Chronique

IV.B. Intégrité du marché

U.S. Corporate pre-trial diversion for tax-related offenses: the case of the Swiss Bank Program(1)



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Introduction

In a previous issue of this journal,(2) we discussed the development of U.S. corporate pre-trial diversion mechanisms in the form of Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs, together with NPAs, N/DPAs) and the recent expansion of DPAs into European countries (such as the UK and, more recently, France). N/DPAs are pre-trial arrangements between a prosecutor and a *corporate* defendant that permit corporate legal entities to avoid criminal prosecution, formal conviction(3) and a potentially permanent mark on their criminal record.(4) Both NPAs and DPAs are a "middle ground option" between an indictment(5) and the declination of criminal proceedings against a business entity.(6) N/DPAs allow prosecutors to exercise discretion to avoid the dramatic consequences that a criminal conviction may have on a corporation,(7) and also limit collateral damage to innocent third parties. The main difference between NPAs and DPAs is a procedural one:(8) a DPA is filed with a court of law(9) and subject

1. The views expressed herein are of the authors and do not purport to constitute legal advice upon any of the matters described herein. This article is for informational purposes only and readers should not rely upon the contents of this article for purposes other than general educational purposes.
2. M. Fernandez-Bertier, "US corporate pretrial diversion: non/deferred prosecution agreements as a model for continental law systems?", *International Journal for Financial Services*, 2016/4, pp. 183 ff.
3. Although the entity admits to corporate wrongdoing. B. L. Garrett, "Structural Reform Prosecution", *Virginia Law Review*, Vol. 93, 2007, p. 853; J. Arlen, "Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements", *Journal of Legal Analysis*, Vol. 8, No. 1, Spring 2016, p. 192.
4. United States Sentencing Commission (USSC) 2012 Guidelines Manual, § 4A1.2(f).
5. About 97% of federal criminal cases are resolved with a plea agreement. Administrative Office of the US Courts. *Statistics Division, Statistical Tables for the Federal Judiciary*, June 2013, 2014 and 2015, Table D-4, www.uscourts.gov; J. Rakoff, "Why innocent people plead guilty", *The New York Review of Books*, 20 November 2014, www.nybooks.com.
6. The United States Attorney Manual (USAM) provides for general principles of prosecution that must be followed by federal attorneys. USAM 9-27.110.
7. Yet, one could argue that this affirmation is an overstatement when looking to the limited impact of BNP Paribas' tremendously onerous conviction in 2015: the financial institution entered into a guilty plea in connection to the violation of sanctions against Sudan, Iran and Cuba and was sentenced to a "record penalty" of USD 8.9 billion (the almost entirety of which consisted in confiscation/forfeiture). DOJ, "BNP Paribas Sentenced for Conspiring to Violate the International Emergency Economic Powers Act and the Trading with the Enemy Act", 1 May 2015, www.justice.gov.
8. "Although DPAs may generally be more complex and involve higher fines and penalties, the principal distinction between the two types of agreements is nomenclature and procedure, rather than substance". J. R. Copland, R. A. Mangual, *op. cit.*, p. 5.
9. A DPA implies that the prosecutor files formal charges against the defendant but agrees to defer the proceedings for a defined probationary period in order to allow the defendant to comply with the conditions set forth in the agreement, in which event the prosecutor

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to approval by the appropriate court;[10] by contrast, an NPA can be more accurately described as a contractual arrangement between the prosecutor and the defendant[11] – it is neither approved by nor submitted to a court as the agreement itself is executed by the prosecutor and the defendant and the obligations thereunder are performed by the parties themselves without much (if any) judicial oversight.[12] NPAs are seen as more favourable than DPAs, and therefore generally less frequently used by the United States Department of Justice (DOJ). There is, however, a major exception to this trend, which has generated much discussion in the financial sector, namely the prevalent use of NPAs in connection with tax-related offenses within the scope of the "Swiss Bank Program" (the Program).

The Program was the "culmination of U.S-Swiss attempts to create a framework under which Swiss banks could cooperate with the United States in its offshore tax investigations while remaining compliant with Swiss law".[13] The Program was created via an agreement between the U.S. and Swiss authorities in August 2013 as a means to resolve potential criminal liabilities of the Swiss Banking industry for tax-related offenses in relation to their cross border activities in the US, through the conclusion of NPAs or Non-Target Letters (NTLs).[14] The Program concluded in December of 2016 with the DOJ's announcement of the final resolutions of NPAs under the Program (and the subsequent winding up of the Program itself).

This contribution describes the Birth of the Swiss Bank Program (I), analyses the structure of the Program and the methods of resolution of potential criminal liability of Swiss Banks with a particular emphasis on NPAs (II), and concludes with the lessons learned from the Program (III).

I. The Birth of the Swiss Bank Program

It is estimated that the use of secret offshore accounts to evade U.S. tax liabilities costs the U.S. Treasury at least USD 100 billion annually.[15] As a result of this, the Tax Division of the DOJ under the Obama administration prioritized combating offshore non-compliance with U.S. tax laws.[16] This impetus, along with three other key developments led to the creation of the DOJ Swiss Bank Program (the Program)[17][18] which resulted in the conclusion of 80 NPAs. The first factor involves the investigation of certain large Swiss banking institutions, namely UBS AG (including certain employees and officers thereof) and Wegelin & Co. by the DOJ and FBI (A). The second factor involves the creation

stays or dismisses the charges in question. US Government Accountability Office, *Corporate Crime. Preliminary Observations on DOJ's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, June 2009, p. 12.

