swiss banks; and (3) greater tax revenues for the U.S. government.⁶ Part II of this Note will introduce the UBS investigation as it relates to the loss of tax revenue in the United States.⁷ Part III will compare Swiss bank secrecy laws with American bank secrecy laws and specifically address how the Swiss laws have made Switzerland, like several other offshore tax havens, attractive to American customers.⁸ Part IV will explore the evolution of Swiss bank secrecy in the UBS investigation.⁹ Part V will examine the effects of the new interpretations of the Swiss secrecy laws, expanding on the potential harm to the Swiss banking industry and how these new interpretations will affect American clients.¹⁰ Part VI will discuss the recent developments regarding the agreement between the United States and Switzerland, address how the Swiss courts reacted to the agreement, and analyze the options available to the Swiss for future compliance with the original agreement.¹¹

II. THE UBS INVESTIGATION

A. *Tax Havens*

There are two alternative ways to determine if a country constitutes a tax haven: the objective approach and the subjective approach.¹² The objective approach defines a tax haven as “any nation which has no tax or a low rate of tax on all or certain categories of income and which offers a certain level of banking or

6. See *infra* Part V, pp. 454-58.

7. See *infra* Part II, pp. 436-41.

8. See *infra* Part III, pp. 441-48.

9. See *infra* Part IV, pp. 448-54.

10. See *infra* Part V, pp. 454-58.

11. See *infra* Part VI, pp. 458-65. This information is current as of Feb. 1, 2010.

12. Douglas J. Workman, Comment, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675, 678 (1982).

commercial secrecy.”¹³ A nation is a subjective tax haven “if it promotes itself as one, and those who specialize in international tax planning consider it to be one.”¹⁴ Switzerland is a tax haven under both the objective and subjective approach because it requires strict bank confidentiality, promotes itself as an expert in the banking industry and enables Americans to invest assets in the country without paying taxes.¹⁵

The strict secrecy laws and the expertise of the Swiss in the banking industry make Switzerland an attractive tax haven for American investors. According to the 2008 Senate Subcommittee Report on Tax Havens, UBS alone has “maintain[ed] for an estimated 19,000 U.S. clients ‘undeclared’ accounts in Switzerland with billions of dollars in assets that have not been disclosed to U.S. tax authorities.”¹⁶ The ease with which Americans can hide assets in offshore accounts hinders the U.S. government’s ability to enforce its tax laws effectively.

B. Loss of Tax Revenue in the United States Through Use of Offshore Tax Havens

American citizens may have close to \$14.8 billion hidden in Swiss bank accounts.¹⁷ In May 2009, the Obama Administration announced a plan to reform corporate taxation by strictly enforcing laws against tax haven abuse in an effort to raise \$8.7 billion in tax revenues.¹⁸ The Administration’s efforts to stop tax haven abuse are necessary to increase tax revenues to decrease the deficit and fund new programs. This increased effort to raise money is not unusual, as “[t]ax-dodging schemes are increasingly

13. *Id.*

14. *Id.*

15. *See id.* Other countries that have been identified as tax havens include Andorra, the Bahamas, Barbados, the Cayman Islands, Liechtenstein, Monaco, Singapore, and Turkey. *See id.* at n16; ORG. FOR ECON. CO-OPERATION AND DEV., COUNTERING OFFSHORE TAX EVASION: SOME QUESTIONS AND ANSWERS, 12 (Sept. 28, 2009), <http://www.oecd.org/dataoecd/23/13/42469606.pdf>.

16. U.S. TAX COMPLIANCE, *supra* note 1, at 8.

17. Emma Thomasson, *US Civil Case No Big Threat to UBS-Swiss Regulator*, REUTERS, Feb. 21, 2009, available at <http://uk.reuters.com/article/idUKLL61373220090221>.

18. *The Last Days of Bank Secrecy?*, PODER360.COM, Sept., 2009, http://www.poder360.com/article_detail.php?id_article=2496.

under attack by governments scrambling to find revenue needed to finance the soaring costs of government stimulus programmes.”¹⁹ Tax haven abuse is an essential part of reform, as the United States loses more than \$100 billion of tax revenue annually due to abuse of offshore tax havens.²⁰ President Obama said, “[i]f financial institutions won’t cooperate with us, we will assume that they are sheltering money in tax havens, and act accordingly.”²¹

One analyst has suggested that decreasing tax evasion through offshore tax havens is “essential for President Obama’s rescue effort to retain public support and credibility.”²² Tax evasion is considered “grossly unfair”²³ at any time to those in the lower, middle, and upper-middle classes because only they must pay taxes while the wealthy are able to hide assets offshore to avoid paying. While it is unfair at any time, critics argue that tax evasion “should be intolerable” in times of financial crisis.²⁴ Curbing tax evasion, which is primarily promulgated by the wealthy, is a way for President Obama to maintain public support while he is trying to usher in significant legislative reform. Obama can garner such public support for expensive social programs by making the wealthy pay taxes that directly fund such proposed programs.

C. *Investigation into UBS: Events Creating Suspicion in the Bank*

UBS has developed a substantial business enabling American clients to hide assets and evade taxation on the resulting investment income.²⁵ The Senate launched an investigation in

19. Thomasson, *supra* note 17.

20. U.S. TAX COMPLIANCE, *supra* note 1, at 1.

21. *The Last Days of Bank Secrecy?*, *supra* note 18.

22. Editorial, *\$100 Billion the Country Could Use*, N.Y. TIMES, Mar. 14, 2009, at A20, available at http://www.nytimes.com/2009/03/14/opinion/14sat1.html?_r=1.

23. *Id.*

24. *Id.*; see, e.g., Sec. & Exch. Comm’n v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 117, 32 Fed. R. Serv. 2d 1650, 1657 (1981) (explaining that using secret foreign bank accounts has “debilitating effects” on Americans and the American economy).

25. See U.S. TAX COMPLIANCE, *supra* note 1, at 11 (“These facts indicate that, soon after it joined the [Qualified Intermediary] program [in 2001], UBS helped its U.S. clients structure their Swiss accounts to avoid reporting billions of dollars in assets to the IRS.”); SEC, *UBS Agrees to Pay \$200 Million to Settle SEC Charges for*

2003, followed by a criminal investigation by the DOJ in 2004, into UBS's involvement in tax shelters.²⁶ The investigation delved into substantial records of the taxpayers and their interaction with UBS, adding scrutiny to other activities of UBS.²⁷

In 2001, UBS signed an agreement with the United States to be a part of the U.S. Qualified Intermediary Program which "encourage[s] foreign financial institutions to report and withhold tax on U.S. source income paid to foreign bank accounts."²⁸ UBS never filed the requisite reporting forms to the IRS, however.²⁹ In 2003, the IRS launched a three-month long Voluntary Disclosure Initiative whereby American taxpayers could voluntarily disclose their use of offshore credit cards, many of which were set up by UBS.³⁰ Due to continued heightened scrutiny of UBS's involvement, the IRS and the DOJ focused on any and all activities of UBS with American taxpayers in which American taxpayers could be evading income tax.

The arrest and indictment of Bradley Birkenfeld in April 2008 reignited the investigation into UBS.³¹ The DOJ charged Birkenfeld, a former private banker and an American, for conspiring with another American citizen "to defraud the IRS of \$7.2 million in taxes owed."³² The United States alleged that Birkenfeld traveled to the United States to market U.S. securities to American clients, which requires a license that UBS did not

Violating Registration Requirements, SEC Litigation Release No. 20905 (D.D.C. filed Feb. 18, 2009) ("As alleged in the SEC's complaint, from at least 1999 through 2008, UBS acted as an unregistered broker-dealer and investment adviser to thousands of U.S. persons and offshore entities with United States citizens as beneficial owners.").

26. See U.S. S., PERMANENT SUBCOMM. ON INVESTIGATIONS, U.S. TAX SHELTER INDUSTRY: THE ROLE OF ACCOUNTANTS, LAWYERS AND FINANCIAL PROFESSIONALS (2003) [hereinafter *Role of Accountants*].

27. See *id.*

28. U.S. TAX COMPLIANCE, *supra* note 1, at 3, 9, 21-22.

29. *Id.* at 9 (explaining that UBS defended this claim by stating that "these U.S. client accounts fall outside its [Qualified Intermediary] reporting obligations.").

30. See generally Press Release, Internal Revenue Service, Statement by Treas. Ass't Sec'y For Tax Policy Pam Olsen, Early Data Show Strong Response to Offshore Initiative; Applicants Owe Millions, Reveal Scores of Promoters (May 1, 2003), <http://www.irs.gov/newsroom/article/0,,id=109351,00.html>.

