FATCA and the broader tax crackdown

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Abstract: As the US government's crackdown on tax evasion continues, change is arriving. The US Foreign Account Tax Compliance Act (FATCA) is now nearly fully operational, as country after country implements intergovernmental agreements effecting its terms within their jurisdictions. FATCA is a powerful new tool—but even as it comes on line, setbacks at trial and in one of the US government's flagship bank cooperation programmes have created uncertainty as to the crackdown's future direction and effectiveness. Foundations navigating this new landscape face a complex and constantly changing enforcement scheme, but this article suggests a number of important data to bear in mind as they craft a path forward.

Private Client

In its ongoing quest to secure tax revenue from its overseas citizens, the US government continues to develop its substantial levers of influence to encourage financial institutions and individuals to report US taxable income. As practitioners in this area have seen, the US government's tax enforcement efforts continue inexorably to increase, while the new normal of persistent diplomatic and prosecutorial efforts against holdout institutions, accountholders, and nations further solidifies. It is in that context that the US has added another potent statute, the Foreign Account Tax Compliance Act (FATCA), to the already-powerful set of tools it has been employing to great effect over the past seven-plus years—all of which have only gained strength as more and more countries and entities capitulate to US demands.

Even though the US has enjoyed great success in this realm, the events of the past six months suggest that the crackdown has reached at least a potential turning point. Numerous banks that were formerly cooperating with the US have pulled back, and the US Department of Justice lost a high-profile trial against a senior Swiss banker who returned to face the charges against him—both of which may be early indicators of more prosecutorial problems to come. Whether a strengthening of FATCA or these setbacks for the US government becomes the dominant story in the US tax enforcement project in the coming years remains to be seen.

FATCA joins the fight

FATCA was signed into law in 2010, but came fully online last year as the enacting intergovernmental agreements (IGAs) between the US and scores of other nations went into effect. The law requires persons or entities making certain payments from the US to withhold a 30 per cent tax on such payments when they are made to non-compliant foreign financial institutions (FFIs) or else face secondary liability for that tax. In essence, FATCA outsources part of the government's enforcement burden to these 'withholding agents' and compels them to do the US government's bidding. In the same vein, FFIs are required to perform significant due diligence such as acquiring individuals' and entities' identifying information in the service of ensuring tax compliance. Importantly, the 'FFI' category is defined broadly, and even institutions that may not think of themselves as providing financial services—such as, in some circumstances, trusts and

foundations, especially when their assets are managed by outside professionals—will feel FATCA's effects.

FATCA thus further erodes a key comfort previously enjoyed by FFIs and their clients: the US government's finite resources for tracking down tax evaders and their bankers. Not only does FACTA enlist FFIs and withholding agents in the service of the IRS, but as more and more FFIs become FATCA-compliant and disclose their US accounts, the government obtains more and more information with which to pursue new targets. More than 100,000 FFIs have already registered with the IRS under the statute— and that number, which is growing, significantly understates the full scope of participation, since many IGAs do not require such registration.

Heavy penalties

FATCA adds to the already-heavy penalties tax evaders may face: civil penalties can reach up to US $60,000, while criminal penalties range up to US $250,000 and five years in jail for individuals, plus a 40 per cent understatement penalty with respect to non-disclosed foreign financial assets (or 75 per cent in cases of fraud). The 'responsible officer' tasked with overseeing a foreign financial entity's FATCA compliance may also be held criminally responsible if he or she knowingly makes false compliance certifications. This is on top of the huge losses accountholders already faced should they fail to file reports of foreign bank and financial accounts (FBARs)—which, though not common, can be 50 per cent of the high-value amount of the account for each violation, ie the loss of the whole account after just two missed FBAR filings—or provide false statements on or failing to file Form 8938 ('Statement of specified foreign financial assets').[1] In short, firms and individuals ignore FATCA and the other US tax laws and regulations at their peril.[2]

FATCA in the context of the growing crackdown on US tax avoidance

The pressure to which FATCA now adds has been building since 2008. That year, the US government began its early enforcement efforts in its first target country, Switzerland. From there the US has ratcheted its Swiss effort into an ever-expanding universe of information sources and leverage in many other countries that were formerly regarded as welcoming to US account holders with questionable tax compliance.

