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Bradley J. Bondi

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I. INTRODUCTION

Privacy protection is a defining characteristic of Swiss culture and a pillar of the Swiss economy. For centuries, the Swiss people have coveted the principles of individual privacy, regularly reaffirming those principles in response to referendums designed to limit them. Swiss banking secrecy, one aspect of privacy, is protected by Swiss criminal and civil laws and professional duties. Swiss banks pride themselves on protecting customer identity and have leveraged their legal and cultural commitment to secrecy to gain a competitive advantage in the global banking market. As of March 2009, Swiss banks held an estimated $2 trillion in foreign assets, which amounted to 27% of global assets held abroad.[1]

In early 2009, the foundation of the Swiss banking industry was shaken—if not cracked—by events occurring halfway around the world in

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[*] Bradley J. Bondi is counsel to a commissioner at the U.S. Securities and Exchange Commission (SEC) and an adjunct professor at Georgetown University Law Center and George Mason University School of Law. The SEC, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission, any commissioner, the author's colleagues on the staff of the Commission, or any other person or organization.

[1] David Crawford & Jesse Drucker, *Swiss To Relax Bank Secrecy Laws*, WALL ST. J., Mar. 14, 2009, at A5; Warren Giles & Dylan Griffiths, *Swiss Banks Court New Markets, Shun Americans as Secrecy Erodes*, BLOOMBERG, Aug. 20, 2009, http://www.bloomberg.com/apps/news?pid=20601085&sid=a9qFQwi3phw0 [hereinafter *Swiss Banks Court New Markets*].

the United States. Federal prosecutors in the United States alleged that Swiss banking giant UBS aided Americans in committing criminal tax fraud. Under intense pressure by United States prosecutors and with the reluctant acquiescence of the Swiss banking regulator, UBS entered into a deferred prosecution agreement in which it paid a fine of $780 million and agreed to disclose the identities of, and account information for, 250 to 300 United States customers of UBS's cross-border business.[2] Following UBS's transfer of the account information, Switzerland's president, Hans-Rudolf Merz, announced to the world that "[b]anking secrecy . . . remains intact" and that the Swiss government will not relent in protecting confidential bank accounts.[3]

The next day, however, the United States government made a surprising move by filing a lawsuit against UBS to enforce an Internal Revenue Service (IRS) summons from July 1, 2008, that would force UBS to reveal the names of 52,000 American customers.[4] UBS had been specifically permitted under the deferred prosecution agreement to challenge the July 1, 2008, IRS summons,[5] and UBS immediately indicated that it would do so.[6] On the eve of a showdown in federal court, UBS and the United States government announced on July 31, 2009 that they had reached an agreement in principle to resolve the pending dispute by UBS providing information for approximately 9% of the 52,000 account holders sought.[7] Commentators opined that production of information for the

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[2] Press Release, U.S. Dep't of Justice, *UBS Enters into Deferred Prosecution Agreement* (Feb. 18, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/February/09-tax-136.html; David Voreacos & Carlyn Kolker, *U.S. Sues UBS Seeking Swiss Account Customer Names*, BLOOMBERG, Feb. 19, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=a_TaQP5WVZuA&refer=home.

[3] Imogen Foulkes, *Clock Ticking for Swiss Bank Secrecy*, BBC NEWS, Feb. 20, 2009, http://news.bbc.co.uk/2/hi/business/7901832.stm.

[4] Devlin Barrett, *U.S. Steps Up Pressure on UBS in Bank Secrets Case*, ASSOCIATED PRESS, Feb. 19, 2009, http://abcnews.go.com/Business/wireStory?id=6912989. The number of accounts was revised upward to 52,000 from the prior day when the government alleged there were close to 20,000 United States clients that hid assets through UBS's program. UBS has indicated that it has turned over only 250 to 300 names. *Id.*

[5] Deferred Prosecution Agreement at 9, para. 13, United States v. UBS AG, No. 09-60033 (S.D. Fla. Feb. 18, 2009), *available at* http://www.usdoj.gov/tax/UBS_Signed_Deferred_Prosecution_Agreement.pdf [hereinafter Deferred Prosecution Agreement].

[6] Voreacos & Kolker, *supra* note 2. In response, the Swiss People's Party (SVP) called for retaliation against the United States and an urgent debate in parliament on ways to protect Swiss banking secrecy from "further foreign blackmail." Emma Thomasson, *Swiss Party Wants To Punish U.S. for UBS Probe*, REUTERS, Feb. 21, 2009, http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSTHO150174 20090221.

[7] Graham Bowley, *A Privileged World Begins To Give Up Its Secrets*, N.Y. TIMES, Aug. 22, 2009, at WK3; Sven Egenter, *UBS Not To Pay Fine in U.S. Tax Settlement: Reports*, REUTERS, Aug. 2, 2009,

majority of the 52,000 names would have amounted to the end of Swiss bank secrecy.[8] IRS Commissioner Douglas Shulman said the agreement "blows a big hole in bank secrecy."[9] The Swiss newspaper *Tages Anzeiger* called the UBS affair "the death knell" for Swiss banking secrecy.[10]

This brief Article discusses the Swiss banking laws that prohibit a Swiss bank from disclosing client information even if those Swiss laws are at odds with United States law. The Article then provides an overview of the UBS matter. Finally, the Article briefly analyzes the UBS dispute over the account information under a conflicts of law framework to hypothesize on the outcome had the matter been decided by the court. [11] Analyzing the UBS dispute may prove useful in predicting the outcome of inevitable future disputes between the United States government and global banks over confidential client information.[12]

II. OVERVIEW OF SWISS BANK SECRECY LAWS

The Swiss people have protected Swiss banking secrecy primarily through banking laws, criminal laws, civil laws, and codes of professional obligation.[13] Of these authorities, the primary source of law establishing and protecting bank secrecy is the Swiss Federal Banking Act of 1934,

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http://www.reuters.com/article/newsOne/idUSTRE5710I320090802?pageNumber=2&virtualBrandChannel=0&sp=true.

[8] Lisa Jucca, *UBS Tax Deal Reduces Uncertainty; Problems Remain*, REUTERS, July 31, 2009, http://www.reuters.com/article/ousivMolt/idUSTRE56U48Q20090731?pageNumber=2&virtualBrandChannel=0&sp=true.

[9] Kathleen Pender, *Networth: UBS Case Weakens Swiss Bank Secrecy*, S.F. CHRON., Aug. 23, 2009, at D1.

[10] Foulkes, *supra* note 3.

