

May 5, 2020

Bank Hapoalim Enters into Criminal and Civil Resolutions for Its Participation in Separate Tax Evasion and Money Laundering Conspiracies, and Agrees to Pay Nearly \$1 Billion in Penalties

On April 30, 2020, the U.S. Department of Justice (“DOJ”), the Board of Governors of the Federal Reserve System (“Federal Reserve”), and the New York State Department of Financial Services (“DFS”) announced nearly \$875 million in penalties against Bank Hapoalim B.M. (“BHBM”), Israel’s largest bank, and its Swiss subsidiary, Hapoalim (Switzerland) Ltd.¹ (“BHS,” and collectively with BHBM, “Bank Hapoalim” or “the Bank”). These penalties were assessed in connection with Bank Hapoalim’s participation in a conspiracy with U.S. taxpayers and others to hide in excess of \$7.6 billion held in more than 5,500 secret Swiss and Israeli bank accounts and related income from the U.S. Department of Treasury’s Internal Revenue Service (“IRS”). The multi-agency resolution includes the filing of criminal charges against BHBM and a related three-year deferred prosecution agreement (“DPA”) with the U.S. Attorney’s Office for the Southern District of New York, as well as the entry of a guilty plea by BHS.² The Bank also agreed to the entry of a cease and desist order with the Federal Reserve and an accompanying \$37.35 million civil monetary penalty, as well as a separate \$220 million consent order with the DFS.³

Notably, both the DOJ and the DFS commented on the Bank’s early, deficient attempts at cooperation, which included, among other things, an inadequate internal investigation, a failure to timely disclose relevant facts, the provision of incomplete and sometimes inaccurate information, and also a failure to take adequate steps to preserve certain emails, which frustrated and delayed the agencies’ investigations and, ultimately, resulted in higher penalties.

On the same day, the Bank also agreed to pay additional monetary penalties of more than \$30 million in connection with entering into a three-year non-prosecution agreement (“NPA”) with the DOJ’s Money Laundering and Asset Recovery Section and the U.S. Attorney’s Office for the Eastern District of New York to resolve an investigation into the Bank’s involvement in a conspiracy to launder bribes and kickbacks paid to high-ranking soccer officials.⁴

The Tax Evasion Conspiracy DPA and Guilty Plea

According to the Statements of Facts to which BHBM stipulated as part of its DPA and to which BHS admitted in connection with its guilty plea, Bank Hapoalim conspired with certain of its employees, U.S. customers, and others between 2002 and 2014 to defraud the United States of taxes due and owed, to file false federal tax returns, and to commit tax evasion.⁵ The Bank admitted that it actively assisted U.S. customers in opening and maintaining secret accounts, sheltering assets and income held in those accounts

from the U.S. government, and evading those customers' U.S. income tax and reporting obligations through the following conduct, among other things:

- Assisting U.S. customers with opening and maintaining accounts in a manner designed to conceal the beneficial owner of those accounts. For example, Bank Hapoalim – including through its New York branches – opened customer accounts for known U.S. customers using non-U.S. forms of identification, and provided “encrypted” accounts, in which the account holder’s name would not appear on any statements. Instead, the customer’s name would be replaced with a code or a pseudonym.⁶
- Providing “hold mail” services, whereby all correspondence associated with a particular customer’s undeclared foreign bank account would be held at the branch where the foreign account was maintained instead of being sent to the address of any U.S. taxpayer.⁷
- Processing wire transfers and issuing checks in amounts of less than \$10,000 drawn on the accounts of U.S. taxpayers or entities in order to avoid triggering scrutiny.⁸
- Offering “back-to-back loans” for U.S. customers, whereby BHBM’s U.S. branches (in both Miami and New York) offered loans to those U.S. taxpayers, secured by funds held in the offshore accounts at Bank Hapoalim by those same customers.⁹
- Enabling U.S. taxpayers to evade U.S. reporting requirements on securities’ earnings, in violation of BHBM’s and BHS’s Qualified Intermediary Agreement with the IRS.¹⁰

In pleading guilty to a single count of conspiracy pursuant to a plea agreement with the DOJ, BHS agreed to pay a total of more than \$402 million, comprised of approximately \$139 million in restitution owed to the IRS; forfeiture of approximately \$124 million, representing the gross fees paid to BHS by U.S. taxpayers with undeclared accounts at BHS; and a fine of approximately \$139 million. The fine amount reflects a 25% discount for BHS’s cooperation.

