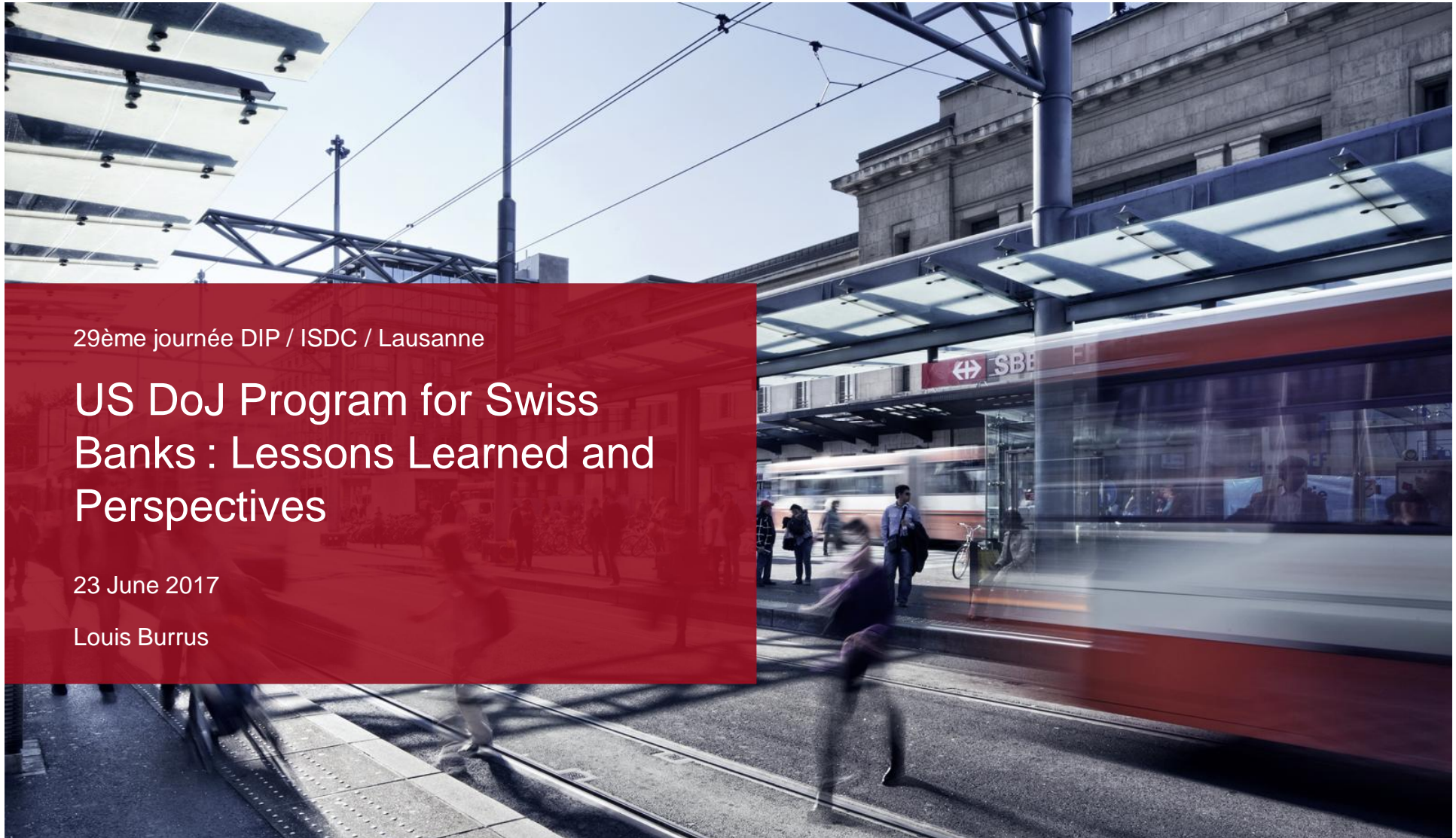


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US DoJ Program for Swiss Banks : Lessons Learned and Perspectives

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1. Introduction

- > **US DOJ Program for Swiss Banks** (the “**Swiss Bank Program**”)
- > Unprecedented initiative of the U.S. Department of justice (“**DOJ**”) in terms of foreign enforcement, not replicated in any other jurisdiction (so far).
- > More than 100 Swiss banks entered into the Swiss Bank Program and faced the same challenges, but almost no cooperation among them.
- > Strong political background – solution “negotiated” between the U.S. and the Swiss authorities.

