Offshore Tax Fraud: IRS and DOJ Build New Cases Using Non-traditional International Evidence-Gathering Techniques

This article discusses the recent enforcement actions taken by the IRS and DOJ in the area of offshore tax avoidance. The authors examine these actions in the context of the collection of foreign evidence for use in the U.S. They also address the types of information that have been collected through these enforcement activities, and what the IRS and DOJ intend to do with that information.

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Over the past seven years, the United States Department of Justice (DOJ) and the Internal Revenue Service (IRS) have made offshore tax compliance and enforcement a top priority, using various tools to achieve their goals. Those tools have included criminal prosecutions, civil enforcement actions, and various amnesty programs—aimed both at individual U.S. taxpayers avoiding their tax obligations and at foreign institutions alleged to have helped such taxpayers to hide their assets and their tax obligations from the taxing authorities.

This article addresses the effect these enforcement actions have had in re-shaping international evidence collection techniques for purposes of building tax fraud prosecutions, the potential future uses of the techniques, and the apparent intended use of the evidence collected through these techniques. The article opens with a brief overview of the background surrounding modern offshore enforcement and the international evidence gathering tools that existed prior to the recent IRS/DOJ enforcement actions. It then examines some of the specific enforcement activities undertaken. Finally, the article closes with a discussion of how these enforcement activities have affected international evidence gathering and what the IRS and DOJ apparently intend to do with the information they have collected.

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HISTORICAL BACKGROUND OF OFFSHORE TAX ENFORCEMENT

Generally speaking, the Internal Revenue Code requires that a U.S. taxpayer pay tax on all income, wherever that income is earned.[1] The general rule is

[1] 26 U.S.C. § 1; 26 C.F.R. § 1.1-1.

straightforward: If a U.S. taxpayer earns income anywhere in the world, it is taxable in the U.S. Taxable income, of course, derives from gross income, which includes, among other things, compensation for services, interest earned on bank account deposits, and dividends.[2] While these general rules are well-settled, they present a real and practical problem for the accurate assessment of tax by the IRS. More specifically, before the advent of the Foreign Account Tax Compliance Act (FATCA) and similar international agreements, foreign banks, businesses, and financial advisors generally had limited legal duties to report the foreign or "offshore" income or assets of U.S. taxpayers to the IRS. Rather, U.S. tax assessment and collection primarily relied on taxpayers self-reporting their offshore income.[3]

While concerns about U.S. taxpayers hiding income offshore are not new, in the mid-2000s, various commentators and legislators loudly questioned whether the U.S. statutory regime was adequately assessing and collecting tax on offshore income.[4] Many viewed the international tax gap—that is, the difference between the tax the IRS actually collected on foreign income and the taxes that should have been collected—as a growing problem that needed to be addressed.[5] That gap, according to some, was driven by a lack of transparency and dependence on self-reporting.[6] In a July 2008 report, the U.S. Senate Permanent Subcommittee on Investigations stated that "each year, the United States loses an estimated $100 billion in tax revenues due to offshore tax abuses."[7] In that same report, the Subcommittee pointed to growing evidence that foreign banks were aiding U.S. taxpayers in avoiding their U.S tax obligations.

TRADITIONAL MEANS OF GATHERING EVIDENCE OF TAX FRAUD FROM ABROAD

While the problem seemed well defined, large-scale and rapid prosecution of offshore tax evasion suffered from certain structural obstacles regarding the collection of evidence located in other countries. Domestic tax fraud prosecutions are investigated using multiple tools, including the use of a federal grand jury subpoena, which allows U.S. prosecutors to collect documents and witness testimony relevant to the issues in a tax fraud case.[8] It is not easy, however, to build an international tax fraud case with just the power of a grand jury subpoena. First, a U.S. prosecutor can only serve a subpoena "within the United States."[9] Second, although a U.S prosecutor could issue a federal grand jury subpoena for foreign records on a U.S.-based branch of a foreign entity, DOJ policy requires multiple layers of approval and some showing that the records are indispensable to the success of the prosecution.[10]

In place of grand jury subpoenas, U.S. prosecutors were required to use various international evidence-gathering tools that also proved cumbersome and slow. The more common tools were Mutual Legal Assistance Treaties (MLATs), Tax Information Exchange Agreements (TIEAs), and tax treaties.

