Eidgenössische Finanzmarktaufsicht FINMA
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Swiss Financial Market Supervisory Authority FINMA

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FINMA investigation into business conducted by Credit Suisse with US clients

Summary report

Laupenstrasse 27, 3003 Bern
Phone +41 (0)31 327 91 00, Fax +41 (0)31 327 91 01
www.finma.ch

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Summary

*This summary report prepared by the Swiss Financial Market Supervisory Authority FINMA outlines the background and findings of the proceedings conducted **against Credit Suisse between 2011 and 2012. These proceedings concluded with the issuing of a decree.***

On 21 February 2011, and thus prior to the indictment of four current or former Credit Suisse employees at the United States District Court for the Eastern District of Virginia, FINMA ordered Credit Suisse to conduct an investigation into the risks emanating from business conducted with US private clients

The investigation pointed to regulatory breaches. Therefore, in November 2011, FINMA instituted enforcement proceedings against Credit Suisse, with a particular focus on the following subjects:

- *The development of Credit Suisse's cross-border business with US clients since 2000;*
- *Credit Suisse's policies in relation to the US client business since 2000;*
- *US client relationships, in particular with structures, including the question whether the corporate governance of the structures was respected;*
- *Measures taken by Credit Suisse after 2008 to identify and limit the risks established during the investigation.*

FINMA formally concluded the enforcement proceedings instituted against Credit Suisse with a decree issued on 21 September 2012. FINMA reprimanded Credit Suisse for severe violation of governance and proper business conduct requirements. Credit Suisse had violated its duty to identify, limit and monitor risks relating to its US business. Thus, Credit Suisse had exposed itself and its employees to inappropriate legal and reputational risks in the US and thus violated the requirement to assure proper business conduct (Article 3 para. 2 let. c Banking Act and Article 3f Banking Act; for the assurance of proper business conduct, see FINMA Bulletin 1/2010, p. 180 f.).

FINMA ordered Credit Suisse to terminate the business with US clients whose tax situation was not transparent and to establish a risk management and risk control system suitable to appropriately identify, limit and monitor legal and reputational risks inherent in the entire cross-border financial services business that would also be conducive to a good compliance culture.

Credit Suisse has implemented the measures ordered by FINMA. Independent third parties reviewed the implementation process. The independent audit firm reviewing Credit Suisse's exit from the business with non-tax transparent US clients concluded that the processes put in place by Credit Suisse were suitable to ensure that clients identified by Credit Suisse as non-tax compliant would be exited. The independent examiner who conducted a critical assessment of the risk management and risk control system implemented by Credit Suisse deemed it to be appropriate.

On 21 February 2014, Credit Suisse announced a settlement with the US Securities and Exchange Commission (SEC). Today, Credit Suisse has announced agreements with the US Department of

Justice (DoJ), the Board of Governors of the Federal Reserve System (Fed Board) and the New York State Department of Financial Services (NYDFS) regarding the same matter. As part of the agreement with the DoJ, Credit Suisse has agreed to plead guilty to conspiracy to aid and assist US taxpayers in filing false returns and to accept a fine amounting to USD 1.804bn. The agreement with the DoJ puts an end to its long-lasting criminal investigation. Regarding its business with US clients, Credit Suisse has now reached a resolution with five important authorities. In total, Credit Suisse will pay a fine amounting to USD 2.815bn to US authorities.

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1 Swiss banks in the focus of US authorities

For several years, the issue of client relations with US persons booked in Switzerland has been the subject of inquiries conducted not only by FINMA, but also by the US Department of Justice (DoJ), the US Internal Revenue Service (IRS), the US Securities and Exchange Commission (SEC) and a US Senate investigation committee, with a particular focus on tax issues. Since 2009, several disclosure programs have been launched in the US, in which to date over 40,000 US taxpayers with untaxed offshore assets have participated.

On 17 July 2008, UBS AG publicly announced its withdrawal from the offshore business with clients domiciled in the US. In 2008, the Swiss Federal Banking Commission (SFBC) conducted an investigation into UBS AG's cross-border business with US clients, the results of which were published by FINMA, the SFBC's successor authority, on 18 February 2009.[1] In 2009 and 2010, initially some 250 client files were handed over to the US authorities, followed by approx. 4,450 UBS AG client files based on an agreement between Switzerland and the US that had been approved by the Swiss parliament.

