International Tax Enforcement Continues to Rise

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I. Multilateral Developments

There are many multilateral developments regarding international tax enforcement, especially regarding the OECD, the Financial Stability Board (FSB), and the Financial Action Task Force on anti-money-laundering (FATF).

A. OECD Tax Transparency

The work of the OECD's Global Forum on Transparency and Exchange of Tax Information has been continuing. Since 2008, tax transparency has been a key feature of the G-20 summits. In the run-up to the G-20 summit held in April 2009 in London, all the key players endorsed the standards on transparency and exchange of information. In 2000 the OECD established the original Global Forum to implement the harmful tax practices initiative.

1. Global Forum on Taxation

As of March 16, 2011, the Global Forum includes 97 members. The forum agreed on a three-year mandate to promote the rapid implementation of the standards through the peer review of all its members and other jurisdictions that may require special attention.

The Global Forum's mandate contains:

- An initial three-year mandate to create a strengthened Global Forum to promote rapid and consistent implementation of the standards through a robust and comprehensive peer review process.
- Two-phase review of each jurisdiction's legal and regulatory framework (Phase 1) and practical implementation (Phase 2) of the standards on transparency and the exchange of information for tax purposes.
- In-depth ongoing monitoring of legal instruments that allow for exchange of information. A Peer Review Group, composed of 30 forum members,

oversees the process. The restructured Global Forum is a consensus-based program under Part II of the OECD budget for which the OECD has a €2.9 million budget.

The aim of the Global Forum is to ensure that all jurisdictions fully implement the international standards on transparency and exchange of information.

The reports adopted so far by the Global Forum have identified some deficiencies regarding the standards' implementation and have recommended improvement.

The Global Forum is currently developing a process whereby jurisdictions will be able to request a supplemental report reflecting the changes it has made in its legal and regulatory framework subsequent to peer review.

2. The Peer Reviews

In April 2011 the OECD published evaluation reports on Aruba, the Bahamas, Belgium, Canada, Estonia, Germany, and Ghana.

The peer review evaluations fall into two types. Aruba, the Bahamas, Belgium, Estonia, and Ghana were undergoing Phase 1 tests, which merely checked their legal and regulatory preparedness for tax information exchange, not whether it is actually happening. The examinations of Canada and Germany combined a Phase 1 check with an assessment of their implementation of tax information exchange agreements in practice — a Phase 2 test.

The OECD's summary of the results avoids the language of pass and fail, but, briefly:

- The Bahamas was found adequate on all Phase 1 counts. However, it must increase the availability of accounting information for international companies, registered private and foreign-incorporated companies, authorized purpose trusts, and foundations.
- Aruba must improve the availability of information on limited partnerships and some companies and also must move quickly to bring into force the TIEAs it has signed over the past two years.
- Belgium has signed 41 TIEAs in the past two years, but only one has been brought into force. The country needs to ratify a ''significant number'' of these agreements before it can move to Phase 2.
- Estonia's strict bank secrecy means it is not ready to sign TIEAs. It also must improve the availability of information on foreign companies and foundations.
- Ghana lacks a legal framework required for tax information exchange, though it has only recently relaxed its banking secrecy laws. It must strengthen the availability of information on foreign companies, trusts, and underlying documentation for accounting records.
- Canada and Germany, both members of the G-7, were fully approved by their peer reviewers for both Phase 1 and Phase 2. However, they were advised to improve the availability of ownership information of bearer shares and nominees. Germany was cited as slow to respond to requests for assistance.
- As of November 5, 2011, the OECD Global Forum has so far completed and published reports on 59 of its members. Ten were published in January. Four jurisdictions — Barbados, San Marino, the Seychelles, and Trinidad and Tobago — failed their Phase 1 reviews.[1]

On July 6, 2011, Panama moved to the OECD's list of jurisdictions considered to have substantially implemented the standard for exchange of information when it signed a TIEA with France. Following the Global Forum Phase 1 Peer Review, Panama has significantly amended its legislation to address some of the deficiencies identified by the Global Forum that resulted in Panama not moving forward to a Phase 2 review. At the request of Panama, the Global Forum will soon undertake a further review of whether Panama's domestic laws, including recent changes, will allow for effective exchange of information in practice.[2]

B. Revised OECD Convention Progresses

On April 4, 2011, Belgium became the 20th country to sign the Protocol amending the Convention on Mutual Assistance in Tax Matters. The OECD and Council of Europe developed the protocol in response to a G-20 call for a multilateral framework for the exchange of information for tax purposes. On June 5, 2010, the G-20 welcomed the development of a multilateral mechanism for information exchange open to all countries. The protocol amends the convention so that it updates the standard on exchange of information and opens the amended convention to all countries on June 1, 2011. As a result, the convention offers a quick way for all countries to have a TIEA with many countries.

The convention provides a multilateral basis for a wide variety of administrative assistance including information exchange on request, automatic exchange of information, simultaneous tax examinations, assistance in tax collection, and service of documents.

On September 22, 2011, a high-level Treasury official said the U.S. government is likely to sign the revised OECD convention.

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[1]For more information, see ''Seven more countries assessed for tax transparency,'' *STEP Wealth News Structuring Digest*, Apr. 14, 2011.

[2]For more information, see OECD, ''Tax: Panama meets target for international exchange of tax information,'' *available at* http://www.oecd.org/document/16/0,3746,en_21571361_44315115_48333776_1_1_1_1,00.html.

C. OECD Establishes Task Force

On March 23, 2011, the OECD established the Task Force on Tax Crimes and Other Crimes to strengthen international cooperation in the fight against tax evasion and other crimes.[3]

The task force was established as a result of the OECD Tax and Crime Conference on March 21-23, 2011, organized by Norway. In attendance were 150 delegates from 54 delegations, including tax, finance, central bank, and other officials from OECD member and nonmember countries, as well as the FATF, and business representatives, attended the conference.[4]

The closing statement observed that tax crimes, money laundering, and other financial crimes can threaten the strategic, political, and economic interests of both developed and developing countries as well as undermine citizens' confidence in their governments' ability to have taxpayers pay their taxes and may deprive governments of revenues required for sustainable development.

These activities occur in an environment of secrecy, inadequate legal frameworks, lax regulation, poor enforcement, and weak interagency cooperation. Conduct involving money laundering, corruption, or other economic crimes typically also constitutes a tax crime. Combating these activities requires greater transparency, more strategic intelligence gathering, and improved efforts to harness the capacity of different government agencies to work together to detect, deter, and prosecute these crimes.[5]

Issues of financial crime and illicit flows are of particular concern to developing countries. Illicit financial flows resulting from financial crimes deprive resources from developing countries that could finance their long-term development. The recent freezing of billions of dollars of assets owned by deposed North African autocrats and their families exemplifies the point. Also, illicit financial flows are linked to organized crime and illicit goods (such as drugs and illegal arms), all of which affect the quality of governance, violent conflict, and state fragility in the developing world. More than two-thirds of these flows are estimated to involve tax evasion.[6]

The conference reached the following conclusions:

- Tax crimes are serious crimes and must be pursued that way. Participants welcomed the discussions within FATF on tax crimes as a predicate offense.
- Changing conduct is key and requires clear, consistent, and public messaging.
- Business can play a key role by establishing the tone from the top through internal controls, policy, and structures to ensure compliance.
- A clear benefit exists from interagency cooperation concerning tax, law enforcement, anti-money laundering (AML) authorities, and other agencies when appropriate.
- Different models for international cooperation exist and should be reviewed to strengthen cooperation on tax and crime, such as a forum for criminal investigators bringing together different governmental agencies from both developing and developed counties.
- A need exists to identify and fill the legislative, policy, and operational gaps that prevent effective domestic and international cooperation.
- Developing countries also can benefit from the ''whole of government approach'' and especially significant improvements could be achieved through early detection, effective investigation, prosecution, and recovery of assets by use of appropriate tools.[7]

At the conclusion of the conference, the delegates decided to establish a global dialogue on interagency collaboration to better fight financial crimes, including illicit financial flows. A platform for sharing operational experiences could support the dialogue. They decided that the new task force will focus on:

- improving interagency cooperation by developing different models of cooperation, their advantages, and challenges with a view to developing best practice standards, and with a special focus on the contribution that tax administrations can make in this regard;
- improving understanding and use of international cooperation mechanisms by cataloguing all relevant forms and instruments for international cooperation in fighting financial crime; and
- supporting sustainable development and fiscal transparency by seeking to assess areas of biggest benefit to developing countries from the ''whole of government approach.''[8]

D. Progress on International Cooperation

On April 29, 2011, the FSB published a report on the progress of its initiative to encourage the adherence

[3]Rick Mitchell, ''OECD Task Force to Address Cooperation on Tax Evasion, Global Financial Crime,'' *Daily Rep. For Exec.*, Mar. 25, 2011, at I-1.

[4]The Launch of the Oslo Dialogue, a Closing Statement by Norway, as host, and the OECD, Mar. 23, 2011.

[5]*Id.*

[6]*Id.*

[7]*Id.*

[8]*Id.*

of all countries and jurisdictions to regulatory and supervisory standards on international cooperation and information exchange.[9]

In March 2010 the FSB initiative started in response to a call by the G-20 leaders at their April 2009 summit in London for the FSB to develop a toolbox of measures to promote adherence to prudential standards and cooperation with jurisdictions. It complements similar initiatives by the Global Forum to promote adherence to international standards in the tax area, and by the FATF for standards concerning anti-money-laundering and combating the financing of terrorism (AML/CFT).

The FSB's initiative focuses on adherence to internationally agreed information exchange and cooperation standards in the areas of banking supervision, insurance supervision, and securities regulation. Cooperation and information exchange among financial supervisors and regulators are essential for effective oversight in an integrated financial system. Because financial markets are global in scope, weaknesses in international cooperation and information exchange can undermine the efforts of regulatory and supervisory authorities to ensure that laws and regulations are followed and that the global operations of the financial institutions for which they have responsibility are adequately supervised.[10]

The FSB initiative is part of a framework that the FSB has established for more broadly encouraging stronger adherence to international standards.[11] In this framework, FSB members have committed to lead by example. They have committed to implement international financial standards, participate in international assessments, and disclose their extent of adherence. Also, FSB members undergo periodic peer reviews focused on the implementation and effectiveness of international financial standards and of policies agreed within the FSB.