The MLAT Process. MLATs are treaties with other countries that are negotiated by the U.S. Department of State in conjunction with the DOJ.[11] Generally, these treaties obligate the contracting parties to provide evidence and other assistance for the purpose of prosecuting criminal cases.[12]

In 2008, the United States had MLATs with only selected countries.[13] Those MLATs did not permit the

[2] 26 U.S.C. § 61.

[3] Michael Brostek, Director, Strategic Issues Team, U.S. Government Accountability Office (GAO), "Offshore Financial Activity Creates Enforcement Issues for IRS" (Testimony Before the Committee on Finance, U.S. Senate, Mar. 17, 2009), available at http://www.gao.gov/assets/130/121902.pdf, at 4-5 [hereinafter "GAO Report"].

[4] E.g., Id.; Reuven Avi-Yonah, "Offshore Tax Evasion: Stashing Cash Overseas" (statement at Hearing Before the Committee on Finance, United States Senate, 110th Congress, First Session, May 3, 2007, S.Hrg. 110-677), available at http://www.finance.senate.gov/imo/media/doc/050307testra-y1.pdf.

[5] United States Senate Permanent Subcommittee on Investigations, "Tax Haven Banks and U.S. Tax Compliance" (Staff Report, July 17, 2008), at 16, available at http://www.hsgac.senate.gov/public/_files/071708PSIReport.pdf.

[6] E.g., GAO Report, supra note 3, at 1, 4-5.

[7] "Tax Haven Banks and U.S. Tax Compliance," supra note 5, at 1.

[8] Fed. R. Cr. P. 6.

[9] Fed. R. Cr. P. 17(e).

[10] United States Attorney's Manual, Title 9, Criminal Resource Manual, § 279, available at http://www.justice.gov/usam/criminal-resource-manual-279-subpoenas.

[11] United States Department of Justice, Tax Division, Criminal Enforcement Section, 2012 Criminal Tax Manual, 41.02[1], available at http://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0 [hereinafter "2012 CTM"].

[12] In re Comm'r's Subpoenas, 325 F.3d 1287, 1290 (11th Cir. 2003), *overruled on other grounds by* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004).

[13] In 2008, the United States had MLATs with Antigua and Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Brazil, Canada, Cyprus, Czech Republic, Dominica, Egypt, Estonia, France, Grenada, Greece, Hong Kong (SAR), Hungary, India, Israel, Italy, Jamaica, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, the Netherlands with respect to its Caribbean overseas territories (Aruba

collection of evidence for all criminal conduct in the United States, but only for crimes that were specifically identified in the MLAT. And some MLATs did not permit collection of evidence for tax crimes at all. Notably, the U.S.-Swiss MLAT generally did not cover what U.S. prosecutors normally consider tax crimes.[14] As a result, it was often difficult for U.S. prosecutors to collect evidence of U.S. tax fraud using the U.S.-Swiss MLAT.[15] MLATs with some other countries limited the collection of evidence related to tax fraud to evidence of other crimes, not tax fraud as an offense in and of itself.[16]

Aside from issues presented by the text of the various treaties, the MLAT process was also cumbersome. The process generally required investigators in the requesting country to submit a request to their country's designated "Central Authority." Then, the Central Authority, which in the United States is the Office of International Affairs, Criminal Division, U.S. Department of Justice (OIA), would submit the request through the appropriate channels in the foreign country. Once submitted, foreign law enforcement would have to act on the request. Understandably, this could take time and, ultimately, success was dependent on the other country's cooperation and understanding of the crime being investigated.