[11] A conflicts of law analysis is highly dependent on the facts. The facts relied upon in this Article were obtained exclusively from public court filings and newspaper articles. Because many of the key facts surrounding the UBS dispute are not publicly available, the analysis set forth herein is unavoidably incomplete. Therefore, this brief Article is intended merely to highlight some of the considerations that a court might have weighed in reaching a decision. The Article should not be viewed as a definitive source for predicting the outcome in the specific UBS dispute. Moreover, any description or interpretation of Swiss law in this Article is provided merely as background for the reader. This Article should not be relied upon as a source of Swiss law, given that the author is not admitted to practice in any Swiss canton or before any Swiss court. Finally, the author takes no position with respect to the merits of the United States government's criminal or civil prosecutions.

[12] In an interview with Bloomberg Television following the settlement with UBS, IRS Commissioner Douglas Shulman said that the IRS plans to target other financial institutions, law firms, and entities that help Americans hide assets offshore. *Swiss Banks Court New Markets*, *supra* note 1.

[13] Michèle Moser, Comment, *Switzerland: New Exceptions to Bank Secrecy Laws Aimed at Money Laundering and Organized Crime*, 27 CASE W. RES. J. INT'L L. 321, 324 (1995); *see* Peter C. Honegger, Jr., *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. INT'L L. & COM. REG. 1 (1983).

while other laws address professional secrecy in general.[14] Together, these laws establish the requirement that Swiss banks and their personnel preserve the privacy of their clients or else face harsh sanctions, including criminal and civil liability and loss of professional licenses. Swiss banking laws are not absolute, however; exceptions exist as discussed below.

Swiss banking secrecy is protected by Swiss banking law, which imposes criminal sanctions for violations. Article 47 of the Swiss Federal Banking Act of 1934 codifies the professional duty bankers have to maintain the confidentiality of banking information.[15] Criminal repercussions exist for intentional breach of that duty and civil repercussions for negligent breach of that duty.[16] Any bank, bank employee, or agent of a bank that intentionally violates the duty of privacy faces severe criminal sanctions, including imprisonment.[17] In addition, Swiss laws contain strict prohibitions against foreign attempts to obtain confidential Swiss banking information. Article 273 of the Swiss Criminal Code criminalizes as espionage certain disclosure of bank secrets to foreign governments under the premise that such disclosure may harm the Swiss economy.[18] Because of the harmful effect that disclosure may have on the

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[14] *See* Alfadda v. Fenn, 149 F.R.D. 28, 31–33 (S.D.N.Y. 1993).

[15] Loi fédérale sur les banques et les caisses d'épargne [LB] [Swiss Federal Banking Act], Nov. 8, 1934, Recueil systématique du droit federal [RO] 952.0, art. 47 (Switz.), *available at* http://www.admin.ch/ch/f/rs/9/952.0.fr.pdf [hereinafter Swiss Federal Banking Act of 1934]. Article 47 states:

> Any person who willfully . . . (b) in his capacity as organ, officer or employee of a bank, as auditor or assistant auditor, as member of the Banking Commission, officer or employee of its secretarial office, violates his duty to observe silence or the professional secrecy, or whoever induces or attempts to induce a person to commit such an offense, shall be fined not more than twenty thousand francs, and/or shall be imprisoned for not longer than six months. . . . If the offender acted negligently, the penalty is a fine of not more than ten thousand francs.

Id.

[16] *Id.* art. 47.

[17] *Id.* In addition, Article 162 of the Swiss Criminal Code "bars the disclosure of commercial secrets by those legally and contractually obligated to maintain their secrecy." Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [Cp], Codice penale svizzero [Cp] [Criminal Code] Dec. 21, 1937, RS 311.0, art. 162 (Switz.) [hereinafter Swiss Criminal Code].

[18] Moser, *supra* note 13, at 324; Swiss Criminal Code, *supra* note 17, art. 273. Article 273 states:

> Whoever makes accessible a manufacturing or business secret to a foreign official, agency, or to a foreign organization or private enterprise or to any agents of the same, shall be punished by imprisonment and in serious cases by penitentiary. In addition to that penalty, a fine may be imposed.

Swiss economy, this provision cannot be waived by the client.[19]

Banking secrecy also is protected by the civil code. Articles 27 and 28 of the Swiss Civil Code provide protection for the privacy rights of individuals and legal entities.[20] All persons who are given insight into the privacy of others by virtue of their profession (e.g., lawyers, physicians, and bankers) are legally bound to protect that privacy.[21] Article 28 establishes a private right of action to any aggrieved party.[22]

As mentioned, Swiss bank secrecy laws are not absolute. In most instances, a client can consent to the disclosure of his or her information by a Swiss bank to a third party.[23] In addition, Swiss banks are permitted to divulge bank secrets to Swiss regulators in limited circumstances but not to foreign authorities.[24] Foreign authorities must request judicial assistance from the Swiss government by utilizing diplomatic channels.[25] A number of treaties provide avenues that allow the Swiss government to assist another country by permitting a Swiss bank to disclose bank secrets.[26]

Until recently, the Swiss government's willingness to provide assistance to the United States in tax cases has turned on key distinctions between United States law and Swiss law. Under United States law, a violation of the Internal Revenue Code generally can be charged as a civil or criminal violation, regardless of whether the violation is failing to report income or assets, filing erroneous tax information with the IRS, or lying to authorities.[27] By contrast, under Swiss law, a failure to report income or assets for tax purposes is only a civil violation for tax evasion, not a

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Id.

[19] PESSTALOZZI GMUER & HEIZ, BUSINESS LAW GUIDE TO SWITZERLAND § 1135 (1991).

[20] Honegger, *supra* note 13, at 2.

[21] *Id.*

[22] *Id.* Bankers also have an implied duty of discretion, which is rooted in general contract law, agency law, and a good faith principle set forth in Swiss Civil Code. *Id.*

[23] Alfadda v. Fenn, 149 F.R.D. 28, 32 (S.D.N.Y. 1993).

[24] Honegger, *supra* note 13, at 8. It is important to note, however, that Swiss bank secrecy laws are not designed to provide a competitive advantage to Swiss banks. The bank privacy laws of Switzerland apply to all information located within Switzerland, without regard to the nationality of the bank, account holder, or requesting entity. *See* Minpeco v. Conticommodity Servs., Inc., 116 F.R.D. 517, 524 (S.D.N.Y. 1987) ("[T]he bank secrecy laws . . . have the legitimate purpose of protecting commercial privacy inside and outside Switzerland.").

[25] Honegger, *supra* note 13, at 8.

[26] *See, e.g.*, Loi fèdèrale sur l'entraide internationale en matière pénale [EIMP] [Swiss Federal Law on International Judicial Assistance in Criminal Matters] Mar. 20, 1981, RS 351.1 (Switz.); Treaty on Mutual Assistance in Criminal Matters, U.S.-Switz., May 25, 1973, 27 U.S.T. 2019 (Mar. 20, 1967).