Parallel with this initiative and partly in response to complaints from nonmembers of FSB about the lack of involvement by nonmembers of the FSB, the FSB is establishing regional consultative groups to broaden the range of input into its work and hence to broaden the applicability and implementation of the policies and standards it promotes. The regional groups, which may be similar to the FATF regional-style bodies, will be started in the coming months and will combine financial authorities from FSB member and nonmember countries to interact on the vulnerabilities affecting financial systems, on policies and standards to promote financial stability, and on the implementation of these policies and standards.[12]

1. Jurisdictions Evaluated

The initial focus is on the adherence of FSB members and other jurisdictions that rank highly in financial importance. The FSB has prioritized a pool of about 60 jurisdictions for evaluation, including all 24 FSB members. FSB has sought a balance between evaluating many jurisdictions and how many evaluations could feasibly be done in 2010-2011. Later in 2011 the FSB will consider whether to extend evaluations to jurisdictions beyond the about 60 evaluated to date.

The non-FSB jurisdictions prioritized for evaluation were those that ranked highly on a combination of economic and financial indicators.[13] The ranking was based on about 20 different economic and financial indicators, covering domestic financial assets, external financial assets and liabilities, capital flows, and selected global market segments. The FSB's ranking was not designed to identify jurisdictions with systemically important financial systems.

2. Adherence to International Standards

The FSB evaluated the adherence of jurisdictions to regulatory and supervisory standards relevant to international cooperation and information exchange, based on the detailed assessments underlying the reports on the Observance of Standards and Codes prepared by the IMF and the World Bank, as well as signatory status to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information overseen by the International Organization of Securities Commissions. The FSB strongly supports the IMF-World Bank program for assessing globally consistent adherence to standards and codes, and views it as the core mechanism for promoting implementation of international financial standards across countries. The FSB evaluation progress will hence build on the IMF-World Bank assessment reports as compliant or largely compliant with the relevant standards.

The FSB has invited the jurisdictions evaluated by the FSB that lack sufficiently strong adherence to engage in a confidential dialogue to further evaluate their adherence and, if necessary, identify ways to improve. Some of those jurisdictions are in the process of

[9]FSB, ''Progress of the FSB's initiative to promote international cooperation and information exchange,'' Press release, Ref. No. 15/2011, Apr. 29, 2011.

[10]FSB, ''Promoting global adherence to regulatory and supervisory standards on international cooperation and information exchange'' (hereafter, ''progress report''), Apr. 29, 2011.

[11]FSB, ''Framework for Strengthening Adherence to International Standards,'' Jan. 9, 2010, *available at* http://www.financialstabilityboard.org/publications/r_100109a.pdf.

[12]FSB progress report, *supra* note 10.

[13]*See* FSB, ''Promoting global adherence to international cooperation and information exchange standards,'' Mar. 2010, p. 4, *available at* http://www.financialstabilityboard.org/publications/r_100310.pdf.

implementing reforms, while others have outdated assessments or have never been assessed and have requested new assessments by the IMF and World Bank.[14]

3. Noncooperative Jurisdictions

The report states that some jurisdictions prioritized for evaluation by the FSB haven't cooperated satisfactorily with the FSB's process for promoting adherence to regulatory and supervisory standards on international cooperation and information exchange. In those cases, the authorities have chosen not to engage in dialogue with the FSB.

The report states that other measures may be implemented to apply additional pressure. In particular, the FSB may publish a list of noncooperative jurisdictions if positive measures make insufficient progress. Those lists have proven effective in facilitating improvements in other areas, such as tax standards.[15]

4. Publication of Jurisdictions Evaluated

To indicate the progress of most jurisdictions that the FSB has evaluated and to provide incentives for improvements by those jurisdictions not cooperating fully, the FSB ahead of the November 2011 G-20 leaders summit published the names of all jurisdictions evaluated under the current initiative. The public list identifies noncooperative jurisdictions.

5. Analysis

The effect of the evaluations is that small international financial services jurisdictions will need to spend more time preparing for yet another external evaluation. As a result, the few professionals they have to devise and develop new products or new treaties will instead spend it on another evaluation project. The small international financial services jurisdictions considered noncooperative will face unilateral measures from OECD and G-20 countries. For instance, France has ordered its banks and financial institutions to withdraw from jurisdictions blacklisted by the OECD and FATF.

E. Bar Associations Express Dissent

On the eve of the September 15, 2011, deadline, several bar associations made comments to FATF's Consultation Paper containing the review of the FATF standards and FATF's preparation for the Fourth Round of Mutual Evaluations.[16] Once the FATF adopts revised AML/CFT standards, it will schedule the fourth round of mutual evaluations of countries' implementation of the standards. Since the private sector and lawyers in particular have significant responsibility to implement the recommendations, the FATF has engaged bar associations in the revision of the recommendations.

1. Process

At least two comments — from the Council of Bars and Law Societies of Europe (CCBE) and the American Bar Association — expressed concern about the process. The CCBE said it was disappointed that although it submitted comments on January 21, 2011, it did not receive any feedback on those comments. The CCBE said that FATF:

> feedback, or at least further discussion, either in a formal or informal framework, on topics referred to in the first consultation paper which are of importance to lawyers, seems important if FATF seriously ''values this input from the private sector and civil society'' as is stated in the foreword of this second consultation paper. At the moment the wordings in which the FATF intends to review the Recommendations have still not been made public or at least shared with the CCBE, yet.

The ABA was more candid, stating that based on FATF's timetable, it ''is concerned that the FATF may issue revisions to the Standards as a *fait accompli*.'' The ABA urges the FATF — sooner rather than later — to engage with the legal profession on the substantive issues raised in the Consultation Paper. It states that:

> [a]bsent this engagement, there is a likelihood that the revised Standards will fail to achieve the desired goals. That outcome misses an opportunity to enhance compliance, and indeed would run the risk of undermining the credibility of the Standards. Impractical and excessively burdensome Standards may in fact inadvertently subvert the process.

The ABA letter recommends that ''the FATF have public deliberations on the Consultation Paper with a written record of the decisions, so that a legislative history exists of the choices and reasons for its choices.''

The Law Society said it is difficult to fully understand the ramifications of the proposals without seeing the actual drafting. ''The potential unintended consequences of amendments only truly become apparent when one seeks to apply the actual drafting to real life circumstances.''

2. Beneficial Ownership

The CCBE's letter states that the obligation to identify the beneficial owner and, if applicable, to verify that identity in a risk-based manner, is one of the most burdensome administrative AML regulations. It takes a lot of time and resources to obtain this data in writing, and clients, most of which having no or a low level of money laundering/terrorist financing risk, do not always understand the efforts they must make to provide the lawyer with the requested data. In particular, the vast majority of services rendered by lawyers do not

[14]FSB progress report, *supra* note 10.

[15]*Id.*

[16]This section is based on Bruce Zagaris, ''Bar Associations Express Dissent on Some of FATF Proposals,'' 27 *Int'l Enforcement L. Rep.* 948 (Nov. 2011).

have any money laundering risks at all, or at most a low risk level. Nevertheless, these clients are subject to extensive client due diligence, of which the verification of the identity of the beneficial owner is a substantial element. Furthermore, these customer due diligence measures take time and subsequently prevent the lawyer from rendering his services as fast as customers would prefer.

The Law Society states that the percentage of individuals who use companies, trusts, and agents for a legitimate purpose significantly outweighs the percentage of those who use them for criminal means. Hence, this must be considered when assessing the proportionality of FATF's proposals.

The Law Society observes that FATF's 2010 typology research on the misuse of trust and company service providers shows that the warning signs of money laundering often come not from who the owners are, but rather from the nature of their business, the specific transactions they are undertaking, and the size and source of funds they are utilizing. Hence, the continued insistence on seeking out an ultimate beneficial owner irrespective of risk would seem to be not only disproportionate but also counterproductive. This requirement wastes resources that could be better deployed on identifying and managing real areas of risk; it simultaneously impinges the fundamental human right of privacy for millions of law-abiding individuals who are involved with companies and legal arrangements. The Law Society raises various concerns on the requirements for verification of documents for a corporate client that add more responsibilities and costs to law firms and are disproportionate to the risks.

The ABA states that the suggested methods for verifying beneficial ownership under Recommendation 5 raise some feasibility, complexity, and cost issues. The ABA states that the FATF's narrative on proposed changes to Recommendation 33 lacks a discussion of the importance of the risk-based approach regarding beneficial ownership issues. The ABA states that to the extent lawyers hold beneficial ownership information and are compelled to disclose it to law enforcement authorities, as suggested by the proposed changes to Recommendation 33, the FATF must consider a lawyer's obligation under professional ethical rules to protect the attorney-client privilege, the client-lawyer relationship that is fundamental to the functioning of democracies, and confidential client information. Also, granting the competent authorities access to information raises privacy and constitutional issues under U.S. law.

The Law Society and ABA object to the FATF proposal that the details of the nominators in the case of nominee shareholders be on a public register. The Law Society states that this is a completely disproportionate infringement on the fundamental right to privacy of those individuals.

On the proposed Recommendation 34 (Legal Arrangements), the CCBE states that ''[p]roviding authorities with the competence to access information on an identity from, amongst others, lawyers would clearly interfere with this principle of legal professional privilege and professional secrecy and should be firmly rejected.'' Regarding Recommendation 34, the Law Society states it:

> simply does not see how the proposals contained in the consultation will effectively help to prevent the manner in which trusts are currently being abused by money launderers as described in FATF's own research. Instead the proposals will disproportionately infringe legitimate expectations of privacy for law abiding individuals, and place extensive burdens on legitimate arrangements which can easily be circumvented by determined criminals who will simply lie about beneficial ownership details.

While the ABA calls the proposed trust registry impractical, the Law Society points out problems regarding the proposed registration approach. It states that it ''does not envisage that such a shifting of jurisdictional responsibility would be practically achievable or effective in limiting the misuse of trusts and other legal arrangements by money launderers.''

3. Data/Privacy Issues and Expansion of PEP Obligations

Each of the three bar associations have problems with data protection and privacy, and recommended changes to the handling of politically exposed persons (PEPs). The recommendations call for an expansion of PEP obligations to family members and close associates, and adding to the definition of PEP individuals who have prominent functions with an international organization. The Law Society states enhanced due diligence for PEPs should only be required on a risk-based approach. The ABA and CCBE also oppose the proposed expansion of PEP obligations.