10. However, the actual judicial review is limited in practice. See US Government Accountability Office, *Corporate Crime. DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, December 2009, pp. 25-26; B. L. Garrett, "The metamorphosis of corporate criminal prosecutions", *Virginia Law Review*, Vol. 102, February 2016, pp. 8-9; *United States v Fokker Servs. B.V.*, No. 15-3016, 2016 WL 1319226, at 1 (D.C. Cir. Apr. 5, 2016)
11. No criminal action is ever filed with a court, provided that the beneficiary of the NPA does not breach the agreement.
12. For more developments on N/DPAs, see M. Fernandez-Bertier, *op. cit.*
13. S.-Y. Oei, "The Offshore Tax Enforcement Dragnet" (31 March 2017), *Emory Law Journal*, Vol. 67, 2018 (Forthcoming), p. 24.
14. The Program also allowed for a global "path to resolution for Swiss banks that were not engaged in wrongful acts with U.S. taxpayers but nonetheless want a resolution of their status," as opposed to a more piecemeal solution. DOJ, "United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations", 29 August 2013, www.justice.gov.
15. See DOJ, "Offshore Compliance Initiative" (updated 29 December 2016), www.justice.gov; see also C. Levin, N. Coleman, *Tax Haven Banks and U.S. Tax Compliance, Staff Report, Permanent Subcommittee on Investigations*, United States Senate, 17 July 2008, www.hsgac.senate.gov; J. Guttentag and R. Avi-Yonah, "Closing the International Tax Gap", in M. B. Sawicky (ed.), *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration*, Washington, Economic Policy Institute, 2006 (estimating offshore tax evasion by individuals at USD 40-USD 70 billion annually in lost U.S. tax revenues); K. A. Clausing, "Multinational Firm Tax Avoidance and U.S. Government Revenue", *National Tax Journal*, Vol. 62, No. 4, December 2009 (estimating corporate offshore transfer pricing abuses resulted in USD 60 billion in lost U.S. tax revenues in 2004); J. Zdanowics, "Who's watching our back door?", *Business Accents magazine*, Vol. 1, No. 1, Fall 2004 (estimating offshore corporate transfer pricing abuses resulted in USD 53 billion in lost U.S. tax revenues in 2001); Tax Justice Network, "The Price of Offshore", March 2005, www.taxjustice.net (estimating that, worldwide, individuals have offshore assets totaling USD 11.5 trillion, resulting in USD 255 billion in annual lost tax revenues worldwide); For a different perspective, see W. Byrnes, "Is FATCA chasing a leprechaun and his pot of gold?", 19 August 2015, www.caymanfinancialreview.com.
16. DOJ, "Offshore Compliance Initiative", *op. cit.*
17. Interview with J. C. Poling, Partner at Akin Gump Strauss Hauer & Feld LLP and former federal prosecutor with the DOJ, 7 September 2016. (J. Poling Interview).
18. It is important to note that the government of Switzerland, particularly the Swiss Federal Department of Finance and the Swiss Financial Market Supervisory Authority, welcomed the Program and worked to draw the attention of Swiss banks to the program and encouraged them to participate in the Program. See *Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance* (the Joint Statement), 29 August 2013, www.justice.gov.

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of the Internal Revenue Service's Offshore Voluntary Disclosure Initiatives in 2009, which led to the divulgence of information that would have otherwise been inaccessible to U.S. authorities (B).[19] The third and final factor was the passage of the Foreign Account Tax Compliance Act (FATCA) by Congress in 2010 (C).[20]

A. The criminal investigation of UBS AG and Wegelin & Co.

UBS AG

An early-perceived triumph of the Tax Division under the Obama administration was the investigation of UBS AG (UBS), Switzerland's largest bank, and its subsequent entry into a DPA.[21] UBS came to the attention of U.S. authorities as a result of various disclosures made by a former UBS employee, Bradley Birkenfield, to the DOJ, the Securities Exchange Commission (SEC) and the IRS in 2007 relating to UBS's practice of assisting persons subject to U.S. tax liabilities in hiding their assets in offshore funds in an effort to evade U.S. tax liabilities. UBS subsequently became the subject of an intensive on-site investigation by the U.S. Federal Bureau of Investigations (FBI).[22]

Birkenfield's disclosures culminated, in February 2009, in the entry by UBS into a DPA with the DOJ; the criminal information accompanying the DPA formally charged[23] UBS with conspiring to defraud the U.S. Government and the IRS by concealing the identities of U.S. clients and the existence of their accounts from the IRS; aiding in the wilful failure to pay taxes to the IRS; and failing to submit certain financial information regarding their U.S. clients to the IRS on the required Form 1099.[24] UBS's DPA, by definition, implied that the prosecution deferred the legal proceedings for a defined probationary period to allow UBS to comply with the terms set forth in the agreement. As a result of their DPA, UBS was required to provide the U.S. government with information regarding the identities and accounting information of certain U.S. clients and pay USD 780 million in fines, penalties, interest and restitution.[25]

Wegelin & Co.

Wegelin & Co. (Wegelin), founded in 1741 and headquartered in St. Gallen, Switzerland with branches in 12 other Swiss cities, specialized in providing private banking and asset management services to a global clientele.[26] According to the DOJ, Wegelin had seized the opportunity presented by the UBS affair and had actively courted clients who had fled from UBS in or about 2008 and 2009 in the wake of its DPA with the DOJ.[27] As a result, Wegelin aggressively expanded its U.S. client base, which it had assisted in concealing assets from the IRS in secret offshore accounts since as early as 2002.[28]

Wegelin was later indicted and pleaded guilty in January 2013 to assisting U.S. clients conceal USD 1.2 billion in assets from 2002 to 2012.[29] Part of Wegelin's guilty plea included a required payment of USD 57.8 million in penalties, restitution and asset forfeiture (i.e. confiscation).[30] As a result of its guilty plea agreement and its penalty, Wegelin transferred all of its non-U.S. clients, assets, and almost its entire staff to its subsidiary, Notenstein Privatabank, which was then sold to the Raiffeisen banking group;[31] Wegelin then announced that it would close permanently after paying its fines.[32] Wegelin was the oldest Swiss bank at the time of its closing.[33]

19. See W. Byrnes, *op. cit.*; IRS, "IRS Says Offshore Effort Tops $5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole", 26 June 2012, www.irs.gov; J. Poling Interview.
20. 26 USC §§1471-1474.
21. DOJ, "Offshore Compliance Initiative", *op. cit.*; J. Poling Interview.
22. S. Pfeifer, "He put a dent in tax evasion", *The Los Angeles Times*, 26 October 2009, www.latimes.com. DOJ figures estimate that UBS provided Swiss bank accounts to 20,000 U.S. clients with assets of approximately USD 20 billion, and that nearly 17,000 of the clients hid their identifies and the existence of their accounts from the IRS and U.S. authorities. H. Touryalai, "Tale Of Two Swiss Banks: Why Wegelin Failed And UBS Survived Tax Evasion Charges", *Forbes*, 4 January 2013, www.forbes.com.
23. For a discussion of whether UBS would have been subject to U.S. Federal long-arm jurisdiction, see A. Sithian, "'But the Americans Made Me Do It!': How United States v. UBS Makes the Case for Executive Exhaustion", *Emory International Law Review*, Vol. 25, Issue 1, 2011, Comments.
24. See Information, filed in the U.S. District Court for the Southern District of Florida, attached to the UBS DPA as Exhibit B, www.justice.gov.
25. DOJ, "UBS Enters into Deferred Prosecution Agreement", *op. cit.*
26. Company Overview of Wen AG, www.bloomberg.com.
27. See Indictment, *US v. Wegelin & Co.*, pp. 6-7, www.justice.gov.
28. US Attorney P. Bharara describes Wegelin as having "willfully and aggressively" jumped in to "fill the void that was left when other Swiss banks abandoned the practice due to pressure from US law enforcement." R. Neate, "Oldest Swiss Bank Wegelin to Close after admitting aiding US tax evasion", *The Guardian*, 4 January 2013, www.theguardian.com.
29. DOJ, "Switzerland's oldest bank Wegelin to close after pleading guilty to aiding US tax evasion", 3 January 2013, www.justice.gov; X, "Switzerland's oldest bank Wegelin to close after pleading guilty to aiding US tax evasion", *The Telegraph*, 4 January 2013, www.telegraph.co.uk.
30. X, "Switzerland's oldest bank Wegelin to close after pleading guilty to aiding US tax evasion", *op. cit.*
31. X, "Wegelin buyer Raiffeisen cuts US client ties", *Reuters*, 5 February 2012, www.reuters.com.
32. R. Neate, "Oldest Swiss bank Wegelin to close after admitting aiding US tax evasion", *op. cit.*
33. *Ibid.*