2. Key characteristics

> **The Swiss Bank Program**

- > Announced on August 29, 2013 by U.S. and Swiss authorities (Joint-declaration).
- > Path for Swiss banks to resolve potential criminal liabilities in the U.S.
- > Swiss banks eligible to enter the program were required to advise the department by Dec. 31, 2013, that they had reason to believe that they had committed tax-related criminal offenses in connection with undeclared U.S.-related accounts.
- > Banks already under criminal investigation related to their Swiss-banking activities and all individuals were expressly excluded from the program.

> **Categories of Banks**

- > **Category 1 Banks:** Swiss banks that were under criminal investigation by the DOJ and/or another U.S. law enforcement authority at the time of the publication of the Swiss Bank Program in relation to the alleged commission of tax-related offenses.
- > **Category 2 Banks:** Swiss banks that advised DOJ by 31 December 2013 that they had reason to believe that they had committed tax-related criminal offenses in connection with undeclared US Related Accounts.
- > **Category 3 Banks:** Swiss banks that advised DOJ by December 31, 2014 that they had not committed any tax-related criminal offense in connection with undeclared U.S. Related Accounts.
- > **Category 4 Banks:** Swiss banks that were able to demonstrate that they met certain criteria for deemed-compliance under the Foreign Account Tax Compliance Act (FATCA).

* We have not included Liechtensteinische Landesbank AG, which is a bank based in Vaduz. In order to resolve a tax criminal investigation, this bank agreed in July 2013 to pay a penalty of \$23 million and to close its wholly-owned Swiss subsidiary.

“Tax-Related Offenses under Title 18 or 26” United States Code (“USC”)

Offense	Statutory Source	Statute of Limitations
Tax Evasion/Fraud	26 USC §§7210, 7203, 7206(1),(2), 7207	6 years
Aiding/Abetting	18 USC § 2	Same as aided/abetted crime
Conspiracy	18 USC § 371	6 years (for tax evasion conspiracies)
<i>False Statement</i>	18 USC § 1001	5 years
False Refund Claim	18 USC § 287	5 years
<i>Perjury</i>	18 USC § 1621	5 years
<i>Mail/Wire Fraud</i>	18 USC §§ 1341/1343	5 years (10 years if offense “affects” financial institution)
Money Laundering	18 USC §§ 1956, 1957	5 years
<i>Unlicensed Money Transmitting Business</i>	18 USC § 1960	5 years

Offenses in *italics* not clearly/necessarily “tax-related” so as to fall within scope of Cat. 2 NPA.

“Unreported Monetary Transaction” Offenses Under 31 USC §§ 5314 or 5322

Offense	Statutory Source	Statute of Limitations
FBAR Requirement	31 USC § 5314	N/A
Failure to File FBAR	31 USC § 5322	5 years

2. Key characteristics

- > Requirements for Participating Banks
 - > Make a complete disclosure of their cross-border activities
 - > Provide detailed information on an account-by-account basis for accounts in which U.S. taxpayers have a direct or indirect interest
 - > Cooperate in treaty requests for account information
 - > Provide detailed information as to other banks that transferred funds into secret accounts or that accepted funds when secret accounts were closed
 - > Agree to close accounts of account holders who fail to come into compliance with U.S. reporting obligations
 - > Perform a non-privileged review by an Independent Examiner
 - > Pay appropriate penalties

3. Challenges faced by Swiss Banks

- > The Swiss Bank Program imposed an obligation to acknowledge (potential) criminal wrongdoing, without any possible judicial review.
- > Several important Swiss law constraints (Blocking statutes, Banking Secrecy and Data Protection regulations). Swiss authorities automatically granted each participating bank a full waiver regarding Article 271 of the Swiss Criminal Code in order to allow cooperation with DOJ.
- > Compliance with disclosure obligations led many banks to face judicial proceedings initiated by current or former employees and third parties to prevent disclosure of personal data. Some of these proceedings are still ongoing (on this topic, see Decision from the Swiss Federal Tribunal 4A_83/2016 of 22 September 2016).
- > Banks were not allowed to individually negotiate the terms of their NPA with DOJ.