4. Analysis

The process issues associated with the FATF Consultation are enormous, especially considering that FATF's membership is limited to 36 countries and is an informal network, as opposed to an international organization. The process issues also reflect the extremely low level of compliance, especially by lawyers.[17] One of the big gaps is that FATF is an informal

[17]For a recent discussion of the low level of AML compliance, see the blog on June 27, 2011, by IMF AML head Joseph ''Jody'' Myers and his reference to an IMF paper on compliance with AML standards. Myers states that the IMF paper on the assessment reveals that compliance by countries with the international AML standard is low. Of the 161 countries assessed using the current methodology from 2004 to April 2011, full compliance with any principle was rare, occurring in only 12.3 percent of the cases. Countries achieved the second-highest score, largely compliant, only 25.5 percent of the time. For a link to the blog, see http://blog-imfdirect.imf.org/2011/06/27/blow-bling-and-bucks-imf-work-against-money-laundering-and-terrorist-financing/.

group composed of law enforcement and financial regulatory officials. Its experience in the private sector is limited and in some cases nonexistent. Since its mission is to enhance enforcement and regulation of AML, it takes into account the costs and practical problems of the private sector and lawyers to a very limited extent, if at all. Hence, the process of allowing private sector consultation is a limited measure, even though the implementation of the recommendations won't be successful unless the private sector and lawyers in this case believe that the recommendations and the process under which they are adopted are fair and based on sound principles. That FATF in almost all cases is expanding the Recommendations at the very time of that low compliance and during a worldwide economic downturn illustrates the disconnect between its well-intentioned mission and the reality of economics and sociopolitical circumstances in which lawyers and their clients operate.

II. Bilateral Developments

A. Panama-U.S. TIEA

On November 30, 2010, the U.S. and Panama signed a TIEA. The Panama-U.S. TIEA illustrates the limits to bank and financial confidentiality. To a large extent the Panama financial services sector has attracted investors through offers of confidentiality, including the use of bearer shares.

The new TIEA would allow for access to information about Panamanian bank accounts and information on bearer shares for the first time.

The TIEA has enormous significance because Panama is the most important entry point for capital from Latin America into the U.S. Also, Panama has long resisted signing a TIEA due to its strong international financial sector, which has been based in part on strong bank and financial confidentiality.

The agreement allows the United States and Panama to seek information from each other on all types of national taxes in both civil and criminal matters for tax years beginning on or after November 30, 2007.

According to a joint declaration between the two countries, the TIEA will take effect ''as soon as practicable'' after Panama passes implementing legislation.

The diplomatic note to the convention states that Panama expects to enact implementing legislation before the end of 2011, and intends that the legislation would require the identification of bearer shares.

Resident agents acting for Panamanian entities would have to obtain and retain in their records sufficient information to identify those entities, including, when the owner is a legal person, information sufficient to identify substantial owners of that legal person. However, a resident agent won't be required to obtain and maintain information sufficient to identify substantial owners of legal persons when the resident agent acts for a professional client that is part of an organization required to maintain information on those entities and that has agreed to make that information available to the resident agent when requested.

Under the contemplated legislation, agents will have to produce ownership and client identity information in response to a proper request under the TIEA, regardless whether the entity is newly formed or already exists when the legislation is enacted, the declaration said. Regarding already existing entities, ownership information would have to be obtained within a five-year period from the date of enactment.

The TIEA itself provides for the exchange of information, through competent authorities, ''that may be relevant to the administration and enforcement of the domestic laws of the parties concerning the taxes covered by this agreement.'' This includes information relevant to determining, assessing, enforcing, or collecting tax, as well as to the investigation or prosecution of criminal tax matters.

The TIEA applies to all U.S. federal taxes, including income taxes, taxes related to employment, estate and gift taxes, and excise taxes. The TIEA does not apply to taxes imposed by states, municipalities, or other political subdivisions, or possessions of a party.

For Panama, the TIEA applies to income tax; real estate tax; vessels tax; stamp tax; notice of operations tax; tax on banks, financial, and currency exchange companies; insurance tax; tax on the consumption of fuel and oil derivatives; and tax on the transfer of movable goods and the provision of services.

The agreement requires that requests for information can only be made when the requesting party is not able to obtain the requested information by other means, ''except where recourse to such means would give rise to disproportionate difficulty.'' Privileges under the laws and practices of the requesting party won't apply in the execution of a request by the requested party, and these matters must be reserved for resolution of the requesting party.

Any request for information must be made with as much specificity as possible, and in all cases must specify, in writing, the taxpayer's identity, the period of time for which information is requested, the nature of the information requested and the form in which the requesting party would prefer to receive it, and reasons for believing the information requested:

- is relevant to tax administration or enforcement; and
- is present or in the possession or control of a person in the other country.

Requests must also provide:

- the grounds for believing the information requested is present in the requested party or is in the possession or control of a person within the jurisdiction of the requested party;

- a statement whether the requesting party would be able to obtain and provide the requested information if a similar request were made by the requested party; and
- a statement that the requesting party has pursued all reasonable means available in its own territory to obtain the information, except when that would give rise to disproportionate difficulty.

However, under the TIEA, the parties are not obligated to obtain or provide ownership information for publicly traded companies or public collective investment funds or schemes, ''unless such information can be obtained without giving rise to disproportionate difficulties.'' Competent authorities can decline requests when:

- the request does not conform to the agreement;
- the requesting party has not pursued ''all reasonable means'' available in its own territory to obtain the information, *except* when recourse to those means would cause disproportionate difficulty; and
- the disclosure of the information would be contrary to the public policy of the requested party.

The agreement must not impose on a party any obligation to provide information that under the laws of the requested party is subject to legal privilege or contains any trade, business, industrial, commercial, or professional secret or trade process.

The agreement does not require a party to carry out administrative measures at variance with its laws and administrative practices.

The requested party must obtain and provide information that the requesting party would be unable to obtain in similar circumstances under its own laws for the purpose of the administration or enforcement of its own tax laws or in response to a valid request from the requested party under the agreement.

The statute of limitations of the requesting party pertaining to the taxes described in the agreement will govern a request for information.

Once the TIEA enters into force, it will have effect for requests made on or after the date of entry into force, with regard to tax periods beginning on or after three years before the signature of the agreement to which the matter relates.

One of the main incentives for Panama to sign a TIEA with the U.S. was its desire to obtain U.S. ratification of the free trade agreement, which had been blocked by the U.S. government's demand for Panama to conclude a TIEA. This condition was reflected by the remarks of the leaders of the U.S. House Ways and Means Committee subsequent to the signing of the TIEA.

That the ratification of the Panama-U.S. TIEA was delayed for three years and that the signing of a TIEA was imposed as a condition to U.S. ratification raise the question of whether the U.S. and other countries (EU and its members) may impose the condition of a TIEA as a prerequisite to other future trade and investment agreements.

The proposed TIEA is the subject of harsh criticism by Eduardo Morgan, the former Panamanian Ambassador to the U.S. and one of the leaders of Panama's legal and banking community.[18] Litigation is likely if the TIEA becomes law.

On April 18, 2011, the U.S. Treasury Department announced the entry into force of a TIEA with Panama. Signed November 30, 2010, the TIEA obligates the signatories to provide information from each other on all types of national taxes in both civil and criminal matters for tax years starting on or after November 30, 2007.[19]

In June 2010, Panama amended its domestic law to authorize the government to obtain and exchange information to comply with international conventions, including TIEAs, even when that information isn't of domestic tax interest (Law 2, ''Know Your Client, published in the Official Gazette on February 1, 2011). The amendment addresses the practice of anonymous accounts known as ''bearer shares'' and requires law firms incorporating businesses to conduct due diligence to verify the identity of the owners and to share that information with Panamanian authorities on request.[20]

On April 14, 2011, Panama's National Assembly approved the TIEA as part of an arrangement to achieve the U.S. government's support to ratify the free trade agreement. The U.S. has required the TIEA because of Panama's prior reputation as a so-called tax haven. After Panama's ratification of the TIEA, U.S. House Ways and Means Chair Dave Camp, R-Mich., Trade Subcommittee Chair Kevin Brady, R-Texas, Senate Finance Committee Chair Max Baucus, D-Mont., and Sen. Orrin Hatch, R-Utah, ranking member of the Finance Committee, all issued statements that Panama has now addressed every issue considered outstanding by the Obama administration and facilitated the immediate consideration by the U.S. Senate to ratify the free trade agreement.[21]

Because the TIEA obligates the signatories to provide information for tax years starting on or after November 30, 2007, and because Panama was the leading intermediary for Latin American capital into the U.S., the U.S. is likely to make a series of requests to Panama. At least initially, these requests are likely to

[18]Eduardo Morgan, ''Double Taxation Treaties and Tax Information Exchange Agreements,'' Jan. 27, 2011, *available at* http://www.eduardomorgan.com/blog/?p=1607.

[19]U.S. Department of Treasury, ''U.S.-Panama Tax Information Exchange Agreement Now In Effect,'' Apr. 18, 2011.

[20]*Id.*

[21]Lee Bracken, ''U.S.-Panama Tax Information Exchange Pact Wins Praises as Prelude to Trade Agreement,'' *Daily Rep. For Exec.*, Apr. 19, 2011, at G-3.

engender litigation in Panama.[22] The TIEA is significant because the U.S. government successfully conditioned ratification of the free trade agreement on the conclusion of a TIEA and the enactment in Panama of implementing legislation.

B. Other Treaties With Enforcement Implications

The U.S. has signed protocols to its income tax treaties with Luxembourg and Switzerland, and signed a new income tax treaty with Hungary on February 4, 2010. The treaty with Hungary is important because of its tax information and limitation on benefits provisions. The Senate Foreign Relations Committee approved all three and reported them to the full Senate on July 26, 2011.

III. Unilateral Developments

One trend has been that tax authorities globally are increasingly taking proactive enforcement measures including criminal investigations against entities and individuals.

In this regard, the U.S. has received increased requests from Brazil under its mutual legal assistance treaty. Brazil has also conducted criminal investigations against multinational enterprises for evading VAT. Many of these cases involved mis-invoicing sales to take advantage of tax incentives for producing goods in the Amazon.

