

Client Alert

July 2021

U.S. Government Asks for Repatriation Order of Assets Located in Switzerland to Satisfy FBAR Penalties and Interest

The U.S. government recently filed a motion requesting that a U.S. District Court order an individual to repatriate assets to the United States from Switzerland in order to pay FBAR penalties and interest.¹ This type of order is known as a "repatriation order". The key takeaways from this move are as follows:

- Though just a motion and not yet final, it signals the U.S. government will use all available means to pursue payment of judgments rendered against defendants.
- It is unlikely that an individual may render him or herself judgment proof by moving all assets off-shore to Switzerland, because the U.S. might seek to enforce either the initial judgement or the repatriation order through the Swiss courts, though the process can be lengthy.

A repatriation order is a mechanism that the U.S. government can use to satisfy debts owed to the U.S. government. The authority for this type of order arises from the Federal Debt Collection Procedures Act² and it is used in the situation where a judgment exists against a debtor and the debtor's U.S. assets are insufficient to settle the debt.³ There is no requirement that a fraudulent transfer has taken place; rather, the U.S. government must only show that a substantial liability exists and collection of the indebted amount is in jeopardy.⁴

The repatriation order at issue arises from a case out of the U.S. District Court for the Southern District of Florida. On August 27, 2018, the U.S. government filed a complaint against Isac Schwarzbaum alleging that he wilfully failed to file his FBAR reports for 2006 through 2009. Eventually, the court agreed with the U.S. government for years 2007 through 2009 and on August 28, 2020 issued an amended final judgment for USD 12,555,813, plus accruals of late payment penalties and interest. Prior to the amended final judgment, Schwarzbaum sold his Florida residence on June 16, 2020 and moved to Switzerland.

¹ United States v. Isac Schwarzbaum, Plaintiff United States' Motion to Repatriate Foreign Assets (June 3, 2021).

² See 26 U.S.C. §§ 1651 (a), 3202(a).

³ See *United States v. McNulty*, 446 F. Supp. 90, 92 (N.D. Cal. 1978).

⁴ *Id.*



Contacts:

Zurich
Holbeinstrasse 30
CH-8034 Zurich
Switzerland

Caleb Sainsbury
+41 44 384 12 26
Caleb.Sainsbury@bakermckenzie.com

Lyubomir Georgiev
+41 44 384 14 90
Lyubomir.Georgiev@bakermckenzie.com

Mamin Michaels
+41 44 384 12 08
Mamin.Michaels@bakermckenzie.com

Gregory Walsh
+41 44 384 14 91
Gregory.Walsh@bakermckenzie.com

Christopher Murrer
+41 44 384 14 07
Christopher.Murrer@bakermckenzie.com

Christoph Kurth
+41 44 384 13 00
Christoph.Kurth@bakermckenzie.com

Valentina Hirsiger
+41 44 384 12 70
Valentina.Hirsiger@bakermckenzie.com

Geneva
Esplanade Pont-Rouge 2
1212 Grand-Lancy/Geneva
Switzerland

Elliott Murray
+41 22 707 98 39
Elliott.Murray@bakermckenzie.com

Jacopo Crivellaro
+41 22 707 98 29
Jacopo.Crivellaro@bakermckenzie.com

Simon Ntah
+41 22 707 98 33
Simon.Ntah@bakermckenzie.com

In November, 2020, and with the judgment still outstanding, the U.S. government served Schwarzbaum with a post-judgment discovery request. Schwarzbaum responded to the discovery request in early 2021 and confirmed that he had moved all of his assets totalling approximately USD 49 million to banks in Switzerland and therefore unable to satisfy the debt with U.S. situs assets. The U.S. government in its motion alleged that this was a deliberate move to avoid paying the judgment, penalties and interest.

Although this is just a motion and an order has not been entered, it is important to note that the United States government might seek to enforce either the judgment or the order in the Swiss courts. Whether the U.S. decides to enforce the judgment or the order is a matter of strategy. An enforcement via civil procedure would require that guarantees of formal process have been fulfilled and the decision is not contrary to the public order. Either strategy would likely require significant time and engagement with local counsel.

The efforts by the U.S. government in the above specific case are in line with the international, cross-border efforts more generally. For example, between December 2020 and June 2021 the U.S. Internal Revenue Service (IRS) submitted dozens of group requests to the Swiss Federal Tax Administration under the intergovernmental agreement (“IGA”) between the United States and Switzerland for cooperating in implementation of the U.S. Foreign Account Tax Compliance Act of 2010 (“FATCA”). More than 40 Swiss financial institutions (FIs) would provide information with respect to accounts previously identified as either (1) U.S. accounts or (2) accounts held at the Swiss FI by nonparticipating FIs to which reportable amounts were paid. As a reminder, U.S. accounts for this purpose include accounts identified as being held by U.S. persons or, in some cases, by certain entities, trusts or other arrangements with U.S. controlling persons. In each case the account holder consent was not provided for specific FATCA reporting; however, the Swiss FIs already reported these accounts to the IRS in the aggregate (including the aggregate number and value of such types of accounts but without any account holder identifying data). Accordingly, tax compliance enforcement involving specific account holders continues and the Biden Administration has proposed to increase the IRS budget by \$80 billion over ten years.

* * *

*This client alert was prepared by **Caleb Sainsbury** and **Lubo Georgiev** with insights from **Christoph Kurth**, **Valentina Hirsiger** and **Simon Ntah**.*