The US government's tax enforcement efforts in Switzerland were remarkably effective. By 2009, UBS had agreed to turn over more than 4450 client names to the US government and pay a US $780 million fine for selling tax-evasion services to wealthy Americans. In July 2011, the US began a criminal investigation of Credit Suisse that would culminate in massive penalties. In February 2012, the Department of Justice (DOJ) indicted Wegelin & Co on charges of enabling wealthy Americans to evade taxes—charges that, once Wegelin was convicted of them, put the 270-year-old bank out of business. Just as important, many more FFIs and individuals were not prosecuted because they provided extensive disclosures to the US government.

More and bigger sticks

It is difficult to overstate the impact that the dramatic increase in criminal and other US penalties has had in

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the world of FFIs serving US clients. Those penalties are the real driver for much of the new willingness of actors around the world to cooperate with the US.

For FFIs, Credit Suisse AG's guilty plea in May 2014 was a landscape change. Until the Credit Suisse plea, it had become almost an article of faith that the US government would not bring the full force of its criminal justice system to bear against large institutions.[3] In the period leading up to the Credit Suisse prosecution, in fact, Attorney General Eric Holder and his then-deputy James Cole had faced persistent criticism from many quarters, including in the US Congress, for their perceived unwillingness to prosecute large institutions. Holder noted publicly that many institutions are simply 'too big to jail'. At the same time, however, an aggressive and influential US federal prosecutor who served under Holder was complaining that large banks' constant, 'breathless' claims that their prosecution would lead to dire consequences for the economy—what this prosecutor, US Attorney Preet Bharara in Manhattan, called a 'repeated Chicken Little routine'—was 'wear[ing] thin'.[4] Bharara pushed hard to chip away at Holder's reluctance, and to unleash the prosecutors in his office on some of the large financial institutions who did business in his jurisdiction. With Credit Suisse, he ultimately succeeded.

While Credit Suisse was not the first European bank to fall victim to the crackdown, the Credit Suisse prosecution heralded an important change in how the US authorities treat banks that conspire with US persons to evade US taxes. Credit Suisse was forced to enter a felony guilty plea that brought serious potential business consequences, and to pay a settlement—approximately US $2.6 billion—more than three-and-a-half times larger than the DOJ's landmark US $780 million settlement (which did not include a criminal plea) with UBS AG in 2009. The Credit Suisse case thus prompted FFIs everywhere to reassess the kind of punishment they were likely to face if they failed to cooperate with the US.

The US has also raised the stakes on individual bankers in its crackdown on offshore tax evasion through criminal prosecutions. Just to name a few, in 2013, the DOJ indicted Swiss lawyer Edgar Paltzer (who is reportedly cooperating with the DOJ) and Swiss banker Stefan Buck for helping clients hide money in Swiss bank accounts. In 2014, the DOJ charged Swiss asset manager Peter Amrein with helping Americans hide millions of dollars to evade taxes. Numerous accountholders have been targeted as well. The US government's interest in prosecuting individuals is not likely to subside any time soon—and that interest has forced officers and employees of FFIs serving US clients, as well as those clients themselves, to remain closely focused on US efforts and the steps available to avoid them.[5]

Using the threat of prosecution to obtain cooperation

The threat of successful prosecution of FFIs or individuals has created a wave of cooperation with the US government, both through the criminal justice system and through other mechanisms such as the IRS' Offshore Voluntary Disclosure Programme (OVDP). OVDP has been particularly effective in encouraging account holders to move quickly to notify the IRS of any problem accounts by promising lenience, but restricting admission to the programme to holders who provide information about accounts of which the IRS is not yet aware.

The normal plea bargaining process of the US criminal justice system provides powerful rewards for potential prosecution targets who cooperate with the government and implicate other tax avoiders or co-conspirators—cooperation often can mean the difference between harsh punishment and no punishment at all. The well-known fact that US government prosecutors win nearly all the cases that they bring to trial only adds to the pressure. For institutions, as we have seen, a felony conviction can be fatal—so even a bank that believes it has a good chance of winning at trial will not seriously consider sending its case to a jury.