A. John Doe Summons for HSBC India

On April 8, 2011, U.S. District Judge Phyllis J. Hamilton in San Francisco granted the request of the U.S. government[23] authorizing the IRS to issue a John Doe summons for HSBC Bank USA, N.A. to obtain information about U.S. residents who may be using accounts at the Hong Kong and Shanghai Banking Corp. in India (HSBC India) to evade federal income taxes.[24]

The IRS employs a John Doe summons to obtain information about possible tax fraud by people whose identities are not known. If approved, the John Doe summons would direct HSBC USA to produce records identifying U.S. taxpayers with accounts at HSBC India, many of whom are believed by the government to have hidden their accounts from the IRS.

IRC section 7609(f) and (h) enables the U.S. government to seek leave from a court to serve an IRS John Doe summons that does not identify the person for whose liability it is issued. Section 7609(h)(1) provides that a district court in which the person to be summoned resides or is found will have jurisdiction to hear and determine any proceeding brought under section 7609(f). HSBC USA is in San Francisco. Section 7609(h)(2) provides that any determinations required to be made under section 7609(f) will be made ex parte and will be made solely on the petition and supporting affidavits.

To obtain the order it seeks, section 7609(f) requires the U.S. to show that:

- the John Doe summons relates to the investigation of an ascertainable group or class of persons;
- there is a reasonable basis for believing that group or class of persons may fail or may have failed to comply with any provision of any internal revenue law; and
- the information sought from examination of the records or testimony (and the identities of the persons regarding whose liability the summons is issued) is not readily available from other sources.

The U.S. government's filings explain that on January 26, 2011, a grand jury in Newark, N.J., indicted Vaibhav Dahake of Somerset, N.J., charging him with conspiracy to defraud the U.S. by undeclared accounts in the British Virgin Islands and at HSBC India to evade his income taxes. The U.S. in its pleadings explained that employees of HSBC Holdings plc and its affiliates operating in the U.S. assured Dahake that accounts maintained in India would not be reported to the IRS.[25]

The U.S. alleges that HSBC's website explains that in 2002, HSBC India opened a ''representative office'' at an HSBC USA office in New York City so that ''Non-Resident Indians'' (NRIs) living in the U.S. could open accounts in India. In 2007 HSBC India allegedly opened a second representative office at an HSBC USA office in Fremont, Calif., purportedly ''to make banking transactions more convenient for the NRI community based in California.'' HSBC India closed those offices in June 2010, but the government alleges that NRI clients may still access their accounts at HSBC India from the U.S. The U.S. government alleges that NRI clients have told IRS investigators that NRI representatives in the U.S. argued that the clients could invest in accounts at HSBC India without paying U.S. income tax on interest earned on the accounts and

[22]For a discussion of the Panama-U.S. TIEA, see Bruce Zagaris, ''Panama and the U.S. Sign a Tax Information Exchange Convention,'' 27 *Int'l Enforcement L. Rep.* 569 (Feb. 2011).

[23]*In the Matter of the Tax Liabilities of John Does*, U.S. District Court N.D. Cal., San Francisco Div., CV 11 1688 LB, Order Granting Ex Parte Petition for Leave to Serve ''John Doe'' Summons, Apr. 8, 2011.

[24]U.S. Department of Justice, ''Justice Department Asks Court to Allow IRS to Seek HSBC India Bank Account Records,'' Apr. 7, 2011.

[25]*In the Matter of the Tax Liabilities of John Does*, U.S. District Court N.D. Cal., San Francisco Div., CV 11 1688 LB, Memorandum in Support of Ex Parte Petition for Leave to Serve ''John Doe'' Summons, at 5-6.

that HSBC would not report the income earned on the HSBC India accounts to the IRS.[26]

The U.S. government alleges that HSBC offers an enhanced personalized banking service for high-net-worth individuals called HSBC Premier. For clients who maintain a minimum balance of $100,000 in all HSBC accounts combined, Premier banking provides around-the-clock international services with worldwide access to account information regardless of where, and with which affiliate, the accounts reside.

The U.S. government alleges that HSBC helped Dahake and its Premier clients in concealing their Indian accounts from the IRS by:

- dividing transferred funds into increments of less than $10,000 to ''stay below the radar'';
- directing HSBC India to send Indian account statements to Dahake's father, who resided outside the U.S.;
- transferring funds from other foreign accounts to HSBC India, after converting the funds to non-U.S. dollar denominations, through correspondent accounts outside the U.S., to avoid using the U.S. banking system;
- withdrawing funds from HSBC India in amounts less than thresholds that would trigger reporting to governmental authorities; and
- assuring Dahake that the Indian accounts would not be reported to the IRS.[27]

According to the U.S. government, HSBC has advised the IRS that as of September 2010, approximately 9,000 U.S. residents who were Premier clients of HSBC also had NRI deposits at HSBC India. As of December 2009, according to HSBC USA, U.S. resident Premier clients had NRI deposits of nearly $400 million. For calendar year 2009, the most recent year for which information is available, there have been only 1,391 foreign bank account reports filed disclosing 1,921 accounts of HSBC India. Hence, thousands of U.S. taxpayers who maintain more than $100,000 in accounts with HSBC may have failed to disclose their HSBC India accounts to the U.S. government.[28]

HSBC has said that it has been engaged in a ''constructive dialogue'' with U.S. authorities and hoped that any summons issues can be quickly resolved.[29]

[26]*Id.* at 4-5.

[27]*Id.* at 5-6.

[28]*Id.* at 7-8.

[29]Suzanne Kapner, ''HSBC in Tax Evaders Probe,'' *Fin. Times*, Apr. 8, 2011, at 13.

In July 2010 some HSBC clients received a letter from the U.S. Department of Justice saying that they were the subject of a criminal tax evasion investigation.[30]

The filing of the new case shows that the U.S. has extended beyond Switzerland its investigations of potential U.S. taxpayers using offshore accounts to commit tax crimes.[31]

In 2008 a federal judge in Miami approved a similar request by the IRS to serve a John Doe summons on UBS, which resulted in a deferred prosecution agreement between the United States and UBS in February 2009. Both Stuart Gibson, counsel in the HSBC case, and Daniel Reeves, declarant in HSBC in support of the petition and senior adviser and project manager to the IRS's Offshore Compliance Initiatives Program, participated in the UBS case. Based on the petition and declaration in the HSBC case, the U.S. government has a strong likelihood of obtaining a favorable order.

The fact that HSBC allegedly formed offices in the U.S. and marketed the Premier account as a tax evasion mechanism does not bode well for potential criminal liability by HSBC. Part of the problem that UBS encountered was that it committed a series of actions in the U.S. to both allure and service its high-net-worth U.S. taxpayer clients.

Clearly the case shows that the DOJ and the IRS have been mining the many offshore voluntary disclosure applications to develop this and other investigations. The case comes at an opportune time, since tax practitioners have reported that the response to the second offshore voluntary disclosure initiative has not been as robust as the first one. The response to the first initiative was fueled in part by constant media attention to the efforts by the DOJ to obtain from UBS the banking records of U.S. taxpayers, the deferred prosecution reached with UBS, as well as the hearings held by the Senate Subcommittee on Permanent Investigations focusing on the problem of tax evasion through the use of offshore bank accounts.

An interesting aspect of the case is that India is not an international financial center and India itself has been aggressive in asserting jurisdiction over a wide range of foreign persons doing business in India.

B. Appellate Court Enforces Grand Jury Subpoena

On August 19, 2011, the U.S. Court of Appeals for the Ninth Circuit[32] affirmed the lower court's ruling that under the Required Records Doctrine, a target of a

[30]*Id. See* Andrew Clark, ''HSBC Offshore Accounts Under Investigation by US Tax Authorities,'' *available at* http://www.guardian.co.uk, July 6, 2011.

[31]Kapner, *supra* note 29.

[32]*In re: Grand Jury Investigation, M.H. v. United States*, U.S. Court of Appeals for the 9th Cir., No. 11-55712, Opinion, Aug. 19, 2011.

grand jury could not use the privilege against self-incrimination to refuse to produce Bank Secrecy Act information.[33]

M.H. is the target of a grand jury investigation seeking to determine whether he used secret Swiss bank accounts to evade paying federal taxes. The district court granted a motion to compel M.H.'s compliance with a grand jury *subpoena duces tecum* demanding that he produce specific records related to his foreign bank accounts. The court refused to condition its order compelling production upon a grant of limited immunity and, under the recalcitrant witness statute, 28 U.S.C. section 1826, held M.H. in contempt for refusing to comply.

The U.S. government seeks foreign bank account information that M.H. must keep and maintain for inspection under the Bank Secrecy Act of 1970 (BSA), 31 U.S.C. section 5311, and its related regulations. M.H. argues that if he provides the sought-after information, he risks incriminating himself in violation of his Fifth Amendment privilege. He asserts that the information he is asked to produce might conflict with other information M.H. has previously reported to the IRS. For example, production might reveal that he has accounts he has not reported or that the information he has already reported is inaccurate. On the other hand, if M.H. denies having the records, he risks incriminating himself because failing to keep the information when required to do so is a felony.

The district court concluded that under the Required Records Doctrine, the Fifth Amendment did not apply.

In June 2010 a San Diego federal grand jury issued a *subpoena duces tecum* to M.H. for records concerning his FBAR. When M.H. declined to provide the information based on his risk of self-incrimination under the Fifth Amendment, the court conducted a show-cause hearing for failing to comply with its order and found him in contempt. However, the court stayed the contempt order pending appeal, contingent on M.H.'s posting of a $250,000 cash bond.

On appeal, the appellate court examined whether M.H. could claim that the Required Records Doctrine under the Fifth Amendment did not apply as basis for refusing to comply. The appellate court concluded that each of the three principal elements of the doctrine, as set forth in *Shapiro v. United States*, 335 U.S. 1, 17 (1948), applied to M.H.'s situation:

- first, the purposes of the U.S.'s inquiry must be essentially regulatory;
- second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and
- third, the records themselves must have assumed ''public aspects,'' which render them at least analogous to public documents.