Under the terms of the DPA, BHBM agreed to pay a total of more than \$214 million to the United States. Specifically, BHBM agreed to pay approximately \$78 million in restitution; to forfeit approximately \$35 million (which represents the gross fees paid to BHBM by U.S. taxpayers with undeclared accounts); and to pay a monetary penalty of approximately \$101 million, which like the fine agreed to by BHS, reflects a 25% discount for cooperation.

In both the DPA entered by BHBM and the plea agreement signed by BHS, the DOJ noted that early in its investigation “the Bank’s initial cooperation was deficient.”¹¹ Among other things, the Bank’s early attempts to cooperate were marked by an inadequate internal investigation, a failure to timely disclose relevant facts, and by providing incomplete and, in certain cases, inaccurate information and data to the DOJ. The DOJ also noted Bank Hapoalim’s failure to take adequate steps to preserve email, which resulted in the deletion

of certain relevant email boxes and back-up tapes. As a result of Bank Hapoalim's deficient cooperation attempts, the DOJ's efforts to timely resolve its investigation were hindered, and its efforts to prosecute certain potentially culpable individuals were thwarted. The DOJ recognized, however, that, later in its investigation, the Bank enhanced its efforts to cooperate fully.¹² Specifically, Bank Hapoalim replaced its lead outside counsel, conducted an extensive internal investigation, made regular presentations to the DOJ on a wide variety of factual topics, provided relevant facts about individual wrongdoers, produced vast quantities of documents, and facilitated interviews of relevant individuals by the DOJ. Ultimately, the DOJ credited Bank Hapoalim with providing substantial information related to the investigation.¹³

Related Tax Evasion Resolutions with the Federal Reserve and DFS

In its resolution with the Federal Reserve, BHBM consented to the entry of a cease and desist order, which included a civil monetary penalty of \$37.35 million.¹⁴ Under this order, BHBM has agreed to take certain remedial steps to address oversight, management, and control deficiencies. Specifically, the order requires BHBM to submit a written plan to enhance management's oversight of compliance by BHBM and its U.S. branches with applicable U.S. laws in connection with financial account services and products provided to U.S. customers, as well as an enhanced written internal audit program and a written plan to update and enhance document retention policies.¹⁵ BHBM also agreed not to retain any individual who participated in the illegal conduct, and to provide continuing cooperation to the Federal Reserve.¹⁶

The DFS found that the Bank, including at times through its New York branches, operated a wrongful cross-border banking business that knowingly facilitated U.S. persons, including New York residents, in opening and maintaining undeclared accounts in foreign countries and concealing their offshore assets and income from the IRS and other federal and state authorities. Among other things, the DFS specifically noted the New York branches' involvement in concealing the beneficial ownership of accounts and offering "back-to-back loans." In agreeing to the entry of a Consent Order with the DFS, in which the DFS found the Bank and its New York branches conducted business in an unsafe and unsound manner, and failed to maintain or make available true and accurate books, accounts, and records, the Bank agreed to pay a \$220 million monetary penalty and to implement certain remedial measures designed to improve its policies and procedures, and to ensure that certain personnel are no longer employed by BHBM.¹⁷ More specifically, and among other things, BHBM agreed (1) to create an "International Tax Compliance Unit," whose function is to ensure compliance with applicable tax laws and regulations;¹⁸ (2) to deny any back-to-back loan "unless provided with a financial statement from an outside accountant explaining the economic rationale for the loan";¹⁹ and (3) to decline to rehire any former employees involved in the tax evasion at issue.²⁰

