

Cooperation with U.S.-authorities, does it pay off?

AmCham LC Meeting
11 November 2014

Peter Honegger
Jürg Bühlmann



Prologue

«Schweizer Banken und die Schuldfrage»

Gefährliche Gruppe 2

Jürg Bühlmann (NZZ 24.12.2013)

«Dezidierteres Auftreten

Die Banken zögern jedoch bei kleinsten Anzeichen von Reputationsrisiken, sich rechtlich zur Wehr zu setzen. **Es fragt sich, ob ein allzu schnelles Einlenken die richtige Strategie ist oder ob nicht ein selbstbewussteres Agieren mehr Erfolg versprechen würde.**

Wünschbar wäre zudem, die FINMA würde nun eine stärker unterstützende Rolle ausüben, indem sie bedrohten Banken zu verstehen gibt, dass sie nicht fallengelassen werden, solange ihre Schuld nicht definitiv feststeht.»

<http://www.nzz.ch/aktuell/startseite/gefaehrliche-gruppe-2-1.18210280>



Interview with former FBI Agent Joe Navarro 1



http://www.nzz.ch/wirtschaft/wie-mit-aggressiven-us-behoerden-umgehen-1.18409374?extcid=Newsletter_23102014_Top-News_am_Morgen

Interview with former FBI Agent Joe Navarro 2



DoJ Internal Guidelines to Decline Prosecution

Prosecution in **FCPA matters** declined if some or all of the following factors apply:

1. A corporation **voluntarily** and fully self-disclosed potential misconduct;
2. Corporate principals voluntarily engaged in interviews with the DoJ and provided truthful and complete information about their conduct;
3. A parent corporation voluntarily and fully self-disclosed information to the DOJ regarding alleged conduct by **subsidiaries**;
4. A parent company conducted extensive pre-acquisition **due diligence** of potentially liable subsidiaries, and engaged in significant remediation efforts after acquiring the relevant subsidiaries;
5. A company provided information to the DoJ about the parent's extensive **compliance policies**, procedures, and internal controls, which the parent had implemented at the relevant subsidiaries;
6. A company agreed to a civil resolution with the SEC, while also demonstrating that a declination was appropriate for additional reasons;
7. A **single employee**, and no other employee, was involved in the provision of improper payments; and
8. The improper payments involved **minimal funds** compared to the overall business revenues.

<http://www.mainjustice.com/wp-admin/documents-databases/160-2-DOJ-response-to-6.22.11-FCPA-letter.pdf>



Swiss-American Chamber of Commerce

DoJ “Tone at the Top”

James Cole, Deputy Attorney General (2014):

“But I want to make clear what we mean by cooperation. In order to receive credit for cooperation, companies – including financial institutions – must provide useful and complete facts and do so in a timely manner. To that end, **a truly cooperating company will disclose improper conduct, before we know about it**; it will secure relevant documents and information promptly; it will conduct its own internal investigations and share with us relevant information it uncovers; it will identify relevant actors within and outside the company, including, if applicable, senior executives; it will make their employees available for interviews; and it will take remedial action to correct the problems and discipline employees. I'm not telling you anything new. **You have all known for years what constitutes real cooperation and what does not.**”

<http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-government-enforcement-institute-university-texas>



Group 2 Banks: «Total Cooperation Paper» 1

SWISS BANK shall also, subject to applicable laws or regulations: (a) cooperate fully with the Department, the Internal Revenue Service, and any other domestic or foreign law enforcement agency designated by the Department regarding all matters related to the conduct described in this Agreement;

SWISS BANK acknowledges that this penalty payment is a final payment and no portion of the payment will be refunded or returned under any circumstance, including a determination by the Tax Division that SWISS BANK has violated any provision of this Agreement.

It is understood that if the Tax Division determines, in its sole discretion, that: (a) SWISS BANK committed any U.S. federal offenses during the term of this Agreement; (b) SWISS BANK or any of its representatives have given false, incomplete, or misleading testimony or information;

(i) SWISS BANK shall thereafter be subject to prosecution for any federal offense of which the Department has knowledge, including perjury and obstruction of justice;

and (iii) SWISS BANK shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or documents or any leads therefrom should be suppressed.