31. U.S. TAX COMPLIANCE, *supra* note 1, at 2.

32. *Id.*; see also, 18 U.S.C.A. § 371 (2009) (provides that when two or more persons conspire to commit an offense or defraud the United States for any purpose, each person can be fined or imprisoned up to five years, or both).

have.³³ Birkenfeld pled guilty to conspiracy and agreed to provide testimony to the Senate Subcommittee on Investigations for insight into the business operations of UBS.³⁴ In his testimony, Birkenfeld indicated that “UBS in Switzerland had ‘\$20 billion of assets under management in the United States undeclared business, which earned the bank approximately \$200 million per year in revenues.’”³⁵

The information obtained from Birkenfeld’s disclosures was the “crucial factor leading to the criminal investigation of UBS.”³⁶ Kevin Downing, the DOJ prosecutor who handled the UBS case stated, “[w]ithout Mr. Birkenfeld walking into the door of the Department of Justice in summer of 2007, I doubt this massive fraud scheme would have been discovered by the United States government.”³⁷ In August 2009, a U.S. District Court judge sentenced Birkenfeld to forty months in prison, a sentence that was “10 months longer than was recommended by prosecutors.”³⁸

The United States may request information in a “John Doe” summons to “obtain information about possible tax fraud by people whose identities are unknown.”³⁹ In July 2008, the IRS

33. Indictment at 3, *United States v. Bradley Birkenfeld and Mario Staggi*, No. 08-60099 (S.D. Fla., April 10, 2008); see also U.S. TAX COMPLIANCE, *supra* note 1 (explaining that the evidence shows that multiple Swiss UBS bankers were involved in such activities that were not only against U.S. law but also the bank’s own policies).

34. U.S. TAX COMPLIANCE, *supra* note 1, at 2, 9 (noting that his testimony was provided as part of his agreement to plead guilty to the charges).

35. *Id.* at 10.

36. Lynnley Browning, *Ex-UBS Banker Seeks Billions for Blowing Whistle*, N.Y. TIMES, Nov. 26, 2009, at B1 (explaining that, in 2007, Birkenfeld came forward seeking a multi-billion-dollar reward under a new whistle-blower law, though his recent conviction may hinder his ability to collect). Because Birkenfeld came forward before the DOJ, IRS, or SEC learned of the scheme he is still entitled to benefit from the whistle-blower law. *Id.* Birkenfeld’s attorney represents that, at the time of his arrest, he “was already cooperating extensively” with federal authorities. Martha Brannigan, *Whistle-Blower Advocates Seek Review of Former UBS Banker’s Treatment*, MIAMI HERALD, Nov. 28, 2009, <http://www.miamiherald.com/business/story/1355297>.

37. *Ex-UBS Banker Seeks Billions for Blowing Whistle*, *supra* note 36.

38. Joanna Chung, *Former UBS Banker Given Prison Term*, FIN. TIMES, Aug. 21, 2009, http://www.ft.com/cms/s/0/34c02bcc-8e86-11de-87d0-00144feabdc0.html?nclick_check=1.

39. Press Release, U.S. Department of Justice, Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records (June 30, 2008) [hereinafter Justice Department Asks Court].

issued John Doe summonses⁴⁰ demanding that UBS provide the names of American taxpayers “who may be using Swiss bank accounts to evade federal income taxes”⁴¹ or perpetrating “activities intended to conceal from the IRS the identities of UBS’s United States clients, who willfully evaded their income tax obligations.”⁴² According to a 2008 Senate Subcommittee Report on Tax Havens, UBS opened accounts in Switzerland from as early as 2000 through 2007 in a “concerted effort” to help American clients evade payment of U.S. income taxes.⁴³

III. BANK SECRECY LAWS PRIOR TO THE UBS INVESTIGATION

A. *Offshore Tax Havens*

The Organization for Economic Co-operation and Development (OECD)⁴⁴ issued a list of factors used to identify tax havens.⁴⁵ In 2000, the OECD had a list of forty tax havens,⁴⁶ thirty-

40. Deferred Prosecution Agreement, *supra* note 3, at 9.

41. Justice Department Asks Court, *supra* note 39. The IRS investigation into UBS’s actions was not necessarily a novel move on the part of the IRS as it has investigated offshore tax havens in an effort to curb tax evasion for many years. Workman, *supra* note 12. In the 1960s and 1970s, the IRS initiated investigations commonly referred to as “Operation Trade Winds,” which focused on Americans hiding assets in offshore havens such as the Bahamas. This project and others like it were subsequently shut down because of Congressional investigations into possible impropriety of the activities by the IRS. *United States v. Payner*, 447 U.S. 727, 279, (1980); *UBS Refuses to Disclose Tax Shelter Accounts*, WEBCPA.COM, Mar. 5, 2009, <http://www.webcpa.com/news/30921-1.html> (Democratic Senator Carl Levin from Michigan suggests that the difference between the past relations with the Swiss banks, in which U.S. investors hid assets to evade taxes without aid from the banks themselves, and the current situation is that “here, Swiss bankers aided and abetted violations of U.S. tax law by traveling to this country, with client code names, encrypted computers, counter-surveillance training, and all the rest of it, to enable U.S. residents to hide assets and money in Swiss accounts.”).

42. Deferred Prosecution Agreement, *supra* note 3, at Exhibit B, p. 4.

43. U.S. TAX COMPLIANCE, *supra* note 1, at 8.

44. James K. Jackson, CONG. RESEARCH SERV. REPORT FOR CONG., THE OECD INITIATIVE ON TAX HAVENS, at 6 (July 24, 2009), http://assets.opencrs.com/rpts/R40114_20090724.pdf. (As an intergovernmental organization with thirty member countries, including both the United States and Switzerland, “the OECD has addressed the issue of tax havens in various forms since the organization was formed in 1961.”).

45. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 15 (noting that these factors include: (1) no or nominal tax on the relative income, (2) lack of effective exchange of information, (3) lack of transparency, and (4) no requirement that the activity be substantial) “No or nominal tax is not sufficient in itself to classify a

five of which were deemed to be uncooperative.⁴⁷ By 2008, however only three countries remained on the list of uncooperative tax havens.⁴⁸ This sharp decline was a direct result of countries not wishing to be considered “uncooperative” by the OECD and their agreeing to sign “Commitment Letters” to be more cooperative in tax information exchange initiatives.⁴⁹ In 2009, no countries were listed as “uncooperative tax havens.”⁵⁰ This does not mean, however, that offshore tax havens no longer exist; it simply means that none of them have refused to comply with the OECD’s minimum standards.⁵¹

B. *Swiss Approach*

The economic uncertainty resulting from World War I caused widespread panic over the financial loss, inciting individuals worldwide to invest their money in secure banks in other nations, away from the reach of their home country.⁵² During the 1930s, the Nazi regime sought to prevent the outflow of capital from Germany by imposing strict regulations.⁵³ The 1933 Nazi regulations stated “all German nationals [were required] to declare assets held outside of Germany.”⁵⁴ Holding foreign assets was punishable by death.⁵⁵ Switzerland reacted to the execution of

country as a tax haven . . . [t]hus, in order to avoid being listed as an uncooperative tax haven, jurisdictions which met the criteria were asked only to make commitments to implement the principles of transparency and exchange of information for tax purposes.” The last factor of “no substantial activity” was not considered in determining whether a tax haven was “cooperative.” *Id.*

46. *Id.*

47. U.S. TAX COMPLIANCE, *supra* note 1, at 27.

48. *Id.* (listing the countries as Andorra, Liechtenstein, and Monaco).

49. *Id.*

50. ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 15.

51. *See id.* The OECD maintains a “gray list” of uncooperative tax havens as well, removing Switzerland in September. Deborah Ball, *Switzerland is Taken Off List of Uncooperative Tax Havens*, WALL ST. J., Sept. 26, 2009, A22 (Switzerland signed a dozen double-taxation treaties in order to be taken off the list.).

52. Greg Brabec, Note & Comment, *The Fight for Transparency: International Pressure to Make Swiss Banking Procedures Less Restrictive*, 21 TEMP. INT’L & COMP. L.J. 231, 233 (2007).

53. *Id.*

54. C. Todd Jones, *Compulsion Over Comity: The United States’ Assault on Foreign Bank Secrecy*, 12 NW. J. INT’L L. & BUS. 454, 455 (1992).

55. *See*, Brabec, *supra* note 52, at 233.

three German citizens convicted of hiding money from the German government by enacting strict banking secrecy laws in the Swiss Federal Banking Act of 1934.⁵⁶ The Banking Act of 1934 created a standard for the Swiss Federal Banking Commission to have a “limited amount of supervision” over the banking industry.⁵⁷ To further protect investors, Swiss bankers chose to use “Numbered Accounts” without names to protect those customers who might be “threatened by political persecution.”⁵⁸

In Switzerland, the secrecy laws were created for the dual purpose of “protect[ing] the national sovereignty of the Swiss economy as well as the assets of bank customers.”⁵⁹ Accordingly, the Banking Act of 1934 provides for criminal sanctions for violations of the “banker’s duty of confidence”⁶⁰ although it does not define the scope of this duty. It has traditionally been viewed, however, as similar to American attorney-client privilege.⁶¹ The Banking Act of 1934 states:

Whomever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator or commissioner of a bank . . . or divulges a secret of which he has become aware in this capacity, and whomever tries to induce others to violate professional secrecy shall be punished by a prison term not to exceed six months or by a fine not exceeding . . . 50,000 [Swiss Francs].⁶²

Swiss law provides for some exceptions to the strict bank secrecy provisions. Swiss bankers can and, in some cases, are

56. *Id.*; accord Jennifer A. Mencken, Note, *Supervising Secrecy: Preventing Abuses Within Bank Secrecy and Financial Privacy Systems*, 21 B.C. INT’L & COMP. L. REV. 461, 468 (1998) (the secrecy laws also served the purpose of granting protection to those who were at risk of the Nazi Gestapo seizing their assets.).