For example, consider the chain of events described in *United States v. Trainor*: The OIA transmitted an MLAT request to Swiss Authorities on October 7, 2000, requesting that the Swiss interview a witness and gather certain documents from that witness.[17] On March 30, 2001, some six months later, Swiss authorities advised the U.S. that they had been unable to locate the witness at the address provided. The U.S. provided a potential new address for the witness, and additional back and forth between Switzerland and the U.S. continued for some period of time. Finally, in late 2002, the witness agreed to testify.[18] Thus, a somewhat simple request for testimony and records from a single witness took two years to process. Consistent with the delay highlighted in *Trainor*, U.S. law permits a court to suspend the running of the statute of limitations for criminal offenses, where an official request has been made for evidence located in a foreign country.[19]

Use of TIEAS and Tax Treaties. Unlike MLATs, TIEAs are agreements executed solely between the IRS and foreign taxing authorities. Tax treaties, a third mechanism to gather information from foreign taxing authorities, also exist with certain countries. Tax treaties function similar to TIEAs and permit the request of certain information. While TIEAs and tax treaties provide additional avenues for the collection of foreign evidence, they, too, suffer from certain limitations. First, most TIEAs and tax treaties contain confidentiality requirements, which prohibit the use of evidence in any non-tax investigation.[20] Thus, issues arise when a prosecutor is conducting an investigation involving both tax and non-tax offenses, such as securities fraud and tax fraud. In such cases, the prosecutor must ensure that the evidence gathered pursuant to the TIEA or tax treaty request is not used in the non-tax investigation—not an easy task when the same jury is hearing the issue.[21]

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Second, according to the DOJ Tax Division, TIEA and tax treaty requests for evidence in criminal tax cases present issues in countries that view tax treaties as administrative, not judicial, in nature.[22]

Finally, the Tax Division also notes that some countries with which the IRS has TIEAs or tax treaties will refuse to collect evidence located outside of their own taxing authorities' files.[23] In other words, if the

and the Netherlands Antilles), Nigeria, Panama, the Philippines, Poland, Romania, Russia, South Africa, South Korea, Spain, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, the United Kingdom, the United Kingdom with respect to its Caribbean overseas territories (Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands), and Uruguay. See United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report, Volume II, Money Laundering and Financial Crimes, available at http://www.state.gov/j/inl/rls/nrcrpt/2008/vol2/index.htm [hereinafter 2008 INCSR].

[14] Michael Abbell, *Obtaining Evidence Abroad in Criminal Cases* (2010) at 516; Caroline A.A. Greene, "International Securities Law Enforcement: Recent Advances in Assistance and Cooperation," 27 Van. J. Transnat'l L. 635, 664 (1994); see also 2012 CTM 41.02[3].

[15] 2012 CTM 41.02[3] ("Historically, the Swiss had considered the conduct underlying most U.S. criminal tax felonies as civil in nature, and establishing 'tax fraud' as the term is used under Swiss law had been a considerably difficult task.").

[16] 2 Asset Protection: Dom. & Int'l L. & Tactics § 24A:29.

[17] United States v. Trainor, 376 F.3d 1325, 1328 (11th Cir. 2004).

[18] Id.

[19] 18 U.S.C. § 1392.

[20] 2012 CTM 41.04[10].

[21] Id.

[22] Id.

[23] Id.

IRS wants bank records and those bank records are not in the taxing authority's files, the TIEA or the tax treaty does not permit collection of the bank records.

As this general background of the landscape in the mid-2000s demonstrates, putting together tax fraud cases with international evidence was neither simple nor quick.