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The fallout from the Wegelin affair shook many Swiss banks.[34] Swiss banks came to the realization that an actual criminal indictment and subsequent guilty plea could have drastic consequences for their businesses, including the threat of permanent closure, as was the case with Wegelin.[35] By contrast, the UBS DPA, though drastically expensive, offered a better and less permanent alternative to closing a bank. Additionally, as was explained *supra*, UBS's DPA allowed charges to be dismissed against the bank provided that it paid its fine and complied with the other terms of the agreement, which included exiting the U.S. cross-border business, enhanced compliance, the retention of an external auditor, ongoing monitoring of the entity, full cooperation with the Government and disclosure obligations.[36] The existence of an alternative criminal dispute resolution mechanism which affords Swiss banks the ability to avoid prosecution and a criminal conviction in exchange for the payment of penalties created an incentive-based environment; banks which had reason to believe that they had aided in tax avoidance schemes were presented with an opportunity to manage their risk and exposure to harsh criminal penalties. This environment, coupled with the factors discussed below, left a ripe environment for the negotiation of the Swiss bank Program.

B. IRS Offshore Voluntary Disclosure Program

In March 2009, only a month after the conclusion of the UBS DPA, the IRS announced and implemented the Offshore Voluntary Disclosure Program (OVDP) in an effort to combat offshore tax evasion.[37] The OVDP temporarily allowed individuals with undisclosed income in secret offshore accounts to come forward, pay fines, and square their accounts with the IRS.[38] Additional temporary OVDP programs were established in 2011 and in 2014.[39] Overall, these programs have been extremely successful, resulting in the collection of over USD 5 billion in back taxes as of 2012.[40] More importantly, however, is the effect that the OVDP had on the IRS and DOJ's information collection efforts; as a condition of the voluntary disclosures, individuals had to supply identifying information of the financial institutions at which they had held undisclosed assets and identifying information off all foreign and domestic entities through which the assets were held.[41]

These disclosures were a complete anathema to the decades-long practice of banking privacy in the Swiss banking industry.[42] Privacy in Swiss banking had been compared to the client confidentiality kept by doctors and lawyers.[43] Although not the primary target of the OVDPs, nevertheless as a result of the OVDPs, Swiss banking privacy was being vitiated by the very individuals it was designed to protect. Individuals who came forward as a result of the OVDPs provided key information to the DOJ regarding the banking institutions they had held their hidden accounts in[44] and further primed the environment for the development of the Swiss Bank Program.

C. FATCA

The third and final major factor that led to the development of the Swiss Bank Program was the enactment of the Foreign Account Tax Compliance Act (FATCA) in 2010.[45] FATCA was implemented in Switzerland pursuant to a model 2 intergovernmental agreement (IGA) between Switzerland and the United States in 2012, in an effort to "improve […] cooperation in combating international tax evasion".[46] Switzerland's model 2 IGA was approved by the Swiss Parliament in September of 2013, and contained provisions which require Swiss banking institutions to report directly to the IRS.[47] [48]

34. K. Scannell, "Wegelin guilty plea rattles Swiss banks", *Financial Times*, 10 January 2013; I. Foulkes, "Swiss banks' Unease Over Wegelin", *BBC News*, 4 January 2013.
35. H. Touryalai, "Tale Of Two Swiss Banks: Why Wegelin Failed And UBS Survived Tax Evasion Charges", *Forbes*, 4 January 2013, www.forbes.com; see also J. Poling interview.
36. See p. 9 of the UBS DPA available at www.justice.gov.
37. See IRS, "Second Special Voluntary Disclosure Initiative Opens; Those Hiding Assets Offshore Face Aug. 31 deadline", 10 June 2011 (updated), www.irs.gov.
38. *Ibid.*
39. L. J. Saret, "Roadmap To IRS' 2014 Offshore Voluntary Disclosure Program For Taxpayers With Undisclosed Offshore Accounts", *Wealth Strategies Journal*, 23 June 2014, www.wealthstrategiesjournal.com.
40. IRS, "IRS Says Offshore Effort Tops $5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole", 26 June 2012, www.irs.gov.
41. IRS, "How to Make an Offshore Voluntary Disclosure", 9 September 2016 (updated), www.irs.gov.
42. Embassy of Switzerland in Washington DC, "Swiss Banking Secrecy", www.swissemb.org.
43. *Ibid.*
44. J. Poling interview.
45. As part of the HIRE Act of 2010. 26 United States Code (U.S.C.) §§ 1471-1474.
46. *Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA* (The FATCA Agreement), 14 February 2013, www.teasury.gov; M. Cohn, "U.S. Strikes FATCA Deals with Switzerland and Japan", 21 June 2012, www.accountingtoday.com.
47. J.-L. Herbez, A. Antonietti and V. S. Reardon-Kofmel, "Update on FATCA implementation in Switzerland – no need to register for Swiss investment advisers and assets managers?", 17 March 2014, www.lexology.com.
48. An agreement between the U.S. and Switzerland for Cooperation to Facilitate the Implementation of FATCA was signed on 14 February 2013 (see above, the FATCA Agreement). The Joint Statement.