57. TAX AND TRADE GUIDE: SWITZERLAND 56 (Arthur Andersen & Co. 2d Ed. 1972) (1965) [hereinafter Tax and Trade Guide].

58. *Id.* at 57.

59. Brabec, *supra* note 52 at 234.

60. Micheloud & Cie, “Banking Act of 1934,” <http://switzerland.isyours.com/e/banking/secrecy/banking.act.html>.

61. Tax and Trade Guide, *supra* note 57 at 57.

62. *Id.* at 56 (citing Article 47 of the Swiss Banking Law of 1934).

required to breach secrecy if the disclosure best serves the public welfare.⁶³ Other exceptions include carve-outs for legal proceedings involving money laundering.⁶⁴ Tax evasion is not included in these exemptions⁶⁵ because tax evasion is not a crime in Switzerland.⁶⁶ Swiss bank secrecy laws require that the crime for which information is sought must also be a crime under Swiss law.⁶⁷

Switzerland has entered into several international treaties⁶⁸ and enacted legislation limiting the scope of bank secrecy in response to international pressure regarding conflicting tax law.⁶⁹ These treaties have opened the door for investigations like that of the IRS against UBS, allowing the United States to advance its goal of transparency. Switzerland's desire to improve its "tarnished image"⁷⁰ appears to be the biggest motivator for entering into these treaties.⁷¹ Switzerland has entered into two bilateral agreements with the United States: the Treaty on Mutual Assistance in Criminal Matters (TMACM) in 1951; and the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income (the Convention) in 1975.⁷²

The TMACM provides that Swiss authorities⁷³ must make certain identifying information available to the United States that

63. Micheloud & Cie, *supra* note 60 (explaining that secrecy can be breached in criminal cases with regards to money laundering and in civil cases regarding bankruptcy and divorce, for example).

64. *Id.*

65. Brabec, *supra* note 52, at 235.

66. Tax and Trade Guide Switzerland, *supra* note 57, at 58.

67. E.g., Urs Martin Lauchli, *Swiss Bank Secrecy With Comparative Aspects to the American Approach*, 42 ST. LOUIS L.J. 865, 873 (1998).

68. E.g., Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., May 24, 1951, 2 U.S.T. 1751 (ratified Sept. 27, 1951) [hereinafter Double Taxation]; Treaty on Mutual Assistance in Criminal Matters, U.S.-Switz, Dec. 23, 1975, 27 U.S.T. 2019 [hereinafter Mutual Assistance].

69. Brabec, *supra* note 52, at 237.

70. Michele Moser, Note, *Switzerland: New Exceptions to Bank Secrecy Law Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 327 (1995).

71. Beckett G. Cantley, *The New Tax Information Exchange Agreement: A Potent Weapon Against U.S. Tax Fraud?*, 4 HOUS. BUS. & TAX L.J. 231, 240 (2004).

72. Double Taxation, *supra* note 68; Mutual Assistance, *supra* note 68.

73. Mutual Assistance, *supra* note 68 at 33 (designating that the Swiss authority responsible for assisting the United States is the Central Authority for Switzerland, which is the Division of Police of the Federal Department of Justice and Police in Bern).

would assist in investigating and prosecuting an offense listed in the treaty.⁷⁴ The treaty requires Switzerland to provide information that would traditionally violate the Swiss secrecy laws under certain conditions, including:

- a. the request concerns the investigation or prosecution of a serious offense;
- b. the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation or proceeding; and
- c. reasonable but unsuccessful efforts have been made in the United States to obtain the evidence or information in other ways.⁷⁵

Switzerland's obligation to cooperate is mitigated, however, because it has the right under the TMACM to refuse to assist the United States if it "considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests."⁷⁶ This "general safeguarding clause" ensures that Switzerland could "plead important interests" in order to refuse a request of the United States.⁷⁷ In the past, Switzerland has "been diligent in rejecting generalized requests for information concerning large groups of people, or 'fishing expeditions.'"⁷⁸ Nonetheless, the TMACM includes a list of offenses that would require obligatory cooperation between the two countries, including crimes such as murder, rape, and fraud, but not including tax evasion.⁷⁹ Therefore, Switzerland can limit the effect of TMCAM on tax evasion investigations because it can claim protection against prejudice to sovereignty and national interests.

The Convention for the Avoidance Double Taxation between the United States and Switzerland ensures an effective information exchange to prevent fraud and to avoid both nations "claiming the right to tax the same stream of income."⁸⁰ The

74. *Id.* at 6.

75. *Id.* at 17.

76. *Id.* at 7.

77. Lauchli, *supra* note 67, at 875.

78. *Id.* at 876.

79. Mutual Assistance, *supra* note 68, at 46-51.

80. Workman, *supra* note 12, at 687.

Convention allows American and Swiss authorities to correspond directly with each other to fulfill their obligations under the Convention.⁸¹ It also allows the authorities to “prescribe regulations necessary to carry [the Convention] into effect.”⁸²

C. *The American Approach*

American laws protecting privacy of financial information are more limited in scope than Swiss laws.⁸³ American banks must collect customer information for “law enforcement and prosecution purposes.”⁸⁴ The Court of Appeals for the Fifth Circuit in *United States v. Prevatt*⁸⁵ held that records submitted voluntarily by banks to the IRS were admissible as evidence to prove tax evasion despite claims of privilege.⁸⁶

Congress passed the Bank Secrecy Act in 1970 in response to “concern that foreign financial institutions in jurisdictions with strict bank secrecy laws were being used to violate or evade U.S. criminal, tax, and regulatory requirements.”⁸⁷ The Act requires American banks to maintain records that would “have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings,” as promulgated by regulations from the Secretary of the Treasury.⁸⁸ The Bank Secrecy Act also requires American citizens to file reports about their relationships with foreign financial institutions.⁸⁹ While Swiss law⁹⁰ calls for civil and criminal

81. Double Taxation, *supra* note 68, art. XIX.

82. *Id.*

83. Brabec, *supra* note 52, at 237-38.

84. *Id.* at 238.

85. *United States v. Prevatt*, 526 F.2d 400 (5th Cir. 1976).

86. *Id.* at 402-403 (The privilege asserted by the appellant in this case was a “banker-depositor” privilege, which appellant claimed, “would not allow the Government to use information against a depositor obtained from the bank without the depositor’s permission”).

87. Lewis J. Saret et al., *Viewpoint: The Report of Foreign Bank and Financial Accounts: A Primer*, BNA BANKING DAILY, Sept. 25, 2009.

88. 31 U.S.C.A. § 5311 (2009).

89. 31 C.F.R. § 103.24(a) (2009) (“Each person subject to the jurisdiction of the United States . . . having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship to the Commissioner of the Internal Revenue for each year in which such relationship exists.”).

90. *See supra* pp. 442-44.

penalties for bankers who violate their duty of confidence, the Bank Secrecy Act calls for civil and criminal penalties for failure to comply with the reporting requirements.⁹¹ If an individual participates in an activity that a bank is required to report or record, that bank must retain records for a period of five years.⁹²

D. Difference in Approaches

Swiss secrecy laws conflict with American laws and the IRS's practice of actively prosecuting tax evaders.⁹³ The fundamental difference is that tax evasion is a crime in the United States, unlike in Switzerland.⁹⁴ Tax evasion is "an affirmative act" including "any conduct, the likely effect of which would be to mislead or to conceal."⁹⁵ Such conduct could include making false statements to the Treasury or concealing sources of income or other assets.⁹⁶ Criminal tax evasion results from "conduct that entails deception, concealment, destruction of records and the like."⁹⁷ To successfully prosecute parties for tax evasion, the government must prove each of the following elements: "willfulness, the existence of a tax deficiency, and an affirmative act constituting evasion or attempted evasion of the tax."⁹⁸ To establish "willfulness," the government must "prove that the law imposed a duty on the defendant, that the defendant knew of this

91. Tax and Trade Guide, *supra* note 57; 31 C.F.R. § 103.57 (2009) (civil penalty); 31 C.F.R. § 103.59 (2009) (criminal penalty).

92. 31 C.F.R. § 103.32 (2009).

93. Compare Tax and Trade Guide, *supra* note 57, at 56, with 31 U.S.C.A. § 5311.

94. Brabec, *supra* note 52, at 235; see also 26 U.S.C.A. § 7201 (2009) ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

95. *United States v. Josephberg*, 562 F.3d 478, 490 (2d Cir. 2009), (citing *United States v. Klausner*, 80 F.2d 55, 62 (2d Cir.1996)); see 26 U.S.C.A. § 7201.