For individuals, even if they are at least better able than institutions to make a real decision as to whether to risk jail and test the government's charges at trial, still other factors stack the deck in favour of the DOJ. In particular, the risk that a foreign banker going to the US to try to defeat an accusation of wrongdoing could be denied bail may make mounting a defence unattractive even for those convinced they would prevail at the end of a process that can take well in excess of a year. Bail is very often granted to US-based white-collar criminal defendants, but foreign defendants with significant assets and ties overseas face a high likelihood of pre-trial detention. Efforts to work around this problem have generally failed. In the Buck case, the defendant was both a

Swiss citizen and resident. He sought an advance bail determination through his US counsel in order to learn whether he would be able to remain free while his case proceeded to trial; but, after the US government prosecutors opposed the request, the US District Court in Manhattan refused to consider bail unless Buck first appeared in the US.

This typical pressure to cooperate with the government that exists in all kinds of US federal prosecutions has been particularly strong in the tax enforcement realm. In tax cases, the US government has been more systematic and predictable in its granting of significant benefits for cooperation than is typically the case in other kinds of prosecutions. For individuals, there is OVDP, and for institutions a formal programme was set up through which Swiss banks may seek non-prosecution agreements (NPAs) in exchange for certain (extensive) disclosures regarding all of their US accounts.[6] Institutions that find themselves the target of DOJ investigations for crimes not related to tax evasion often try to obtain NPAs in exchange for cooperation, but only in the tax realm has a formal programme been established to address the large number of interested FFIs.[7]

While the formal NPA programme pertains only to Switzerland, its impact has been felt in tax prosecutions in other jurisdictions too. Institutions and individuals in other countries still stand to obtain much-reduced (or eliminated) penalties, and even payouts, in exchange for their cooperation, and have sought the NPAs already being obtained by their Swiss brethren. The significant potential benefits of such cooperation have led to ever more of it. As one illustration, in Liechtenstein, Landesbank AG ('LLB') settled an investigation into alleged assistance of tax evasion by paying only US $23.8 million—less than 1/100th of the Credit Suisse fine. LLB received leniency because of its extensive cooperation, voluntary implementation of remedial measures before the US investigation, and its support of the US' efforts to change Liechtenstein law to permit the establishment of an information exchange with the US—all much appreciated by the US government, and factors that led to a starkly different outcome from the one Credit Suisse suffered.

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To complement the intelligence gleaned from this cooperation, the government has also strengthened its IRS whistleblower programme. That programme is available around the world and can award significant sums of money to employees of reluctant FFIs who report their employers and US clients to the IRS. As fortified in 2006, the programme permits bank employees to reap huge financial rewards—up to 30 per cent of the IRS recovery—for assisting tax investigations. Faced with the possibility of employees seeking to obtain whistleblower awards, on top of the significant penalties for those caught assisting US persons to avoid tax obligations, FFIs are even harder pressed to resist the US government.[8]

The Swiss crackdown spreads to new jurisdictions

By August 2013, the Swiss government had bowed to growing pressure and agreed to cooperate with the US. As part of that agreement it encouraged Swiss banks to consider requesting non-target letters by providing the US the required associated disclosures, and also encouraged them to notify their account holders of the OVDP. The US government, perhaps emboldened by success and having largely deterred tax evasion by US persons (and the bankers in Switzerland who assisted them), has now carried its efforts further.

As the crackdown on Swiss banks began, many individuals with accounts in that country transferred money from Switzerland to other jurisdictions that at least appeared at the time to be further from the US government's grasp. The US government has been using its newly acquired mountains of offshore account data to identify the recipients of these electronic funds transfers, the names of and other information regarding bank officials who facilitated them, and myriad other information to accelerate its investigations—each of which can provide numerous new leads, which in turn produce further leads, and so on. The former chief of the US DOJ Tax Division, Kathryn Keneally, warned in 2013 that the government intended to press this advantage:

We expect to get from the Swiss banks a wealth of information that will lead us to the rest of the world, and that information will be fueling our investigations for some time into the future.