[27] *See generally* I.R.C. §§ 1–9833 (2008). The IRS most often charges tax-related criminal offenses under the tax evasion statute (I.R.C. § 7201), the statute addressing the failure to file a return or pay a tax (I.R.C. § 7203), and the false statements statute (I.R.C. § 7206).

criminal violation for tax fraud.[28] As a result, the Swiss government traditionally has permitted disclosure of information to the United States government only where the equivalent of criminal tax fraud has occurred under Swiss law, not mere tax evasion.[29]

In early 2009, the Organisation for Economic Co-operation and Development (OECD), a voluntary organization composed of 30 member nations,[30] placed member-nation Switzerland on its "grey list" and threatened financial sanctions against Switzerland for its unwillingness to cooperate with other nations in tax evasion cases.[31] The United States also increased pressure on Switzerland and other "tax havens" to modify their approach to tax evasion cases.[32] In response to the international pressure, on March 13, 2009, the Swiss Federal Council took the landmark step of announcing that Switzerland now will offer administrative assistance in individual cases of well-founded suspicion of tax evasion, bringing Switzerland in line with international standards set forth in the OECD Model Tax Convention.[33] In other words, the Swiss government no longer will distinguish between tax fraud and tax evasion for purposes of providing international cooperation.[34]

Switzerland's volte-face on cooperating in tax evasion cases has had a noticeably adverse effect on Swiss banks, particularly smaller banks, which have relied upon the competitive advantage of Swiss bank secrecy laws to attract clients.[35] Since the Swiss government relaxed secrecy laws, some of

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[28] Swiss Bankers Ass'n, *Bank Client Confidentiality*, http://www.swissbanking.org/en/home/dossier-bankkundengeheimnis/dossier-bankkundengeheimnis-themen-geheimnis.htm (last visited Oct. 18, 2009).

[29] *See, e.g.*, Lynnley Browning, *A 2nd Inquiry Hits UBS, Pressed for 52,000 Names*, N.Y. TIMES, Feb. 20, 2009, at B1 [hereinafter *UBS Pressed for 52,000 Names*].

[30] Org. for Econ. Cooperation and Dev. [OECD], About OECD, http://www.oecd.org/pages/0,3417,en_36734052_36734103_1_1_1_1_1,00.html (last visited Oct. 18, 2009).

[31] Pierre Bessard, Op-Ed., *Leave Swiss Banks Alone*, N.Y. TIMES, Aug. 3, 2009, at A21.

[32] L. Gordon Crovitz, *Information Age: Swiss Banks and the End of Privacy*, WALL ST. J., Mar. 23, 2009, at A13.

[33] Swiss Bankers Ass'n, *supra* note 28; *see also* OECD, Articles of the Model Convention with Respect to Taxes on Income and on Capital (Jan. 28, 2003), *available at* http://www.oecd.org/dataoecd/52/34/1914467.pdf.

[34] Swiss Bankers Ass'n, *supra* note 28. On August 26, 2009, Austria, the remaining European Union member on the OECD's banking "grey list," moved a step closer to easing restrictions on sharing information with other nations concerning tax evaders. Austria's main political parties agreed to pass measures to ease banking secrecy in order to bring Austria in conformance with OECD standards. Sylvia Westall, *Austria's Parties Agree on Easing Banking Secrecy*, REUTERS, Aug. 26, 2009, http://www.forbes.com/feeds/afx/2009/08/26/afx6817895.html.

[35] In an interview with Thomson Reuters, Stephane Garelli, professor of international business policy at Lausanne University in Switzerland, said, "Those who will suffer are those smaller organizations in Switzerland and Liechtenstein who were living off banking secrecy and nothing else. They will struggle and maybe disappear because they only had the

Switzerland's private banks reportedly have experienced a significant loss of clients.[36] Larger, public Swiss banks also may have felt the effects. Publicly traded Swiss banks such as Julius Baer Holding AG, Bank Sarasin, and EFG International AG lost at least 10% of stock market value in the four weeks after the government first lifted secrecy rules on February 18, 2009, which may have been due to the change in policy.[37] Some opine that Switzerland's decision to loosen protection of foreign tax evaders will force Swiss banks to offer additional services and to establish branches in countries where their clients reside in order to avoid losing their clients.[38] Relying on the political stability of Switzerland, Swiss banks may be forced to concentrate on developing business in emerging and potentially less stable markets such as China, Russia, and India.[39]

III. BACKGROUND OF THE UBS MATTER

In 2007, Igor Olenicoff, a California billionaire, pleaded guilty to criminal tax fraud in the United States in connection with offshore accounts managed by his former UBS private banker, Bradley Birkenfeld.[40] With information obtained through that investigation, the IRS began to build a case against Birkenfeld and UBS. In April 2008, a grand jury indicted Birkenfeld for conspiring to commit criminal tax fraud,[41] and in June 2008, Birkenfeld pleaded guilty and agreed to cooperate with United States prosecutors in exchange for a reduced sentence.[42] Information provided by Birkenfeld pointed prosecutors directly to UBS's banking operations in

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one product." Jason Rhodes, *UBS Tax Deal May Pave Way for Bank's Recovery*, REUTERS, Aug. 19, 2009, http://www.reuters.com/article/GCA-CreditCrisis/idUSTRE57H4AC20090819 (quoting Stephane Garelli).

[36] Crovitz, *supra* note 32.

[37] Dylan Griffiths, *Geneva Banks Face 'Creative Destruction' in Losing Secrecy*, BLOOMBERG, Mar. 20, 2009, http://www.bloomberg.com/apps/news?pid=20601085&sid=a7QiEJj.PYTs&refer=europe (citing a March 2009 study by Booz & Co.). More analysis is necessary to determine whether the stock decline of these banks is correlated to the change in Swiss government policy.

[38] *Id.*

[39] *Swiss Banks Court New Markets*, *supra* note 1.

[40] Paul Sullivan, *UBS and the Diamond Smuggler*, PORTFOLIO.COM, Sept. 18, 2008, http://www.portfolio.com/news-markets/international-news/portfolio/2008/09/18/UBS-Diamond-Smuggling-Scandal.

[41] Indictment, United States v. Bradley Birkenfeld and Mario Staggl, No. 08-60099 (S.D. Fla. Apr. 10, 2008), *available at* http://amlawdaily.typepad.com/amlawdaily/files/BirkenfeldIndictment.pdf.

[42] *See* Lynnley Browning, *Ex-UBS Banker Pleads Guilty in Tax Evasion*, N.Y. TIMES, June 19, 2008, at C1. In August 2009, Birkenfeld was sentenced to 40 months in prison, 10 months more than requested by prosecutors, and fined $30,000. Erik Larson & Carlyn Kolker, *UBS Tax Fraud Case Whistleblower Gets 40-Month Prison Sentence*, BLOOMBERG, Aug. 21, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=aqRUmD2LzH.E.