Group 2 Banks: «Total Cooperation Paper» 2

Under the terms of this Agreement, SWISS BANK shall: (a) commit no U.S. federal offenses; (b) truthfully and completely disclose, consistent with applicable law and regulations, all information not protected by a valid claim of privilege or work product with respect to the activities of SWISS BANK, those of its parent company and its affiliates, and its officers, directors, employees, agents, consultants, and others concerning all matters related to the conduct described in this Agreement, including any evidence or allegations and internal and external investigations, about which SWISS BANK has any knowledge, which information can be used for any purpose, except as otherwise limited in this Agreement; and (c) bring to the Department's attention as quickly as is practicable all conduct by, or criminal investigations of, SWISS BANK, its parent company and its affiliates, and its officers, directors, employees, agents, consultants, and others relating to any U.S. federal offenses that come to the attention of SWISS BANK'S senior management, as well as any administrative proceeding or civil action brought by any governmental authority that alleges fraud or corruption by or against SWISS BANK.

Conflict with Swiss laws echoing in eternity?



FINMA's «wake-up call»

Patrick Raaflaub (November 29, 2013)

„Das Aufsichtsrecht verlangt von allen Instituten ein angemessenes Risikomanagement. Ein Institut, das sich aus Sicherheitsüberlegungen trotz Zweifeln über die Schwere des eigenen Fehlverhaltens für die **Programmkategorie 2 entscheidet, handelt aus Sicht der FINMA verantwortungsvoll.** Ein solcher Entscheid wird von der FINMA gewürdigt und wirkt sich aus der Aufsichtsperspektive nicht nachteilig für die betroffene Bank aus.“

<http://www.nzz.ch/meinung/debatte/entscheidende-phase-fuer-schweizer-banken-1.18194436>

Would former FBI Agent Joe Navarro agree?



The Revolving Door?

Jed Rakoff

„In my experience, most federal prosecutors, at every level, are seeking to make a name for themselves, and the best way to do that is by **prosecuting some high-level person**.



My point is that whatever small influence the '**revolving door**' may have in discouraging certain white-collar prosecutions is more than offset, at least in the case of prosecuting high-level individuals, by the **career-making benefits** such prosecutions confer on the successful prosecutor.“

<http://www.economist.com/news/united-states/21621799-how-prosecutors-came-dominate-criminal-justice-system-kings-courtroom?src=scn/gp/wl/pe/kingsofcourtroom>



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Cooperation and Arts. 271/273 PC, DPA, etc.

Art. 271 PC:

- own premises exemption
- 271 authorization by FFD
- depositions in Evian, Konstanz?

Art. 273 PC, Art. 6 DPA, Art. 47 Banking Law:

- Redaction?
- Waiver/consent?
- Judgment Horgen District Court re. DPA (July 24, 2014)

Situation of necessity (Arts. 17/18 PC)?

Renzo Gadola: Order of summary punishment re. 273 (July 21, 2014)

GBC Total Cooperation and Global Waiver?

Global waiver of customers, suppliers, employees?

“The undersigned releases the Company from all duties of confidentiality, including but not limited to data privacy protection, Art. 273 Penal Code, bank client confidentiality, with respect to foreign authorities such as the DoJ, IRS, SEC ...

Furthermore, the undersigned agrees that the existence of corresponding official, judicial, or statutory directives will also lead to the release of the data to Swiss authorities ...

This declaration of release shall survive a loss of legal capacity, bankruptcy, declaration or presumed death, or the death of the undersigned.”



Willful Blindness: Spectre of CEO and GC?

- 2011: Global-Tech Appliances Inc. v. SEB S.A., 131 S. Ct. 2060

“Under the doctrine – also know as 'conscious avoidance' or the 'ostich' instruction – **the government does not have to prove that a defendant had 'actual knowledge' of wrongdoing.** Instead, the knowledge element can be satisfied if a defendant 'consciously avoided' learning the truth.”

- 1997(!):
**THE EIZENSTAT REPORT AND RELATED ISSUES
CONCERNING UNITED STATES AND ALLIED
EFFORTS TO RESTORE GOLD AND OTHER ASSETS
LOOTED BY NAZIS DURING WORLD WAR II**

Despite various war-time reporting requirements imposed upon the **banks** by U.S. law, both **Swiss Bank Corp.** and **Credit Suisse** through **willful blindness**, creative bookkeeping and intentional misrepresentation, managed to maintain the veil of secrecy over the identity of most of their customers.