That promise is being fulfilled.

The result of these programmes has been an expanding web of leads, arriving as FATCA causes more offshore account information to be disclosed, to help the US government ensnare those who do not voluntarily come forward. After beginning in Switzerland, the crackdown is now proceeding in other locations where US persons have been known to hide their untaxed wealth.

Israel, a destination for a significant number of transfers from Swiss banks at the start of the crackdown, provides an illustration. Using data from its Swiss enforcement effort and new leads uncovered by re-employing the same tactics that had been effective there, the US opened a series of investigations in Israel. Now the Israeli government (which never supported bank secrecy to the extent Switzerland did anyway), like many others, has agreed to collect US person account information under FATCA from its financial institutions and provide it to the US. Media outlets have indicated that several Israeli banks known to be under investigation have either already agreed, or are close to agreeing, to provide information to the US government, and have reported massive withdrawals from Israeli banks by US citizens. Perhaps most telling, one Israeli bank under investigation, Bank Leumi (which had operations in Switzerland), reportedly encouraged its US account holders to step forward and cooperate with the US

tax authorities. As in Switzerland, the US government is taking a heavy-handed approach, and making it clear that no person or institution involved in US tax evasion is beyond its grasp.

The US is also intensifying its diplomatic and prosecutorial efforts in countries more traditionally associated with strong bank secrecy rules, especially in the Caribbean. In November 2014, Barbados entered into an IGA with the US government to comply with FATCA. Recently, Barbados also signed onto the OECD exchange, to begin in 2017, as did Turks and Caicos, Trinidad and Tobago, Curacao, Anguilla, the British Virgin Islands, Bermuda, and Cayman Islands. These agreements will sharply curtail the ability of US taxpayers to avoid paying taxes on wealth stored in Caribbean bank accounts or through the use of Caribbean offshore structures. On the criminal justice side, in

October 2014, the DOJ announced the convictions of Eric St-Cyr, an investment advisor in the Cayman Islands, and Patrick Poulin, an attorney in Turks and Caicos, for assisting US citizens in hiding money to evade US taxes. Both St-Cyr and Poulin pleaded guilty, and were each sentenced to 14 months' imprisonment for money laundering. Deputy Assistant Attorney General Ronald Cimino of the DOJ Tax Division noted that '[t]his investigation, which lasted years, involved cooperation from multiple foreign law enforcement agencies'. While Cimino does not name these agencies, it is reasonable to assume they were local authorities assisting the US government. Notably, in the St-Cyr case the IRS employed undercover agents—a potentially risky policing tactic that the agency had not previously been known to use, but that fits with the broader, aggressive tax crackdown.

These steps are being replicated in numerous other jurisdictions. In one after another, the US government has been seeking to create a new climate of compliance with its tax laws around the world.[9]

The increasing US pressure signals a growing trend

The US effort has benefited from, and spawned, parallel or copycat movements by multilateral institutions and foreign states. In October 2014, fifty-one jurisdictions that span the globe signed a Multilateral Competent Authority Agreement that will activate automatic exchange of information based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Some countries are expected to launch their information exchanges as soon as September 2017, with others to follow in 2018.

The new protocol mandates automatic exchange of key bank account information annually, implemented on a reciprocal basis with all interested jurisdictions. This system effectively removes the signatories from consideration as viable options for US accountholders seeking to avoid reporting obligations, since tax information will be automatically shared with member countries. Some view this as the beginning of what is being referred to as the Global Account Tax Compliance Act 'GATCA', which would take FATCA and expand it from the US to all countries that play significant roles in the world financial system.