From 2011 to 2013, the DoJ instituted criminal investigations against a number of other banks (including Credit Suisse) and indicted numerous bank clients, bank employees (including Credit Suisse employees), independent asset managers and lawyers.

On 29 August 2013, the DoJ launched a program to settle the Swiss banks' tax dispute with the US ("*Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" – US Program).* The US Program lays out the conditions under which Swiss banks that are not the target of a criminal tax matter investigation in the US can resolve their status with the responsible authorities. On the same day, the Swiss Federal Department of Finance and the DoJ published a joint statement on the US Program which allows Swiss banks to solve the tax dispute with the US ("*Joint Statement between the U.S. Department of Justice and the Swiss Federal Department of Finance")*.

Given that Credit Suisse was already the target of a DoJ criminal investigation when the US Program was published, Credit Suisse could not participate in that program.

[1] Summary report "EBK investigation of the cross-border business of UBS AG with its private clients in the USA" of 18 February 2009.

2 Business conducted with US private clients: current and pending regulations

2.1 *Qualified Intermediary Agreement*[2]

The US levies, *inter alia,* a 30% withholding tax on interest and dividends deriving from US securities that are payable to a person who is not a US resident (*non-resident alien* - NRA). The responsibility for levying and delivering this tax lies with the *US Withholding Agent*. Investors domiciled in a country that has concluded a double taxation treaty (DTT) with the US are entitled to full or partial exemption from this withholding tax (*NRA Withholding Tax).* As a rule, no withholding tax is levied on payments credited to a US person. Instead, taxation of these proceeds is ensured through a reporting procedure vis-à-vis the IRS.

In 2001, the IRS established the *Qualified Intermediary* System (QI system) so that all income from US sources, in particular from US securities, would be captured in a correct fiscal manner. The QI system assigns certain duties of the *US Withholding Agent* to a foreign financial institution known as the *Qualified Intermediary* (QI). In order to do so, financial institutions have to conclude a so-called *Qualified Intermediary Agreement* (QIA) with the IRS, assuming extensive documentation, reporting and withholding obligations. A key element is the classification of clients into US and non-US persons or NRA's, respectively. For offshore structures (mostly domiciliary companies such as foundations), the situation is special. In principle, these are admissible, but under US tax law such structures must not be a mere *sham* or a *mere conduit structure*.

2.2 Conspiracy to defraud the United States - the IRS *Aiding and Abetting provision*

The DoJ has indicted employees of Swiss banks, including Credit Suisse, in several cases, on "*conspiracy to defraud the United States* (*for the purpose of impeding, impairing, obstructing, and defeating the lawful government functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment, and collection of revenue: to wit, U.S. income taxes, in violation of Title 18, United States Code, Section 371*, so-called "Klein Conspiracy")". Under US criminal law, a "*conspiracy*" is defined as an agreement between two or more persons to engage jointly in an unlawful or criminal act, which must have manifested in an overt act. Under US criminal law, a "*conspirator*" can be a natural person or a legal entity.[3] Under certain conditions, a natural person's misconduct can be attributed to a legal entity.

Under US criminal law, *aiding and abetting* to perpetrate tax offences is an offence. Whoever aids and abets the commitment of an offence or causes the perpetration of an offence can be liable to prosecution. Where inaccurate tax returns are submitted by US taxpayers, the government does not have to

[2] More detailed information on the *Qualified Intermediary Agreement*, SEC restrictions and the *Deemed Sales Rules* can be found in the Summary report "EBK investigation of the cross-border business of UBS AG with its private clients in the USA" of 18 February 2009.

[3] See the indictment of 2 February 2012 United States of America v. Wegelin & Co., Michael Berlinka, Urs Frei, and Roger Keller.

prove that a taxpayer has submitted an inaccurate tax return in bad faith when prosecuting for aiding and abetting under the IRS *Aiding and Abetting* provision (see United States Code Title 26, para. 7206(2)).