96. *Id.*

97. William B. Barker, *The Ideology of Tax Avoidance*, 40 LOY. U. CHI. L.J. 229, 242 (2009).

98. *United States v. Beale*, 574 F.3d 512, 517 (8th Cir. 2009), (citing *United States v. Marston*, 517 F.3d 996, 999 n.2 (8th Cir. 2008)).

duty, and that he voluntarily and intentionally violated that duty.”⁹⁹

Switzerland employs a strict policy, known as the principle of speciality, to determine when to release banking records in connection with tax evasion investigations conducted by the United States or other countries where tax evasion is a crime.¹⁰⁰ Generally, the Swiss only release information and records if the crime being investigated is also a crime under Swiss law and then only to the extent that judicial assistance is authorized under Swiss law.¹⁰¹ Since tax evasion is not a crime under Swiss law, the release of records and information is not authorized under the speciality principle and the relaxation of secrecy is not permitted.¹⁰²

IV. THE EVOLUTION OF SWISS BANK SECRECY IN THE UBS INVESTIGATION

A. *Swiss Bank Secrecy*

1. Prosecution of UBS

In February of 2009, as part of an earlier agreement with the IRS, UBS gave 255 names of U.S. citizens suspected of using offshore accounts to evade taxes to the IRS.¹⁰³ The IRS subsequently initiated investigations against 150 of the 255 disclosed as part of the February settlement.¹⁰⁴ By August 2009, three of UBS’s American customers pled guilty “to filing false tax returns that failed to disclose the existence of their UBS Swiss

99. *Id.* (citing *United States v. Barker*, 556 F.3d 682, 687 (8th Cir. 2009)).

100. *Brabec*, *supra* note 62, at 254.

101. *See id.* at 251.

102. *Id.*

103. Haig Simonian, *UBS and US Strike Tax Evasion Deal*, FIN. TIMES, Aug. 12, 2009, available at <http://www.ft.com/cms/s/0/513bc70-8748-11de-9280-00144feabdc0.html>.

104. Haig Simonian & Joanna Chung, *UBS Deal Heralds New Era of Tax Enforcement*, FIN. TIMES, Aug. 19, 2009, available at <http://www.ft.com/cms/s/0/c57c32d2-8cf1-11de-a540-00144feabdc0.html>.

bank accounts.”¹⁰⁵ By November, seven people had been charged criminally, “with at least two getting sentenced to prison time.”¹⁰⁶

2. Entering Into a Deferred Prosecution Agreement

The Financial Market Supervisory Authority (FINMA), the Swiss bank regulatory agency, issued the order for UBS to provide the 4,450 account names to the Swiss Federal Tax Administration, as stipulated in the Deferred Prosecution Agreement.¹⁰⁷ UBS must also pay the United States \$780 million in “fines, penalties, interest and restitution.”¹⁰⁸ UBS has also agreed to suspend business with American residents, in accordance with the Deferred Prosecution Agreement, and will now only offer banking services to American residents “through subsidiaries or affiliates registered to do business in the United States” (“Exit Program”).¹⁰⁹

In exchange for this cooperation, the United States has recommended that prosecution against UBS “be deferred for the period of the longer of eighteen (18) months from the date of the signing” of the Deferred Prosecution Agreement, the “resolution of the ‘John Doe’ Summons,” or upon the “completion of UBS’s

105. Joanna Chung, *150 Clients of UBS Investigated*, FIN. TIMES, Aug. 19, 2009, available at <http://www.ft.com/cms/s/0/3e293f46-8c4c-11de-b14f-00144feabd0.html>.

106. *Slew of Offshore Tax Evaders Settle With IRS*, MSNBC.COM, Nov. 17, 2009, <http://www.msnbc.msn.com/id/33988899>.

107. Deferred Prosecution Agreement *supra* note 3, at 6; *see also*, Simonian & Chung, *supra* note 104; Settlement Agreement Concerning DOJ, IRS, SEC, and UBS at 2, between U.S. and Switz., Aug. 19, 2009 available at http://www.ubs.com/1/ShowMedia/index/crossborder/johndoesettlement?contentId=170419&name=UBS_IRS_agreement.pdf [hereinafter Settlement Agreement] (explaining that the basis for this number is that an analysis conducted by UBS estimated that this will amount to about 4,450 accounts to be reported by UBS to the Swiss Federal Tax Administration).

108. U.S. Dep’t of Justice, *supra* note 4; *see also*, Deferred Prosecution Agreement *supra* note 3, at 3 (explaining that the \$780 million includes \$380 million “in disgorgement of the profits from maintaining the United States cross-border business from 2001 through 2008.” Two hundred million of the \$380 million will be paid directly to the SEC as part of a Consent Order. The remaining \$400 million will be paid to the DOJ and the IRS for “federal backup withholding tax . . . interest and penalties; and restitution for unpaid taxes, together with interest thereon, for undeclared United States taxpayers who were actively assisted or facilitated by UBS private bankers.”).

109. Deferred Prosecution Agreement, *supra* note 3, at 4.

‘Exit Program.’”¹¹⁰ After the eighteen-month period, if the U.S. government is satisfied with UBS’s compliance in all other respects, it will seek dismissal, with prejudice, within thirty days of the expiration of the eighteen-month period.¹¹¹ The Deferred Prosecution Agreement also explicitly states that the United States will not “seek to interfere with, revoke, or limit any licenses.”¹¹²

3. Settlement Agreements

On August 19, 2009, the United States and Switzerland entered into a final settlement agreement (the “Settlement Agreement”) acknowledging the Deferred Prosecution Agreement and mutually accepting its terms.¹¹³ The Settlement Agreement was an opportunity for both governments to “[choose] accommodation over confrontation, with face-saving measures for both sides.”¹¹⁴

According to the Settlement Agreement, the IRS will deliver a “request for administrative assistance” to the Swiss Federal Tax Administration, in compliance with the standards of Article 26 of the Convention for the Avoidance of Double Taxation.¹¹⁵ Pursuant to the agreement, UBS will provide information about account holders with accounts subject to the treaty request based on a certain criteria to the Swiss Federal Tax Administration.¹¹⁶ With the help of FINMA, the Swiss Federal

110. *Id.* at 10.

111. *Id.*; see generally Neil Roland, *UBS Exec Admits Bank’s Sham Tax Shelters Broke U.S. Law*, FIN. WK., July 17, 2008, <http://www.financialweek.com/apps/pbcs.dll/article?AID=2008749563333> (Jacob Frenkel, a former federal criminal and SEC prosecutor stated, “[t]he U.S. government, particularly in this economy, is not going to blow up an international financial institution with a criminal indictment.”).

112. Deferred Prosecution Agreement, *supra* note 3, at 10.

113. Settlement Agreement, *supra* note 107, at 3.

114. David S. Hilzenrath, *Swiss No Longer Shielding Biggest U.S. Tax Dodgers*, WASH. POST, Nov. 18, 2009, at A13, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/17/AR2009111701240.html>.

115. Settlement Agreement, *supra* note 107, at 1; see Double Taxation, *supra* note 68.

116. Settlement Agreement, *supra* note 107, at 2; see, *UBS to Notify Clients*, *supra* note 2 (“Once the Swiss Federal Tax Administration (FTA) has informed UBS that a treaty request has been received, UBS will begin producing the information on a rolling basis, with the first 500 account cases submitted to the FTA within 60 days and all account cases delivered within 270 days.”).

Office of Justice will oversee UBS's compliance with the Deferred Prosecution Agreement.¹¹⁷ Under the Settlement Agreement, UBS must give notice to those U.S. citizens "whose accounts with UBS are subject to a treaty request for information informing them that they should promptly designate an agent in Switzerland."¹¹⁸

The criteria used to identify which accounts will be reported to the Swiss Federal Tax Administration were originally confidential, according to the Settlement Agreement.¹¹⁹ However, the criteria were disclosed in late November, giving UBS's American clients a greater idea of their risk of being reported.¹²⁰ The criteria released by the IRS indicated that "if the account met two measures: having more than \$992,802 (1 million Swiss francs) at any time from 2001 through 2008, and generating average annual revenue of more than 100,000 Swiss francs over three years."¹²¹

4. Protocol to Convention on Double Taxation

Originally, the Convention did not address tax evasion,¹²² but on September 23, 2009, a protocol to the Convention was

117. Settlement Agreement, *supra* note 107, at 3.

118. *UBS to Notify Clients*, *supra* note 2; see also Settlement Agreement, *supra* note 107, Exhibit B (Account holders whose names are reported to the Swiss Federal Tax Administration may appeal the decision to have their names reported, however, it is important to note that, under 18 U.S.C. § 3506, the account holder would be required to report this appeal process to the Attorney General of the United States); see generally 18 U.S.C. § 3506 (2009) ("[A]ny national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General at the time such pleading or other document is submitted.").