Other countries have been pursuing their tax cheats unilaterally as well. Some have been much assisted by Herve Falciani, a former HSBC employee who reportedly gave the names of thousands of HSBC clients and related stolen HSBC documents to tax authorities in France and Spain—after which France provided the data to Greece, where it was obtained by a Greek journalist, who then published the data and brought Belgium, Argentina, and others into the pursuit of likely tax evaders named there. (Switzerland recently charged Falciani with industrial espionage and violating the country's secrecy laws.) *Le Monde* also obtained the data, reportedly from a French
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investigator, and passed it to the International Consortium of Investigative Journalists (ICIJ). As this article went to press, the ICIJ in concert with other news outlets had just published an analysis of the data that allegedly showed active law-breaking by the bank, renewing pressure on HSBC and quickly triggering a raid on the bank by Swiss police on 15 February 2015. Prior to the most recent revelations there were already as many as 1000 Belgian citizens under investigation, many of whom are diamond merchants in Antwerp, along with more than 4000 Argentine citizens. Other countries, it seems, have

learned from the US enforcement effort the value (including monetary value) of developing intelligence on offshore accounts used by their citizens to evade tax obligations.[10]

A potentially shifting climate

The story of the US tax evasion crackdown over the last seven-plus years has been one of generally increasing efforts, penalties, and results. While more and more governments continue to join or support the US effort, however, there is some reason to believe that that effort is currently at an inflection point. Some FFIs formerly inclined towards cooperation with the US NPA programme have begun to shift to a more confrontational stance, at around the same time a failed US prosecution of a well-known and high-level Swiss banker started widespread questioning of the DOJ's ability to win tax prosecutions against FFI personnel. The confluence of these events could erode some of the leverage the US has used to compel assistance in the past.

The recent acquittal of UBS AG official Raoul Weil of charges that he helped wealthy Americans avoid taxes may indicate troubles ahead for the US' reliance on the widespread perception of its invincibility to encourage banks and individuals to come forward. Jurors reportedly did not trust the testimony of the government's witnesses, many of whom were fellow UBS executives who admitted misconduct and testified in exchange for leniency—a common tactic used by US prosecutors in tax cases where much of the alleged misconduct cannot be proven through documents alone. US efforts have come up short in another case as well, adding weight to the better-publicized Weil precedent: Shokrollah Bavarian, a former Bank Mizrahi senior vice president who worked out of the bank's Los Angeles office, was indicted in 2014 on charges of conspiracy to defraud the IRS by helping US taxpayers conceal the existence of accounts in Israel. Bavarian was acquitted the same month as Weil was after six taxpayers who testified as government witnesses admitted that they did not conspire with Bavarian to cheat on their taxes.

In addition to jurors' distrust of its cooperating witnesses, the government in the Weil trial encountered a legal hurdle that significantly complicated the case and that is likely to re-emerge in future US DOJ Tax Division prosecutions. Qualified Intermediary, or 'QI' agreements were entered into by the IRS in a programme dating back to 2001 and have now been coordinated with FATCA and its related IGAs. They permitted an eligible person to assume certain documentation and withholding responsibilities in exchange for, among other benefits, the ability not to disclose account holder information.

The QI programme was, in part, a concession to the need to respect bank secrecy laws in places like Switzerland. Under the QI agreements, if clients of the QI refused to disclose their identities to US tax authorities, the banks were required to divest them of any US securities. If the client objected, then the bank would be required to withhold approximately 30 per cent of sale proceeds or income related to such assets and anonymously pay the withheld amounts to the IRS.

Thus, the QI agreements acknowledged the illegality under Swiss law of certain FFIs' disclosure of their

US clients to the IRS, and created an explicit mechanism by which those FFIs were permitted to continue to serve clients who took advantage of such laws to dodge US taxes. Weil's defence team asserted, successfully, that in the face of the QI agreements the government could not claim that the mere provision of financial services to US clients who were evading tax obligations was a crime. Instead, it would have to prove other fraudulent or deceitful misconduct. The Court instructed the jury that:

The QI Agreement thus permitted UBS to open and maintain accounts containing only foreign stocks and bonds for US clients without reporting those accounts to the Internal Revenue Service.