3. Challenges faced by Swiss Banks II

- > Each NPA contains a very broad obligation to cooperate with DOJ for a period of 4 years from the date of execution of the NPA. DOJ requested several banks, at multiple times after execution of the NPAs, to produce a significant amount of information.
- > NPA have not eliminated the possibility of prosecution of individuals, including bank officers, directors, and employees.
- > Some of the information requested by DOJ exceeds the scope of the information that Category 2 Banks were requested to provide under the Swiss Bank Program.
- > The NPA can be revoked.

4. Overview of current status

	Category 1	Category 2	Category 3	Category 4
Number of Swiss banks that were under criminal investigations by the U.S. Department of Justice (DOJ) at the time of the publication of the Swiss Bank Program in relation to the alleged commission of tax-related offenses	~ 13*	0	0	0
Number of letters of intent received by DOJ in the context of the Swiss Bank Program	Not applicable	106	Information not available	Information not available
Number of banks that reached a plea / deferred prosecution / non-prosecution agreement with DOJ or received a non-target letter	3 ^{*/**}	80	5	0
Date of completion	Not yet completed	January 27, 2016	December 29, 2016	December 29, 2016
Total amount of penalties	\$ 3,56 billion**	\$ 1,36 billion	0	0

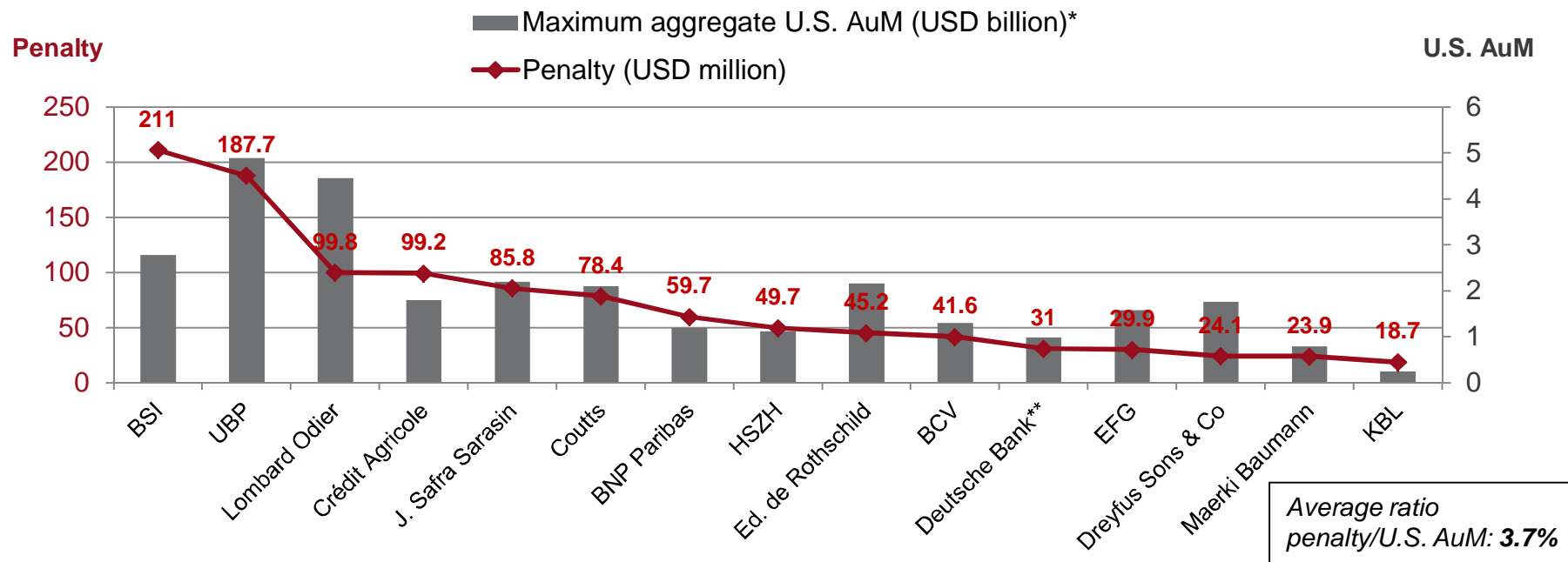
* To our knowledge, no official list of banks under criminal investigation is available.