Regarding the first element, the purposes of the U.S. inquiry must be essentially regulatory, not criminal. The court rejected M.H.'s argument that the banking information M.H. had to maintain under 31 C.F.R. section 1010.420 for a period of five years and the BSA's primary purpose is to detect criminal conduct, especially money laundering, terrorism, and tax evasion. The court concluded that having a foreign bank account and reporting the same does not suggest a person is engaged in illegal activity. The information is not inherently illegal. Hence, reporting the same would not establish a significant link in a chain of evidence tending to prove guilt.

Regarding the second element, the records of the FBARs that persons must keep under section 1010.42 is basic account information that bank customers would customarily keep, in part because they must report it to the IRS every year as part of the IRS's regulation of offshore banking, and in part because they need the information to access their foreign bank accounts.

Regarding the third element, the U.S. Supreme Court has recognized that if the government's purpose in imposing the regulatory scheme is essentially regulatory, then it necessarily has some ''public aspects.''[34] The appellate court rejected M.H.'s argument that the records in question, even if they are essentially regulatory, lack public aspects because ''nothing in the record keep provision of the BSA requires [M.H.] to produce bank records to the government.'' The court of appeal concluded that since the records sought through the subpoena come under the Required Records Doctrine, the Fifth Amendment privilege against self-incrimination is inapplicable, and M.H. may not invoke it to resist compliance with the subpoena's command. Since M.H.'s Fifth Amendment privilege is not implicated, the court need not address his request for immunity.

As a result of the appellate court's ruling, U.S. prosecutors will be able to compel production of foreign bank account information taxpayers must keep as potential evidence in criminal investigations and prosecutions. Targets and defendants will have difficulty in successfully resisting these efforts to compel production of that evidence.

C. Former Credit Suisse Professionals Indicted

On July 21, 2011, the U.S. government unveiled a superseding indictment against eight former Credit

[33]This section is reprinted from Bruce Zagaris, ''Appellate Court Enforces Grand Jury Subpoena of Foreign Bank Account information,'' 27 *Int'l Enforcement L. Rep.* 953 (Nov. 2011).

[34]*Shapiro*, 335 U.S. at 33.

Suisse officials[35] while Credit Suisse announced that it is the target of a U.S. criminal investigation[36] and the U.S. and Swiss governments[37] discussed potential tax enforcement cooperation.[38]

The original indictment was returned on February 23, 2011. The superseding indictment alleges that Credit Suisse's former managers and bankers engaged in illegal international banking whose goal was to assist U.S. customers evade their income taxes by opening and maintaining secret bank accounts at the bank and other Swiss banks. As of the fall of 2008, the superseding indictment alleges that Credit Suisse maintained thousands of secret accounts for U.S. customers with as much as $3 billion in total assets under management in those accounts. The conspiracy relates back to 1953 and involved two generations of U.S. tax evaders including U.S. customers.[39]

On July 15, 2011, Credit Suisse acknowledged that it received a letter from the DOJ on July 14 informing the bank that it was now a target of an investigation.[40]

The superseding indictment alleges that the conspirators used a representative office in New York City to conduct unlicensed and unregistered banking services to U.S. customers with undeclared accounts. The defendants allegedly made false statements and provided misleading information to the Federal Reserve Bank of New York and to the IRS to conceal Credit Suisse's U.S. cross-border banking business and the role of the New York representative office in that business.[41]

According to the superseding indictment, Markus Walder, former head of North America Offshore Banking at Credit Suisse, supervised the U.S. cross-border banking business made up of a Geneva-based team of bankers and a Zurich-based team of bankers, and including the New York representative office headed by Roger Schaerer, another defendant. They allegedly provided unlicensed and unregistered banking services to U.S. customers with undeclared accounts at the bank. The superseding indictment alleges that Andreas Bachman, a private banker for a wholly owned subsidiary of Credit Suisse, traveled to the U.S. to assist U.S. taxpayers in evading their U.S. taxes through the use of secret bank accounts. Also, the superseding indictment alleges that Josef Dörig, the founder of a Swiss trust company, served as a preferred provider of Credit Suisse, helping U.S. customers in forming and maintaining nominee tax haven entities and opening secret accounts at Credit Suisse and its subsidiaries in the names of the entities.[42]

The superseding indictment alleges the defendants and their co-conspirators solicited U.S. customers to open secret accounts because Swiss bank secrecy would allow them to conceal from the IRS their ownership of accounts at Credit Suisse and other Swiss banks. Also, they allegedly provided unlicensed and unregistered banking services and investment advice to customers in the U.S. in person while traveling to the U.S., including at the international bank's representative office in New York City and by mailings, e-mail, and phone calls to and from Credit Suisse's U.S. employees and also allegedly destroyed statements and other account records that were sent by e-mail or facsimile to the representative office in New York so that records regarding the undeclared accounts would not be maintained in the U.S.[43]

According to the superseding indictment, the defendants and their co-conspirators:

- caused U.S. customers to travel outside the U.S. to conduct banking related to their secret accounts;
- opened secret accounts in the names of nominee tax haven entities for U.S. customers;
- accepted IRS forms that falsely stated under penalties of perjury that the owners of the secret accounts were not subject to U.S. taxation;
- advised and caused U.S. customers to structure withdrawals from their secret accounts in amounts less than $10,000 to attempt concealment of the secret accounts and the transactions from U.S. authorities;
- mailed bank checks in amounts less than $10,000 to customers in the U.S.; and
- advised U.S. customers to utilize offshore charge, credit, and debit cards linked to their secret accounts and provided the customers with those cards, including cards issued by American Express, Visa, and Maestro.[44]

[35]U.S. DOJ, ''Swiss International Bank's Former Head of North America Offshore Banking, Others charged with Conspiracy,'' July 21, 2011; *U.S. v. Markus Walder*, Superseding Indictment, U.S. Dist. Ct. E.D.Va., Crim. No. 1-11-CR-95, July 21, 2011.

[36]Daniel Pruzin, ''Credit Suisse Confirms Formal Investigation by DOJ as Part of Tax Evasion Crackdown,'' *Daily Rep. For Exec.*, July 18, 2011, at I-1.

[37]Daniel Pruzin, ''Talks Pursued With U.S. Officials to Resolve Tax Evasion Concerns With Swiss Banks,'' *Daily Rep. For Exec.*, July 21, 2011, at I-1.

[38]This information first appeared in Bruce Zagaris, ''U.S. Indicts Seven Former Credit Suisse Professionals as U.S. and Swiss Discuss Tax Enforcement Cooperation,'' 27 *Int'l Enforcement L. Rep.* 904 (Oct. 2011).

[39]U.S. DOJ, *supra* note 35.

[40]Pruzin, *supra* note 36.

[41]U.S. DOJ, *supra* note 35.

[42]*U.S. v. Markus Walder*, Superseding Indictment, paras. 29, 60, and 65.

[43]*Id.* at paras. 31-56; U.S. DOJ, *supra* note 35.

[44]*Id.* at paras. 31-56; U.S. DOJ, *supra* note 35.

The superseding indictment alleges that after Credit Suisse decided to close the secret accounts maintained by U.S. customers, the defendants encouraged and helped U.S. customers to transfer their secret accounts to other foreign banks as a means of continuing to hide their assets from the IRS and discouraged the customers from disclosing their secret accounts to the IRS through the IRS's voluntary disclosure program.[45]

In August 2009 Swiss authorities reached an agreement with the United States under which Switzerland's largest bank, UBS, agreed to transmit documents and information on more than 4,000 secret bank accounts held by U.S. nationals, to settle proceedings that could have jeopardized the bank's operating license in the United States for facilitating tax fraud. In February 2009 UBS also agreed to transmit details on 255 accounts held by U.S. taxpayers and pay a $780 million fine to settle allegations of conspiring to defraud the U.S. government.

Swiss authorities hoped the UBS settlement would end the matter. However, U.S. officials indicated that they would extend efforts to break Swiss banking secrecy and investigate and prosecute U.S. taxpayers with undeclared funds. For instance, on February 23, 2011, the DOJ and IRS announced that four managers and bankers with Credit Suisse were being charged with conspiring with other Swiss bankers to help U.S. customers use secret accounts to evade income tax.[46] The U.S. regularly continues to charge Swiss professionals with conspiring with U.S. taxpayers to evade tax and commit other crimes.[47] No settlement appears imminent between the U.S. and Swiss government over the U.S. investigations against Swiss financial institutions and professionals.

D. Founders of Internet Poker Companies Indicted

On April 15, 2011, a grand jury indictment charged 11 defendants, including the founders of the three largest Internet poker companies doing business in the United States — PokerStars, Full Tilt Poker, and Absolute Poker — with bank fraud, money laundering, and illegal gambling offenses. Also, the U.S. brought a civil money laundering and in rem forfeiture complaint against the poker companies, their assets, and the assets of several payment processors for the poker companies. The U.S. government obtained restraining orders against more than 75 bank accounts utilized by the poker companies and their payment processors, and it seized five Internet domain names used by the poker companies to host their allegedly illegal poker games.[48]

The U.S. government alleges the defendants concocted an elaborate criminal fraud scheme, alternately tricking some U.S. banks and effectively bribing others to assure the continued flow of billions of dollars in illegal gambling profits. To circumvent the gambling laws, the defendants also allegedly engaged in massive money laundering and bank fraud.

On October 13, 2006, the U.S. enacted the Unlawful Internet Gambling Enforcement Act (UIGEA), which criminalized gambling businesses to ''knowingly accept'' most forms of payment ''in connection with the participation of another person in unlawful Internet gambling.'' Even with the passage of UIGEA, the poker companies, located outside the U.S., continued operating in the U.S. In a press release on October 16, 2006, Absolute Poker said that the company would continue its U.S. operations because ''the U.S. Congress has no control over'' the company's payment transactions.

The U.S. alleges that since U.S. banks and credit card issuers were largely unwilling to process their payments, the poker companies used fraudulent methods to circumvent federal law and trick these institutions into processing payments on their behalf. For instance, defendants Isai Scheinberg and Paul Tate of PokerStars, Raymond Bitar and Nelson Burtnick of Full Tilt Poker, and Scott Tom and Brent Beckley of Absolute Poker allegedly arranged for the money received from U.S. gamblers to be disguised as payments to hundreds of nonexistent online merchants purporting to sell merchandise such as jewelry and golf balls. The U.S. charges that approximately one-third or more of the funds obtained by poker companies in payment transactions went directly to the poker companies as revenue through the ''rake'' charged to players on almost every poker hand played online.[49]

To achieve their fraud, the poker companies worked with various compensated ''payment processors,'' four of which were indicted. The processors allegedly started accounts at U.S. banks for the poker companies. The payment processors allegedly lied to banks about the nature of the financial transactions they were processing and concealed the lies by, among other things, establishing phony corporations and websites to disguise payments to the poker companies. For instance, a PokerStars document from May 2009 acknowledged that it received money from U.S. gamblers though company names that ''strongly imply the transaction has

[45]*Id.* at paras. 31-56; U.S. DOJ, *supra* note 35.

