



U.S. Department of Justice

Tax Division

Washington, D.C. 20530

March 6, 2015

Via e-mail

Counsel for Category 2 Swiss Banks

Re: Swiss Bank Program penalty reductions under Part II.H

Dear Counsel:

We have received inquiries from a number of counsel representing Category 2 Swiss Banks about the standard that the Tax Division will apply when considering the banks' submissions with respect to the computation of penalties under the Swiss Bank Program. We are writing now to provide you with a description of the guidance we have provided to Tax Division attorneys ("DOJ Tax Teams"), and we ask that, if you wish to make any comments, you do so on or before March 13, 2015.

The Swiss Bank Program allows Category 2 banks to reduce the Swiss Bank Program penalty in three ways. The program provides in Part II.H that the "determination of the maximum dollar value of the aggregated U.S. Related Accounts may be reduced by the dollar value of each account as to which the Swiss Bank demonstrates, to the satisfaction of the Tax Division, was not an undeclared account, was disclosed by the Swiss Bank to the U.S. Internal Revenue Service, or was disclosed to the U.S. Internal Revenue Service through an announced Offshore Voluntary Disclosure Program or Initiative following notification by the Swiss Bank of such a program or initiative and prior to the execution of the NPA." The burden to show the application of penalty reductions rests with each Category 2 bank.

DOJ Tax Teams working on Category 2 banks will make recommendations on the final penalty that should be paid by each bank to a mitigation committee within the Tax Division. Among other things, the committee will seek to ensure that fair and consistent principles are applied to all Category 2 banks while giving due consideration to the unique circumstances at each bank.

DOJ Tax Teams will make their penalty recommendations to the committee in two stages. First, a single uniform standard will be applied to all Category 2 banks that present evidence to support a request that an account not be subject to penalty based on one of the three penalty reduction categories. Second, DOJ Tax Teams will make additional penalty recommendations for those accounts that do not meet the standard set forth in the first stage.

1. The principles that the DOJ Tax Teams will consider when making recommendations concerning *Not Undeclared Accounts* include the following:

(a) *Stage One.* Recommend mitigation if a Category 2 bank has produced, in unredacted form, an FBAR, original tax return, or amended tax return that was filed prior to August 29, 2013 and that reported an accountholder's information at that Category 2 bank for at least one year during the Applicable Period. The Category 2 bank must have possessed the evidence being offered on or before July 31, 2014.

(b) *Stage One.* Recommend mitigation if a Category 2 bank has produced the names and taxpayer identification numbers of U.S. accountholders who have waived their right to confidentiality under Swiss bank secrecy laws and the DOJ Tax Team verifies that the accountholder has filed any of the documents described in the preceding paragraph for at least one year during the Applicable Period subject to the same time limits.

(c) *Stage Two.* DOJ Tax Teams may recommend a penalty reduction if a Category 2 bank has produced evidence other than described in Paragraphs 1(a) and (b). The ultimate determination to be made by the Tax Division is whether it is satisfied that the account, or category of accounts, is "not an undeclared account."

2. The principles that the DOJ Tax Teams will consider when making recommendations concerning *Timely Disclosed Accounts by Swiss Bank to IRS* include:

(a) *Stage One.* Recommend mitigation if a Category 2 bank has produced, in unredacted form, a Form 1099 that timely reported relevant bank account information to the IRS for at least one year during the Applicable Period, that was filed with the IRS prior to August 29, 2013, and that is confirmed by the DOJ Tax Team. The Category 2 bank must have possessed the evidence being offered on or before July 31, 2014.

(b) *Stage One.* Recommend mitigation if a Category 2 bank has produced the names and taxpayer identification numbers of U.S. accountholders who have waived their right to confidentiality under Swiss bank secrecy laws and the DOJ Tax Team verifies that the Category 2 bank timely filed Forms 1099 for those accounts for at least one year during the Applicable Period subject to the same time limits.