MODERN ENFORCEMENT ACTIVITIES

The UBS Deferred Prosecution Agreement and John Doe Summons. As the voices for strong offshore enforcement grew, the DOJ and IRS were beginning to undertake criminal prosecutions and other enforcement actions that would alter the usual techniques of international evidence gathering. One of those prosecutions involved the Swiss bank UBS, for allegedly aiding U.S taxpayers in hiding their offshore income and assets. The UBS prosecution was resolved by way of a deferred prosecution agreement (DPA).[24] The UBS DPA involved the filing of criminal charges against the bank, certain factual admissions by the bank, and a written agreement imposing certain requirements on UBS. Under the agreement, if UBS complied with the requirements, then the United States would dismiss the charges against the bank after 18 months.[25]

Under its 2009 deal with DOJ, UBS would provide the identities of more than 4,400 U.S. bank customers to the DOJ and IRS pursuant to a request under the U.S.-Swiss Tax Treaty, the IRS would withdraw the summons, and the civil case to enforce the summons would be dismissed.

Under the DPA, UBS was required:

1. To pay $780 million to the United States;
2. To exit the cross-border business;
3. To implement and maintain a compliance program to ensure proper sharing of tax information with U.S. authorities under existing law and agreement;
4. To restructure its legal and compliance programs; and
5. To continue to cooperate with the government.

In addition to these requirements, UBS also was required to disclose to the United States "the identities and account information of certain United States clients."[26]

The day after the DPA was filed, the DOJ filed suit to enforce a so-called "John Doe" summons on UBS. A John Doe summons is a request for information, issued by the IRS to a third party, regarding information on an unidentified person or class of persons.[27] Unlike other IRS summonses, the IRS must apply to a federal district court to obtain authorization to serve a John Doe summons. In court, the IRS must establish that the summons relates to an investigation of a particular person or class of persons, that there is a reasonable basis to believe that the person or persons "may fail or may have failed" to comply with their tax obligations, and the information sought is not readily available from other sources.[28] After making this showing, the court may authorize the service of the John Doe summons. These proceedings generally occur *ex parte*. In the case of UBS, a federal district court in Miami, Florida, authorized the issuance of the John Doe summons on July 1, 2008, for bank account information of U.S. taxpayers. UBS, however, balked at complying and the Swiss government argued that compliance with the summons would violate Swiss bank secrecy laws. Thus, the U.S. filed a lawsuit to enforce compliance with the summons.

In the following months, U.S. and Swiss negotiators hammered out a deal that was finally announced on August 19, 2009. Under that deal, UBS would provide the identities of more than 4,400 U.S. bank customers to the DOJ and IRS pursuant to a request under the U.S.-Swiss Tax Treaty, the IRS would withdraw the summons, and the civil case to enforce the summons would be dismissed.[29] After the August 19, 2009, agreement, a Swiss court ruled the agreement violated Swiss law, but, ultimately, the Swiss Parliament approved the agreement in June of 2010.[30] Thereafter the U.S. taxpayers' account records were provided to the U.S.

A Spate of Post-UBS Prosecutions. Other bank prosecutions followed. For example, in December 2014, Bank Leumi entered a DPA with the United

[24] United States v. UBS AG, 09-CR-60033-Cohn, (Deferred Prosecution Agreement) (S.D. Fl. Feb. 18, 2009) (Docket Entry 20).

[25] Id. The charges were in fact dismissed on October 25, 2010. See United States v. UBS AG, 09-CR-60033-Cohn, (Order of Dismissal) (S.D. Fl. Feb. 18, 2009) (Docket Entry 32).

[26] United States v. UBS AG Deferred Prosecution Agreement, supra note 24.

[27] 26 U.S.C. § 7609(f).

[28] Id.

[29] Lynnley Browning, "Names Deal Cracks Swiss Secrecy" (N.Y. Times, Aug. 19, 2009), available at http://www.nytimes.com/2009/08/20/business/global/20ubs.html?pagewanted=all&_r=0.

[30] Jason Rhodes, "Swiss Parliament Approves UBS-US Tax Deal" (Reuters, June 17, 2010), available at http://www.reuters.com/article/2010/06/17/us-ubs-tax-idUSTRE65D1LJ20100617.