[46]Pruzin, *supra* note 36.

[47]U.S. DOJ, ''U.S. Justice Department Announces Indictment Against Former UBS Banker,'' Aug. 4, 2011 (announcing the indictment of former UBS official and then asset manager, Gian Gisler, in the U.S. District Court of the Southern District of New York.)

[48]U.S. Attorney Southern District of New York, ''Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies With Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds,'' Apr. 15, 2011.

[49]*Id.*

nothing to do with PokerStars,'' and that PokerStars used whatever company names ''the processor can get approved by the bank.'' By late 2009, U.S. banks and financial institutions detected and closed multiple fraudulent bank accounts used by the poker companies. Scheinberg and Bitar allegedly developed a new processing strategy that would not involve lying to banks. PokerStars, Full Tilt Poker, and their payment processors persuaded the principals of a few small, local banks facing financial difficulties to engage in that processing in return for multimillion-dollar investments in the banks.

The indictment and civil complaint seek at least $3 billion in civil money laundering penalties and forfeiture from the poker companies and the defendants. The District Court issued an order restraining approximately 76 bank accounts in 14 countries containing the proceeds of the charged offenses. Under a warrant for arrest in rem issued by the U.S. District Court, the U.S. also seized five Internet domain names used by the poker companies to operate their illegal online businesses in the U.S.

Some of the defendants were arrested in the U.S. while a number are outside the U.S. and haven't been arrested. The U.S. is working with foreign law enforcement agencies and Interpol to obtain the arrest of those outside the U.S. and the seizure of criminal proceeds located abroad.[50]

On April 19, 2011, Bradley Franzen pleaded guilty before a U.S. magistrate in New York.[51]

On September 2, 2011, Judge Leonard B. Sand signed an order releasing all the funds frozen in the ''Black Friday'' seizure of PokerStars except for $5.5 million. The order will remain in place until the conclusion of the litigation or a superseding order regarding the account.[52]

On September 20, 2011, the U.S. government filed a revised complaint in the U.S. District Court for the Southern District of New York, requesting civil forfeiture against the three leading foreign Internet gaming companies doing business in the U.S., PokerStars, Full Tilt Poker, and Absolute Poker/Ultimate Bet, their principals, and payment processors, alleging that they arranged for the money received from U.S. gamblers to be disguised as payments to hundreds of nonexistent online merchants and other non-gambling businesses.[53]

The complaint alleges that because U.S. banks were largely unwilling to process payments for an illegal activity such as Internet gambling, the three poker companies used fraudulent methods to avoid these restrictions and to receive billions of dollars from U.S. residents who gambled through the poker companies. In essence, the complaint alleges that the principals and highly compensated third-party payment processors deceived or directed others to deceive U.S. banks and financial institutions into processing billions of dollars in payments for the poker companies, by, among other things, arranging for the money received from U.S. gamblers to be disguised as payments to hundreds of nonexistent online merchants and other non-gambling businesses.

The complaint alleges that Full Tilt Poker not only engaged in the operation of an unlawful gambling business, bank fraud, wire fraud, and money laundering as alleged in the complaint, but also defrauded its poker players by misrepresenting to them that funds deposited into their online player accounts were secure and segregated from operating funds, while at the same time allegedly using those player funds to pay out hundreds of millions of dollars to Full Tilt Poker owners.[54]

1. Analysis

Among knowledgeable Internet gaming attorneys and many governments, the U.S. indictment is based on shaky legal ground.

As one of the foremost experts on gaming law, Prof. I. Nelson Rose of Whittier Law School has observed that successfully prosecuting a defendant for illegal gaming is difficult since a federal court of appeal has ruled the Wire Act is limited to bets on sports events. Tricking or defrauding financial institutions into processing poker payments seems a technicality, particularly since the banks made millions without paying fines.[55] Other legal experts contend that operating a poker site online is not illegal because, as a game that involves skill, poker is not gambling.[56]

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[50] *Id.*

[51] Patricia Hurtado and Beth Jinks, ''Online Poker Player Accounts Frozen as U.S. Indicts Operators,'' Bloomberg News, Apr. 19, 2011.

[52] *U.S. v. PokerStars, et al.*, U.S. District Court, S.D.N.Y., 11 Civ. 2564 (LBS), Stipulation and Order, Sept. 2, 2011; for additional background, see Bruce Zagaris, ''U.S. Government Releases All but $5.5 Million of PokerStars' Frozen Money,'' 27 *Int'l Enforcement L. Rep.* 967 (Nov. 2011).

[53] *U.S. v. PokerStars et al.*, U.S. District Court, S.D.N.Y., 11 Civ. 2564 (LBS), Verified First Amended Complaint, Sept. 20, 2011.

[54] *Id. See also* Alexandra Berzon, ''Poker Site Stacked Deck: U.S.,'' *Wall St. J.*, Sept. 21, 2011, at A1; Bruce Zagaris, ''U.S. Files Revised Complaint Against Foreign Internet Gaming Companies, Their Principals and Payment Processors Alleges Conspirators Dealt Bad Hand to Players,'' 27 *Int'l Enforcement L. Rep.* (Dec. 2011).

[55] I. Nelson Rose, ''Federal Poker Indictments: Revisiting Prohibition,'' Gambling and the Law (Blog), Apr. 17, 2011, *available at* http://www.gamblingandthelaw.com/blog.html.

[56] Berzon, ''Justice Department Breaks Up Online Poker,'' *Wall St. J.*, Apr. 18, 2011, at A6; Matt Richtel, ''Authorities Crack Down on 3 Poker Sites,'' *N.Y. Times*, Apr. 16, 2011, at B1

(Footnote continued on next page.)

The indictment tries to solve the Wire Act[57] problem by charging the online operators under 18 U.S.C. section 1955. This law makes it a felony to be a large business in violation of state anti-gambling laws. The indictment cites state laws in New York (New York Penal Law 225 and 225.05) and the state of Washington that prohibit unlicensed gambling. However, at least the New York law does not apply to mere poker players.[58] The state laws are needed for the claims in the indictment of money laundering and fraud. However, a problem may be proving that state laws apply to foreign-based gambling operations since federal law regulates international commerce.[59]

Prof. Rose notes that in addition to the agreements between U.S. casinos and the foreign Internet gaming domains (for example, Caesars-888 and Wynn-PokerStars), the Nevada Assembly Judiciary Committee recently approved a bill to regulate online poker and the District of Columbia enacted a law to legalize online gaming.[60]

The civil forfeiture cases may be especially problematic for the defendants. To effectively defend them, the poker companies and other defendants will likely have to subject themselves to U.S. jurisdiction and open their books and records to the DOJ and the IRS. Poker companies may default on the civil forfeiture and players may have no real legal recovery regarding efforts to write off their funds on deposit for tax purposes and obtain some benefit by tax losses. To be able to write off gambling losses, IRC section 165 limits gambling losses to gambling winnings, plus travel and related expenses for professional gamblers. However, players must report winnings and show proof of deposits.[61]

After the enactment of UIGEA, many poker websites left the U.S. Others, namely Full Tilt Poker and PokerStars, developed lucrative businesses by catering to U.S. players from overseas. PokerStars is based in the Isle of Man; Full Tilt is regulated by Alderney in the Channel Islands; Absolute Poker is in Costa Rica. According to PokerScout, which tracks online poker site data, in 2010 the approach was so successful that 1.8 million people in the U.S. played poker online for money.[62]

The civil forfeiture cases illustrate the difficulty banks have had with enforcing the UIGEA. The banking industry complained vociferously about the difficulties and burdens of trying to implement the UIGEA. As the U.S. privatizes AML, then counterterrorism financial enforcement in 2001, Internet gaming payments in 2008-2009, and more recently tax compliance with the Qualified Intermediary initiative, the Foreign Account Taxpayer Compliance Act, banks and financial institutions are struggling to develop sufficient human resources and software to effectively enforce all of these programs. Meanwhile, as these financial regulatory requirements (all with draconian administrative penal or even criminal penalties for violations) are in turn imposed on correspondent accounts and relationships, foreign financial institutions and governments are complaining about the bureaucratic and enormously expensive costs of these unilateral enforcement initiatives. In particular, since the UIGEA violates the decisions of the WTO, U.S. and foreign financial institutions have more reason to complain. And as of now, the legal machinations, lawsuits, diplomacy, and maneuvering in Congress are still seemingly in their beginning stages.

The case may affect the effort in the U.S. Congress to legalize Internet gaming. The companies named in the indictment have indirectly paid more than half of the lobbying and operating bills for Poker Players Alliance, a nonprofit organization that is leading the effort to legalize Internet gaming. Last year the alliance spent $1.6 million on lobbying, using nine lobbying firms, including by former members of the U.S. Congress.[63]

The seizing of domain names may be costly for the companies that have invested in promoting their domains as the main route to their sites. However, the companies can switch to a new Web address outside the reach of U.S. law enforcement.[64]

The battle over prosecutions has been fought at an international level. After Antigua and Barbuda won a case against the U.S. in the WTO, the EU has brought its own WTO case against the U.S. for prosecuting European companies. The case was settled. Meanwhile, the Antiguan government has yet to receive any compensation from the U.S.[65]

(quoting Lawrence Walters, a lawyer for online gambling operators, as stating experts are divided over whether federal law clearly prohibits online games like poker and blackjack).

[57]18 U.S.C. section 1084.

[58]I. Nelson Rose, "Black Friday: A Step Too Far," Gambling and the Law (Blog), Apr. 22, 2011, *available at* http://www.gamblingandthelaw.com/blog.html.

[59]Richtel, *supra* note 56; Rose, *supra* note 54.

[60]*Id.*

[61]Sanford Millar, "Player Shouldn't Expect Money Back without Facing Tax Problems," POKERATI, Apr. 18, 2011, *available at* http://www.pokerati.com.

