Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

MEMORANDUM

To: Michael Leupold
Susanne Kuster

From: Stephan E. Becker

Date: September 6, 2009

Re: 18 USC § 3506

This memorandum responds to your request for a brief overview of the scope of 18 USC § 3506, the statute that requires U.S. persons to notify the U.S. Justice Department when they challenge a foreign government's response to a U.S. government request for information.

Section 3506 was enacted as part of the Comprehensive Crime Control Act of 1984. The purpose of the provision is to ensure that U.S. prosecutors have an adequate opportunity to respond to the foreign filing and to take appropriate steps in the U.S. proceedings, such as requesting a continuance while the foreign proceedings are pending. Section 3506 provides as follows:

> (a) Except as provided in subsection (b) of this section, any national or resident of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense shall serve such pleading or other document on the Attorney General at the time such pleading or other document is submitted.
>
> (b) Any person who is a party to a criminal proceeding in a court of the United States who submits, or causes to be submitted, a pleading or other document to a court or other authority in a foreign country in opposition to an official request for evidence of an offense that is a subject of such proceeding shall serve such pleading or other document on the appropriate attorney for the Government, pursuant to the Federal Rules of Criminal Procedure, at the time such pleading or other document is submitted.
>
> (c) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

Section 3506 does not provide for sanctions for direct noncompliance. A court can issue an order requiring a person to comply with Section 3506, and noncompliance with the court order could lead to contempt of court penalties under the general rules that govern compliance with all court orders.

The legislative history of Section 3506 indicates that it was enacted specifically to assist U.S. prosecutors in dealing with accounts in tax haven countries. Congress cited an example involving Switzerland in explaining the legislation.

> New section 3506 requires that united states prosecutors be notified of certain steps taken in another country to oppose an official request made by the united states for evidence located in that country. Subsection (a) requires such notification when the steps are taken in response to an official request made during the investigation of an offense, and subsection (b) requires such notification when the steps are taken in response to an official request made when a criminal case is pending.
>
> Subsection (a) of section 3506 provides that a united states national or resident must, contemporaneously with the submission of a pleading or other document in opposition to an official request for evidence located in a foreign country, serve a copy of the pleading or document on the attorney general. The national or resident has this obligation even if the pleading or document is filed in the foreign country by someone else acting on behalf of the national or resident. The phrase 'serve . . . On the attorney general' means that the pleading or document must be sent to the department of justice in Washington, D.C.
>
> Subsection (b) provides that any party to a criminal proceeding in a united states court must, contemporaneously with the submission of a pleading or other document in opposition to an official request for evidence located in a foreign country, serve a copy of the pleading or document on the appropriate attorney for the government. The party has this obligation even if the pleading or document is filed in the foreign country by someone else acting on behalf of the party. The phrase 'serve . . . On the appropriate attorney for the government' means that the pleading or document, pursuant to rules 49 and 54(c) of the federal rules of criminal procedure, must be served upon the united states attorney, assistant united states attorney, or justice department attorney who is appearing in the case on behalf of the united states.
>
> Subsection (c) defines the term 'official request' to mean (1) a letter rogatory, (2) a request under a treaty or convention, or (3) a request to a court or other authority of another country made by a united states court or an agency of the united states having criminal law enforcement responsibility.

Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW | Washington, DC 20037-1122 | tel 202.663.8000 | fax 202.663.8007

H.R. Rep. No. 907, 98TH Cong., 2nd Sess. (July 25, 1984).

There are few reported cases involving the interpretation of Section 3506. The courts have addressed the law in circumstances in which the U.S. government had requested the issuance of a court order requiring an individual to comply.

The terms of Section 3506(a) could be interpreted to mean that the requirement applies to all oppositions to treaty requests, regardless of whether the U.S. enforcement action is civil or criminal. However, in Fraser v. United States, 834 F.2d 911 (11th Cir. 1987), the 11th Circuit Court of Appeals held that the statute's language, position in the United States Code (in Title 18), and legislative history indicated that an order to enforce Section 3506 should be considered part of a criminal, not civil, proceeding. Significantly, the court also held that enforcement of Section 3506 was criminal in nature even when an indictment had not yet been filed:

> The present posture of this case (i.e., preindictment) does not require that we characterize the district court's order as part of a civil proceeding. Indeed, this Court has recognized that "[a] pending criminal investigation, even in the absence of a formal charge, may be sufficient to show that the motion is tied to an existing criminal prosecution." *In re Grand Jury Proceedings (Berry)*, 730 F.2d 716 (11th Cir. 1984) (per curiam). Here, Fraser is the subject of a grand jury investigation and Congress specifically passed Section 3506(a) so prosecutors need not delay seeking indictments.