119. Settlement Agreement, *supra* note 107, at 5.

120. Hilzenrath, *supra* note 114.

121. *Id.* (The agreement will also include accounts with more than 250,000 Swiss francs "if the American depositors used an off-shore shell company to hide ownership of the funds"); Lynnley Browning, *14,700 Disclosed Offshore Accounts*, N.Y. TIMES, Nov. 17, 2009, <http://www.nytimes.com/2009/11/18/business/global/18irs.html> [hereinafter *14,700 Disclosed*] ("UBS will also disclose accounts for which holders did not file a special disclosure document, called a W-9, over at least three years since 1998, and for which the accounts generated annual revenue to the client of at least 100,000 Swiss francs.").

122. Double Taxation, *supra* note 68, at 16.

signed to “expand this cooperation to tax evasion as well as tax fraud.”¹²³ The Protocol states that Switzerland cannot refuse to give information to the United States because the “information is held by a bank.”¹²⁴ If such a case arises, Swiss authorities “have the power to enforce disclosure of information.”¹²⁵ This recent development in the scope of the Convention may have the effect of permanently allowing for American tax investigators to look into possible tax evasion schemes taking place within Swiss borders.

B. The IRS and Tax Evasion: The Hunt for 10,000 Names

The IRS indicated in the Settlement Agreement that it will not stop its investigation until it has acquired the names of 10,000 UBS customers.¹²⁶ Under the Settlement Agreement, the IRS will withdraw the Summons “no later than 370 days from the date of the Settlement Agreement” or when the IRS receives information concerning 10,000 accounts held with UBS, whichever comes first.¹²⁷ The 10,000 names would include the 250 to 300 names that the IRS already received in February and any names obtained through UBS handovers under the Settlement Agreement.¹²⁸ The IRS is also willing to count names obtained through its “voluntary program,”¹²⁹ which is an IRS program separate from the Settlement Agreement.

The IRS’s voluntary disclosure program, scheduled to be in effect for six months in connection with this investigation, initially provided that individuals who came forward with information regarding their offshore assets would be provided a written

123. *UBS to Notify Clients*, *supra* note 2.

124. Protocol Amending the Convention Between the Swiss Confederation and the United States of America for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz, Art. 3 § 5, Sept. 23, 2009, *available at* http://www.taxation.ch/File/PDF/Treaties/DBA_CH_USA_english_protocol.pdf.

125. *Id.*

126. *UBS Agrees to Disclose 4,450 Bank Account Names*, WEBCPA.COM, Aug. 19, 2009 [hereinafter *UBS Agrees to Disclose 4,450 Names*], <http://www.webcpa.com/news/UBS-Agrees-Disclose-4450-Bank-Account-Names-51396-1.html>.

127. Settlement Agreement, *supra* note 107, at 4.

128. *UBS Agrees to Disclose 4,450 Names*, *supra* note 126.

129. *Id.*

guarantee to be free from criminal prosecution.¹³⁰ The IRS has since removed this guarantee from the voluntary disclosure program to allow more discretion in reviewing the cases due to the increased volume of the taxpayers involved.¹³¹ Instead, those who disclose offshore assets voluntarily are only guaranteed that the IRS will not recommend prosecution to the DOJ.¹³² The IRS has stated that it intends to be more forgiving towards taxpayers who provide information regarding parties who aided the taxpayer to hide assets overseas.¹³³ Also, the voluntary disclosure program initially included a form with more than twenty questions, including the account holder's motivation for evasion and who advised the account holder to open the offshore account.¹³⁴ The IRS has since terminated its use of the questionnaire and, instead, it has reserved the right to require taxpayers participating in the voluntary disclosure program to submit to an interview.¹³⁵

The Commissioner of the IRS, Douglas Shulman, stated that taxpayers who report themselves voluntarily would be benefitted.¹³⁶ These taxpayers will receive a "fair settlement" requiring that they pay back-taxes and interest for six years, "either an accuracy or delinquency penalty on all six years," and "a penalty of [twenty] percent of the amount in the foreign bank

130. Roger Russell, *IRS has Deal for Offshore Evaders*, WEBCPA.COM, May 4, 2009, http://www.webcpa.com/ato_issues/2009_7/-50170-1.html. See Statement from IRS Commissioner Doug Shulman on Offshore Income, March 26, 2009, <http://www.irs.gov/newsroom/article/0,,id=206014,00.html> [hereinafter Shulman Statement]; Voluntary Disclosure: Questions and Answers, last updated Aug. 25, 2009, <http://www.irs.gov/newsroom/article/0,,id=210027,00.html> [hereinafter Disclosure Q&A] (the IRS' voluntary disclosure program, which has been in place for years, allows persons with offshore bank accounts to come forward and admit to tax evasion to potentially avoid criminal prosecution).

131. See Michael Cohn, *IRS Revises Voluntary Disclosure Info*, WEBCPA.COM, July 30, 2009, http://www.webcpa.com/debits_credits/IRS-Revises-Voluntary-Disclosure-Info-51192-1.html.

132. See *id.*

133. Russell, *supra* note 130 (explaining that the presumed benefit of this information to the IRS is that it could contact the adviser to obtain the names of the adviser's other clients with offshore assets).

134. *Id.*

135. Disclosure Q&A, *supra* note 130 (noting that optional format letter is a viable method of disclosure).

136. See Shulman Statement, *supra* note 130 (explaining that those who come in purely voluntarily can potentially escape a criminal prosecution).

accounts in the year with the highest aggregate account or asset value.”¹³⁷

So far, the IRS has reported that more than 14,700 Americans have turned themselves in under the voluntary disclosure program.¹³⁸ The IRS Commissioner was pleased, stating, “[w]e are talking about billions of dollars coming into the U.S. Treasury.”¹³⁹ The IRS Commissioner indicated that this influx of information will not affect UBS’s duty to hand over the 4,450 account names and that UBS had already selected 500 account names.¹⁴⁰ While the voluntary disclosure of 10,000 accounts would trigger the withdrawal of the John Doe Summons, 10,000 UBS clients coming forward would “ha[ve] nothing to do with the obligation that the Swiss have taken to the U.S. government to produce 4,450 account names.”¹⁴¹

V. THE IMPACT OF WEAKENED SWISS BANK SECRECY

This Part will examine the effects of the information exchange treaties discussed above and the recent agreement between UBS and the DOJ on the strength of Swiss secrecy laws. Further, this Part will expand on the potential harm to the Swiss banking industry and how these changes will impact American customers.

A. *Impact on the Swiss Banking Industry*

The settlement agreements between the United States and Switzerland and the United States and UBS, along with the amendment to the Convention to expand cooperation by the Swiss government in cases of tax evasion, demonstrates a decided shift from protecting the individual privacy of bank investors to a more cooperative attitude for sharing information with other countries undertaking various tax fraud or evasion investigations.¹⁴² While

137. *Id.*

138. *14,700 Disclosed*, *supra* note 121.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See Cantley*, *supra* note 71.

this cooperation will likely improve Switzerland's international reputation, it is problematic on two fronts. First, critics point to the fact that tax law is a domestic issue and "Swiss laws and national sovereignty should be respected."¹⁴³ International pressure on a nation to change the interpretation of its bank secrecy laws has the negative impact of interfering with state sovereignty.

Second, the Swiss banking industry could suffer if the interpretation of the secrecy laws is dramatically weakened.¹⁴⁴ A great concern for Swiss banks is a potential loss of clients' faith.¹⁴⁵ If current or potential clients do not have faith in the application of Swiss secrecy laws, they could be discouraged from investing with Swiss banks.¹⁴⁶ International investors now know that if they wish to keep their assets hidden, they should transfer their funds to another offshore tax haven with strict secrecy laws that have not been diluted by international pressure.¹⁴⁷

Switzerland is in a corporate catch-22 with regards to the UBS investigation. If UBS fails to comply with criminal investigations it runs the risk of failure as the threat of criminal prosecution against it for noncompliance may be fatal to a corporation.¹⁴⁸ Instead, if UBS complies with the investigation, it

143. Brabec, *supra* note 52, at 259.

144. *Id.* at 238.

145. *See* Moser, *supra* note 70.

146. *See id.*

147. *Id.* at 354.