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FATCA was enacted primarily to detect hidden offshore accounts of U.S. taxpayers.(49) Under FATCA, "foreign financial institutions", i.e. foreign entities that are engaged in banking, brokerage or investment-like businesses, are required to report information regarding ownership by U.S. individuals subject to U.S. tax liabilities of assets held in offshore accounts at such institutions.(50) If the foreign financial institution in question fails to comply with the reporting requirements promulgated by FATCA, they are subject to a 30% tax on withholdable, U.S.-source payments to the foreign financial institution.(51) The reporting requirements under FACTA compel foreign financial institutions to enter into written agreements with the U.S. Treasury Department.(52) These agreements require foreign financial institutions to conduct necessary diligence and verification procedures to obtain information regarding each account holder to determine if such an account holder is subject to U.S. tax liabilities.(53) To the extent that such information is verified, the foreign financial institution in question must report, on an annual basis, certain information related to the account.(54) With steep financial costs for non-compliance, the IRS utilizes financial deterrents to enforce compliance with the terms of FACTA.

FATCA has been criticized as being controversial and ineffective: former acting IRS Commissioner Steven Millner has been on record stating that the costs of FATCA and its implementation far outweigh the financial benefits the U.S. receives in return.(55) Others have criticized FATCA for being over-reaching and unduly complex:(56) e.g., individuals who were born in the U.S. but have lived their lives abroad and who are not necessarily aware of their U.S. citizenship would still fall under the definition of a U.S. account holder under FATCA's indicia of U.S. taxpayer status.(57) Additionally, in order to comply with the U.S.-Switzerland IGA implementing FATCA, Swiss banks had to jump through various administrative hoops. In order for a Swiss bank to comply with FATCA, it first had to request that the customer execute a "bank secrecy" waiver. If the customer refused the waiver, the bank was only allowed to transmit non-identifying data. The IRS, in turn, would have to file a formal request for assistance from the Swiss federal tax administration; thus, if the client's information was ultimately revealed without his consent, it would have been by the Swiss tax authority, not by the banks. Nevertheless, FATCA played an important role in the lead-up to the creation of the Swiss Bank Program.

The occurrence of these events in the aggregate created a unique environment which allowed the creation of the Swiss bank program. Whereas in the last 100 years prior to FATCA, the idea of Swiss banks volunteering to come forward and effectively breach their cherished tenet of banking privacy to report wrongdoing of their own clients would have seemed unthinkable, the idea did not seem so controversial in the Swiss banking environment circa 2012-2013. With that, we turn to the Swiss bank program itself.

II. Structure of the Swiss Bank Program

The Swiss bank program (the Program) was announced on August 29, 2013(58) and reached final resolutions on 29 December 2016.(59) The Program was the result of negotiations between the Obama-era DOJ and the Swiss Federal Department of Finance.(60) The Program itself allowed Swiss banks (and not individuals) the opportunity to resolve potential U.S. tax liabilities for tax-related offenses without the need to go to trial and risk criminal sanctions;(61) in exchange for such out-of-court resolution of tax liabilities, the banks would agree to pay certain fines and disclose certain information related to undeclared "U.S. Related Accounts" located at the bank in question under the period under which the Program applied.(62) U.S. Related Accounts are accounts which exceeded USD 50,000 under the applicable period under which the Program applied and demonstrate U.S. taxpayer indicia as to the beneficial ownership of the account in a similar fashion to FATCA's indicia.(63) The period to which the Program applied was the period between August 1, 2008 and the

49. 111 Cong. Rec. S1635-36 (daily ed. Mar 17, 2010), statement of Sen. Levin: ("Right now, thousands of U.S. tax dodgers conceal billions of dollars in assets within secrecy-shrouded foreign banks, dodging taxes and penalizing those of us who pay the taxes we owe. The Permanent Subcommittee on Investigations… estimated that these tax-dodging schemes cost the Federal Treasury USD 100 billion a year".
50. J. H. Bogaard, M. E. Draz, "What… The FATCA (Foreign Account Tax Compliance Act)?", *The National Law Review*, 14 March 2013, www.natlawreview.com.
51. 26 U.S.C. § 1471(a).
52. *Ibid.*
53. *Ibid.*
54. Including the name, address, TIN of each account holder, the account number, and the balance or value of such account to the U.S. Treasury Department. 26 U.S.C. § 1471(c).
55. Blank Rome LLP, "FATCA Notebook: Former IRS Chief, Taxpayer Advocate Criticize FATCA; Switzerland Moves Toward Greater Transparency", 10 October 2014, www.jdsupra.com.
56. F. Behrens, "Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand", *Wisconsin Law Review*, Vol. 1, No. 1, 2013, pp. 205-236.
57. "U.S. FATCA tax law catches 'accidental Americans'", *The National*, 13 January 2014, www.cbcplayer.ca.
58. DOJ, *Swiss Bank Program*, www.justice.gov.
59. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", 29 December 2016, www.justice.gov.
60. The Joint Statement.
61. *Ibid.*
62. *Ibid.*
63. *Ibid.*

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later of December 31, 2014 or the date of the applicable non-prosecution agreement (NPA) or non-target letter (NTL) (*infra*).[64] The term "Swiss Bank" as it relates to the Program is defined as "(i) any financial institution[65] organized under the laws of Switzerland, but excluding any branch or head office of such financial institution that is located outside Switzerland, and (ii) any branch or head office of a financial institution not organized under the laws of Switzerland, if such branch or head office is located in Switzerland."[66]

The Program itself is divided into four categories based on level of criminal exposure, and each particular Swiss Bank was eligible for one of the categories based on certain factual circumstances. In brief, excluding category 1 banks (banks currently under criminal investigation), the Program offered "a path for Swiss banks to resolve potential criminal liabilities in the United States, and to cooperate in the Department's ongoing investigations of the use of foreign bank accounts to commit tax evasion" on the one hand (category 2); and "a path for those Swiss banks that were not engaged in wrongful acts but nonetheless wanted a resolution of their status" on the other hand (categories 3 and 4).[67]

A. Category 1: Ineligible Swiss Banks

Category 1 banks are those Swiss Banks for which the DOJ had authorized a "formal criminal investigation concerning its operations."[68] Category 1 Swiss Banks were per se ineligible for the Program and would have been notified by the DOJ that they were under investigation or would be subject to investigation in the future.[69]

Being qualified as a category 1 bank however does not automatically mean that the bank is subject to prosecution in full before a criminal court. DOJ prosecutors had to elect between conducting a formal criminal trial, with potentially catastrophic consequences as exemplified by the Wegelin controversy, and offering the target bank the ability to enter into a DPA (not an NPA) in a similar vein to one UBS entered into. As a result, category 1 investigations have been resolved through entering into a guilty plea or a DPA, with a predominance of the latter.[70]

In practice, 14 of Swiss banks fell under category 1 and therefore lost eligibility to participate in the Program as being already under investigation at the time the Program was launched;[71] in February 2017, it was affirmed that 8 institutions had already resolved their criminal liability under U.S. law.[72]

B. Category 2: Swiss Banks Eligible for NPAs

Category 2 banks are those Swiss Banks to which the DOJ had *not* authorized a "formal criminal investigation concerning its operation", but nevertheless had reason to believe it "*may* have committed tax-related offenses" under the laws of the U.S. in connection with "undeclared U.S. Related Accounts" held by the Swiss Bank under the period under which the Program applied.[73] As a result of qualifying as a category 2 Swiss Bank, such an institution would have been able to request an NPA as long as it had voluntarily submitted itself for consideration under the Program before December 31, 2013 by written request.[74] Category 2 is the bulk of the Program.