2.3 SEC restrictions and the *Deemed Sales Rules* of US tax law

Various US laws (including the Securities Act of 1934, the Securities and Exchange Act of 1934 and the Investment Advisers Act of 1940) and regulations provide the framework for cross-border financial services into the US. The SEC is responsible for enforcing these provisions. A foreign entity is subject to the relevant US decrees if it provides certain services to persons in the US through so-called *US Jurisdictional Means*. Such *US Jurisdictional Means* include, *inter alia,* all communications from abroad to the US (e.g. by e-mail, phone or letter). As a rule, it is necessary to have a license issued by the SEC to operate as a broker or dealer and to provide investment advice in the US..

The restrictions under the US Treasury rules, the so-called "*Deemed Sales Rules*", largely parallel those of the SEC. The *Deemed Sales Rules* provide that selling securities outside the US is treated as if it had taken place in the US if there are certain connections to the US. Such transactions entail certain duties. A connection to the US exists where a client has opened an account at a broker's office in the US or has sent instructions from the US by e-mail, phone or letter (excluded are instructions sent "*in isolated and infrequent circumstances*"), or where the proceeds from a transaction are transferred to the client to an account in the US.

2.4 Legal situation in Switzerland

Under current Swiss law, accepting untaxed assets, as well as aiding and abetting acts that could have an adverse effect on another country's treasury are generally not criminal – unless punishable offences (e.g. forgery of documents) have been committed at the same time. Article 8 of the Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 08) only sets out that banks must not abet actions of their contractual partners to deceive domestic and/or foreign authorities (especially tax authorities) by providing incomplete or misleading certifications.

In February 2013, the Swiss Federal Council launched a consultation process on the so-called "'white money strategy" (enhanced due diligence requirements to prevent the acceptance of untaxed assets). In late November 2013, the Federal Council announced its assessment that an internationally recognized standard on the automatic exchange of information (AEI) would exist in the foreseeable future and that enhanced due diligence requirements should be coordinated with the AEI implementation.

The Swiss Financial Market Supervision Act (FINMASA) does not directly and explicitly establish an obligation of the regulated institutions to comply with foreign provisions, e.g. either supervisory or tax law. But FINMA set out, *inter alia* in its position paper on legal risks published in October 2010[4] that under certain circumstances breaches of foreign rules can also constitute a violation of Swiss supervisory law, in particular, the requirement to assure that proper business conduct. In addition, supervisory

[4] FINMA position paper on Legal and reputational risks in cross-border financial services published on 22 October 2010.

provisions require banks to identify, limit and monitor all risks appropriately, including legal and reputational risks. In recent years, in the course of its supervisory activities, FINMA closely looked into how Swiss banks deal with risks involved in aiding and abetting foreign clients with tax offenses. In this context, FINMA conducted numerous other enforcement proceedings, in addition to those it instituted against Credit Suisse.

3 The Credit Suisse case

3.1 FINMA generally advises of the difficult-to-control legal and reputational risks in connection with the US business

Since the UBS case, in the course of its ongoing supervision, FINMA has on numerous occasions advised the institutions under its supervision of the risks emanating from providing cross-border financial services. FINMA underlined that in particular the business with US private clients can involve risks that are difficult to control.

Neither in 2008 nor now did or does FINMA have a legal basis allowing it to enforce a comprehensive ban on business with untaxed client assets at the institutions under its supervision: Accepting untaxed assets was and still is generally not a criminal offense in Switzerland. Against this backdrop, FINMA can only conduct an investigation and initiate measures against a financial institution if there are indications of relevant violations of obligations under Swiss supervisory law, i.e. indications of inadequate management of legal and reputational risks from the cross-border financial services business.

3.2 FINMA instructs Credit Suisse to examine its US business

Following first indications of an elevated risk exposure of Credit Suisse in the US, in mid-January 2011 FINMA initiated a comprehensive investigation into the risks Credit Suisse had entered into with regard to its US business.

On 23 February 2011, four current or former Credit Suisse employees were indicted in the United States District Court for the Eastern District of Virginia on charges of conspiracy to defraud the United States.

On 15 July 2011, Credit Suisse publicly announced that since 14 July 2011 it had been the subject of a formal investigation conducted by the DoJ.