Switzerland.[43]

On July 1, 2008, the United States District Court for the Southern District of Florida permitted the IRS to serve a "John Doe" summons on UBS, seeking bank records in Switzerland for 19,000 United States residents who maintained accounts offshore with UBS.[44] A Department of Justice spokesperson conceded that the request was "unprecedented, particularly for a foreign bank."[45] The summons triggered an immediate response from UBS, which issued a statement denouncing the move.[46] A spokesperson for the Swiss Federal Office of Justice (Bundesamt Fur Jüstiz) stated that UBS would violate the Swiss Banking Act if it complied with the summons and that there would need to be an "indication of further circumstances" for UBS to comply.[47]

As matters progressed in the courts, on July 17, 2008, the Permanent Subcommittee on Investigations in the United States Senate held hearings on global tax havens.[48] Among the witnesses called to testify was Martin Liechti, a Swiss UBS executive who had been detained at Miami International Airport on April 23, 2008, while traveling from Switzerland to Latin America. Liechti, who oversaw UBS's private wealth management in North America, asserted his Fifth Amendment right against self-incrimination in response to questions.[49] By contrast, Mark Branson, the chief financial officer of global wealth management and business banking at UBS, testified that UBS would no longer provide offshore banking to United States citizens. He indicated that UBS was cooperating with United States and Swiss authorities to identify clients who had committed tax fraud.[50]

As legal and political struggles ensued over production of records from Switzerland, prosecutors moved forward with criminal charges against a UBS executive and the company itself. On November 6, 2008, federal prosecutors in Miami unsealed an indictment of Raoul Weil, the chief executive officer of the UBS division that oversaw the cross-border

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[43] Larson & Kolker, *supra* note 42.

[44] *See* Deferred Prosecution Agreement, *supra* note 5, at 9, para. 13.

[45] Sullivan, *supra* note 40.

[46] *Id.* The UBS statement said: "As we have noted, UBS takes this matter very seriously and is working diligently with both Swiss and U.S. government authorities, consistent with Swiss law and the legal frameworks for intergovernmental cooperation and assistance." *Id.*

[47] *Id.* James Nason, a spokesman for the Swiss Bankers Association, said, "UBS itself cannot decide to hand over client data because then it would be violating Swiss law" and that any Swiss bank "waits for instructions from the Swiss authorities." Nason added, "Switzerland doesn't allow fishing expeditions." David S. Hilzenrath, *IRS, Justice Target Undisclosed Assets In Swiss Accounts*, WASH. POST, Nov. 1, 2008, at D01.

[48] Sullivan, *supra* note 40.

[49] *Id.* To the surprise of many, Liechti was permitted to return to Switzerland on August 12, 2008. *Id.*

[50] *Id.*

business and world-wide private banking.[51] The indictment alleged that Weil and other unindicted co-conspirators assisted U.S. clients in violating the United States tax code by failing to report IRS Form 1099 information to the United States,[52] creating offshore structures to conceal the U.S. clients' accounts from the IRS,[53] and falsifying documents to the IRS.[54] The indictment even alleged that Weil and other co-conspirators underwent training in Switzerland on how to avoid detection in the United States while traveling on UBS business,[55] and that they avoided travel to the United States entirely at certain periods.[56]

On February 18, 2009, UBS entered into a deferred prosecution agreement with federal prosecutors whereby UBS admitted to helping United States clients avoid paying taxes.[57] The deferred prosecution agreement required UBS to pay a $780-million fine and disclose the names of certain account holders to the IRS.[58] Although the precise number of account holders is not publicly known because that portion of the agreement was filed under seal,[59] press reports indicate that UBS turned over 250 to 300 names.[60]

The client names were the subject of a pending request for administrative assistance that the United States had submitted to the Swiss Federal Tax Administration (SFTA) pursuant to treaties between Switzerland and the United States.[61] UBS was able to disclose the names of the account holders without violating Swiss law because UBS sought and obtained permission from the Swiss Financial Market Supervisory Authority (FINMA).[62] FINMA, in consultation with SFTA, ordered UBS

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[51] Indictment, United States v. Raoul Weil, No. 08-60322 (S.D. Fla. Nov. 6, 2008), *available at* http://www.dailybusinessreview.com/images/news_photos/51685/Weil_Indictment.pdf [hereinafter Indictment of Raoul Weil].

[52] *Id.* at 2–4, paras. 4, 6–10.

[53] *Id.* at 8, para. 25.

[54] *Id.* at 10, para. 37.

[55] *Id.* at 10, para. 35.

[56] *Id.* at 9, para. 30. Weil failed to appear in court for the first hearing, so the district court judge declared him a fugitive. Order, United States v. Raoul Weil, No. 08-60322 (S.D. Fla. Jan. 13, 2009), *available at* http://amlawdaily.typepad.com/files/weil-fugitive-status.pdf.

[57] Deferred Prosecution Agreement, *supra* note 5.

[58] *Id.*

[59] *Id.* at 6, para. 9 and Exhibit E (filed under seal).

[60] *See, e.g.*, *UBS Pressed for 52,000 Names*, *supra* note 29.

[61] *See* Bundesverwaltungsgericht [Fed. Admin. Court] Mar. 5, 2009, docket nos. A-7342/2008 & A-7426/2008 (Switz.); *see also supra* note 27 and accompanying text.

[62] Press Release, Swiss Fin. Mkt. Supervisory Authority [FINMA], FINMA Makes Possible Settlement Between UBS and the US Authorities and Announces the Results of Its Own Investigation (Feb. 18, 2009), *available at* http://www.finma.ch/e/aktuell/Pages/mm-ubs-xborder-20090218.aspx [hereinafter FINMA Press Release]. FINMA is the new Swiss government authority that supervises banks, insurance companies, stock exchanges, and

to surrender a limited quantity of client data to the United States authorities.[63] FINMA relied on Articles 25 and 26 of the Swiss Banking Act, which it contended gave it the authority and obligation to impose unspecified preventative measures if it had reasonable grounds to believe a Swiss bank faced serious liquidity problems.[64] Following the transfer, the United States withdrew its request for assistance.[65]

One day after entering into the deferred prosecution agreement with UBS, the United States government filed suit against UBS in the U.S. District Court in Miami to enforce the IRS summons of July 1, 2008, which would force UBS to reveal the names and account information of now

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securities dealers, as well as other financial intermediaries in Switzerland. FINMA Homepage, About FINMA, http://www.finma.ch/e/finma/Pages/Ziele.aspx (last visited Oct. 18, 2009). On June 22, 2007, the Swiss Parliament approved the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA), which gave rise to the creation of FINMA. The Federal Council ratified the implementing provisions for FINMASA on October 15, 2007, with the Act entering into full force on January 1, 2009. The Act merged three bodies—the Federal Office of Private Insurance (FOPI), the Swiss Federal Banking Commission (SFBC), and the Anti-Money Laundering Control Authority—into the Swiss Financial Market Supervisory Authority (FINMA). *Id.*

[63] FINMA Press Release, *supra* note 62. At the same time FINMA ordered the limited production, it also published the results of an investigation undertaken by the Swiss Federal Banking Commission (SFBC) related to the matter. *Id.* The SFBC reprimanded UBS for "a severe breach of certain provisions of the Swiss Banking Act by individual staff members and serious shortcomings in dealing with the legal risks associated with its business with U.S. clients." *Id.*; *see also* Summary Report, FINMA, EBK Investigation of the Cross-Border Business of UBS AG with Its Private Clients in the USA (Feb. 18, 2009), *available at* http://www.finma.ch/d/aktuell/Documents/kurzbericht-ubs-x-border-20090218-e.pdf.