As discussed above, N/DPAs offer prosecutors the flexibility to craft punishments for corporate crimes that aim to curb corporate wrongdoing, while also maintaining the viability of commercial institutions in a fragile, post-2008 financial ecosystem. Because NPAs are generally seen as more favourable than DPAs, category 2 banks were offered to enter into NPAs as opposed to category 1 banks which, at best, were offered to enter into a DPA.

64. *Ibid.*
65. Financial institution for the purposes of this discussion are either (a) a custodial institution that holds "as a substantial portion of its business, financial assets for the account of others. An entity holds financial assets for the account of others as a substantial portion of its business if the entity's gross income attributable to the holding of financial assets and related financial services equals or exceeds 20 percent of the entity's gross income during the shorter of: (i) the three-year period that ends on the December 31 (or the final day of a non-calendar year accounting period) prior to the year in which the determination is being made; or (ii) the period during which the entity has been in existence" or (b) a depository institution that "accepts deposits in the ordinary course of banking or similar business." The FATCA Agreement.
66. *Ibid.*
67. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
68. The Joint Statement.
69. The Joint Statement.
70. According to www.ustaxprogram.com, Category 1 banks generally enter into a DPA.
71. In addition to the UBS and Wegelin cases. X, "United States winds up 'Swiss Bank Program'", *Swiss Info*, 30 December 2016, www.swissinfo.ch; see also N. Johannesen, T. B. M. Stolper, *The deterrence effect of whistleblowing – an event study of leaked customer information from banks in tax havens*, EPRU Working Paper Series, 2017, pp. 6-8; "Swiss Banks – Participation Details", www.ustaxprogram.com.
72. M.D. Lee, "DOJ Announces Final Resolutions Under Its Groundbreaking Swiss Bank Program As Program Enters "Legacy" Phase", *Tax Controversy Sentinel*, www.foxrothschild.com.
73. The Joint Statement.
74. *Ibid.*

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Structure of the revised model of NPA

Financial Sanctions

Swiss Banks who entered into NPAs under the Program were required to pay a fine, the amount of which was calculated based on a number of factors and which was also subject to certain mitigating factors that could reduce the amount payable.(75) The fines payable for U.S. Related Accounts were as follows:

- For U.S. Related Accounts that were already open and operational on August 1, 2008, the fine equalled an amount equal to 20% of the maximum aggregate dollar value of all such accounts during the period to which the Program applied;
- For U.S. Related Accounts that were opened and operational between August 1, 2008, and February 28, 2009, the fine equalled an amount equal to 30% of the maximum aggregate dollar value of all such accounts; and
- For U.S. Related Accounts that were opened after February 28, 2009, the fine equalled an amount equal to 50% of the maximum aggregate value of all such accounts, the idea being that as time passed, Swiss Banks had increasing notice of the criminal nature of their tax-evasion advisory services.(76)

The three foregoing timeframes related to events that supposedly raised the awareness of the Swiss banking sector on the investigations conducted by the DOJ on offshore tax evasion, namely the investigation of UBS and the conclusion of a DPA by the bank (see above).(77)

These fines were also subject to certain mitigating factors, as mentioned above, which could potentially lessen the amount of fines that were required under the terms of each Swiss Bank's particular NPA. U.S. Related Accounts that were subject to mitigation, i.e. accounts that were excluded from the penalty calculation included those accounts that were declared in a timely manner, accounts which were never undeclared, or accounts where the Swiss Bank in question advised the account holder to enter into an OVDP as discussed *supra*.(78)

Waiver of Rights

Entry into an NPA under the Program required the Swiss Banks in question to waive defences based on the expiration of the applicable statute of limitations. The notice of written intent also was required to include an acknowledgment on the part of the Swiss Bank in question that the statute of limitations had not run and that the issues were not time-barred.(79)

Cooperation and disclosure

A Swiss Bank's notice of written intent to apply for consideration in the Program had to include a plan for complying with the requirements of their particular NPA, including the engagement of an independent accountant/lawyer examiner and the provision of information regarding such an independent examiner and a statement of agreement to maintain all records for inspection. Additionally, before entry into an NPA, Swiss Banks had to disclose certain additional preliminary information, including, but not limited to, how the cross-border business for U.S. Related Accounts was structured, how the Swiss Bank attracted and serviced U.S. clients, and the total number and aggregate amount of U.S. Related Accounts.(80) This information collection process was time-consuming and expensive for the banks.(81)

Entry into an NPA under the Program required additional disclosures, among other steps as well. Upon entry into an NPA, a category 2 Swiss Bank was required to disclose information relating to U.S. Related Accounts that were closed during the period to which the Program applied. This information included identifying information for the holder of the U.S. Related Account, the aggregate value of the account, whether one or more individuals were the beneficial owners of the account, and, most importantly, information regarding where the funds were transferred to, including whether the money was withdrawn at once or in increments, whether it was withdrawn in cash and whether an intermediary was used. Category 2 Swiss Banks were required to engage independent examiners to verify the information provided to the U.S. authorities. The information disclosed by category 2 Swiss Banks was later compiled into so-called "Leavers Lists," which were compilations of the information of U.S. taxpayers who decided to close their accounts at implicated Swiss Banks in favour of transferring their funds to other foreign financial institutions or back into U.S. banks.(82)

75. The Joint Statement.
76. The Joint Statement.
77. X. Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency*, Cheltenham, Edward Elgar Publishing, 2015, pp. 206-207; M. J. Michaels, G. M. Clarke, M. P. Furrer, "The DOJ's Swiss Bank Program: Lessons Learned and the Road Ahead", *Practical Law*, August/September 2016, p. 52.
78. The Joint Statement. For more information on the mitigation process, see M. J. Michaels, G. M. Clarle, M. P. Furrer, *op. cit.*, p. 53.
79. The Joint Statement.
80. *Ibid.*
81. M. J. Michaels, G. M. Clarle, M. P. Furrer, *op. cit.*, p. 52.
82. The Joint Statement. It should be noted that while a substantial portion of funds may have gone back into U.S. banks or declared accounts, there still remains the possibility that some funds were transferred to banks which accepted clients who preferred to keep their U.S. Related Accounts undeclared. X, "'Leaver lists' will expose more Swiss banks to US dragnet", *Step*, 29 July 2013, www.step.org.