(c) *Stage Two.* DOJ Tax Teams may recommend a penalty reduction if a Category 2 bank has produced evidence other than described above in Paragraphs 2(a) and (b). The ultimate determination to be made by the Tax Division is whether it is satisfied that the account, or category of accounts, was timely disclosed by Swiss Bank to the IRS.

3. The principles that the DOJ Tax Teams will consider when making recommendations concerning *Accounts Disclosed to IRS Through IRS Offshore Disclosures (OVD/Streamlined Filings/Delinquent Submissions)* include:

(a) *Stage One.* Recommend mitigation if a Category 2 bank has produced, in unredacted form, evidence that an accountholder has participated in an approved voluntary disclosure program or initiative, including streamlined filings and delinquent submissions, following notification by Swiss Bank of such program or initiative. The Category 2 bank must have possessed the evidence being offered on or before September 15, 2014 (except as noted in

subparagraph 4, below). The evidence required for a penalty reduction in this first stage includes the production of these items:

1. OVD documents confirming that the accountholder disclosed bank and relevant account number to IRS, as confirmed by the DOJ Tax Team; or
2. Streamlined Form 1040 or 1040X and FBARs disclosing the relevant bank account, as confirmed by the DOJ Tax Team; or
3. Delinquent Submission filing (FBARs or International Information Returns) that includes a statement referencing the filing pursuant to the delinquent procedures and explaining why the forms are being filed late and that discloses the relevant bank account to IRS, as confirmed by the DOJ Tax Team; or
4. OVD preclearance request that identifies the Category 2 bank, followed by proof that the accountholder submitted complete OVD documents disclosing the relevant account number to IRS after September 15, 2014, but within 45 days of receipt of the IRS Preclearance Response, as confirmed by the DOJ Tax Team.

(b) *Stage One.* Recommend mitigation if a Category 2 bank has produced the names and taxpayer identification numbers of U.S. accountholders who have waived their right to confidentiality under Swiss bank secrecy laws and the DOJ Tax Team verifies from available sources that the accountholder has filed any of the documents described in the preceding paragraphs subject to the same time limits.

(c) *Stage Two.* DOJ Tax Teams may recommend a penalty reduction if a Category 2 bank has produced evidence other than described above in Paragraphs 3(a) and (b). The ultimate determination to be made by the Tax Division is whether it is satisfied that the account was disclosed to the IRS through voluntary disclosures acceptable to the IRS following notification by Swiss Bank of the IRS program or initiative.

We recognize that, for some banks, the bulk of U.S. Related Accounts might be reviewed in the second stage of the process. As we have described, the determination to be made is whether the Tax Division is satisfied that the account meets the requirements of one of the three penalty reduction categories.

After hearing and reviewing the presentations of each Category 2 bank pursuant to Part [REDACTED] 1 of the Program, as well as the presentations and submissions made with respect to penalty mitigation, it is clear to us that the DOJ Tax Teams must make individualized assessments based on the circumstances at each bank. We appreciate the thought that Category 2 banks have put into these presentations and we recognize the difficulties that some Category 2 banks have encountered in gathering documents and direct proof to establish that an account falls within one of the three categories. Likewise, we recognize that banks will present penalty reduction evidence in different ways due not only to the unique circumstances at each bank, but also in response to the flexibility built into the Program, which did not require that proof be submitted in any particular form.

Finally, we have received a number of inquiries with respect to the July 31 and September 15 deadlines, which we have included in Stage 1 of the mitigation process. DOJ Tax Teams will not solicit from banks additional mitigation information that was not already in the bank's possession at the time of these deadlines. DOJ Tax Teams may recommend in Stage 2 of the process, in appropriate circumstances, that the Tax Division credit any information that falls outside of these deadlines.

As I indicated at the outset, we are inviting any additional comments that you might wish to submit with respect to the process and principles for determining the Category 2 penalty. During the course of the Program, Category 2 banks have provided written submissions and made in-person presentations to suggest mitigation approaches that may be appropriate for Category 2 banks, and you do not need to duplicate any submissions that you have already made. My email address is [REDACTED]

Sincerely yours,

[REDACTED]