148. *See* Thomasson, *supra* note 17; *Swiss Bank Settles U.S. Tax Charges, Mounting U.S. Pressure on Swiss Bank Secrecy*, 103 AM. J. INT'L L. 338, 338 (Jon R. Crook ed., 2009) (explaining that criminal charges such as these "often are fatal to corporations"); *see generally*, Luisa Beltran et al., *Andersen Guilty, Once Grand Accounting Firm Now Faces Five Years Probation, \$500,000 Fine and Possibly Its Own End*, CNNMONEY.COM, Jun. 16, 2002, http://money.cnn.com/2002/06/13/news/andersen_verdict/index.htm (after eighty nine years as a successful accounting firm, Arthur Andersen was prosecuted and convicted by the U.S. government); Bill Mears, et al., *Andersen Conviction Overturned*, CNNMONEY.COM, May 31, 2005, http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scutus/index.htm (explaining that even though the conviction was overturned, the conviction itself had almost forced the firm out of business while the indictment had caused 28,000 people to lose their jobs at that time); Charles Lane, *Justices Overturn Andersen Conviction*, WASH. POST, Jun. 1, 2005, at A1; *see e.g.*, *End to Defiance*, *supra* note 29 (KPMG entered into a settlement agreement with the DOJ in order to avoid a "potentially fatal indictment and . . . the fate of Arthur Andersen, the accounting firm that collapsed after prosecutors charged it with obstruction of justice." KPMG entered

could suffer a significant loss of business as UBS loses the advantage it could provide wealthy Americans.¹⁴⁹

The Swiss government cannot afford UBS's failure resulting from either a criminal prosecution or a loss of business.¹⁵⁰ In 2008, UBS managed more than \$2.8 trillion worth of assets,¹⁵¹ and UBS's annual revenue was more than \$117 billion.¹⁵² Switzerland's Gross Domestic Product (GDP) was \$321.9 billion in 2008.¹⁵³

Moreover, the successful attack on Swiss bank secrecy could "encourage tax authorities in other jurisdictions to pursue a similar strategy."¹⁵⁴ This could lead to more criminal prosecutions against Swiss banks and a loss of other foreign clients.¹⁵⁵ For example, following the agreement between Switzerland and the United States, France entered into a treaty with Switzerland providing the French government easier access to information regarding French citizens with money hidden in Switzerland.¹⁵⁶ France took steps to warn tax evaders that it had acquired a list of

into this agreement because it "realized that its defiance was threatening its existence.").

149. Brabec, *supra* note 52, at 238 (explaining that the "trust and loyalty" that Switzerland has shown to its clients over time is the foundation of the Swiss banking industry's "competitive edge").

150. See *Update 3 - UBS Falls After Swiss Minister Comments on U.S. Row*, REUTERS, Feb. 1, 2010, <http://www.reuters.com/article/idUSLDE6100DY20100201> [hereinafter *UBS Falls*] ("The stability of UBS . . . is vital to Switzerland as the bank's liabilities are worth several times the country's gross domestic product.").

151. U.S. TAX COMPLIANCE, *supra* note 1

152. Fortune Global 500, *Annual Ranking of World's Largest Corporations for 2008*, <http://money.cnn.com/magazines/fortune/global500/2008/snapshots/7652.html> (last visited Feb. 6, 2010).

153. CIA World Factbook, *Europe: Switzerland*, <https://www.cia.gov/library/publications/the-world-factbook/geos/sz.html> (last updated on Jan. 15, 2010) UBS' annual revenue represents about thirty-six percent of Switzerland's GDP. *Compare id* (noting Swiss GDP of \$321.9 billion), with Fortune Global 500, *supra* note 152 (noting UBS annual revenue at 117.2 billion).

154. Lisa Jucca, *UBS Tax Deal is Swiss Bank Secrecy's Waterloo*, REUTERS, Feb. 20, 2009, <http://uk.reuters.com/article/idUKLNE51100M20090220>.

155. See Carolin Schober, *Will Swiss Banks Have to Reinvent Themselves?*, CNBC, Aug. 24, 2009, <http://www.cnbc.com/id/32506536/site/140811545>.

156. See, Peggy Hollinger, *Tax Evaders' Bank Secrecy 'Rolled Back,'* FIN. TIMES, Aug. 30, 2009, <http://www.ft.com/cms/s/0/7a4c8dd0-958d-11de-90e0-00144feabdc0,s01=1.html>.

3,000 citizens' names with a combined three billion Euros deposited in Swiss bank accounts.¹⁵⁷

Some believe that the Swiss banking industry may be able to withstand the harm caused by this scandal and the UBS deal. As one analyst noted, "Swiss banks will always be able to use the economic and political stability of Switzerland as their unique selling point."¹⁵⁸ One Swiss banker commented that "the strength in Swiss banking is in corporate, not private, banking"; therefore, a decrease in the amount of private investors would not have a great effect on the banking sector.¹⁵⁹

B. *What This Means for American Clients*

The Stop Tax Haven Abuse Act, recently re-introduced in the Senate by Senator Carl Levin, "would allow the United States to bar banks in this country from doing business with foreign banks that refused to cooperate with American tax authorities."¹⁶⁰

In 2008, Senator Levin lobbied for the revocation of UBS's bank license.¹⁶¹ The United States may still call for such a drastic move if authorities find that UBS is "one of the main culprits for the significant loss of tax revenues."¹⁶² Nevertheless, given the size and stature of UBS the United States is not likely to revoke UBS's

157. *Id.*

158. Schober, *supra* note 155.

159. Moser, *supra* note 70, at 354.

160. See Editorial, *\$100 Billion the Country Could Use*, N.Y. TIMES, Mar. 14, 2009, at A20; Stop Tax Haven Abuse Act, S. 506; 111th Cong. §104(a)(2009) ("[I]n which the particular person or ascertainable group or class of persons have financial accounts in or transactions related to offshore secrecy jurisdictions, there shall be a presumption that there is a reasonable basis for believing" that the person or group has not complied with the internal revenue law). The bill would increase the amount of time authorities have to conduct investigations to within six years of when the tax return was filed. *Id.*; see, e.g., *UBS Refuses to Disclose Tax Shelter Accounts*, *supra* note 41; see generally Russell, *supra* note 130 (explaining that this Act will likely become legislation because President Obama was one of the original co-sponsors of the bill during his time as an Illinois senator).

161. *Levin Calls for Closing Down UBS*, WEBCPA.COM, Jul. 17, 2008, <http://www.webcpa.com/news/28468-1.html> [hereinafter *Closing Down UBS*].

162. David Stevenson, *UBS Forced to Name US Tax Evaders*, INT'L TAX REV., Dec. 9, 2008, <http://www.internationaltaxreview.com/?Page=9& PUBID=210&ISS=25204&SID=715235>.

banking license.¹⁶³ Instead, the United States may sanction Swiss banks for failing to provide the SEC with sufficient information.¹⁶⁴

A potentially devastating implication of this Act¹⁶⁵ would occur if foreign banks decide not to do business with American customers.¹⁶⁶ During a 2007 hearing held by the Senate Permanent Subcommittee on Investigations looking into the actions of offshore tax havens, an executive at UBS stated that it would no longer offer offshore banking to residents of the United States.¹⁶⁷ This assertion has, in fact, come to fruition, as part of the Deferred Prosecution Agreement through which UBS has agreed that it will only do business with American customers through U.S. registered subsidiaries or affiliates.¹⁶⁸

VI. RECENT DEVELOPMENT

A. *Swiss Court Makes a Ruling*

On January 22, 2010, a Swiss court panel reviewing an appeal by a UBS client ruled that “UBS AG files on private-bank clients shouldn’t be turned over to U.S. authorities” because “the failure to file a W-9 form wasn’t considered fraud in Switzerland.”¹⁶⁹ This is the first Swiss ruling since UBS agreed to

163. *Id.* The Justice Minister Widmer-Schlumpf stated that Switzerland is aware that “the Swiss economy and the job market would suffer on a major scale should UBS fail as a result of its license being revoked” *UBS Falls*, *supra* note 150.

164. *E.g.* Sec. & Exch. Comm’n v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 32 Fed. R. Serv. 2d 1650 (1981) (“[A] party who had made deliberate use of foreign law to evade American law might be subject to sanctions.”).

165. Stop Tax Haven Abuse Act, S. 506; 111th Cong. §104(a)(2009).

166. *See, e.g.*, Deferred Prosecution Agreement, *supra* note 3, at Exhibit D (letter from UBS to its American clients terminating the business relationship).

167. *See supra* p. 449; *Closing Down UBS*, *supra* note 161; *see generally U.S. Cracks Down on Tax Havens*, WEBCPA.COM, Dec. 4, 2008, <http://www.webcpa.com/news/30017-1.html> (regarding similar instances of tax haven abuse in Liechtenstein).

168. *See* Deferred Prosecution Agreement *supra* note 3, at 4 (section explains “Permanent Restrictions On and Elevated Standards for UBS’s United States Cross-Border Business”). *See generally id.*, at Exhibit D (information letter regarding termination of business relationship with UBS AG sent to American clients).