States, and, as part of the agreement, disclosed information on 1,500 account holders. Additional John Doe summonses followed as well. For example, in April 2013, the IRS applied for a John Doe summons on a U.S. bank for records related to the correspondent bank account held by FirstCaribbean International Bank (FCIB) at a U.S.-based financial institution.[31] The IRS was looking for information about U.S. taxpayers hiding income and assets at FCIB.[32] The court granted the request.[33] Later, a court in New York authorized a John Doe summons to be served on various domestic express mail carriers, a bank, and money transmitters, for records related to evasion of U.S. taxes through the use of offshore bank accounts.[34] In each case, the IRS and DOJ were in search of data related to a group of U.S. taxpayers using an offshore bank and not just a single individual.

In addition to the prosecutions of banks, the DOJ began prosecuting U.S. individuals for hiding their income offshore. Many of the early cases involved prosecutions of individuals with bank accounts at UBS.

Amnesty Programs. At the same time, the IRS and DOJ instituted various amnesty programs for both individuals and banks. Under the individual amnesty programs, referred to as the Offshore Voluntary Disclosure Program (OVDP), U.S. taxpayers can declare their foreign income and assets, pay a reduced penalty, and avoid criminal prosecution. Under the OVDP, taxpayers are required to disclose, among other things, the institution where they banked; who helped them open the account, including financial advisors; communications that the taxpayers had with their foreign bankers and advisors, along with the answers to detailed questions regarding the substance of those communications; and information regarding the movement of their offshore money. Answers to these types of questions are mandatory in order to benefit from the OVDP.

On August 29, 2013, the DOJ, in coordination with Switzerland, announced an amnesty program for certain qualifying banks.[35] The program, similar to OVDP, allowed banks to receive a promise of non-prosecution from the DOJ if the banks undertook certain actions.[36] Among other requirements, qualifying banks in the Swiss Bank Program were required to disclose details of how they conducted their cross-border business and who helped them conduct this business.[37] In addition, the banks were required to provide detailed information regarding certain accounts, held by U.S. taxpayers, that were open on August 1, 2018, but closed sometime prior to either December 31, 2014, or the effective date of a financial institution's Foreign Financial Agreement under FATCA.[38] The detailed information required to be provided on the individuals that left the bank during that time period included account balance information; the number of U.S. persons affiliated with the account; their relationship to the account; the names and other information related to any money managers, trustees, attorneys, etc., affiliated with the accounts (commonly referred to by DOJ as "facilitators"), and information about funds transferred into the account while it was open; and the names and locations of any financial institutions that transferred money into or out of the accounts.[39]

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In addition to providing certain types of information, the banks were also required to promise to aid the United States in treaty requests. More specifically, the program requires the banks to provide "all necessary information for the United States to draft treaty requests to seek account information; such cooperation will include but not be limited to the development

[31] In the Matter of the Tax Liabilities of John Does, 13-CV-1938 (N.D. Ca. April 29, 2013) (Docket Entry 1; *Ex Parte* Petition for Leave to Serve "John Doe" Summons).

[32] *In the Matter of the Tax Liabilities of John Does*, supra note 31 (Docket Entry 3; Memorandum in Support of Petition for Leave to Serve "John Doe" Summons).

[33] *In the Matter of the Tax Liabilities of John Does*, supra note 31 (Docket Entry 6; Order to Serve "John Doe" Summons).

[34] United States Department of Justice, "Court Authorizes IRS to Issue Summonses for Records Relating to U.S. Taxpayers Who Used Sovereign Management & Legal, Ltd., to Conceal Offshore Accounts, Assets, or Entities" (Press Release, Dec. 19, 2014), available at http://www.justice.gov/usao-sdny/pr/court-authorizes-irs-issue-summonses-records-relating-us-taxpayers-who-used-services.

[35] United States Department of Justice, "United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations" (Press Release, Aug. 29, 2013), available at http://www.justice.gov/tax/pr/united-states-and-switzerland-issue-joint-statement-regarding-tax-evasion-investigations.

