

Client Alert.

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New Swiss law on recovery of “illicit assets” from 1 February 2011

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Switzerland’s Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means (commonly referred to as the Return of Illicit Assets Act or “RIAA”) was passed by both houses of the Swiss Parliament in October 2010 and will become effective on 1 February 2011. The legislation is seen by many as marking a new era in Switzerland’s stance on asset recovery involving politically exposed persons or “PEPs”. The Swiss Federal Banking Commission in its guidelines on money laundering defines a PEP as a “person occupying an important public function”.

Over the last two decades, it has been reported that Switzerland has returned more than \$1.6 billion USD held in Swiss bank accounts constituting monies which were suspected as being misappropriated by PEPs. However, Switzerland has failed to repatriate allegedly illicit funds to a number of developing states because of such states’ inability to provide the Swiss Federal Criminal agencies with adequate cooperation in the due diligence process of establishing the origin of monies deposited in Swiss bank accounts by PEPs.

Mutual legal assistance channels are the key conduit for the repatriation of illicit assets and the RIAA, when enacted, will not alter this position. Mutual Legal Assistance (“MLA”) is the formal way in which countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country. There are a number of international conventions and treaties. The passing of the RIAA is intended to overcome a number of difficulties in cases involving assets frozen in Switzerland which have been acquired unlawfully, but which cannot be returned to the rightful recipient via the usual international MLA channels because of failures in the victim state’s judicial system. For example, if, because of the judicial and/or administrative inadequacies of the state involved, it is impossible to conduct a proper exchange of information or if there are no relevant criminal prosecution sanctions in place in the affected state, as is required under Swiss law, the affected state is presently unable to recover assets illegitimately deposited in Swiss bank accounts. The RIAA will allow restitution to states previously unable to obtain relief from Switzerland.

Under the RIAA, the Swiss government has also increased the due diligence requirements in transactions involving PEPs and the burden of proof in establishing legitimate entitlement to the deposited funds has shifted from the Swiss authorities to the PEP. The Swiss government and/or its relevant agencies will no longer have to prove that the monies are deposited unlawfully or derive from illegitimate origins. Rather, a presumption of unlawful origin will automatically arise where a PEP’s wealth is subject to an extraordinary increase connected to the exercise of his public office and the level of corruption in the country of origin or surrounding the term of office is high. If the depositor is unable to prove a legitimate origin of his assets held in Swiss bank accounts, an assumption of illegitimate acquisition may be lawfully made and allow the Swiss Federal Administrative Court to confiscate the assets and ultimately repatriate the assets to the affected state.

The Courts’ power to confiscate illegitimately acquired assets extends to cases where the affected state fails to commence proceedings for the return of the assets. In these cases, the confiscated assets will be used to finance

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initiatives in the affected state (or country of origin of the illegitimately acquired assets) to the benefit of the population rather than any private financial institution in the affected state.

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