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These Leavers Lists put additional foreign financial institutions into the crosshairs of U.S. law enforcement authorities, which will be discussed *infra*.(83) Additionally, NPAs also contained clauses which required the Swiss Bank in question to agree to continued cooperation with U.S. law enforcement authorities and further disclosures.(84) The nature of these agreed upon further disclosures has been a topic of intense discussion: some individuals believe that the DOJ is entitled to disclosures could be unrelated to tax-related criminal investigations, including FCPA investigations,(85) while others can argue that, as a contract, the NPA should be interpreted only to require disclosures limited to the matters described in the NPA itself on its face. Finally, the Swiss Bank in question was required to agree to declare to the IRS the existence of any U.S. Related Accounts open after the date of entry into the NPA.(86)

Increased Compliance: Category 2 banks who entered into NPAs frequently agreed to implement procedures to detect and avoid future violations and agreed to endeavour to close the accounts of so-called "recalcitrant" holders of U.S. Related Accounts.(87)

Probationary Period: the typical NPA has a set probationary period after which, if the Tax Division concludes that the Swiss Bank has met all obligations set forth in the NP A, the Department will not prosecute the Swiss Bank for any tax-related offenses or for any unreported monetary transactions in connection with undeclared U.S. Related Accounts held by the Swiss Bank during the Applicable Period. NPAs in the Program had a set 4-year period wherein the bank in question was given the opportunity to implement the requirements of the NPA, after which the criminal proceedings are terminated.(88) Additionally, however, the banks must continue to cooperate to the investigations of the DOJ against other persons involved in those tax-related offenses.(89)

In case of "extraordinary culpability", the Tax Division reserved the right to require that the Swiss Bank enter a DPA instead of an NPA.(90) In practice, however, such a situation does not appear to have happened.

Considerations for Swiss Banks to Enter into an NPA

A Swiss Bank's decision regarding whether or not to enter into an NPA was the result of a cost-benefit analysis and an evaluation of each particular institution's risk appetite. The internal review of accounts, verification by the independent examiner and the calculation and announcement of a proposed penalty by the DOJ were all conducted *ex ante*, i.e. *before* a Swiss Bank was required to actually sign the NPA. As such, a bank always had the option to decline to sign the NPA at the end of the process and walk away from the Program. The limited resources of the DOJ was an additional factor in a bank's calculus; walking away from an NPA did not necessarily guarantee an indictment. However, Swiss Banks also needed to consider the fact that by participating in the Program even up to the point right before signing an NPA, they had already divulged significant amounts of information to the DOJ via their provision of independently verified account information.(91)

Additionally, even executed NPAs may be rejected or flipped into harsher DPAs upon the DOJ learning of further developments or in instances of non-cooperation in bad faith on the part of the Swiss Banks in question.(92) It may be argued that the DOJ has enjoyed broad discretion in determining whether a bank has met the requirements of their NPA. This latitude, coupled with steep penalties and strict compliance obligations, caused consternation within the Swiss Banks – which had entered the Program believing they would be afforded credit for voluntarily coming forward to work with the DOJ. Swiss Banks were essentially submitting themselves to continued monitoring from the DOJ in exchange for a conditional guarantee that the DOJ would not decide to flip their NPA into a more harsh DPA or a full-blown criminal prosecutions until the term of the NPA had run its course, all while the statute of limitations continued to tick for banks that had not decided to voluntarily enter the Program.

Many Swiss Banks expressed regret about entering the Program in the first place.(93) The implementation of the Program had been rapid and gave Swiss Banks a short time period to consider whether or not they should participate in the Program, what category to apply for, and how they would go about complying with the application requirements. The Swiss Banks in question had to identify themselves, announce their intent to participate in the Program, engage in costly internal review processes, engage expensive independent examiners to verify the information to be provided to the DOJ, and ultimately had to effectively pause the running of the statute of limitations. Banks additionally had to bear the costs of obtaining waivers from certain clients and defending themselves in Swiss legal proceedings brought by disgruntled clients or employees who accused the banks of violating Swiss privacy laws by releasing private information. Banks had witnessed the fall of Wegelin due to indictment and prosecution by the DOJ and included the possibility of shut down in their risk calculus. In hindsight, however, this fear

83. *Ibid.*
84. The Joint Statement.
85. *Ibid.*; see also J. Poling Interview.
86. The Joint Statement.
87. *Ibid.*
88. *Ibid.*
89. M. J. Michaels, G. M. Clarke, M. P. Furrer, *op. cit.*, p. 52.
90. *Ibid.*
91. J. Poling Interview.
92. The Joint Statement.
93. As many as 26 Swiss banks withdrew from the Program before its completion. M. J. Michaels, G. M. Clarke, *op. cit.*, p. 56.

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proved to be misplaced, as the DOJ has yet to indict a Swiss Bank that had dropped out of the Program after initially volunteering to come forward, even after the closure of category 2 of the Program, with the signing of the final NPA in January of 2016. Perhaps the risk calculus would have been different if banks had known that the DOJ would not ultimately prosecute banks who had exposure to liability and chose not to enter the Program.(94)

C. Category 3: Swiss Banks With an International Client-Base Eligible for NTLs

Category 3 banks are those Swiss Banks to which the DOJ has *not* authorized a "formal criminal investigation concerning its operation", and reasonably believes that it has *not* committed any tax-related offenses under U.S. law in connection with undeclared U.S. Related Accounts. As a result of such a classification, Category 3 banks may request an NTL from the DOJ as long as it had voluntarily submitted itself for consideration under the program before October 31, 2014 by written request in form and substance substantially similar to the written notice required from a category 2 bank. Prior to admission to the Program as a category 3 bank, each institution had to comply with various information reporting (such information is to be verified by an independent examiner) and agree that, upon execution of the NTL, any U.S. Related Accounts open after the date of entry into the NTL would be declared to the IRS. In other words, category 3 banks were those which "established, with the assistance of an independent internal investigation of their cross-border business, that they did not commit tax or monetary transaction-related offenses and have an effective compliance program in place".(95) Quite logically, category 3 banks were not required to pay a fine.(96)