Following the indictment at the United States District Court for the Eastern District of Virginia of four further current or former Credit Suisse employees on 21 July 2011, and in view of the former employees' positions within the Credit Suisse Group, FINMA requested the extension of the investigation to other group companies.

To guarantee the independence of the investigation, FINMA instructed Credit Suisse to mandate an impartial law firm or audit firm with experience in the subject matter to conduct the investigation. In consultation with FINMA, Credit Suisse engaged a well-respected Swiss law firm to lead the investigation. The investigation was carried out in close collaboration with a US law firm and an audit firm. The investigation period covered the years 2000 to 2011.

3.3 FINMA institutes proceedings against Credit Suisse

The findings of the investigation indicated that Credit Suisse's risk management was inadequate under Swiss supervisory law. Therefore, FINMA instituted enforcement proceedings against Credit Suisse in November 2011. In particular, these proceedings focused on the following topics:

- The development of Credit Suisse's cross-border business with US clients since 2000;
- Business policies in relation to the US client business since 2000;
- US client relationships, in particular with structures,[5] including the question whether the corporate governance of the structures was respected;
- Measures taken by Credit Suisse after 2008 to identify, limit and monitor the risks established during the investigation.

FINMA's investigation was based on the analysis and findings of the investigation conducted by the law firm (see 3.2). The investigation involved reviewing documents from over 95 relevant persons, analyzing about 6.5 million electronic messages, conducting interviews with 65 persons (including all but two of the current or former employees indicted in the US), as well as reviewing 2,000 client files.

3.4 Findings of the FINMA proceedings

3.4.1 Credit Suisse entered into unduly high risks

The subject of the proceedings was the question whether Credit Suisse and its group companies had assumed legal and reputational risks in relation to the private client business with US persons that, from a Swiss supervisory perspective, were irresponsible, thus violating supervisory law. The findings showed that Credit Suisse violated the requirement to assure proper business conduct:

- **Lack of risk awareness with regard to untaxed assets until 2008**: In 2008, following the UBS case, Credit Suisse began specifically to look into the tax status of its US clients. Until then, Credit Suisse had considered tax compliance towards the tax authorities the US clients' responsibility, and had believed that accepting assets that were possibly untaxed was not Credit Suisse's problem or that it posed any risks.

- **Failed adaptation of the business model to the supervisory SEC restrictions**: Until 2002, Credit Suisse focused on finding a model that would allow continuation of the cross-border business with US clients in accordance with the SEC regulations. The strategy eventually pursued by Credit Suisse was to set up a subsidiary registered with the SEC as a "broker dealer" and "in-

[5] Structures are, for instance, domiciliary companies such as foundations.

vestment advisor", and to centralize the US business at a US country desk SALN (US country desk). The goal was to centralize all existing and new US clients at this desk. Going forward, only services that, according to SEC regulations, were permissible without a license were to be provided to clients domiciled in the US. However, both projects were not implemented forcefully enough:

- The concentration of US clients was not achieved. After closure of the concentration project at the end of February 2003, 46% of the assets of US clients were still serviced outside the US country desk due to the fact that the planned centralization was not pursued with the required determination. One contributing factor was that the client advisors' personal targets were not adjusted. The client advisors were not given any incentives to push ahead with the originally planned concentration. Moreover, exemptions were generously granted. As a result, for 46% of the US client assets, Credit Suisse continued to take the risk to provide services in the US or across the border into the US that required a license without having the appropriate SEC licenses. Furthermore, those clients were serviced by advisors who, contrary to the client advisors at the US country desk, were not specialized in serving US clients.
- In 2002, Credit Suisse's SEC registered subsidiary commenced business. Initially, Credit Suisse allowed its clients to decide whether they wanted to be served by Credit Suisse itself or by the SEC-registered subsidiary. Only when, at the end of 2006, the "W-9" project was launched, forcing clients domiciled in the US who had submitted a signed W-9 form to be transferred to the SEC-registered subsidiary did a substantial number of transfers occur. Subsequently, instead of the planned transfers of CHF 2.570 million in managed assets, only CHF 80 million was transferred when the SEC Credit Suisse registered subsidiary started business in 2002.