[64] FINMA Press Release, *supra* note 62. According to the FINMA website,

> [T]he FINMA Board of Directors ordered the disclosure of the client data as it considered this as the only way to avoid the real threat of the US authorities starting proceedings against the bank, which would have threatened its existence and seriously worsened its liquidity situation which, in turn, would have impacted the Swiss economy.

Press Release, FINMA, Comment on the Federal Administrative Court Ruling on the Furnishing of Bank Client Data to the US Authorities (Jan. 8, 2010), *available at* http://www.finma.ch/e/aktuell/Pages/mm-entscheid-bvger-20100108.aspx. On January 8, 2010, a Swiss court ruled that FINMA overstepped its authority, and that the Swiss government and the parliament are the only bodies with the power to implement such emergency actions. *See* Chris V. Nicholson, *Swiss Court Says Regulator Broke the Law in UBS Case*, N.Y. TIMES, Jan. 9, 2010, at B2. The decision, however, is limited to account information transferred before the United States and Switzerland entered into the new information-sharing agreement on March 13, 2009. *See supra* notes 33–34 and accompanying text. In other words, it does not appear that the decision will impact future transfers of customer information. *See* Nicholson, *supra* note 64.

[65] Sam Cage, *US Withdraws Request for Swiss Help on UBS Case*, REUTERS, Mar. 19, 2009, http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSB25027720090319.

52,000 American customers.[66] UBS immediately indicated that it would challenge the summons.[67] The deferred prosecution agreement stated that the United States "shall not deem UBS's interposing of any defenses, objections, arguments or the filing of any motions" or "its exhausting of all available appellate remedies" in connection with the summons to be a breach of the agreement.[68] However, if UBS lost and exhausted its appellate remedies, the deferred prosecution agreement would require UBS to comply with the enforcement of the summons.[69]

On April 30, 2009, UBS filed a fifty-page brief in opposition to the United States government's petition to enforce the summons.[70] Relying primarily on the factors set forth in the Restatement of Foreign Relations Law, UBS argued that the principle of international comity restrained the court from enforcing the summons.[71] UBS asserted that Swiss law prohibited UBS and its employees from complying with the summons and that enforcing the summons would interfere with the balance struck through treaties between the United States and Switzerland.[72]

As the dispute progressed toward a showdown in federal court in Miami, UBS and the United States government reached an "agreement in principle" to resolve the dispute.[73] The deal required UBS to produce the names of 4,450 United States citizens—far fewer than the 52,000 names originally sought—whose accounts are believed to hold as much as $18 billion in assets.[74] The agreement did not require UBS to pay a fine.[75] IRS Commissioner Douglas Schulman said the settlement with UBS was a "major step forward" in the United States government's efforts to pierce the veil of bank secrecy, and he warned that "wealthy Americans who have

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[66] Barrett, *supra* note 4.

[67] *See* David S. Hilzenrath, *Pressure Builds on UBS over Secrecy; U.S. Officials Vow Tough Action on Tax Havens*, WASH. POST, Mar. 5, 2009, at D01. UBS executive Mark Branson indicated that UBS has disclosed all the information it could about the clients in question "without subjecting its employees to criminal prosecution in Switzerland." *Id.*

[68] Deferred Prosecution Agreement, *supra* note 5, at 9, para. 13.

[69] *Id.*

[70] Brief of UBS AG in Opposition to the Petition To Enforce the John Doe Summons, United States v. UBS AG, No. 09-20423 (11th Cir. Apr. 30, 2009), *available at* http://www.ubs.com/1/ShowMedia/index/crossborder/home?contentId=166528&name=UBS Brief.pdf.

[71] *Id.* at 21–35.

[72] *Id.* at 28–39, 40–45.

[73] Egenter, *supra* note 7.

[74] Holman W. Jenkins, Jr., Op-Ed., *Does the World Still Need the Swiss?*, WALL ST. J., Aug. 26, 2009, at A13; Bowley, *supra* note 7. The agreement required UBS first to provide the names of the account holders to "an intermediate tax administration in Switzerland for review." Pender, *supra* note 9.

[75] Egenter, *supra* note 7. In the second quarter of 2009 alone, money outflows from UBS totaled $37.21 billion, and some analysts predict the trend to continue. Rhodes, *supra* note 35.

hidden their money offshore will find themselves in a jam."[76] UBS Chairman Kaspar Villiger justified the disclosure of the names by saying, "The clients are not just harmless victims. They knew what they wanted to evade."[77]

On August 19, 2009, the United States and Switzerland ratified an agreement for further cooperation by the Swiss government in United States tax evasion prosecutions involving UBS customers.[78] As a practical matter, UBS required the consent of the Swiss government to avoid running afoul of Swiss privacy laws. In order to satisfy the Swiss government that the information could be produced without violating Swiss law, the United States government identified examples of fraud associated with the 4,450 clients at issue.[79] As a result, the Swiss State Secretary in the foreign ministry, Michael Ambuehl, opined that the production of the client data would not violate Swiss law.[80] Switzerland's Foreign Minister, Micheline Calmy-Rey, went further, saying that data pertaining to other clients could be produced by UBS to the United States government, provided that the data pertained to the same type of tax fraud described in the agreement.[81] UBS Chairman Villiger cautioned, however, that he did not expect the agreement would lead to automatic exchanges of client data between countries in the future.[82]

The Swiss government had its own financial reasons to allow the transfer of the client data. At the time of the agreement, the Swiss government owned a 9% investment in UBS in the form of mandatory convertible notes.[83] The agreement removed a significant contingent liability looming over the price of UBS's stock, thus paving the way for the Swiss government to convert its notes to stock and sell the shares for a profit, which it did so on the day after the settlement was announced.[84] Removal of the liability also lessened the likelihood that another bailout by the Swiss government would be necessary, thus providing the Swiss

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[76] Bowley, *supra* note 7.

[77] Jason Rhodes, *UBS Chairman Says Clients "Not Harmless Victims": Report*, REUTERS, Aug. 23, 2009, http://www.reuters.com/article/newsOne/idUSTRE57M10Q20090823?sp=true [hereinafter *UBS Chairman Says Clients "Not Harmless Victims"*].