[62]Berzon, *supra* note 56.

[63]Eric Lipton, "Big Setback for Online Poker, Despite Lobbying Campaign," *N.Y. Times*, Apr. 19, 2011, at A16.

[64]Richtel, *supra* note 56.

[65]Antiguan Minister for Finance and the Economy, the Honorable Harold Lovell, expressed his disappointment in the latest effort by the U.S. authorities to shut off competition in remote gaming in violation of international law. "I am concerned," Lovell said, "that at this point in time United States authorities continue to prosecute non-domestic suppliers of remote gaming services in clear contravention of international law. I am not aware of any other situation where a member of the World Trade Organization has subjected persons to criminal prosecution under circumstances where the WTO has expressly

(Footnote continued on next page.)

Clearly, the battle over Internet gaming is being waged in U.S. federal and state courts, the U.S. federal and state legislatures, the U.S. executive branch, and international tribunals. The DOJ relishes each opportunity to prosecute and seize assets of Internet gaming operators and payment processors of Internet gaming. Because the EU believes Internet gaming can be properly regulated and that there is a huge market for Internet gaming within and outside the U.S., prohibiting the activity is a non-starter as a successful law enforcement exercise.

It is unknown how much enforcement cooperation foreign governments and courts will provide on the criminal and civil forfeiture cases.

The indictments and stalemates in Congress indicate that the action will be in the states until well after the 2012 election.[66] In this regard, there are some income tax enforcement problems. For instance, how should the states deal with players who were participating in Internet gaming and may have unreported income? Should there be a state amnesty given to the potentially tens of thousands of players in the U.S.? In any case, what steps, if any, should the states take to obtain data on player activity? What will be the effect on states' income tax forecast if there is a long-term gap in advertising because of the absence of the major offshore companies? How should the federal and state governments cooperate on the tax enforcement issues?

E. Reintroduction of Stop Tax Haven Abuse Act

On July 12, 2011, Sen. Carl Levin, D-Mich., and five cosponsors reintroduced the Stop Tax Haven Abuse Act (S. 1346), the purpose of which is to collect $100 billion in annual lost revenue from offshore tax dodges.

Section 101 permits Treasury to take special measures when U.S. tax enforcement is impeded. It is designed to build on existing Treasury authority to act against foreign financial institutions that engage in money laundering by extending that same authority in 31 U.S.C. section 5318A to the tax areas. In 2011 the USA PATRIOT Act authorizes Treasury to require domestic financial institutions and agencies to take special measures regarding foreign jurisdictions, financial institutions, or transactions found to be of ''primary money laundering concern.'' Once Treasury designates a foreign jurisdiction or financial institution to be of primary money laundering concern, section 5318A permits Treasury to impose a range of requirements on U.S. financial institutions in their dealings with the designated entity — from requiring U.S. financial institutions, for example, to provide greater information than normal about transactions involving the designated entity, to prohibiting U.S. financial institutions from opening accounts for that foreign entity.

Section 101 would authorize Treasury to use that same tool to require U.S. financial institutions to take the same special measures against foreign jurisdictions or financial institutions found by Treasury to be ''impeding U.S. tax enforcement.'' In addition to extending Treasury's ability to impose special measures against foreign entities impeding U.S. tax enforcement, section 101 would add one new measure to the list of possible sanctions that could be applied: It would permit Treasury to instruct U.S. financial institutions not to authorize or accept credit card transactions involving a designated foreign jurisdiction or financial institution.

The bill has eliminated its predecessors' list of ''offshore secrecy jurisdictions,'' which many countries observed was discriminatory and illegal, because the standards of the U.S. regarding serving as a source of tax dodging and money laundering is just as great, if not greater, than many of the countries on the prior list. Nevertheless, providing authority for more unilateral sanctions based on alleged impeding of U.S. tax enforcement will likely cut U.S. access to foreign markets at the very time the U.S. needs foreign investment. Section 101 will require Treasury to make unilateral evaluations of tax enforcement cooperation for which Treasury has questionable expertise and which require resources to try to keep current. It will exacerbate tax and foreign relations with other governments. It will also likely lead other governments to emulate the provisions of section 101, and in some cases U.S. financial institutions and persons will be targeted, not to mention the U.S. government (for example, over the unilateral and extraterritorial and nonreciprocal aspects of FATCA).[67]

Section 102 seeks to clarify, build upon, and strengthen FATCA. To combat abusive offshore practices whereby U.S. taxpayers are hiding behind foreign trusts and corporations, section 102(g) would establish several rebuttable evidentiary presumptions that would presume U.S. taxpayer control of offshore entities that they form or do business with, unless the U.S. taxpayer presents clear and convincing evidence to the contrary. The presumptions would apply only in civil, judicial, or administrative tax, or securities enforcement proceedings examining offshore entities or transactions. They would impose the burden of producing evidence from offshore jurisdiction on the taxpayer.

Section 102 makes several changes to clarify and strengthen FATCA's disclosure obligations, even though there have been a flood of distressed comments from a wide range of financial institutions warning

ruled that to do so is in breach of an International treaty.'' *Available at* http://ab.gov.ag/gov_v4/article_details.php?id=1391&category=38.

[66]Rose, *supra* note 58.

[67]For example, the European Union's implementation of the EU saving directive and the proposal for a directive on alternative investment fund managers illustrates efforts of unilateral extraterritorial tax and related regulatory initiatives.

that the cost and complexity of FATCA challenges the ability to comply. The provisions also make a rebuttable presumption that a U.S. person who deals with funds or assets in a non-FATCA institution exercised control over an entity, and that a U.S. person has received U.S. income if the U.S. person directly or indirectly receives money or things of value from a non-FATCA institution. These provisions make it increasingly difficult for U.S. persons to associate with non-FATCA institutions.

Section 103 treats foreign corporations that are publicly traded or have gross assets of $50 million or more and whose management and control occur primarily in the U.S. as U.S. domestic corporations for income tax purposes. To determine whether the foreign corporation is ''managed and controlled'' in the U.S., section 103 uses the situs of the corporation's executive officers and senior management who exercise day-to-day responsibility for making strategic, financial, operational, and policy decisions. Section 103 also would require Treasury to issue regulations specifying that for corporations the assets of which consist primarily of assets being managed for investors, in the case of investment decisions being made in the U.S., the management and control of the foreign entity would be treated as exercised in the U.S.

Section 103 provides for two exceptions:

- foreign corporations owned by U.S. parents with active businesses; and
- private companies that may have met the gross asset test, but then are below the test in subsequent years and expect not to exceed that amount, if they obtain a waiver from the IRS.

Section 103 would apply to tax years beginning on or after the date that is two years after the enactment date of this act, regardless whether regulations are issued.

Section 103 would affect most offshore investment funds that are classified as corporations for U.S. tax purposes to avoid having their foreign investors be partners in partnerships that invest in U.S. securities. Section 103 would adversely affect most offshore investment vehicles often used in financing structures (for example, blocker corporations) or by hedge funds, real estate funds, collateralized loan obligations as part of a special purpose vehicle, or other investment funds that have gross assets of at least $50 million and have U.S. managers.[68]

Section 104 strengthens detection of offshore activities by requiring U.S. financial institutions that open accounts for foreign entities controlled by U.S. clients or open foreign accounts in non-FATCA institutions for U.S. clients to report the accounts to the U.S. government. Section 104 would strengthen current tax reporting requirements by expressly requiring a bank or broker that knows, as a result of its AML due diligence or otherwise, that a U.S. person is the beneficial owner of a foreign entity that opened an account, to disclose that account to the IRS by filing a Form 1099 reporting the account income. Hence, section 104 continues recent tax enforcement legislation in the U.S. by imposing new reporting burdens on third parties.

Section 201 would require corporations that are registered with the SEC to provide basic information as part of the corporation's existing SEC filings concerning their operations on a country-by-country basis. The basic information would be the approximate number of their employees per country, total amount of sales and purchases involving related and third parties, total amount of financing arrangements with related and third parties, and the total amount of tax obligations and actual tax payments made on a per country basis.

Section 202 would establish a new monetary penalty of up to $1 million for persons who knowingly fail to disclose offshore stock holdings and transactions in violation of U.S. securities laws.

Sections 203-204 would require AML programs for hedge funds, private equity funds, and formation agents to ensure that they screen clients and offshore funds. Section 204 would add formation agents to the list of persons with AML obligations. For the first time, persons engaged in the business of forming corporations and other entities, both offshore and in the U.S., would be responsible for knowing who their clients were and avoiding suspect funds. The bill also directs Treasury to develop AML regulations for this group. Section 204 has an exemption for government personnel and for attorneys who use paid formation agents when forming entities for their clients. Since paid formation agents would already be subject to AML obligations under the bill, no reason exists to simultaneously subject attorneys using their services to the same AML requirements. Section 204 will level the playing field for financial service professionals and entities in countries who abide by AML laws already with those in the U.S. covered by this provision (for example, hedge funds, private equity funds, and formation agents).

Section 205 would strengthen the ability of the IRS to use a John Doe summons. In these cases, the IRS doesn't have the taxpayer's name and doesn't know where to send the taxpayer notice. To obtain approval from a court for advance permission to serve the summons on the third party, the IRS must show the court, in public filings, that:

- the summons relates to a particular person or ascertainable class of person;
- there is a reasonable basis for concluding that a tax compliance issue exists involving that person or class of persons; and

[68]*See* Dennis Kelly, ''Tax Storm Threatens Offshore Funds,'' Association of Corporate Counsel, Lexology, Sept. 13, 2011, *available at* http://www.lexology.com/library/detail.aspx?g=ba0e7dd0-4464-4f7c-8f44-ed63e97538cd.

- the information sought is not readily available from other sources.

Section 205 would provide that in any John Doe summons proceeding involving a class defined in terms of a correspondent or payable through account at a non-FATCA institution, the court may presume that the case raises tax compliance issues.

Section 205 would also allow the IRS to issue a summons to a class of persons that relate to a long-term project approved and overseen by the court.

Section 206 would make several amendments to strengthen the ability of the IRS to enforce the FBAR requirements and clarify the right of access by IRS civil enforcement authorities to Suspicious Activity Reports. Section 206(a) would amend 26 U.S.C. section 6103(h) and deem FBAR-related statutes to be ''related statutes'' to permit IRS personnel to make routine use of tax return information when they work on FBAR matters. Section 206(c) would clarify that FinCEN can share the information with civil tax law enforcement officials.