Only after the Permanent Subcommittee on Investigations (PSI) had published the report "*Tax Haven Banks and US Tax Compliance*" on 17 July 2008 did Credit Suisse decide that its business with all US domiciled clients would from then on be carried out solely by SEC-registered subsidiaries and requested existing US clients to provide evidence of tax compliance. Those US clients who could not provide requested evidence of tax compliance were exited.

- **Serious misconduct of US country desk SALN employees**: Approximately 15 client advisors worked at the US country desk. Many desk employees, especially their manager and both team heads, undertook client-related trips to the US. From 2001 to 2008, the US country desk employees undertook a total of 107 client-related business trips. The average trip duration was ten days, and on each trip, they met with 30 to 40 clients.

  Targets for the US country desk were also set by the superior of the head of the US country desk. Amongst others, he launched an initiative "Reconquista" for the year 2004, with which former wealthy clients were to be won back.

  Up until December 2006, there were no specific rules for the US country desk client advisors on how to conduct themselves when traveling.

  Through their targets, the responsible person at the US country desk created incentives for the client advisors, particularly in the years through to 2006, which created a conflict of interests with the Credit Suisse's directive on US persons. Business trips undertaken by the US country desk employees to the US were only to be approved if acquisition efforts were planned. The client advisors were given specific performance targets for their trips and were advised to meet at least one potential new client per travel day. The successes in acquiring new clients ("success stories") had to be mentioned explicitly in the travel report form.

Only from December 2006 onwards was it prohibited to travel in order to meet potential new clients. From that time onwards, it was only allowed to travel to the US to foster social contacts (“socializing”). Prior to that client advisors had mostly claimed to be on vacation trips when entering the US.

The persons responsible for the US country desk and certain client advisors undertook efforts to disguise the business activities of the US country desk as conforming to the directive. They covered up misconduct vis-à-vis bank-internal control activities and upper management. The US country desk manager, for instance, had travel reports changed before submission to the Internal Audit function, by altering or deleting problematic parts (such as the section "success stories"). Further, Internal Audit expressed suspicion that client advisors were providing advisory services in the US in violation of the directive, based on a correlation between the timing of trips and securities orders. The superiors thus encouraged the client advisors to enter non-compliant securities transactions in the internal banking system only four to five weeks after the business trip.

- **Violations of US supervisory law by the New York Representative Office (NY RO):** The NY RO generally employed two persons and was supposed to serve as an intermediary between the clients in the US and the booking center in Switzerland. The NY RO was opened in New York in April 1999 and closed in the year 2009. Its function was to assist with opening client relationships and handling administrative questions. This was in line with the Statement of Scope of Activities authorized by the responsible US authorities. The NY RO was not authorized to accept deposits, promote securities transactions or provide investment advice.

  The approved Statement of Scope of Activities of 1999 set out in particular: *"The Rep. Office solicits private banking business on behalf of Credit Suisse. The rep may solicit new business and call on potential and existing clients, but he must be careful to accurately describe his role as the client liaison […]. If asked by the client, the rep may describe and explain the services offered by the bank. Under no circumstances is the rep to provide investment advice to U.S. residents or to solicit any securities transactions"*.

  The findings of the investigation suggest that in isolated cases, activities were conducted that were not permitted under US law. For example, in singular cases, the NY RO forwarded securities transaction orders to Switzerland. Furthermore, it could not be ruled out in the course of the investigation that the head of the NY RO had provided unauthorized investment advice in individual client discussions.

- **Cooperation with providers of offshore structures, tolerating sham entities**: The Credit Suisse Group included two group companies specialized in forming, managing and maintaining investment structures such as trusts and foundations. Almost all clients with structures had an account relationship with Credit Suisse or a group company.

  In the early 1990s, one of the aforementioned trust companies decided to part from certain problematic mandates, including trust structures of US persons that were not tax compliant. To do so, it chose to outsource those clients with structures: in 1997, the trust company concluded an agreement with a fiduciary (now indicted in the US). This fiduciary offered the formation and management of offshore structures and had been an employee at that trust company until shortly before that time. Based on this agreement, 175 structured clients, many of whom had a link to the US, were transferred to the fiduciary. But under the agreement, the fiduciary had to seek to maintain bank account relationships with Credit Suisse. Banking services for outsourced clients with structures thus still continued to be provided by Credit Suisse. Moreover, Credit Suisse continued directly to take instructions from the beneficial owners of the structures.