In practice, only 4 banks and 1 bank cooperative qualified under category 3 and were therefore eligible for an NTL.(97)

An NTL is a letter from the Tax Division of the DOJ stating that, as of the date of the letter and based upon information known to the Tax Division as of that date, the addressee Swiss Bank is not the target of a criminal investigation authorized by the Tax Division for criminal liability related to tax-offenses under U.S. law related to U.S. Related Accounts held by the Swiss Bank in question.(98) Similar letters have been used by other U.S. government entities, such as the SEC and CFTC's "No-Action Letters", to express that no legal action will be taken by such a governmental agency. Unfortunately for category 3 banks, NTLs have been criticized as being nothing more than a "good housekeeping seal of approval"(99) as the DOJ may revoke an NTL upon receipt of additional information of possible wrongdoing or upon a determination that the Swiss Bank in question was not disclosing certain information in bad faith.(100) As a result of the revocation of an NTL, the Swiss Bank in question would have to re-apply under category 2 or face the risk of a full criminal prosecution. Still, NTLs have some limited utility; NTLs are an "indication based on present facts that the DOJ does not intend to pursue criminal charges" against the Swiss Bank in question.(101) Given the general "uncertainty in the marketplace" regarding the status of a Swiss Bank, including whether "questions" were being raised by "regulators and counterparts" in financial transactions, the NTL "tells those counterparties and regulators that the DOJ has concluded its review of the bank," allowing for some finality for the bank in question.(102) Supposedly, a law abiding banking client, when presented with the choice of doing business with a Swiss Bank with an NTL or one without one, would choose the Swiss Bank with the NTL in its back pocket, in an effort to manage the risk; by doing business with an NTL-holding Swiss Bank, the client can rest assured that it is doing business with a bank that is not under criminal investigation.

D. Category 4: Swiss Banks with a Local Client-Base Eligible for NTLs

Category 4 banks were those Swiss Banks to which the DOJ had *not* authorized a "formal criminal investigation concerning its operation", and that qualified as a "Deemed Compliant Financial Institution", as a "Financial Institution with a Local Client Base" under the IGA which implemented FATCA in Switzerland.(103) Foreign financial institutions that are deemed to comply with FATCA as a result of having a predominantly local Swiss client base had to prove, among other things, through an independent examiner, that their client base is comprised of 98% Swiss or EU nationals, that they do not solicit clients within the U.S., and the institution in question is located/incorporated in Switzerland under Swiss law and does not maintain a physical presence within then U.S.(104) Put otherwise,

94. J. Poling Interview.
95. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
96. The Joint Statement.
97. *Ibid.*
98. *Ibid.*
99. X., "Mark Matthews Comments on Value of DOJ's Non-Target Letters", 1 June 2016, www.taxnotes.com.
100. The Joint Satement.
101. J. Poling interview.
102. *Ibid.*
103. The Joint Statement.
104. The FATCA Agreement. Put otherwise, Category 4 banks were "those with a very limited exposure to US clients with less than 2% of their client base being

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those were the banks that were able to establish that they met certain criteria for deemed-compliance with FATCA.(105) Category 4 banks were eligible for an NTL in a similar manner to those granted to category 3 banks.

In practice, no Swiss bank ultimately qualified under category 4 of the Swiss Bank Program.(106) Sources have affirmed that about a dozen banks had initially applied to this category.(107)

III. Lessons learned from the Swiss Bank Program

On 29 December 2016, the DOJ announced that it had reached its final resolutions under the Swiss Bank Program: through completion of the examination of Category 3 and 4 banks. Chief Richard Weber of IRS Criminal Investigation (CI) stated that this phase of the Program "marks another milestone in the continued success of this valuable criminal compliance effort" and that "IRS-CI will continue to partner with DOJ in pursuing those who facilitate or engage in international income tax evasion". On her part, Former Principal Deputy Assistant Attorney General Caroline D. Ciraolo considered such completion to be "is a landmark achievement in the Department's ongoing efforts to combat offshore tax evasion", adding that the DOJ has entered into "the legacy phase of the Program, in which the participating banks are cooperating, and will continue to cooperate, in all related civil and criminal proceedings and investigations. The Tax Division, working closely with its colleagues throughout the Department and its partners within the Internal Revenue Service (IRS), will continue to hold financial institutions, professionals, and individual U.S. taxpayers accountable for their respective roles in concealing foreign accounts and assets, and evading U.S. tax obligations". Principal Deputy Associate Attorney General Bill Bear concluded: "(w)orking with the Swiss government, we have made financial institutions reform the way they do business".(108)

Initially, 106 Swiss banks submitted requests to be considered for NPAs under category 2,(109) meaning about a third of the Swiss banks.(110) However, by the end of the Program, only 80 Swiss Banks had entered into an NPA with the DOJ, with penalty amounts ranging from USD 0(111) to USD 211 million.(112) 4 banks and one bank cooperative became eligible for NTLs under the conditions of category 3; whereas no bank ultimately qualified under category 4 of the Program.(113) As the numbers indicate, approximately 20% of the participating category 2 banks either decided to re-classify as a category 3 bank or drop out of the Program entirely. The drop-out rate can be attributed to a variety of factors: first, many banks began an account review process as a result of the Program and came to the realization that they had no more reason to believe that they "may have committed tax related offenses" under the laws of the U.S. in connection with undeclared U.S. Related Accounts.(114) Second, some banks also realized that the estimated number of U.S. Related Accounts was much lower than had been previously anticipated, or that certain U.S. Related Accounts had been opened accidentally by people who were unaware of their U.S. citizenship.(115) Third, banks only had four months to consider whether they should apply to the Program; as a result, many banks decided to apply, and, upon further review of their internal records, decided that they had little to gain from being a party to the Program. Some banks also withdrew as a result of the changing requirements of the DOJ – who did not adhere to its initial framework but imposed additional conditions – and the perception of a bait-and-switch; or because of the inflexibility of the DOJ on the calculation of penalties.(116) Lastly, it must be recalled that many Swiss banks had decided at the outset not to participate to the Program.(117)