To the extent that other courts are willing to grant similar instructions in cases turning on pre-FATCA conduct, the balance of power in plea negotiations— and the calculations undertaken by FFIs and their employees contemplating self-disclosure or other cooperation—may shift somewhat away from the ones that have prevailed while those prosecuted by the DOJ Tax Division expected certain conviction. For its part, the US government has made clear it intends to keep up the pressure, and has made good on that threat by unsealing a new indictment charging Martin Dunki just a week or so after the Weil acquittal. If the DOJ can show, as it is trying to, that it has learned tactical lessons from the Weil defeat to enable it to avoid some of the problems that plagued it there, it may be able to regain some of the leverage that appears at least for the moment to be lost.[11]

Banks backing away

Even prior to the Weil acquittal, a number of Swiss banks had begun to question the wisdom of participating in the NPA programme. Britain's Barclays, which has a Swiss-based wealth management business, exited the programme in the summer of 2014. In August 2014, Liechtenstein-based VP Bank AG withdrew its Swiss subsidiary from the NPA programme. In the wake of these moves, additional Category 2 banks have elected to leave the NPA programme and take their chances with a perceived diminishing threat of prosecution. According to a widely cited report in Swiss newspaper NZZ am Sonntag, confidential sources had identified at least 10 banks—nearly 10 per cent of the total 106-bank Category 2 enrollment—that had withdrawn from the programme as of September 2014.

If accurate, these withdrawals of banks from the Category 2 enrollment constitute a significant departure from the long run of US government success we have seen in this realm to date. These withdrawing FFIs may have concluded there was no tax violation to disclose, or that the enormous costs of investigation and disclosure simply outweighed the risks of prosecution—especially in light of the IRS' stretched resources and the difficulty it may face in identifying non-compliant accounts on its own.[12] It is too early to tell how their withdrawals will turn out. In the event, the US government does take (successful) action against FFIs that decline to voluntarily disclose, they will almost certainly be treated much more harshly than their peers who remained in the NPA programme.

Whatever the outcome of the move, the new world of tax enforcement, created by aggressive US government tactics, is very different from the one that existed a decade ago. The laws and presumptions of jurisdictions that had built long traditions of offering privacy to clients of their banking industries have been turned upside down, and in many cases untaxed capital is literally on the run, moving from

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jurisdiction to jurisdiction just ahead (or more often, not) of the US enforcement crackdown and those facsimiles being pursued now by other nations. That scrambling of old presumptions must be counted as a telling success for FATCA and its brethren, no matter what is next in store for FFIs and their clients.

- [1] The US government is significantly less punitive when dealing with US tax evaders who are resident in the US (as opposed to those overseas). Under the IRS' Streamlined Domestic Offshore Procedures, US resident taxpayers with delinquencies stemming from offshore accounts may be able to make amends with the IRS with a payment of as little as 5 per cent of the high balance of the offshore account(s).
- [2] As noted above, a wide variety of fiduciary structures fall under FATCA's diligence and reporting requirements—including many associated with foundations. The parameters for FATCA compliance with respect to such entities (which of course come in many forms) remain uncertain in many ways, in part because they depend on evolving country-specific IGAs and potentially ambiguous 'application examples' provided as part of the accompanying IRS regulations. For example, the IGA concluded between the US and Liechtenstein provides that in certain respects a 'foundation' is included within the definition of a 'trust'—without explicitly discussing the differing use of the term 'foundation' in the US and Liechtenstein, or invoking important Liechtenstein legal concepts such as 'stiftung' (though other Liechtenstein legal concepts do appear in the IGA, such as 'anstalten'.) Nonetheless, the following key components are sure to be relevant to the US government's ongoing enforcement efforts: as a general matter, each entity within a non-US fiduciary structure generally will be expected to register with the IRS or its own government as an FFI and comply with FATCA's diligence and disclosure obligations, as provided by federal regulations and/or applicable IGAs (unless certain exceptions apply). Trust structures, including foundations, can try to delegate FATCA obligations to 'sponsoring' entities, but this strategy also has risks. And, FATCA responsible officers will be potential targets for US prosecutors and IRS investigators.
- [3] After the accounting firm Arthur Andersen collapsed in 2002 in the wake of its guilty plea related to the Enron energy company scandal—causing the loss of tens of thousands of jobs—the US DOJ had taken a much more careful approach where criminal prosecution had the potential to significantly affect markets.
- [4] For those unfamiliar, Chicken Little is a folk tale character (known by various other names as well in similar tales outside the US, such as Henny Penny) famous for strident and incorrect predictions of imminent doom.
- [5] Alongside the significant rise in criminal penalties, a new civil regulator with the power to hand down what amounts to an FFI death sentence has further increased risks of tax avoidance. New York State's Department of Financial Services (DFS) began several years ago to wade into these international enforcement actions. The Department has demanded enormous additional penalties from affected institutions—reportedly seeking an additional US $107 million in the case of Bank Leumi alone. In the Leumi case, DFS reportedly issued