Raoul Weil Acquittal

“Weil, 54, did not testify and his defense attorneys put no witnesses on the stand. In his closing argument, Menchel suggested many of the government's ex-UBS witnesses were unreliable because they were given immunity from prosecution.”

<http://abcnews.go.com/US/wireStory/defense-rests-tax-fraud-trial-ubs-exec-26652202>

“Not long after Judge James Cohn sent the jury to deliberate, they sent back a note, written in large capital letters with two exclamation points at the end: **“WE HAVE A VERDICT!!”**

“A South Florida jury took only an hour to acquit former UBS AG wealth-management chief Raoul Weil of criminal charges One Hour!!!!!!!!!! How much did the US government waste preparing what must have been one of the weakest cases ever presented.”

<http://online.wsj.com/articles/former-ubs-executive-acquitted-on-tax-conspiracy-charge-1415057280>



Lessons Learned from Weil Acquittal?

- **Non-cooperation with U.S. authorities *may* pay off.**
- **Servicing U.S. persons maintaining accounts in Switzerland does not *per se* mean violation of U.S. tax laws.**
- **Burden of proof still on authorities.**
- **No incriminating emails presented.**
- **Participation in “U.S. Program” to be revised?**
- **Consequences of indictment for Swiss banks?**



Extradition of Swiss Nationals to the U.S.?

Dear Deputy Attorney General Cole:

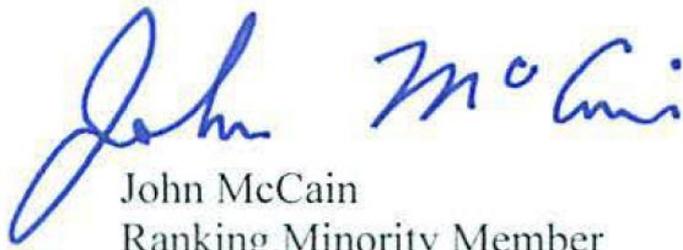
March 18, 2014

We are writing to urge a change in the current policy of the Department of Justice (DOJ) which, for more than five years, has not sought extradition from Switzerland of a single Swiss national charged with criminal conduct related to aiding and abetting U.S. tax evasion.

Given that the current treaty does not foreclose the cooperation of the Swiss government in extradition requests for tax cases, we urge DOJ to at least attempt to use the authorities laid out in that treaty. Even if a request is unsuccessful, it will inform both Switzerland and its citizens that the United States is ready to make full use of available legal tools to stop facilitation of U.S. tax evasion and hold alleged wrongdoers accountable.

Thank you for your attention to this matter.

Sincerely,



John McCain
Ranking Minority Member
Permanent Subcommittee on Investigations



Carl Levin
Chairman
Permanent Subcommittee on Investigations

<http://www.levin.senate.gov/newsroom/press/release/levin-mccain-urge-justice-department-to-seek-extradition-in-tax-evasion-cases/>



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Insurance Coverage?

- Professional indemnity / errors & omissions
- D&O liability

Coverage North America

- ✓ civil litigation
- ✓ criminal prosecution – prevention costs?
- ✓ extradition
- ✓ investigations by DoJ, SEC, IRS
- ✓ attorneys fees, media consultants
- ✓ notice of circumstances
- fines
- burning house coverage

<http://www.kessler.ch/en/specialties/directors-officers-liability-do.html>;

<http://www.kessler.ch/unternehmen/geschaeftsleitung.html>



Riding the Cavalry?

Friedrich Engels, New York Daily Tribune (1853)

„Jede anmassende und hartnäckige Regierung kann bei den Schweizern erreichen, was sie will...

...Was die Schweizer Regierung anbelangt, so gab sie auf jede immer unverschämtere Forderung einen noch demütigeren Bescheid.»

<http://www.nzz.ch/aktuell/startseite/und-immer-wieder-reitet-die-kavallerie-1.18205201>

<http://www.derbund.ch/schweiz/standard/Wie-im-Film/story/20541956?track>