Clients who wanted a structure without providing a certification of legal compliance from a US lawyer were not rejected. Rather, they were referred to external providers such as the referenced fiduciary who has in the meantime been indicted in the US. In addition, from 2005 to October 2008, Credit Suisse had referral contracts with the aforementioned fiduciary, as well as another fiduciary (also indicted in the US), according to which Credit Suisse received referral fees for referred clients. Credit Suisse's client advisors introduced their clients to the aforementioned fiduciaries and travelled to the US with them to meet clients.

The use of domiciliary companies and other structures is not illegitimate per se. However, they can only be recognized under tax law if they in fact act as independent legal entities and the corporate governance of the structure is adhered to. In Credit Suisse's case, the structures' governance was sometimes inadequately observed, for instance when credit cards and general powers of attorney were issued to the US beneficial owner, when no formal decisions by the governing body were available for the disposition of company assets, and when payments to US beneficial owners were made without a plausible legal basis.

Structures that are mere ‚sham entities' must not sign IRS forms for non-see-through structures and thus declare that they themselves are the beneficial owners of the assets if this is not the truth. In such cases, underlying beneficial owners must submit a signed IRS form according to their US tax status, thus, disclosing to the IRS that they are the beneficial owners of the assets. Especially in cases where Credit Suisse was aware of acts of deception, it should not have accepted a declaration from the person acting for the structure according to which only the structure was the beneficial owner of the assets.

- **Avoiding US reporting requirements:** It also happened that payments and checks for US clients were split so that they would not fall under the US disclosure requirements applicable to amounts of USD 10,000 or more. In some cases, there were standing orders for transfers below USD 10,000. There are indications that such splitting was sometimes specifically recommended by Credit Suisse's client advisors.

- **Cash transactions in the US:** In a particular case that occurred in 2001, a Credit Suisse employee now indicted in the US travelled to the US and handed over USD 19,000 in cash to a US client, which he had received from another US client for deposit into that person's account in Switzerland. The investigation did not find any indications of further cash transactions.

- **Using Travel Cash Cards:** Another means to potentially avoid disclosure of money flows from the US authorities was the use of Travel Cash Cards (TCC). While the use of TCCs had been prohibited within Credit Suisse since 2007, they were still in use in one of its group companies through 2011.

- **Encouraging withdrawals from a related party's account:** Particular client advisors encouraged their US clients to withdraw money via a related person's account.

3.4.2 Credit Suisse violated governance and business conduct requirements; no indications of senior management knowledge of specific misconduct

In its decree, FINMA concluded that Credit Suisse, through these shortcomings and mistakes, violated Swiss supervisory laws, by insufficiently identifying, monitoring and limiting the legal risks involved in the cross-border private client business with US persons. Credit Suisse also violated the requirement to assure proper business conduct. The line managers, in particular of the US country desk, did not discharge their responsibility. Support and control functions did not pick up on or pass on warning signs which was detrimental to effective supervision. However, FINMA did not find indications that Credit Suisse's senior management had known of specific misconduct.

From the perspective of Swiss supervisory law, the management and control of cross-border financial services must be assessed under the requirement for assuring proper business conduct and governance under banking law, and, deriving from that, the requirement for appropriate risk management. A bank must be capable of identifying, limiting and monitoring operational and legal risks (see Article 3 para. 2 let. a Banking Act), including legal and reputational risks in the context of cross-border financial services. The requirement to have an adequate organization also applies to the financial group as a whole (see Article 3f para 2 Banking Act). Good group-wide risk management requires appropriate identification, measuring, monitoring and limiting of the risks relevant to the group. With regard to the Credit Suisse Group, FINMA discovered considerable shortcomings in identifying, limiting and monitoring the risks involved in conducting US business and consequently inadequate risk management:

- **Shortcomings in risk identification:** Banks offering cross-border financial services must regularly analyze the applicable foreign law and identify the inherent risks appropriately. Only from 2008 onwards did Credit Suisse consistently identify the risks of becoming involved in aiding and abetting US tax offenses. Particularly with regard to relationships with structures, the respective risks under the QIA and issues related to aiding and abetting had partly been underestimated, or the risk analysis was not adapted to the rapidly changing and increasingly tighter environment. As a result, the bank entered into unduly high risks in this area.
- **Shortcomings in risk limitation:** Supervisory law provisions require banks to adopt suitable measures to eliminate or limit identified risks. In doing so, the risk situation must be evaluated continually and the measures taken must be adapted to the changed circumstances on an ongoing basis. Various measures to limit risks were introduced for relationships with structures and regarding the SEC restrictions (from the years 2001/2002 onwards). The measures taken, however, largely failed to be effective because they were implemented only partly and hesitantly, and because the risks involved in violating the QIA and potential aiding and abetting were apparently underestimated. For example, despite the exit of relationships with structures considered to be problematic, close cooperation with external providers who serviced clients with such structures continued. Furthermore, US clients were referred to such external providers. Credit Suisse also demonstrated a lack of risk awareness by offering certain services such as splitting up payments, as well as encouraging withdrawals through a related person's account.

In particular, the measures introduced in the context of the SEC restrictions largely failed. Centralizing US clients at the US country desk set up especially to service them did not result in the desired risk limitation. Client advisors were given no incentive to pass on their US clients to this new desk. Additionally, exemptions were generously granted so that client advisors and their clients could be retained. Over the years, the US country desk gained its own momentum: Credit Suisse's directives on dealing with US persons were regularly violated and those violations were subsequently actively hidden. With the assistance of the US country desk's management, documents were falsified to mislead the Internal Audit function. Reaching financial targets was deemed more important than adherence to the directives. This meant that for a long time, client advisors were under the impression that it was more important to reach the financial targets than to implement or comply with the measures to limit risks.

- **Shortcomings in risk monitoring:** Banks must control compliance with bank internal directives and punish violations through an effective sanctions regime. Responsibility for ensuring compliance with the rules for conducting business with US clients was primarily with line management. Especially the US country desk superiors did not discharge their responsibilities. Control functions mainly limited themselves to formal checks (documentation). Effective compliance controls were not, or only partly, carried out.
- **Serious violation of the proper business conduct requirement:** *Inter alia* owing to the breaches of duty outlined above with regard to identifying, limiting and monitoring the risks involved in the US business, Credit Suisse and/or the Credit Suisse Group exposed itself and its employees to unduly high legal and reputational risks in the US. In doing so, Credit Suisse violated the requirement to assure proper business conduct under Swiss supervisory law. Contrary to the wording of Article 3 para. 2 let c and Article 3*f* para. 1 of the Banking Act, this requirement must not only be respected by the bank's employees, but also by the bank itself or the financial group, acting through its governing body (so-called institutional assurance, see FINMA Bulletin 1/2010, p. 108 f.). In the meantime, these risks had materialized for the Credit Suisse Group and some of its employees.

3.4.3 Measures already taken by Credit Suisse

When assessing Credit Suisse's misconduct under supervisory law, FINMA took into consideration that Credit Suisse had heavily adapted its processes for conducting business with US private clients since 2008. The following steps are noteworthy:

- On 28 July 2008, Credit Suisse issued a "*policy alert*" under which new relationships with former UBS AG and LGT AG clients could only be accepted if the clients submitted a signed W-9 form and disclosed themselves to the IRS.
- Also in 2008, Credit Suisse decided to allow only SEC-registered entities to continue business with US clients domiciled in the US. Credit Suisse therefore requested clients domiciled in the US to provide evidence of compliance with US tax laws. Beyond that, Credit Suisse also requested non-operating legal entities with a US beneficial owner to prove compliance with US tax laws.
- From 2008 onwards, Credit Suisse undertook measures to enhance compliance and risk management. *Inter alia*, Credit Suisse introduced measures to prevent a structure's beneficial owner

from directly giving orders regarding the structure's assets. Unauthorized payments were identified and sanctions imposed for violating the respective bank internal directives.