Like the DOJ, the DFS also faulted Bank Hapoalim's initial failure to meet its expectations for cooperation. The DFS noted that during the initial phase of its investigation, Bank Hapoalim conducted an internal investigation that involved only a limited review of its operations, which resulted in the Bank providing some incomplete and inaccurate information to the DFS. In addition, the DFS concluded that Bank

Hapoalim failed to appropriately ensure that materials relevant to its investigation were preserved, which resulted in the deletion of potentially relevant emails until the middle of 2018, more than three years after the DFS had commenced its investigation.²¹

The Money Laundering Conspiracy and Bank Hapoalim's NPA

Also, on April 30, 2020, Bank Hapoalim entered into a three-year NPA with the DOJ's Money Laundering and Asset Recovery Section and the U.S. Attorney's Office for the Eastern District of New York, in connection with admitting to engaging in a conspiracy to launder more than \$20 million in bribes and kickbacks paid to high-ranking soccer officials.

Through the NPA and accompanying Statement of Facts, Bank Hapoalim admitted that between 2010 and 2015, BHBM and BHS personnel conspired with sports marketing executives, including executives associated with Argentinian sports media and marketing firm Full Play Group S.A. ("Full Play"), to launder at least \$20,733,322 in illicit payments made to high-ranking soccer officials, including Rafael Esquivel (former president of the Venezuelan Football Federation and a member of CONMEBOL's executive committee), Luis Bedoya (former president of the Colombian Football Federation and vice president of CONMEBOL), Luis Chiriboga (former president of the Ecuadorian Football Association), Sergio Jadue (former president of the National Football Association of Chile and vice president of CONMEBOL), and Eugenio Figueredo (former vice president and president of CONMEBOL and president of the Uruguayan Football Association).²² In exchange for those bribes and kickbacks, the soccer officials awarded or steered broadcasting rights for soccer matches and tournaments to the sports marketing executives and their companies. Full Play allegedly executed the illegal payments from accounts at BHS and BHBM's branch in Miami, Florida. The NPA also notes that compliance personnel at Bank Hapoalim repeatedly raised concerns about certain of the payments made to soccer officials from the accounts associated with Full Play, but the Bank failed to investigate and take other appropriate action.²³

Under the terms of the NPA, pursuant to which the DOJ declined to prosecute the Bank for conspiracy to launder monetary instruments, Bank Hapoalim agreed to pay a criminal monetary penalty of over \$9 million and to forfeit over \$20 million in funds, which represents the minimum amount of funds involved in transactions or attempted transactions through accounts at Bank Hapoalim that were intended to promote the bribery scheme or conceal the proceeds thereof.²⁴ In addition, Bank Hapoalim agreed to complete an internal review of its existing anti-money laundering ("AML") compliance program, and to adopt new AML controls, policies, and procedures, as appropriate.²⁵

The DOJ's decision to enter into the NPA was premised on, inter alia, (1) Bank Hapoalim's representation that it would exit the private banking business outside of Israel and "take all necessary steps to close BHS and surrender its banking license" and (2) Bank Hapoalim's "exemplary cooperation" with the DOJ's investigation.²⁶ Although Bank Hapoalim did not receive voluntary disclosure credit because it did not voluntarily and timely disclose the conduct at issue, it did receive full credit for its cooperation, which

included “conducting an extensive internal investigation,” “making factual presentations” on a wide variety of topics, “review[ing] more than 250,000 documents and hundreds of audio recordings,” “producing translations of key documents and transcriptions of audio files,” and “making employees available for interviews.”²⁷

Implications and Observations

The recent resolutions with Bank Hapoalim for its participation in the alleged tax evasion conspiracy illustrate that U.S. regulators continue to work together to aggressively pursue non-U.S. financial institutions that assist their U.S. taxpayer customers in concealing income and assets in offshore banking accounts and in evading taxes. Here, the DOJ resolution marks the third time an Israeli bank, in particular, has admitted to such criminal conduct,²⁸ and represents the second-largest recovery by the DOJ in connection with its investigations into the facilitation of offshore U.S. tax evasion by foreign banks since 2008.²⁹