[78] Agreement on the Request for Information from the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, Aug. 19, 2009, U.S.-Switz., *available at* http://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf.

[79] Carrick Mollenkam, Stephen Fidler & Laura Saundersubs, *Swiss Reach Pact on U.S. Tax Probe*, WALL ST. J., Aug. 1, 2009, at B1.

[80] Egenter, *supra* note 7.

[81] *UBS Chairman Says Clients "Not Harmless Victims," supra* note 77.

[82] *Id.*

[83] Rhodes, *supra* note 35.

[84] *UBS Chairman Says Clients "Not Harmless Victims," supra* note 77.

government with political cover to convert the notes and exit from UBS.[85]

IV. THE APPLICATION OF A CONFLICTS OF LAW ANALYSIS

The dispute over the customer information presented UBS with a Hobson's choice. On the one hand, if UBS disclosed the account information to the United States government, UBS and its employees likely would have faced criminal and civil prosecution in Switzerland.[86] On the other hand, if UBS exhausted its legal challenges in the United States and still refused to turn over the information, the U.S. Department of Justice could have proceeded with the criminal prosecution that had been put on hold by the deferred prosecution agreement, and the Department of Justice could have used UBS's admissions of wrongdoing as evidence in the criminal case.[87]

If the dispute over the client information had not been resolved through negotiations, the matter would have forced the U.S. District Court to determine whether United States law enforcement interests trump Swiss bank secrecy laws. A court resolution ultimately may be required if the settlement breaks down or if the United States government once again decides to press for information on additional clients. Indeed, the United States government has been relentless and has made pursuit of tax offenders a priority.

In reaching a decision in a dispute involving client records of a Swiss bank, a U.S. District Court first must determine whether Swiss law would be violated if the court were to order the production of the information. A party relying on foreign law to argue that a district court's order violates principles of international comity bears the burden of demonstrating that the foreign law bars compliance with the United States order.[88] If Swiss law would be violated by disclosure, a court then would apply the Restatement (Third) of Foreign Relations Law ("Restatement") to determine whether principles of international comity require deference to Swiss law.[89]

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[85] Rhodes, *supra* note 35.

[86] Swiss Federal Banking Act of 1934, *supra* note 15, art. 47 and accompanying text.

[87] Voreacos & Kolker, *supra* note 2.

[88] *In re* Grand Jury Proceedings (Shams), 873 F.2d 238, 239–40 (9th Cir. 1989) (citing United States v. Vetco Inc., 691 F.2d 1281, 1289 (9th Cir. 1981)). International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 164 (1895). In order for there to be an issue of comity, there must be an actual conflict between the foreign and domestic laws. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993) (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555 (1987)).

[89] *See In re* Grand Jury Proceedings (Marsoner), 40 F.3d 959, 965 (9th Cir. 1994) (applying Restatement to determine whether deference should be given to Austrian banking law over United States law enforcement interests).

Given the broad protection for banking secrecy under Swiss law,[90] UBS likely would have convinced the court that the disclosure of the information violates Swiss law.[91] Indeed, members of the Swiss government said that the disclosure would violate Swiss law and warned UBS against providing the information.[92] The central issue, therefore, would have been whether the illegality of compliance with the order under Swiss law precludes its enforcement in the United States.[93]

Courts in the United States follow the framework set forth in section 403 of the Restatement to evaluate whether international comity precludes enforcement of an order.[94] Under the Restatement, reasonableness is "an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe."[95] The Restatement sets forth a non-exclusive list of factors to evaluate in determining whether the court's exercise of jurisdiction is unreasonable.[96] These factors are applied below to the UBS dispute.

A. Restatement Factors Weighing in Favor of Compelling Disclosure

Some factors of the Restatement weigh in favor of ordering UBS to

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[90] *See supra* Part II.

[91] *See* Swiss Federal Banking Act of 1934, *supra* note 15, art. 47 and accompanying text.

[92] *See supra* note 47 and accompanying text. Under the Federal Rules of Civil Procedure, "[i]n determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law." FED. R. CIV. P. 44.1. Moreover, "[a]n expert witness [on foreign law] is not required to meet any special qualifications." 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2444, at 406 (1971).

[93] *See* United States v. Vetco Inc., 691 F.2d 1281, 1288 (9th Cir. 1981).

[94] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[95] *Id.* § 403 reporter's note 10.

[96] *Id.* § 403(2). The factors set forth in the Restatement are:

> (a) the link of the activity to the territory of the regulating state . . . ; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated . . . ; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

Id.

disclose the names of the 52,000 account holders. The main factor weighing in favor of compelling disclosure is the "link of the activity to the territory of the regulating state."[97] The link to the United States appears to be strong. The summons sought information pertaining to United States residents under investigation for violating United States tax laws.[98] The government alleged that UBS employees actively solicited clients in the United States and marketed UBS private banking services as a way for United States clients to avoid paying taxes.[99] UBS employees allegedly assisted those clients in concealing from the IRS their ownership or beneficial interest in offshore accounts, and by overt acts such as falsifying documents that ultimately were filed with the IRS,[100] transferring assets for clients to offshore accounts,[101] providing credit or debit cards linked to offshore accounts,[102] and regularly meeting with clients in the United States.[103]

A second factor in the Restatement examines "the connections, such as nationality, residence or economic activity, between the regulating state and the person principally responsible for the activity to be regulated . . . ."[104] The connections between UBS and the United States are strong. UBS has an enormous presence in the United States. In 2008, UBS managed $38 billion in assets originating at its locations in the Americas[105] and operated the world's largest trading floor in Stamford, Connecticut.[106] UBS earned more revenue in the Americas from 2004 to 2008 than it did in Switzerland.[107]

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[97] *Id.* § 403(2)(a). Access to the information by persons in the United States may be one distinguishing characteristic between situations where courts have ordered production and situations where courts have not. Courts seem to be more inclined to require production of documents if the documents can be obtained by persons within the United States. *Compare In re* Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384, 1387 (11th Cir. 1982) (finding that all banking transactions for the Bahamian branch could be handled by the U.S. branch) *with* United States v. First Nat'l Bank of Chi., 699 F.2d 341, 343 (7th Cir. 1983) (finding that U.S. branch could not access documents in Greek branch).

[98] Barrett, *supra* note 4.

[99] *See* Deferred Prosecution Agreement, *supra* note 5, at 2, para. 2.

[100] Indictment of Raoul Weil, *supra* note 51, at 10, para. 37.

[101] *See* Deferred Prosecution Agreement, *supra* note 5, at 2, para. 2.

[102] *Id.*

[103] *Id.* According to one commentator, "UBS's sin was trying to market Swiss secrecy cheaply and widely—too cheaply and widely for others to tolerate." Jenkins, *supra* note 74.

[104] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(b) (1987).