Title III will help curb abusive tax shelters. Sections 301-302 would strengthen penalties on tax shelter promoters and persons who aid and abet tax evasion by increasing the maximum fine to 150 percent of any ill-gotten gains.

Section 304 would require bank examination techniques to detect and prevent abusive tax shelter activities or the aiding and abetting of tax evasion by financial institutions. These provisions will help the IRS in its recent targeting of cross-border finance deals between leading U.S. and U.K. banks as it increases efforts to stop abusive tax avoidance. In this regard, the IRS has challenged four large U.S. banks and settled with another.[69]

Section 304 would require a merger of bank examination and tax auditing. It would also potentially provide confidential tax information to nontax officials, a provision that would require careful implementation so as to not violate the confidentiality provisions of section 6103.

Section 305 would authorize the Treasury secretary, with appropriate privacy safeguards, to disclose to the SEC, federal banking agencies, and the Public Company Accounting Oversight Board, upon request, tax return information related to abusive tax shelters, inappropriate tax avoidance, or tax evasion. The agencies could then use the information only for law enforcement purposes, such as preventing accounting firms, investment firms, or banks from promoting abusive tax shelters, or detecting accounting fraud in the financial statements of public companies. A potential problem with section 305 is that traditionally, both domestic and international tax information is confidential. The few exemptions are to transfer information within the tax agency. The provisions of section 305 violate the requirement that tax information be kept confidential. Already, U.S. tax treaty negotiations with countries such as Brazil and Argentina have stalled over the latter countries' concern that the U.S. would be violating traditional confidentiality (that is, by allowing access to tax information by the U.S. Government Accountability Office).

Section 307 would direct Treasury to strengthen the standards of Circular 230 whereby tax practitioners provide opinion letters on the tax implications of potential tax shelters.

Section 308 would provide and strengthen the express statutory authority for these standards. With the abuses caused by practitioners' opinion letters on potential tax shelters, these provisions seem warranted and useful.

The biggest potential asset in favor of enactment is that the proponents of obtained a $100 billion per annum revenue projection for each year that bill is in force. Hence, the bill, along with proposed revenue projections, will be offered as an offset for an appropriations bill. The prospect of stopping tax haven abuse, coupled with obtaining $100 billion of revenue believed lost in the use of offshore tax havens, will make the bill quite alluring, especially if members don't scrutinize the projected revenue estimate.

F. Argentina Raids Agribusiness Exporters

On April 28, 2011, more than 1,000 inspectors working for the Argentine tax authority (Administración Federal de Ingresos Públicos, or AFIP) and in possession of 165 search warrants issued by a federal court raided the offices of Argentina's leading agribusiness exporters in a continuing investigation into tax evasion.[70]

The raids were conducted against the following:

- Bunge Ltd., a Bermuda company with headquarters in White Plains, N.Y.;
- Cargill, a privately held U.S.-based company;
- Noble Group Ltd. (Hong Kong);
- Nidera S.A. (the Netherlands);
- Vincentin (Argentina);
- Aceitera General Deheza (Argentina);
- Grupo Los Grobo (Argentina); and

[69]For more information, see Vanessa Houlder, Megan Murphy, and Jeff Gerth, ''U.S. tax authorities target bank deals,'' *Fin. Times*, Sept. 26, 2011, *available at* http://www.ft.com; and Houlder, Murphy, and Gerth, ''A fight Worth Billions,'' *Fin. Times*, Sept. 26, 2011, at 9.

[70]Randall Jackson, ''Argentine Tax Authorities Stage Second Round of Raids on Agribusiness,'' *Tax Notes Int'l*, May 9, 2011, p. 462, *Doc 2011-9215*, or *2011 WTD 84-7*.

- Molinos Rio de la Plata, the largest branded food company in Argentina.[71]

AFIP has accused the companies of evading approximately $72 million in taxes through various illegal actions, such as creating fake receipts, using shell companies, and hiding grain sale profits in fake paperwork, including documentation of nonexistent companies, sometimes formed under the names of deceased persons.[72]

The raids targeted 200 companies and individuals, including notaries and accountants.[73]

After 500 officials under a federal court order raided Bunge's offices and seized files, AFIP accused Bunge of dodging $300 million worth of taxes. Bunge Argentina responded that the charges were false and said the charges followed Bunge's rejection of AFIP officials' demands for extraordinary income tax payments ''not based on any rule.''[74]

AFIP has targeted Cargill. In October 2010 an investigating judge accused Cargill Argentina of evading at least $14 million in income taxes between 2000 and 2003 and imposed $25 million in liens on the assets of the heads of operations in Argentina and Uruguay. According to AFIP, the heads of Cargill Argentina and Uruguay as well as Bunge Argentina face up to nine years in jail if found guilty of major tax evasion. AFIP accuses Cargill Argentina of billing its sales to its Uruguay subsidiary, which in turn would bill them to tax havens. AFIP alleges that between 2000 and 2003, the Cargill Uruguay unit declared it was realizing sales at below the purchase price, thereby recording fictitious losses to evade taxes.[75]

In March 2011 AFIP suspended the export permit for Louis Dreyfus, Bunge, and Oleaginosa Moreno for alleged tax evasion using triangular operations through tax havens.[76]

The tax controversy reflects the adversarial relationship between the agricultural sector and Argentina's leftist president, Cristina Fernández de Kirchner, who is close politically to AFIP Chief Ricardo Echegaray. In 2008 Kirchner imposed a tax increase on soy exports, explaining that the increase was required to redistribute Argentine farming wealth.[77] Some commentators suggested that the criminal tax investigations reflected the Argentine government's efforts toward a major regulation of the international grain trade, including the establishment of a National Board of Grain, or some similar mechanism.[78]

The coalescence of criminal tax investigations and other policy clashes raise questions about the integrity of the tax administration and proceedings. Because of the intertwining of export and other commercial permission and the criminal tax findings, the outcomes of the investigations also will influence macro- and microeconomics in Argentina. The use of Uruguay companies as intermediaries in international business and trade is common in South America, and the use of proactive tax investigations of alleged corporate misconduct is becoming increasingly common in South America. The allegation by Bunge that the tax investigations followed rejections of demands for extraordinary income tax payments ''not based on any rule'' raises the question of whether the tax assessments are based on fairness and the rule of law. Brazil has aggressively conducted criminal investigations against multinational companies for tax evasion and crimes connected with abusing tax incentives for operating out of free trade zones, including as a way to evade VAT.

G. German Settlement With Julius Baer

On April 14, 2011, Swiss bank Julius Baer agreed to pay the German government €50 million to settle an investigation of allegations that the bank facilitated tax evasion by German taxpayers. The case started after the German government purchased stolen bank data in 2010 that included the identities of German taxpayers who allegedly used the services of major banks in Switzerland, Liechtenstein, and other countries to evade taxes.[79]

The settlement was the first reached by a Swiss private bank following a German effort to find and prosecute tax evaders who use banks in countries such as Switzerland and Liechtenstein to hide taxable income and assets from tax authorities.[80]

Julius Baer was originally implicated in 2010 when financial authorities in Germany's federal state of North Rhine-Westphalia purchased a compact disc from an informant that had 200 sets of data from possible German tax evaders.[81]

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[71]*Id.*

[72]*Id.*

[73]David Haskel, ''Cargill, Bunge Facilities Raided in Argentine Tax-Dodging Probe of Agriculture Companies,'' *Daily Rep. For Exec.*, May 2, 2011.

[74]*Id.*

[75]*Id.*

[76]''AFIP Suspends Export Permission for Three Other Cereal Producers (La AFIP suspende los permisos para exportar de otras tres cerealeras),'' *El Clarin*, Mar. 21, 2011.

[77]Jackson, *supra* note 70.

[78]Marcelo Canton, ''For Cereal Companies, the Government Aims to Better Regulate the Sector (Para las cerealeras, el Gobierno les apunta para regular más al sector),'' *El Clarin*, Apr. 30, 2011.

[79]Randall Jackson, ''Swiss Bank Pays Germany €50 Million to End Tax Investigation,'' *Tax Notes Int'l*, Apr. 25, 2011, p. 285, *Doc 2011-8027*, or *2011 WTD 73-3*.

[80]*Id.*

[81]Daniel Pruzin, ''Swiss Bank in $72.4 Million Settlement Deal to Halt German Tax Proceedings,'' *Daily Rep. For Exec.*, Apr. 15, 2011, at I-4.

Some of the impetus for the settlement came from the recent tax amnesty. One of the conditions for the amnesty was that taxpayers had to provide information about banks that helped facilitate tax evasion.[82]

German tax authorities have also investigated Credit Suisse's activities and its individual client advisers, conducting raids on the Swiss bank's branches in the country.[83]

On March 17, 2011, the Bundestag, Germany's lower house of parliament, approved tougher rules on voluntary declarations that would impose a 5 percent fine on unreported income with tax liability above €50,000 ($72,424).[84]

The settlement reflects how tax authorities and governments are targeting banks and financial institutions that are responsible for luring and assisting taxpayers to evade tax and commit other crimes. The case also exemplifies the role of stolen bank data and voluntary tax compliance initiatives in gaining evidence that enables authorities to ascertain evidence and prosecute other participants in the wrongful conduct. The Joint International Tax Shelter Information Centre, which is an informal network of tax authorities, enables tax authorities to share information about typologies and strategy in investigating and prosecuting tax shelters and tax misconduct.

IV. Conclusion

International tax enforcement is continuing to rise in all forms: multilaterally, bilaterally, and unilaterally. The trend will continue as governments look for more tax revenue and as globalization, free trade, and the information revolution enable individuals and businesses to move money, ideas, products, and know-how instantaneously. Tax authorities will struggle to keep pace with taxpayers and technology.

Another trend is the continuing interaction between tax law and other types of enforcement law (for example, money laundering, corruption, fraud, and asset forfeiture) and international law. ◆

[82]Jackson, *supra* note 79.

[83]Haig Simonian, "Swiss Julius Baer Pays Berlin $75m to Settle Tax Evasion Case," *Fin. Times*, Apr. 15, 2011, at B13.

[84]Jackson, *supra* note 79.