This multi-agency resolution also demonstrates the risks for financial institutions and other companies of failing to meet the expectations of their regulators when seeking to cooperate with government-led investigations. Indeed, the DFS partially tied the significant penalty it imposed for Bank Hapoalim’s involvement in the tax evasion scheme to “the Bank’s initial failure to meet expectations for cooperation by regulated entities.”³⁰ Similarly, in levying its own hefty financial penalties against the Bank, the DOJ also called out the deficiencies present in Bank Hapoalim’s initial cooperation efforts, and applied only a 25% discount for cooperation in calculating the monetary penalty. By contrast, when Bank Hapoalim demonstrated full and exemplary cooperation from the outset in the money laundering case, it obtained significant benefits. There, the DOJ credited the Bank’s “thorough and complete cooperation” with its bribery investigation,³¹ resolved the case as to Bank Hapoalim with an NPA (rather than a DPA), and assessed penalties that were significantly less financially burdensome than the penalties imposed for the Bank’s tax evasion-related conduct.

These enforcement actions also serve as yet another reminder of the importance of implementing appropriate document retention measures at an early stage and conducting an appropriate review whenever issues come to light internally or as a result of a government-initiated inquiry. A company has an obligation to preserve relevant information when it reasonably anticipates an investigation (or litigation). It is difficult to demonstrate full cooperation with a government investigation where the company fails to preserve relevant materials and, as a consequence, potentially significant evidence is lost or destroyed.

The money laundering case also illustrates the importance of responding appropriately and adequately both to employee complaints or reports of illegal conduct within the organization and to government inquiries. Where there is a government inquiry, failure to conduct an appropriate review can lead to a determination by a regulator that the institution did not provide full cooperation, which often can be a substantial factor in determining whether a matter gets resolved by a DPA or an NPA, and the corresponding financial penalty.

Of course, the scope of any internal investigation should be periodically reviewed based on the facts and circumstances developed during the course of that review. Corporations may also benefit from an internal investigations policy, which sets forth a robust process for responding to allegations of misconduct, and provides guidance about the types of issues that must be escalated and investigated immediately.

We will continue to monitor these developments and look forward to providing you with further updates.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

H. Christopher Boehning
+1-212-373-3061
cboehning@paulweiss.com

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

Christopher D. Frey
+81-3-3597-6309
cfrey@paulweiss.com

Michael E. Gertzman
+1-212-373-3281
mgertzman@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Mark F. Mendelsohn
+1-202-223-7377
mmendelsohn@paulweiss.com

Jeannie S. Rhee
+1-202-223-7466
jrhee@paulweiss.com

Richard S. Elliott
+1-202-223-7324
relliott@paulweiss.com

Rachel Fiorill
+1-202-223-7346
rfiorill@paulweiss.com

Karen R. King
+1-212-373-3784
kking@paulweiss.com

Justin D. Lerer
+1-212-373-3766
jlerer@paulweiss.com

Associates Max A. Scharf and Kate Wald contributed to this Client Alert.

- ¹ Formerly known as Bank Hapoalim (Switzerland) Ltd.
- ² U.S. Dep't of Justice, Bank Hapoalim B.M. - Deferred Prosecution Agreement (Apr. 30, 2020), *available* here: https://www.justice.gov/usao-sdny/press-release/file/1272331/download?mod=article_inline; U.S. Dep't of Justice, Hapoalim (Switzerland) Ltd. - Plea Agreement (Apr. 30, 2020), *available* here: <https://www.justice.gov/usao-sdny/press-release/file/1272321/download> ("BHS Plea Agreement").
- ³ N.Y. Dep't of Fin. Servs., Bank Hapoalim, B.M. - Consent Order (Apr. 30, 2020), *available* here: https://www.dfs.ny.gov/system/files/documents/2020/04/ea20200430_bhbm.pdf ("DFS Consent Order"); U.S. Fed. Reserve, Order to Cease and Desist and Order of Assessment of Civil Money Penalty in the Matter of Bank Hapoalim B.M. (Apr. 30, 2020), *available* here: <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20200430a1.pdf> ("Federal Reserve Order").
- ⁴ U.S. Dep't of Justice, Bank Hapoalim B.M. and Hapoalim (Switzerland) Ltd. - Non-Prosecution Agreement (Apr. 30, 2020), *available* here: <https://www.justice.gov/opa/press-release/file/1272446/download>.
- ⁵ DPA at 1; BHS Plea Agreement at 1.
- ⁶ DPA Statement of Facts at 5–6; BHS Plea Agreement Statement of Facts at 4–5; DFS Consent Order at 3–4.