** Excluding the deferred prosecution agreement with UBS.

- The Internal Revenue Service still seems to be in the process of verifying the tax compliance of U.S. taxpayers on the basis of the information (including mitigation evidence) provided by the banks;
- The DOJ seems to focus its attention on certain bank employees and external service providers (lawyers, asset managers, etc.) that played a significant role in facilitating tax evasion by U.S. taxpayers.

4. Overview of current status II

> **Category 2 Banks – 15 banks with biggest penalties:**



* The Swiss banks may not have calculated their U.S. AuMs with the exact same methodology/parameters. Any comparison between banks in respect of their U.S. AuM or the ratio between the penalty paid and the U.S. AuM should therefore be taken with caution.

** Deutsche Bank indicated in its statement of facts that the maximum aggregate value of all its U.S. Related Accounts was \$7.65 billion, but only accounts with a maximum aggregate value of \$986 million had U.S. beneficial owners. Only the second figure (\$986 million) was taken into consideration for the chart.

5. Lessons Learned

U.S. aspects from a Swiss perspective

- > Key strategic decision: attitude of the Bank in the Swiss Bank Program
 - > How to achieve extraordinary cooperation ?
 - > Swiss-driven approach vs. U.S.-driven approach
 - > The importance of communicating your efforts

- > Role and relationship with U.S. Prosecutors
 - > Investigation through requests and actions performed by the target
 - > Cultural choc for Swiss companies
 - > Sophisticated informality ?

- > Are there really alternatives to full cooperation ?

- > International cooperation
 - > all but MLAT requests !

- > Choice of the Independent Examiner
 - > U.S. or non U.S. ?

5. Lessons Learned II

U.S. aspects from a Swiss perspective

- > The importance of disclosures
 - > Quality or quantity ?

- > Calculation of the penalty amount
 - > Is it a scientific exercise ?

- > Attitude regarding limitations imposed by Swiss law

- > Underestimation of the magnitude of Post-NPAs cooperation

- > Importance of the Statement of facts
 - > Public admission of past wrongdoing
 - > Scope of the protection against future prosecution
 - > Difficulty to negotiate the content (much but not too much)
 - > Consequences on other regulators or on business partners

5. Lessons Learned III

Swiss aspects

- > Strong impact on the Swiss legal industry
 - > Development of the corporate investigations practice (more than 100 similar internal investigations had to be conducted in parallel in Switzerland)
 - > Catch-up training on e-discovery

- > Costs, Costs, Costs
 - > In many cases, participation costs exceeded penalty amounts

- > Role of the Swiss Financial Market Supervisory Authority FINMA

6. Perspectives

- > Is it really close to the end ?
 - > Ongoing scrutiny of U.S. regulators on Swiss banks
 - > Increase of U.S. cross-border enforcement (e.g. FIFA, 1MDB, Petrobras, Panama Papers, etc.)

- > Impact of the U.S. enforcement approach
 - > Borders are being increasingly removed
 - > Influence on other jurisdictions (e.g. France, Germany, etc.).
 - > Automatic exchange of information (Agreement between Switzerland and the E.U.)

- > Swiss law restrictions in a global environment
 - > Effective protection ?
 - > Need to reform ?

Thank you for your attention.

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