Ultimately, 80 Swiss Banks participated in the Program, which entailed entering into and ultimately performing their obligation through the conclusion of an NPA with the DOJ. The entry of 80 Swiss Banks into such agreements accounted for a dramatic rise in the number of NPAs entered into during the years covered by the Program – at a time where the mechanism was already under controversy for being considered by many as too lenient:(118) in 2015 alone, 102 N/DPAs

non-local". X, "United States winds up 'Swiss Bank Program'", *op. cit.*

105. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
106. *Ibid.*
107. G. Broom, "Swiss Banks Entering U.S. Client Disclosure Program", *Swiss Info*, 15 October 2014, www.swissinfo.ch.
108. *Ibid.*
109. M. J. Michaels, G. M. Clarke, M. P. Furrer, *op. cit.*, p. 52.
110. G. Broom, "Swiss Banks Entering U.S. Client Disclosure Program".
111. One Swiss bank was imposed no penalty as part of the NPA.
112. DOJ, "Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG", 27 January 2016, www.justice.gov; see also F. J. Warin *et al.*, *2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, 6 July 2016, www.gibsondunn.com;
113. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
114. J. Poling interview.
115. *Ibid.*
116. M. J. Michaels, G. M. Clarle, M. P. Furrer, *op. cit.*, pp. 56-57.
117. 36 banks according to estimates. US Tax Program, "Swiss Banks – Participation Details", www.ustaxprogram.com.
118. See M. Fernandez-Bertier, *op. cit.*

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were executed (roughly 75 of them being NPAs related to the Program). This is in contrast to the average year, which saw around 30 settlements per year during the last decade.(119) As a result of the closure of category 2 of the Program, over USD 1.36 billion were recovered in penalties and fines.(120)

Overall, the Program has received mixed reviews. Some have affirmed that it was an "unqualified success" and that "(n)ever before had the [DOJ] offered what is essentially a tax evasion "amnesty" to an entire country's financial industry".(121) However, many Swiss Banks felt slighted by their treatment by the DOJ; by coming forward voluntarily, many banks expected more lenient treatment on behalf of the DOJ, which was hardly the case. The "one-size-fits all approach"(122) of the DOJ, implementing NPAs with penalty calculations based on arbitrary numbers set by the DOJ, failed to grasp the differing levels of guilt attributable to the different banks; e.g. if a Swiss Bank had clients who had lied to their bankers, that bank would face treatment substantially similar to a bank where the bankers had explicitly aided their clients in avoiding U.S. tax liabilities.

DOJ officials have expressed similar levels of disappointment and fatigue with regards to the Program, the sentiment being that much political capital was exhausted by implementing the Program.(123) Many prosecutors and other DOJ personnel had dedicated substantial amounts of time to the implementation of the Program. The Program's implementation also required assistance from other departments within the DOJ and IRS, potentially at some sort of opportunity cost to other IRS/DOJ endeavours. Relatedly, in an era where banks are given fines that are the equivalent of a slap on the wrist, many Americans feel that the penalties are too lenient;(124) Swiss banks that facilitated offshore tax crime ultimately supported fairly light consequences for their actions.(125)

Additionally, the Leavers Lists discussed above offer the DOJ new opportunities to follow tax evaders to their next destinations, with various countries on the short list for similar programs, including but not limited to, the British Virgin Islands, the Cayman Islands, the Channel Islands, Guernsey, Hong Kong, Israel, Liechtenstein, Luxembourg, Panama and Singapore:(126) "no jurisdiction is off limits".(127) It remains however to be seen whether the DOJ will actually decide to renew the experience. According to Former Acting Assistant Attorney General Ciraolo, "(t)he Tax Division understands that some foreign financial institutions would like to see a formal program established for entities that engaged in criminal conduct and are located in countries other than Switzerland".(128) With that in mind, IRS Large Business & International Division (LB&I) Commissioner Douglas O'Donnell recently reaffirmed that "(o)ffshore compliance remains an important area of tax administration": "we are evaluating incoming information to detect accountholders who have evaded reporting overseas assets and income, and we are using this information to further untangle the web of financial institutions and intermediaries helping with this evasion. We have expanded our investigations to other regions of the world, and we will continue to apply these techniques to help protect honest taxpayers".(129)

Conclusion

Perhaps the Program can serve as a model for similar programs in the future, which can refine the process to avoid many of the pitfalls of this Swiss bank program.(130) It should be noted, however, that these programs rely, in no small part, on the willingness of the partner country to engage with the DOJ in a collaborative process;(131) this may speak to the blatant asymmetry in power between the U.S. government and the government of Switzerland. Essentially, the Program was made possible by the unequal balance of power between the U.S. and Switzerland and Swiss banks had a simple choice: enter the Program or support the (the-

119. F. J. Warin *et al.*, *2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, *op. cit.*; 2016 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), 4 January 2017.
120. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
121. M.D. Lee, *op. cit.*
122. M. J. Michaels, G. M. Clarle, M. P. Furrer, *op. cit.*, p. 53.
123. J. Poling interview.
124. *Ibid.*
125. S.-Y. Oei, *op. cit.*, p. 51.
126. J. H. Temkin, "DOJ Tax Division Today: Interview With Acting Assistant Attorney General", *N.Y.L.J.*, Vol. 255, No. 55, 2016; J. Poling interview.
127. DOJ, "Acting Assistant Attorney General Caroline D. Ciraolo Delivers Remarks at the Federal Bar Association Tax Law Conference", 4 March 2016, www.usdoj.gov.
128. J. H. Temkin, *op. cit.*
129. DOJ, "Justice Department Reaches Final Resolutions Under Swiss Bank Program", *op. cit.*
130. See, e.g., DOJ, "Principal Deputy Assistant Attorney General Caroline D. Ciraolo Delivers Remarks Regarding the Tax Division's Offshore Tax Enforcement Efforts at the Panama Bankers Association Anti-Money-Laundering Conference", 17 August 2016, www.justice.gov.
131. In fact, Switzerland is gradually moving towards opening up its bank account records to outside countries, as evidenced by a tax transparency agreement between Switzerland and the European Union (but with regards to accounts held EU residents). European Commission – Press Release, "Fighting tax evasion: EU and Switzerland sign historic tax transparency agreement", 27 May 2015, www.europa.eu.

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oretical?) risk of being cut off from doing business in the U.S.

The NPA itself, however, offers a novel mechanism for continental jurisprudence and law enforcement agencies to deal with corporate criminal wrongdoing. With the precedent set by the Program, NPAs can be refined and reworked to offer true solutions to the rampant problems of corporate greed and wrongdoing. Its contractual nature offers extreme flexibility on the part of the law enforcement agency (*supra*, I), and should, in the future, be utilized to craft fact-specific remedies for each individual party to the agreement. The NTL, on the other hand, remains problematic: NTLs do not offer immunity nor do they guarantee non-action on the part of the governmental authority in the future. As such, the cost of obtaining an NTL might outweigh the benefits of having one in hand.

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