its demand after Leumi had already substantially concluded negotiations with US federal authorities. Similarly, in the Credit Suisse case, DFS appeared four years after the federal government began its probe, yet received US $715 million of the final settlement. DFS has been able to use its power to revoke the state banking charters of the targets of these investigations both to participate in the settlement negotiations and to make resistance to the demands of the US legal regime even more difficult for FFIs.

- [6] The 'Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks'.
- [7] Swiss FFIs participating in the NPA programme are divided into 'categories'. A Category 1 Bank is one for which the US DOJ has already authorized a criminal investigation concerning its operations; the programme is not available to such banks. A Category 2 Bank is one that has reason to believe it may have committed tax-related offences or monetary transaction offences in connection with undeclared US accounts; such banks may request an NPA through the programme. To do so, they must have submitted to the US DOJ (by 31 December 2013) a plan for complying with the requirements set out in the Programme, the identity and qualifications of an independent examiner, confirmation that it will maintain all records required for compliance with the terms of the NPA, and a waiver of various legal defences. The DOJ then reviews the application and renders a decision. A Category 3 Bank has not committed any tax-related offences or monetary transaction offences in connection with undeclared US accounts, and may request a non-target letter from the DOJ in place of an NPA. Category 4 Banks are FFIs that are deemed compliant with US law.
- [8] One of the best-known examples of this was the US $104 million payout that UBS' Bradley Birkenfeld famously obtained for assisting in the US government's investigation of that bank. But, it is also important to recall that he also spent nearly three and a half years in prison for his activities.
- [9] An additional step the US has taken to formalize a new culture of enforcement is the creation of a 'bad bank' list. The IRS maintains the Foreign Financial Institutions and Facilitators list, which identifies banks that have been subject to public sanctions or investigations into potential facilitation of tax evasion. Accountholders at these banks face heightened penalties on their accounts at the offending bank, and at any other, banks where they have tax shortfalls. The list is notably under-inclusive, naming only 12 banks at the time of publication. It is available at <http://www.irs.gov/Businesses/International-Businesses/Foreign-Financial-Institutions-or-Facilitators>.
- [10] Some of those other countries have followed in the wake of the US effort and hit familiar targets—for example, in January 2014 French prosecutors issued arrest warrants for three former UBS officials, all Swiss nationals. The warrants were issued as part of an ongoing probe into whether the Swiss bank helped wealthy French customers evade taxes.
- [11] One lesson the government has taken from the Weil case is the need to return far more detailed indictments, which allege more specific and nefarious conduct than it was able to allege against Weil. A potential consequence of that lesson may be that senior bankers such as Weil will face far less risk of prosecution going forward than will lower-level bank employees/relationship managers who dealt directly with the US clients, and against whom the DOJ can therefore call multiple

witnesses from among its growing stable of now cooperating, convicted tax cheats.

- [12] In most investigations, the government's resource constraints are sharpened by a looming statute of limitations deadline to file any charges. There is some question as to whether such a deadline exists in many offshore tax cases: under US law, the statute of limitations is generally 'tolled' (paused) while a defendant is overseas, but the issue has not yet been litigated regarding defendants who were never present in the US because they are foreign citizens and residents. Both the government's position on the issue and the rules that may be laid down by the courts remain unknown.