[105] *See* UBS AG, Annual Report (Form 20-F/A), at 96 (May 21, 2009), *available at* http://www.sec.gov/Archives/edgar/data/1114446/000095012309009240/y77164e20vfza.htm#686.

[106] Jenkins, *supra* note 74.

[107] Elena Logutenkova & Joshua Gallu, *Swiss Suffer Secrecy Loss to Sustain Money Management*, BLOOMBERG, Mar. 6, 2009, http://www.bloomberg.com/apps/news?pid=20601109&sid=a8TMsOqV2lO4&refer=home.

Moreover, UBS already had admitted to assisting the conduct at the crux of the summons. In its petition to support the IRS summons, the Department of Justice relied considerably on UBS's admissions in the deferred prosecution agreement that it actively assisted United States residents in violating United States law.[108] Among the admissions, UBS admitted to implementing in 2004 a compensation structure designed to increase contacts between UBS private bankers and United States clients, many of whom are alleged to have violated United States tax laws.[109]

B. Restatement Factors Weighing Against Compelling Disclosure

Other factors in the Restatement appear to weigh against compelling UBS to disclose the information. The strongest factor against disclosure is "the likelihood of conflict with regulation by another state."[110] The disclosure of the information squarely conflicts with Swiss Banking Law. Disclosure, even under compulsion by United States courts, could result in criminal and civil charges against UBS.[111] As the Supreme Court of the United States wrote in a case also involving Swiss laws: "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."[112]

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[108] Petition to Enforce John Doe Summons, United States v. UBS AG, No. 09-20423 (S.D. Fla. Feb. 19, 2009), *available at* http://www.usdoj.gov/tax/UBS_Petition_to_Enforce_John_Doe_Summons.pdf.

[109] *Id.* at 2, para. 6.c. The IRS has attempted to use a John Doe summons to force a bank to break a foreign country's laws in only one prior instance. In that case, the district court quashed the summons. *See In re* Tax Liabilities: John Doe, No. C-88-0137, 92 TNI 26-24 (N.D. Cal. Mar. 11, 1992).

[110] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(h) (1987). The 1996 Treaty on Double Taxation between the United States and Switzerland explicitly acknowledges a respect for home country laws and practices. The treaty provides:

> In no case shall the provisions of this Article be construed so as to impose upon either of the Contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting state or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

Convention for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., Oct. 2, 1996, art. 26, para. 3, S. TREATY DOC. NO. 105-8 (1997).

[111] Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35 (2d Cir. 1972) (explaining that disclosure by a Swiss bank, even at the direction of a U.S. court, would constitute a violation of Swiss laws); *see also* Swiss Federal Banking Act of 1934, *supra* note 15, art. 47 and accompanying text.

[112] Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 211 (1958); *see also* Motorola Credit Corp. v. Uzan, No. 02 Civ.

Swiss officials cooperated with the disclosure of 250 to 300 names, but it is unlikely that the Swiss government would have blessed the broad disclosure of 52,000 names, particularly where the United States government formally withdrew its request for assistance following the agreement reached in the criminal case.[113] Indeed, in the month leading up to the settlement, the Swiss government went so far as to threaten to seize the records from UBS to prevent UBS from handing them over to the United States government.[114]

Similarly, another Restatement factor appears to weigh against compelling the disclosure. That factor examines "the extent to which another state may have an interest in regulating the activity."[115] Courts have recognized that "the Swiss interest in bank secrecy is substantial."[116] As discussed above, Switzerland prides itself in protecting the secrecy of client banking information.[117] Piercing that secrecy may result in drastic economic effects to the banking industry in Switzerland.[118] As the Supreme Court of the United States warned, "We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved by our courts."[119] Therefore, under the Restatement, Switzerland clearly has a strong interest in regulating the release of bank information, and that interest conflicts with a court ordering the disclosure of the information.

666(JSR)(FM), 2003 WL 203011, at *7 (S.D.N.Y. Jan. 29, 2003) (denying a Rule 37 motion to compel UBS to produce bank records from Switzerland, explaining "[a]mong other concerns, UBS and its employees might face criminal sanctions if they were to respond to plaintiffs' subpoena without the authorization of the Swiss court").

[113] Cage, *supra* note 65.

[114] Alex Kingsbury, *Details of IRS Deal with UBS Expected Friday*, U.S. NEWS & WORLD REPORT, Aug. 5, 2009, http://www.usnews.com/articles/news/national/2009/08/05/details-of-irs-deal-with-ubs-expected-friday.html.

[115] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(g) (1987).

[116] *See, e.g.*, Minpeco v. Conticommodity Servs, Inc., 116 F.R.D. 517, 524 (S.D.N.Y. 1987) (declining to enforce subpoena on the ground that it would violate Swiss privacy laws and subject the defendant to criminal sanctions; "There are several indications that the Swiss interest in bank secrecy is substantial.").

[117] *See supra* Part II.

[118] Logutenkova & Gallu, *supra* note 107. Smaller Swiss banks traditionally have relied upon the competitive advantage of Swiss bank secrecy laws to attract clients. After the Swiss government recently relaxed secrecy laws, Geneva private banks have seen a loss of clients. *See* Dylan Griffiths, *Geneva Banks Face 'Creative Destruction' in Losing Secrecy*, BLOOMBERG, Mar. 20, 2009, http://www.bloomberg.com/apps/news?pid=20601085&sid=a7QiEJj.PYTs&refer=europe.

[119] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

C. Restatement Factors and Considerations that May Have Tipped the Scale

In the UBS dispute, all of the deciding factors under the Restatement depend on the international importance of enforcing tax laws, particularly laws against tax evasion. The central factor of the Restatement in this respect is "the character of the activity to be regulated, the importance of the regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted."[120] Two other similar factors are "the importance of the regulation to the international political, legal, or economic system," and "the extent to which the regulation is consistent with the traditions of the international system."[121]

Resolving these factors is not easy because tax laws in the United States are generally different than those in Europe and because the United States government had not explained its planned use of the information pertaining to the 52,000 accounts. Tax evasion, defined as the non-reporting or the incomplete reporting of income or assets without any further manipulations, is not a crime in Switzerland, so Swiss banks traditionally have had no duty to provide information to tax authorities.[122] If, on the other hand, a Swiss taxpayer uses fraudulent practices or falsifies documents, then Switzerland considers the conduct to be tax fraud.[123]

The importance that the Swiss government places on the distinction between tax evasion and tax fraud appears to have eroded in recent years.[124] The Swiss government's indication in March 2009 that it now will offer administrative assistance in individual cases of well-founded suspicion of tax evasion[125] suggests that enforcing laws against tax evasion may have become more "generally accepted" around the world.[126] Indeed, Switzerland's announcement coincided with announcements by Austria and Luxembourg—other European nations with similarly strong bank secrecy

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[120] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(c) (1987).

[121] *Id.* § 403(2)(e), (f).