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- 7 DPA Statement of Facts at 6; BHS Plea Agreement at 5.
- 8 DPA Statement of Facts at 6; BHS Plea Agreement at 5.
- 9 DPA Statement of Facts at 9–11; BHS Plea Agreement at 7–8.
- 10 DPA Statement of Facts at 7–9; BHS Plea Agreement at 6–7. *See also* DFS Consent Order at 8 (noting that, under the Bank’s Qualified Intermediary Agreement with the IRS, if a U.S. account holder wanted to trade U.S. securities and avoid mandatory U.S. tax withholding, the Bank would be required to obtain either (a) the account holder’s consent to disclose the customer’s identity to the IRS, or (b) the authority from the account holder to sell all U.S. securities out of the account and exclude U.S. securities from the account going forward).
- 11 DPA at 2; BHS Plea Agreement at 3.
- 12 *Id.*
- 13 DPA at 3; BHS Plea Agreement at 4.
- 14 Federal Reserve Order at 7.
- 15 *Id.* at 4–7.
- 16 *Id.* at 8–9.
- 17 DFS Consent Order at 12.
- 18 *Id.* at 14.
- 19 *Id.*
- 20 *Id.* at 13.
- 21 *Id.* at 10.
- 22 NPA Statement of Facts at 1, 4–6.
- 23 NPA at 1–2.
- 24 *Id.* at 5.
- 25 *Id.* at 4–5.
- 26 *Id.* at 1–2.
- 27 *Id.*
- 28 The DOJ previously entered into deferred prosecution agreements with Bank Leumi Group (*see* U.S. Dep’t of Justice, Press Release, *Bank Leumi Admits to Assisting U.S. Taxpayers in Hiding Assets in Offshore Bank Accounts* (Dec. 22, 2014), available here: <https://www.justice.gov/opa/pr/bank-leumi-admits-assisting-us-taxpayers-hiding-assets-offshore-bank-accounts>) and Mizrahi-Tefahot Bank Ltd. (*see* U.S. Dep’t of Justice, *Mizrahi-Tefahot Bank Ltd - Deferred Prosecution Agreement* (Mar. 12, 2019), available here: <https://www.justice.gov/opa/press-release/file/1176116/download>).
- 29 The DOJ’s largest recovery to date was from Credit Suisse, which agreed to pay \$2.6 billion in 2014. *See* U.S. Dep’t of Justice, Press Release, *Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns* (May 19, 2014), available here: <https://www.justice.gov/opa/pr/credit-suisse-pleads-guilty-conspiracy-aid-and-assist-us-taxpayers-filing-false-returns>.

- ³⁰ N.Y. Dep't of Fin. Servs., Press Release, *DFS Superintendent Linda A. Lacewell Announces Bank Hapoalim To Pay \$220 Million Penalty To New York State* (Apr. 30, 2020), available here: https://www.dfs.ny.gov/press_releases/pr202004301.
- ³¹ U.S. Dep't of Justice, Press Release, *Bank Hapoalim Agrees to Pay More Than \$30 Million for Its Role in FIFA Money Laundering Conspiracy* (Apr. 30, 2020), <https://www.justice.gov/opa/pr/bank-hapoalim-agrees-pay-more-30-million-its-role-fifa-money-laundering-conspiracy>.