[36] "Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance and Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/75320138291646446640 74.pdf.

[37] Id.

[38] Id.

[39] Id.

of appropriate search criteria."[40] In addition, the banks are also required to "collect and maintain all records that are potentially responsive to such treaty requests to facilitate prompt responses."[41]

IMPACT OF CURRENT U.S. ENFORCEMENT ACTIVITIES

Vast Amounts of Data—and Tax Money—Collected. The effect of these enforcement activities is clear. First, they have placed in the hands of U.S. prosecutors extensive amounts of information without the need to resort to the traditional MLAT, TIEA or tax treaty process. The IRS and DOJ have gathered information from multiple foreign banks through either DPAs or the Swiss Bank program. Under both programs, banks have disclosed to the United States considerable data regarding individual U.S. taxpayers who had income and assets offshore. Banks have also disclosed significant information, including the identities of individuals who have aided the U.S. taxpayers in opening and maintaining their offshore accounts. In addition, banks have provided detailed information on where the money came from and where it went (commonly referred to as the "leavers' list"). Individuals have also provided significant data to the IRS. Through the OVDP, individuals have identified offshore banks that maintained accounts for U.S. taxpayers and they have provided detailed information on how those banks conducted business and the facilitators with whom they did so.

While the full extent of the data that is in the U.S. possession is not public, it is reported that more than 45,000 taxpayers have participated in the OVDP and the IRS has collected more than $6.5 billion in tax and penalties.

While the full extent of the data that is in the U.S. possession is not public, it is reported that more than 45,000 taxpayers have participated in the OVDP and the IRS has collected more than $6.5 billion in tax and penalties.[42] Additionally, public documents show that as of August 6, 2015, 29 Swiss banks have participated in the Swiss Bank Program.

Multiplier Effect. The DOJ and IRS have made clear that they intend to use this evidence to build new cases against individuals, banks, and people who facilitated the conduct. For example, in one recent press release, a DOJ official stated, "[a]s each additional bank signs up under the Swiss Bank Program, more and more information is flowing to the IRS agents and Justice Department prosecutors going after illegally concealed offshore accounts and the financial professionals who help U.S. taxpayers hide assets abroad."[43] On June 19, 2015, the Chief of IRS Criminal Investigation stated that the Swiss Bank Program was "tremendously successful . . . for the multiplier effect. With the vast amount of information these banks are providing and the investigative skills of IRS-CI special agents, we now have clear roadmaps identifying accountholders and facilitators as well as the ability to track the movement of money to other accounts in other countries."[44] According to the DOJ, the investigations "go well beyond Switzerland,"[45] and involve "accountholders, bank employees, and other facilitators and institutions based on information supplied by various sources, including the banks participating" in the Swiss Bank Program.[46]

While investigations are generally not publicly disclosed, there are indications of how the DOJ is using the data. For example, the DOJ has prosecuted numerous former UBS customers. In addition, the John Doe summons for information in FCIB, discussed above, was based, in part, on data that the IRS collected through the OVDP. The IRS and DOJ relied on the OVDP data in alleging that FCIB would have information on tax evaders. More recently, it has been reported that DOJ submitted a treaty request to Switzerland for records of one of the banks participating

[40] Id.

[41] Id.

[42] Internal Revenue Service, IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate (Press Release, June 2014), available at http://www.irs.gov/uac/Newsroom/IRS-Offshore-Voluntary-Disclosure-Efforts-Produce-$6.5-Billion;-45,000-Taxpayers-Participate.

[43] United States Department of Justice, "Two More Banks Reach Resolutions Under Justice Department's Swiss Bank Program" (Press Release, June 3, 2015), available at http://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program.

[44] United States Department of Justice, "Two More Banks Reach Resolutions Under Justice Department's Swiss Bank Program" (Press Release June 19, 2015), available at http://www.justice.gov/opa/pr/two-more-banks-reach-resolutions-under-justice-departments-swiss-bank-program-1.