- Furthermore, in the spring of 2012, Credit Suisse adapted its *Compensation Policy*. From then on, the achievement of an employee's targets no longer depended so strongly on purely financial aspects. Besides, Compliance and Internal Audit also check performance targets to establish whether these targets and the activities required to attain the targets are in line with the bank's internal directives.
- Those responsible for the US country desk SALN were discharged of their duties in 2011. Some of the other employees indicted in the US had already left Credit Suisse long before their indictment in the US.

3.5 FINMA orders measures to restore orderly state

In a decree dated 21 September 2012, FINMA reprimanded Credit Suisse for serious violation of governance and business conduct requirements, thus formally concluding the enforcement proceedings. Credit Suisse did not appeal against FINMA's decree.

FINMA ordered Credit Suisse to promote adequate management of legal and reputational risks in the cross-border financial services business by terminating its business with US clients whose tax situation was not transparent (to the extent it had not been terminated already). Moreover, the bank had to develop and implement a risk management and risk control system suitable to appropriately identify, limit and monitor the legal and reputational risks emanating from the entire cross-border financial services business.

3.6 Credit Suisse implements the measures ordered by FINMA

Credit Suisse has implemented the measures ordered by FINMA. This implementation was reviewed for FINMA by independent third parties. The independent audit firm reviewing Credit Suisse's exit from the business with non-tax transparent US clients concluded that the processes implemented by Credit Suisse were suitable to ensure that the clients identified by Credit Suisse as non-tax compliant would be exited. The independent examiner who conducted a critical assessment of the risk management and risk control system implemented by Credit Suisse deemed it to be appropriate.

3.7 Credit Suisse in the focus of US authorities

When investigations were broadened following the criminal investigation against UBS AG, US authorities such as the DoJ, the SEC, the Fed Board and the NYDFS also began to focus on Credit Suisse. The four important US authorities have all concluded their investigations against Credit Suisse:

- <u>DoJ, Tax Division:</u> On 15 July 2011, Credit Suisse informed the public that on 14 July 2011 it had been informed in writing by the DoJ that it was the target of a formal investigation of the DoJ (so-called *Target Letter*). Today, after more than two years, the DoJ's criminal investigation against Credit Suisse has been closed. As part of the agreement reached with the DoJ, Credit Suisse has agreed to plead guilty (*guilty plea*) to *conspiracy to aid and assist US taxpayers in filing false returns*. Credit Suisse has also agreed to pay an amount of USD 1.804bn.

- Fed Board: The Fed Board today issued a Consent Order to cease and desist and a civil money penalty assessment of USD 100m against Credit Suisse.

- NYDFS: At the beginning of March 2014, the NYDFS requested Credit Suisse to produce information with regard to clients domiciled in New York. In April 2014, the NYDFS deepened its probe into Credit Suisse and requested extensive information regarding Credit Suisse's NY RO that closed in 2009. The NYDFS today issued a Consent Order against Credit Suisse. Credit Suisse has to pay an amount of USD 715m to the NYDFS.

- SEC: In the spring of 2011, the SEC initiated an investigation against Credit Suisse, accusing Credit Suisse in particular of providing unregistered broker-dealer and investment advisory services to US clients. On 21 February 2014, Credit Suisse announced that it had reached a settlement with the SEC with regard to its investigations. As part of this settlement, Credit Suisse issued an *Admission of Wrongdoing.* Credit Suisse agreed to pay an amount of USD 196m to the SEC.

Difference between an indictment and a guilty plea

Legally, an indictment of an institution should not be confused with a guilty plea of the institution concerned. An indictment is a unilateral act on the part of the DoJ and a grand jury, and the contents of the indictment are not negotiated between the DoJ and the institution concerned. A guilty plea can be made either before or after an indictment. The Wegelin plea, for example, was a *Post-Indictment Guilty Plea* and hence a guilty plea following an indictment. In contrast, in the Credit Suisse case, the latter made a guilty plea without an indictment of the institution (*Pre-Indictment Guilty Plea*). In this case, a guilty plea is a solution negotiated between the DoJ and the bank that is subject to court approval. The conclusion of a guilty plea approved by a court ends the confrontation under criminal law, creates clarity and planning certainty in this regard and allows the bank to look ahead. It also marks the end of lengthy negotiations. This agreement also recognizes the measures already taken and the bank’s continued determination to reform.