169. Carrick Mollenkamp & Laura Saunders, *Swiss Court Muddles UBS Settlement With U.S.*, WALL ST. J., Jan. 23, 2010, at B1, *available at* <http://online.wsj.com/article/SB10001424052748704509704575018981732771318.html>. The decision was decided upon “an arcane distinction between tax evasion and tax fraud.” Haig Simonian, *Swiss in Bid to Save Bank Secrecy Deal*, FIN. TIMES, Jan. 24, 2010,

disclose 4,450 account names.¹⁷⁰ While the ruling only directly affects the client¹⁷¹ who filed the appeal,¹⁷² the decision may have broader implications, including potentially invalidating the 2009 Settlement Agreement.¹⁷³ By effectively declaring the Settlement Agreement to be illegal, the court created an uncomfortable dilemma for the Swiss government.¹⁷⁴ Because the decision came from a federal court and may not be appealed, the Swiss government has few remedial options to ensure compliance with the agreement and avoid a criminal indictment against UBS.¹⁷⁵ The Swiss government must uphold its obligation to the United States without violating this decision,¹⁷⁶ or it risks the possibility that giving in to U.S. demands could “trigger a dangerous domestic backlash.”¹⁷⁷

The IRS responded to this decision by affirming that it “believed the Swiss government would continue to honor the agreement.”¹⁷⁸ The IRS’s optimism could stem from the fact that

<http://www.ft.com/cms/s/0/7b5fe9dc-0929-11df-ba88-00144feabdc0.html> [hereinafter, *Swiss in Bid*]. See Daniel Pruzin, *Latest Court Ruling on UBS Case Poses Dilemma for Swiss Government*, BNA BANKING DAILY, Jan. 26, 2010, available at 1/26/2010 BBD d23 (Westlaw) [hereinafter *UBS Case Poses Dilemma*].

170. Mollenkamp & Saunders, *supra* note 169. A separate Swiss court decision issued on January 8, 2010, declared the February 2009 deal to provide 250 to 300 client names to be illegal, however FINMA has indicated it will appeal this decision. Justin Häne et al., *Cabinet Wants More Talks With US Over UBS Data*, SWISSINFO.CH, Jan. 27, 2010, http://www.swissinfo.ch/eng/Specials/Swiss_banking_secretcy_under_fire/News/Cabinet_wants_more_talks_with_US_over_UBS_data.html?cid=8177522 [hereinafter *Cabinet Wants More Talks*].

171. The appeal was brought on behalf of an unidentified female millionaire from the United States. *Swiss in Bid*, *supra* note 169.

172. The court declared this decision to be a “test case” that would apply to “an additional 25 appeals.” *UBS Case Poses Dilemma*, *supra* note 169 (“The SFTA was required to make decisions on 500 accounts by the end of November 2009, meaning holders of the remaining 475 accounts decided not to appeal. These account holders may now request an exceptional right to file an appeal in light of the court’s ruling.”).

173. See Lynnley Browning, *Swiss Ruling Jeopardizes Deal for UBS Clients’ Names*, N.Y. TIMES, Jan. 23, 2010, at B2, available at 2010 WLNR 1466926 (explaining that this ruling also has the potential to “jeopardize” the February 2009 agreement to pay \$780 million and provide 250 account names) [hereinafter *Ruling Jeopardizes Deal*].

174. *UBS Case Poses Dilemma*, *supra* note 169.

175. *Id.*

176. *See id.*

177. Paul Betts, *Swiss Government Faces Uncomfortable U.S. Dilemma*, FIN. TIMES, Jan. 26, 2010, at 22, available at <http://www.ft.com/cms/s/0/c359d81a-0a19-11df-8b23-00144feabdc0.html>.

178. Mollenkamp & Saunders, *supra* note 169.

the decision only covers certain client accounts¹⁷⁹ and not “other cases such as UBS clients setting up shell companies . . . those engaged in a ‘scheme of lies,’ or those submitting incorrect or false documents to conceal assets or underreport income.”¹⁸⁰ The decision could effectively mean, however, that Switzerland will not be able to comply with more than ninety percent of cases.¹⁸¹ Nevertheless, many analysts believe that Switzerland will cooperate with U.S. tax authorities given the difficulty involved in reaching the agreement.¹⁸² Jeffrey Neiman, Assistant U.S. Attorney from the Southern District of Florida insisted that “the United States, Switzerland, and Swiss banking giant UBS will continue to work together to ensure that information about U.S. investors with UBS accounts still will be turned over to the [IRS] despite adverse rulings in the Swiss courts.”¹⁸³ The IRS continued to express its confidence that the Swiss would honor the agreement after the Swiss Cabinet met on January 27, 2010 to discuss Switzerland’s options.¹⁸⁴

B. *Options Available to the Swiss*

Following this most recent court ruling, the Swiss essentially have four choices: (1) refuse to comply in hopes that the United States will be satisfied with the account information it has already achieved through the voluntary disclosure program; (2) employ “retrospective application of the June 2009 revised double taxation agreement to cover the 4,450 accounts;” (3)

179. *UBS Case Poses Dilemma*, *supra* note 169.

180. *Id.*

181. Jason Rhodes, *Swiss Government Confident It Can Save UBS Tax Deal*, REUTERS, Jan. 27, 2010, <http://www.reuters.com/article/idUSTRE60Q3BA20100127> [hereinafter *Swiss Government Confident*]. See also *UBS Case Poses Dilemma*, *supra* note 169 (“[T]he majority of the 4,450 targeted accounts—perhaps up to two-thirds—are likely to be affected by the ruling”).

182. See Alison Bennett, *Parties to Continue Work on UBS Agreement as Prosecutors Focus on Hidden U.S. Assets*, BNA BANKING DAILY, Jan. 27, 2010, available at 1/27/2010 BBD d15 (Westlaw).

183. *Id.*

184. See Daniel Pruzin, *Switzerland for Now to Hand Over Data on Only 250 Secret Accounts with UBS*, BNA BANKING DAILY, Jan. 28, 2010, available at 1/28/2010 BBD d31 (Westlaw) [hereinafter *Only 250 Secret Accounts*].

“secure immediate parliamentary approval of the Aug. 19 agreement;” or (4) adopt an “emergency law.”¹⁸⁵

1. Failure to Comply with the Agreement

The Swiss will most likely comply with the agreement, though they may expect some modifications to the Settlement Agreement.¹⁸⁶ Justice Minister Eveline Widmer-Schlumpf stated that the Swiss Cabinet decided to try to find a “new solution” and present “[a more] ‘appropriate’ agreement with the United States to [Swiss] parliament for approval.”¹⁸⁷ The Swiss are willing to “renegotiate” in an effort to “seek a way to salvage the agreement.”¹⁸⁸ The Justice Minister said, however, that she would not “rule out ‘formal or material changes to the treaty,’ which America has been touting as a triumph in its crackdown on tax fraud.”¹⁸⁹ UBS has also issued a statement indicating that it “will fulfill all [of their] commitments under the agreement.”¹⁹⁰ While Swiss officials want the United States to know that they take this problem seriously, it has demands of its own, according to a law professor in Bern.¹⁹¹

185. *UBS Case Poses Dilemma*, *supra* note 169.

186. *See Cabinet Wants More Talks*, *supra* note 170.

187. *Id.* (emphasizing in her statement that Switzerland would “discuss with the US authorities right away” how to best supply the client information to U.S. tax authorities).

188. Frank Jordans, *Court Forces Swiss Rethink in UBS Tax Deal with US*, ASSOCIATED PRESS, Jan. 27, 2010, available at http://hosted.ap.org/dynamic/stories/E/EU_SWITZERLAND_UBS_TAX_EVASION?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2010-01-27-13-12-47 [hereinafter *Court Forces Swiss Rethink*].

189. Christine Seib, *Swiss Aim to Renegotiate Tax Pact with US to Avoid Referendum*, TIMES (LONDON), Jan. 28, 2010, at A57, available at <http://business.timesonline.co.uk/tol/business/markets/europe/article7005390.ece>.

190. *Court Forces Swiss Rethink*, *supra* note 188. While UBS wishes to be cooperative, it has indicated, however, that it will not break secrecy laws without governmental approval and hand over client information illegally by violating bank secrecy as some politicians had encouraged. *See* Sven Egenter, *UBS Says Swiss Govt Must Save U.S. Tax Deal*, REUTERS, Jan. 27, 2010, <http://www.reuters.com/article/idUSTRE60Q1BW20100127>.

191. Joseph Heaven et al., *Swiss Will Work With U.S. to Save UBS Tax Agreement (Update 4)*, BLOOMBERG, Jan. 27, 2010, <http://www.bloomberg.com/apps/news?pid=20670001&sid=ajAwOXtvz4HY> (indicating that the Swiss are struggling to find a solution).

The Swiss Cabinet has already indicated that it will comply with the Settlement Agreement if the IRS provides the number of UBS clients that were among the 14,700 voluntary disclosure participants.¹⁹² The Swiss are interested in this information because the Settlement Agreement contains provisions requiring the IRS to withdraw the John Doe summons if it received information on 10,000 UBS accounts, including information obtained from voluntary disclosures.¹⁹³ Thus, if the IRS has received a sufficient number of UBS client account names to date, the agency must revoke the John Doe summons.¹⁹⁴ Potentially a “large number” of the disclosed accounts belong to UBS.¹⁹⁵

If Switzerland does fail to comply with the agreement, the United States could return to court to “enforce its original summons request.”¹⁹⁶ One U.S. tax attorney explained that Switzerland’s failure or inability to comply with the agreement could lead the IRS and DOJ to find “some way to reopen [the original] case and pursue more stringent enforcement.”¹⁹⁷ This outcome is most certainly undesirable for UBS and Switzerland as a whole.¹⁹⁸ The possibility of modification of the Settlement Agreement coupled with the threat of legal action make it likely that the Swiss will comply with their obligations under the agreement in some fashion.