[45] United States Department of Justice, Remarks of Caroline D. Ciraolo, Acting Assistant Attorney General, Department of Justice, Remarks delivered at Pen and Pad announcing first resolution in Swiss Bank Program (Mar. 30, 2015), available at http://www.justice.gov/opa/speech/acting-assistant-attorney-general-caroline-d-ciraolo-delivers-remarks-pen-and-pad.

[46] United States Department of Justice, "Four Banks Reach Resolutions Under Department of Justice Swiss Bank Program" (Press Release, May 28, 2015), available at http://www.justice.gov/opa/pr/four-banks-reach-resolutions-under-department-justice-swiss-bank-program.

in the Swiss Bank Program.[47] While the treaty request is not unexpected, the fact that the Swiss authorities reportedly approved the request within three days is indeed surprising.

Broader, Yet More Streamlined, Process. Recent enforcement efforts have provided lessons on how to conduct offshore tax investigations without reliance on the cumbersome and slow MLATs and other treaties. The approach is simple and starts with individual U.S. taxpayers. The UBS case, for example, began with investigations of individual U.S. taxpayers and individual bankers who provided sufficient evidence to build the government's case against the foreign bank. By making cases against foreign banks based on evidence collected from U.S. based taxpayers, DOJ can make settlement of these cases dependent on the foreign banks providing data on still other U.S. taxpayers who might be using the banks to avoid their tax obligations.

A lack of presence in the U.S. does not give a foreign bank immunity from prosecution. Take, for example, the case of the Swiss bank Wegelin. Wegelin, unlike UBS, did not have a U.S. branch or real presence in the U.S. Wegelin, however, did have U.S. resident taxpayer clients who communicated with the bank from the U.S. about hiding their income for purposes of evading U.S. taxes.[48] Wegelin was charged with—and ultimately pled guilty to—conspiring to defraud the IRS[49] Wegelin's alleged co-conspirators were U.S. taxpayers here in the United States who committed certain acts while in the United States. Generally, even if one is located outside of the U.S., and even though a portion of the conspiracy is carried out outside the U.S., one can still be convicted of a conspiracy when (1) an overt act in furtherance of the conspiricy is committed in the U.S. and (2) the conspiracy aims at a crime in the U.S.[50] Thus, an absence of presence or a limited presence in the U.S. will not protect foreign banks, bankers, and facilitators from U.S. prosecution.

The new approach also includes the expanded use of John Doe summonses. The John Doe summonses can be used on U.S. institutions that handle correspondent bank accounts for foreign banks. And even when challenged, as the UBS example illustrates, the IRS and DOJ are able to bring the foreign nation to the table to act and provide information.

CONCLUSION

At bottom, the modern technique is straightforward and arguably easy to reproduce. Build and bring cases in the U.S., build on evidence in the U.S., and make delivery of additional foreign evidence a condition of resolving the cases. By doing this, the DOJ has removed the traditional obstacles of MLATs and treaties, and has maintained the home field advantage. With the evidence gathered from the various enforcement programs and the new playbook, the IRS and DOJ are poised to investigate and prosecute other foreign banks in new jurisdictions. ■

[47] William Hoke, "Switzerland Expedites IRS Treaty Request for Bank Information," 2015 Tax Notes Today 148-11 (Aug. 3, 2015).

[48] United States v. Wegelin & Comp., 13-CR-02 (JSR) (S.D.N.Y.) (transcript of guilty plea January 3, 2013) (on file with authors).

[49] Department of Justice, "Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes" (Press Release, Jan. 3, 2013), available at http://www.justice.gov/usao-sdny/pr/swiss-bank-pleads-guilty-manhattan-federal-court-conspiracy-evade-taxes.

[50] E.g., United States v. Correa-Negron, 462 F.2d 613, 614 (9th Cir. 1972).