[122] Honegger, *supra* note 13.

[123] *Id.* Some cantons (i.e., Swiss states) treat tax fraud as a crime. *Id.* The cantons of the major banking centers of Switzerland (Zurich, Geneva, and Basel) treat tax fraud as a crime. *Id.* UBS is headquartered in Zurich and Basel. *See* UBS Home Page, About Us, http://www.ubs.com/1/e/about.html (last visited Oct. 18, 2009). Although an individual Swiss canton may have its own procedural rules that could override the Swiss Federal Banking Act in a proceeding pending in the canton, a canton procedural rule would not apply to a proceeding in the United States. *See* Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35 (2d Cir. 1972).

[124] Crovitz, *supra* note 32.

[125] *See* Swiss Bankers Ass'n, *supra* note 28; *see also* OECD, Articles of the Model Convention with Respect to Taxes on Income and on Capital, *supra* note 33.

[126] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987).

laws—that they will adopt the OECD model.[127] Singapore, Hong Kong, Andorra, and Liechtenstein also announced they intend to remove barriers to sharing tax information.[128] These developments in 2009 may tip the scale in favor of disclosure of foreign information relating to tax evasion in United States proceedings.

D. Predicting the Court's Ruling

The *sine qua non* of the Restatement is "reasonableness."[129] The Restatement inherently provides a significant amount of discretion to the court to decide what is reasonable. Even if the Restatement factors seem to tip in favor of disclosure, the court may have viewed the government's broad, unprecedented request for 52,000 names to be unreasonable. While courts have compelled disclosure of information protected by foreign bank secrecy law in discrete circumstances,[130] courts generally have rejected broad discovery that would conflict with foreign law.[131] By analogy, even the OECD model, as interpreted, generally requires a showing of well-founded suspicion of tax evasion before a country will provide assistance to a foreign government.[132]

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[127] OECD Centre for Tax Policy and Administration, *Improved Tax Cooperation a Boost to Restoring Financial Confidence – Gurría*, http://www.oecd.org/document/54/0,3343,en_2649_33767_42358774_1_1_1_1,00.html (last visited Oct. 18, 2009).

[128] *Id.*

[129] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporter's note 10 (1987).

[130] *See In re* Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982) (affirming district court's contempt ruling against Bank of Nova Scotia for failing to produce records maintained at the bank's main branch or its branch in Bahamas in response because the bank had not made a good faith effort to comply with the subpoena); United States v. Davis, 767 F.2d 1025 (2d Cir. 1985) (affirming order requiring disclosure of information pertaining to four identified individuals); United States v. Vetco Inc., 691 F.2d 1281 (9th Cir. 1981) (affirming order requiring disclosure of information regarding one U.S. company, its Swiss subsidiary, and its tax accounting firm); Fundacion Museo de Arte Contemporaneo de Caracas v. CBI-TDB Union Bancaire Privee, No. 93 Civ. 6870 (PKL), 1996 WL 243431, at *2–3 (S.D.N.Y. Feb. 9, 1996) (ordering disclosure of information pertaining to one identified individual); SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111, 113 (S.D.N.Y. 1981) (ordering that requests be "refined at the Court's suggestion to target the demanded disclosure in simplest terms").

[131] *See, e.g.*, United States v. First Nat'l Bank of Chi., 699 F.2d 341, 343–45 (7th Cir. 1983) (holding that the district court abused its discretion by requiring a U.S. bank to produce documents from its Greek branch where there was no indication of the rationale for the district court's decision; remanding for further inquiry); Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 38–40 (2d Cir. 1972) (holding in an insurance dispute that district court judge did not abuse his discretion in denying motion to compel Swiss bank to produce the names of account holders where bank officials would face criminal prosecution in Switzerland and where the names had little importance in the case because other information was produced).

[132] *See* Swiss Bankers Ass'n, *supra* note 28; *see also* OECD, Articles of the Model

Predicting an outcome in the UBS case is difficult because many of the facts are not publicly known.[133] On its face, the summons appeared to be nothing more than an overbroad discovery request, and the surrounding circumstances suggested the same. Although the government alleged in the criminal case that UBS and its clients falsified documents, it sought originally fewer than 20,000 names and ultimately settled for 250 to 300 names. The United States government then curiously withdrew its request for additional assistance from the Swiss authorities following the receipt of those names,[134] and expressly permitted UBS to raise defenses to the July IRS summons for the remaining 52,000 names. It is peculiar that prosecutors did not press for more names while they had the most leverage over UBS, that is, while an indictment was hanging over UBS's head. These facts might suggest that the United States government considered the 52,000 account holders to be of lesser importance than the 250 to 300 account holders or that the government lacked a reasonable basis for linking those 52,000 persons with violations of United States law. The fact that UBS admitted to assisting United States clients in violating the law hurt its defense, but it certainly does not mean that all of UBS's private banking clients in the United States violated the law. The government's success in obtaining the additional names likely would have hinged on presenting evidence to the court that those 52,000 clients violated United States law[135]—something it appeared unable to do as evidenced by the ultimate settlement for merely 4,450 names.[136] Accordingly, a district court under the facts likely would have denied the government's motion to compel the production of information relating to all 52,000 names.[137]

V. CONCLUSION

If the dispute between the United States government and UBS had been decided by the court, the United States government probably would not have obtained all 52,000 account names. The government appeared to lack sufficient evidence of violations by all 52,000 clients to justify its broad, unreasonable request. Applying the Restatement (Third) of Foreign Relations Law, the court likely would have ruled that the summons, as drafted, was overbroad and unreasonable under the circumstances. Diplomatic actions, however, ultimately worked in the United States

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Convention with Respect to Taxes on Income and on Capital, *supra* note 33.

[133] Deferred Prosecution Agreement, *supra* note 5, at 6, para. 9 and Exhibit E.

[134] Cage, *supra* note 65.

[135] *See* First Nat'l Bank of Chi., 699 F.2d 341.

[136] Egenter, *supra* note 7.

[137] It is also within the "sound discretion" of the court to modify the summons. *See* Tiberi v. CIGNA Ins. Co., 40 F.3d 110, 112 (5th Cir. 1994); *see also* FED. R. CIV. P 45(c)(3)(A) ("shall quash or modify"). Even if the court orders production, the court may narrow the scope based on the evidence the government ultimately proffers to the court.

government's favor and obviated the need for a decision by the court in this unique dispute.

Only time will tell whether those diplomatic moves have caused long-lasting harm to privacy protection in Switzerland. Building on its 2008 decision to abandon its longstanding protections for depositors accused by their home countries of tax evasion, the Swiss government permitted the hole in the sacred armor of Swiss bank secrecy to grow even further by consenting to the production of the 4,450 names. In its purported attempt to protect Swiss bank secrecy, the Swiss government ultimately may have proven to be the biggest threat to Swiss privacy.