2. Retrospective Application of a June 2009 Agreement

In order to respond to the court’s decision, the Swiss may choose to apply retroactively the June 2009 agreement,¹⁹⁹ a “revised Swiss-U.S. bilateral tax agreement” that provided for

192. Lynnley Browning, *Swiss Back Away From Deal to Give Names of Rich UBS Clients to U.S.*, N.Y. TIMES, Jan. 28, 2010, at B3, available at <http://www.nytimes.com/2010/01/28/business/global/28ubs.html> [hereinafter *Swiss Back Away*]. As of February 1, 2010, the IRS has declined to disclose how many of the accounts were UBS clients. *UBS Falls*, *supra* note 150.

193. *See supra* p. 454; *Only 250 Secret Accounts with UBS*, *supra* note 184.

194. *See id.*

195. *Id.*

196. *Swiss Government Confident*, *supra* note 181.

197. *Ruling Jeopardizes Deal*, *supra* note 173.

198. *See Cabinet Wants More Talks*, *supra* note 170.

199. *See UBS Case Poses Dilemma*, *supra* note 169.

greater administrative information exchange in instances of tax evasion in addition to tax fraud.²⁰⁰ This agreement did not receive parliamentary ratification prior to the court ruling.²⁰¹ While retroactive ratification would solve the problem of enforcing the Settlement Agreement, the June 2009 agreement may be “contrary to the rule of law”²⁰² because it broadens administrative assistance in tax matters to include tax evasion,²⁰³ which is not a crime in Switzerland.²⁰⁴ This agreement will be presented to the Swiss Parliament for a first reading in March, 2010.²⁰⁵

3. Parliamentary Approval of the Settlement Agreement

Instead of implementing the June 2009 agreement, the Swiss Parliament may approve the original Settlement Agreement, providing a stronger legal foundation for the implementation of information exchange between Switzerland and the United States.²⁰⁶ Parliamentary approval would “convert the agreement into a binding treaty rather than the more informal ‘understanding,’ which would then take precedence over the 1996 treaty.”²⁰⁷ This option provides a substantial benefit to the Swiss because it allows the Swiss to meet the deadlines required by the Settlement Agreement.²⁰⁸ While Parliamentary approval is a better legal option than the retrospective application of the June 2009 agreement, it may give rise to greater political controversy.²⁰⁹ The primary issue raised is “whether even parliament could legitimately hand over the information”²¹⁰ and opponents of the approval may lobby for a “national referendum to challenge the

200. *Id.*; *Only 250 Secret Accounts*, *supra* note 184.

201. *UBS Case Poses Dilemma*, *supra* note 169.

202. *Id.*

203. *Only 250 Secret Accounts*, *supra* note 184.

204. *See supra* pp. 444 and 448.

205. *Only 250 Secret Accounts*, *supra* note 184.

206. *UBS Case Poses Dilemma*, *supra* note 169.

207. *Only 250 Secret Accounts*, *supra* note 184 (explaining that this option was actually suggested by the court who made the ruling).

208. *Id.*

209. *UBS Case Poses Dilemma*, *supra* note 169.

210. *Cabinet Wants More Talks*, *supra* note 170.

Parliament's decision."²¹¹ Justice Minister Widmer-Schlumpf explained that Parliament would address the issue of whether to hold a referendum,²¹² while the Swiss Federal Council did not think that a referendum would be necessary.²¹³ The Justice Minister explained, however, that "legislators could 'decide for political reasons' to put the issue on a national ballot."²¹⁴ Putting this decision to a national referendum could present an additional obstacle to attempts to enforce the agreement because polls have "suggest[ed] that Swiss citizens would not approve a loosening of banking secrecy laws."²¹⁵

4. Adoption of an Emergency Law

The final option available to the Swiss is for that the Federal Council to adopt an emergency law enforcing the agreement regardless of any inconsistency with current Swiss law.²¹⁶ An emergency law would mean a removal of bank secrecy laws in special cases.²¹⁷ Nevertheless, Justice Minister Widmer-Schlumpf argued that passing an emergency law is not a viable option²¹⁸ because passing emergency legislation would change Swiss bank secrecy laws.²¹⁹ She promised that Switzerland would "do what it could"²²⁰ to comply without affecting bank secrecy.²²¹ Furthermore, the adoption of an emergency law would be "highly controversial politically" as it has not been used since World War

211. *UBS Case Poses Dilemma*, *supra* note 169.

212. *Cabinet Wants More Talks*, *supra* note 170.

213. *Only 250 Secret Accounts*, *supra* note 184.

214. *Cabinet Wants More Talks*, *supra* note 170.

215. Seib, *supra* note 189.

216. *See UBS Case Poses Dilemma*, *supra* note 169.

217. Jason Rhodes, *Preview—Swiss Government to Discuss UBS Tax Deal*, REUTERS, Jan. 26, 2010, <http://www.reuters.com/article/idUSLDE60P1HP201001226>.

218. *Court Forces Swiss Rethink*, *supra* note 188.

219. *Id.*

220. *Id.*

221. *See supra* p. 462 and note 196.

II.²²² Coincidentally, the last time the Swiss invoked an emergency law was to create the banking secrecy laws during the Nazi era.²²³

C. *What the Swiss Are Willing to Disclose*

The Swiss Cabinet announced that it will not contest the February disclosure agreement to provide 250 UBS client accounts to the DOJ, as a refusal to do so could damage both UBS and the world's economy.²²⁴ The Cabinet distinguished those names from the 4,450 names in the August settlement, which would be illegal to disclose.²²⁵ As of late January, six accounts had been disclosed to the United States; however, those disclosures were made after the clients provided written requests to Swiss authorities to send information.²²⁶ The Justice Minister indicated that the Swiss will not disclose any more account information "until the legal and political issues are resolved."²²⁷ Underscoring the significance of future Swiss action, the Justice Minister stated that any decision regarding its agreement with the United States "will affect not just the future of UBS but 'also the stability of the financial center and the economic situation of Switzerland.'"²²⁸

VII. CONCLUSION

The erosion of Swiss secrecy could create vulnerability for the Swiss banking industry and impact American investors. The Swiss banking industry is already weak due to the current financial crisis.²²⁹ Another blow could cause irreparable harm and a

222. *UBS Case Poses Dilemma*, *supra* note 169 (explaining that the Parliament enacted an emergency law to allow the Federal Council to "ensure Switzerland's independence and security").

223. *See supra* pp. 442-43.

224. *Swiss Back Away*, *supra* note 192.

225. *See id.*

226. *Only 250 Secret Accounts*, *supra* note 184.

227. Heaven et al., *supra* note 191.

228. *Court Forces Swiss Rethink*, *supra* note 188. This statement is further supported by the fact that, after the Justice Minister highlighted this fact, UBS shares dropped by 0.9 percent to an all time low since July 2009. *UBS Falls*, *supra* note 150.

229. UBS has apparently "stabilized its financial situation," however, "it needs to resolve the U.S. dispute to win back wealthy clients." *UBS Falls*, *supra* note 150.

potential collapse of the Swiss banking industry.²³⁰ The Swiss banking industry as a whole could withstand this situation, however, because of both the Swiss banks' strong foundations and Switzerland's international reputation for stability.²³¹

As far as American clients are concerned, UBS has already created and begun to implement their Exit Program and will no longer offer offshore services to American residents.²³² It may only be a matter of time before other Swiss banks, and perhaps other tax haven nations seeking to avoid this kind of an attack will stop offering services to U.S. citizens.

American clients are faced with a choice. They can transfer assets to different tax havens, prolonging the apparently inevitable closing of international tax haven loopholes.²³³ Alternatively, Americans can come forward through the IRS's voluntary disclosure program.²³⁴ This second option provides customers with the soundest protection since the days of unrestricted offshore tax havens that are not subject to scrutiny are dwindling. Kenneth Rubinstein, a wealth management lawyer in New York has stated that he has encouraged his clients to come forward to the IRS "despite the delay in handing over the names."²³⁵ Thus, disclosure may be the best option for Americans with assets offshore.²³⁶

As access to offshore tax havens depletes and more Americans come forward to disclose their offshore assets, the United States could see an increase in tax revenues. This story will evolve at least until the Swiss make a final decision.

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230. *See id.*

231. *See* Schober, *supra* note 155.

232. *See supra* p. 449 and note 109.

233. Bennett, *supra* note 182 (quoting Assistant U.S. Attorney Jeffrey Neiman as saying "this is going to go well beyond UBS and UBS taxpayers. It is not a question of if, it's a question of when.").

234. *See supra* pp. 452-54.

235. Seib, *supra* note 189. Mr. Rubinstein is quoted saying, "I'd say: 'Don't be so sure [the Swiss Government's] not going to cave in. They caved in the first time.'" *Id.*

236. *See supra* p. 453; Disclosure Q&A, *supra* note 130.