The U.S. District Court for the Southern District of New York subsequently agreed that Section 3506 imposes a duty to disclose foreign pleadings before a criminal indictment has been issued. Marcos v. United States, 1989 U.S. Dist. LEXIS 12853 (S.D.N.Y. 1989). That court also held, however, that enforcement of Section 3506 potentially could violate the Fifth Amendment privilege against self-incrimination. The court was careful to distinguish between the information contained in a foreign pleading – which it said would not be privileged because the individual had voluntarily submitted it to a foreign court – and revealing the fact that the pleadings were filed. The court added that the decision whether the Fifth Amendment would be violated must be decided on a case by case basis. The court explained as followed:

> Whether the act of producing documents entails testimonial self-incrimination "depend[s] on the facts and circumstances of particular cases or classes thereof." Fisher, 425 U.S. at 410. The defendant must demonstrate that "the testimonial implications of [her] production of the documents -- i.e., with respect to her alleged representative capacity, the existence or authenticity of the documents, or [her] possession or control of them -- might tend to incriminate [her]." In re Sealed Case, 832 F.2d 1268, 1270 (D.C. Cir. 1987).

> Assuming the defendant is able to make this showing, the Government is then entitled to demonstrate that implicit admissions regarding the existence, authenticity, and possession of the documents should not be accorded Fifth Amendment protection because the substance of the admissions is a "foregone conclusion" or "adds little or nothing to the sum total of the Government's information . . . ." Fisher, 425 U.S. at 411. In this Circuit, the Government's task is a formidable one. The Government must persuade the Court that it possesses sufficient information "to eliminate any possibility that . . . production would constitute an incriminating testimonial act." United States v. Fox, 721 F.2d 32, 37-38 (2d Cir. 1983).

This standard implies that, to avoid a violation of the Fifth Amendment, the U.S. government would have to be able to demonstrate that it already knew that an individual had an account in Switzerland. (Note that this ruling is not binding on other U.S. courts, although it probably would be treated as persuasive authority.)[1]

The court in Marcos case nonetheless required Marcos to submit any pleading filed in foreign countries to the court on an ex parte basis (i.e., without sharing them with the U.S. government), and the U.S. government to submit papers explaining why the production of the pleadings would not add materially to the knowledge it already had. The published rulings of the court do not indicate the ultimate resolution of this issue.

In summary, the available jurisprudent indicate that the following factors should be considered by an individual evaluating whether Section 3506 would require the submittal of its Swiss pleadings with the U.S. government:

- Is the request part of a criminal or civil investigation? If the information will be used in a civil tax enforcement case, Section 3506 probably does not apply. If the information will be used in a criminal prosecution, Section 3506 would clearly apply even if the individual has not yet been indicted. In the case of the UBS treaty request, in most cases it will not be possible to predict with certainty how the information will be used.
- If the proceeding is criminal, would disclosure that the Swiss legal action has been initiated be inconsistent with the Fifth Amendment privilege against self-

---

1 The Government's application in its initial moving papers encompassed only documents Ferdinand and Imelda Marcos submitted to the Swiss Government in opposition to a request for evidence made by the United States to the Swiss Government on or about August 11, 1987. The Government withdrew that application when the Office of International Affairs within the Department of Justice informed it that its motion before this Court would likely impair the Government's ability to receive the Swiss documents sought pursuant to the August 11, 1987 request.

incrimination? Under the standard set forth by the Marcos decision, it likely would be difficult for the U.S. government to demonstrate that learning about the Swiss court case would add nothing to the information it already has when it does not already know that the individual has an account in Switzerland. Courts other than the Southern District of New York are not required to follow the Marcos ruling, however, and might apply a different standard. On the other hand, it will be difficult for individuals to judge whether the IRS already has their identity, or will obtain it, from sources other than the treaty request.

- What are the consequences of not filing, even if Section 3506 applies? As noted above, Section 3506 does not establish sanctions for non-compliance. As a practical matter, Section 3506 can be enforced only by a court order requested by the U.S. government in a particular case – which means that the government would already have to know the identity of the individual. On the other hand, if the U.S. government were to find out – either through the treaty request or otherwise – that an individual had initiated Swiss court proceedings to block the Swiss government response, that factor might influence the evaluation by the U.S. authorities of whether to pursue criminal rather than civil enforcement proceedings. In other words, the failure to comply with Section 3506 could cause the IRS to view the individual's overall behavior as more egregious than otherwise.

Note that in the Marcos case, the U.S. government expressly omitted Switzerland from its request to for a court order enforcing Section 3506. The court explained:

> The Government's application in its initial moving papers encompassed only documents Ferdinand and Imelda Marcos submitted to the Swiss Government in opposition to a request for evidence made by the United States to the Swiss Government on or about August 11, 1987. The Government withdrew that application when the Office of International Affairs within the Department of Justice informed it that its motion before this Court would likely impair the Government's ability to receive the Swiss documents sought pursuant to the August 11, 1987 request.

Accordingly, it appears that, at least in connection with the request for assistance in the Marcos matter, the Swiss authorities had determined that U.S. compulsion of this type of information was inconsistent with the MLAT or Swiss law.

In any event, based on the above analysis, it is likely that some individuals who file legal challenges to the treaty requests in Switzerland may conclude that the risks of not complying with Section 3506 are relatively low. It also appears that the U.S. government is aware of the legal uncertainties regarding the scope of Section 3506, given the language in the UBS settlement agreement that requires UBS to inform account holders that they "may have an

obligation under 18 U.S.C. §3506" (emphasis added) and should consult with counsel. Nonetheless, it cannot be stated with certainty that there would never be adverse consequences from not complying with Section 3506. Each individual's circumstances would need to be evaluated to determine their risks.

If you have any questions, please do not hesitate let to me know.