

Alert

White Collar Defense & Investigations

The Credit Suisse Guilty Plea: What Does It Mean for Companies in the Crosshairs?

By Christopher Garcia and Raquel Kellert

The announcement of the Credit Suisse guilty plea on May 19, 2014 marks the first time in more than a decade that a large financial institution has been convicted of a financial crime in the United States. For this reason alone, some will herald it a watershed moment in the history of corporate criminal liability. But the government's well-publicized efforts to mitigate the collateral consequences resulting from the plea will likely limit the plea's practical significance for companies that find themselves in the unenviable position of negotiating a resolution of criminal allegations with the government. This alert will explore the potential implications of the Credit Suisse guilty plea for corporate criminal liability.

The DOJ: New Boss Same as the Old Boss?

In many ways, the filing of criminal charges against Credit Suisse is not news. It does not represent the first time that a corporation has been charged by the U.S. government – or even the first time that a financial institution has been charged with a financial crime. In 1988, Drexel Burnham Lambert, then the fifth-largest investment house in the United States, pleaded guilty to insider trading charges.¹ Eight years later, in 1996, the Japanese bank Daiwa Bank Ltd. pleaded guilty to a 16-count indictment relating to its cover-up of more than \$1 billion in trading losses at its New York branch.² In 1999, Bankers Trust Co., then the eighth-largest American bank, pleaded guilty to three felony counts and agreed to pay a \$60 million criminal fine for falsely bolstering its performance with millions of dollars of its customers' unclaimed funds.³ Indeed, by the late 1990s, charging corporations was somewhat in vogue at the Department of Justice (the DOJ). It was then, in 1999, that then-Deputy Attorney General Eric Holder formalized the DOJ's first guidelines for charging corporations by declaring that "[c]orporations should not be treated leniently because of their artificial nature" and touting that "[i]ndicting corporations for wrongdoing enables the government to . . . prevent, discover, and punish white collar crime."⁴ And although that memorandum, later called the "Holder Memo," recognized that "[p]rosecutors may consider the collateral consequences of a corporate criminal conviction," such consideration was of a second order.⁵ According to the Holder Memo, "[f]irst and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases."⁶

The Credit Suisse guilty plea *is news*, of course, because it has been a very long time since a bank like Credit Suisse has been charged at the parent level. The DOJ's appetite for charging corporations abated shortly after the release of the Holder Memo. In 2002, the government indicted Arthur Andersen, then one of the "Big 5" accounting firms, for obstruction of justice for having destroyed documents relating to its audit of Enron Corporation.⁷ Although the firm's conviction after trial was its final death knell, the firm essentially collapsed after the indictment.⁸ The dissolution of the firm resulted in widespread criticism of the indictment, criticism that re-emerged after the firm's conviction was dismissed on appeal.⁹ Much of the criticism focused on the collateral damage caused by the indictment: Arthur Andersen employed 28,000 people in the United States, virtually all of whom lost their jobs.¹⁰ The DOJ subsequently moved away from charging corporations and having them plead guilty in favor of alternative resolutions such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). Indeed, from 2000 to 2002, the DOJ entered into two or three such agreements each year.¹¹ Between 2003 and 2005, that number climbed to between six and 14 agreements.¹² Finally, between 2006 and 2013, the DOJ entered an average of nearly 30 such agreements per year.¹³ By September 2012, then-Assistant Attorney General Lanny Breuer noted the rationale for the approach: "[A] DPA has the same punitive, deterrent, and rehabilitative effect as a guilty plea: when a company enters into a DPA with the government, or an NPA for that matter, it almost always must acknowledge wrongdoing, agree to cooperate with the government's investigation, pay a fine, agree to improve its compliance program, and agree to face prosecution if it fails to satisfy the terms of the agreement."¹⁴ Mr. Breuer also noted the potential "effect of an indictment on innocent employees and shareholders" and on "the health of an industry or the markets" in explaining the DOJ's DPAs and NPAs.¹⁵

The question then is whether the Credit Suisse guilty plea reflects a pendulum swing back to the willingness to charge corporations that the DOJ articulated pre-Arthur Andersen. Listening to now-Attorney General Holder's remarks at the press

conference announcing the Credit Suisse plea, one would think that the pendulum has swung fully back: "When a bank engages in misconduct this brazen, it should expect that the Justice Department will pursue criminal prosecution to the fullest extent possible, as has happened here."¹⁶ But how much the pendulum has really swung is less clear, largely because of the DOJ's efforts to mitigate the collateral consequences that could potentially impact the bank as a result of its guilty plea. As has been widely reported, the bank received assurances, in part brokered by the DOJ, that certain potential collateral consequences of pleading guilty would be averted. Among other things, assurances purportedly were obtained from the Federal Reserve and the New York State Department of Financial Services that they would not revoke the bank's license to operate in the United States.¹⁷ Additionally, the SEC waived a rule enacted under Dodd-Frank that would have prohibited Credit Suisse from participating in Regulation D private offerings,¹⁸ and two days after the plea, the Federal Reserve Bank of New York stated that it would not terminate Credit Suisse's status as a primary dealer, which enables it to trade billions of dollars of government securities every day.¹⁹ These efforts suggest that the DOJ that charged Credit Suisse is not all that different from the DOJ that, out of concern for the collateral consequences, has utilized DPAs and NPAs as its principal vehicles for resolving corporate criminal investigations over the past several years.

What the Credit Suisse Guilty Plea Means for Companies in the Crosshairs

These assurances – and the DOJ's role in securing them – mean that the Credit Suisse plea likely does not represent a significant departure from the DOJ's post-Arthur Andersen approach to corporate resolutions and, as a result, has limited practical consequence for companies negotiating resolutions with the government. The DOJ's effort to ensure that Credit Suisse suffered no material collateral consequences to its business reflects that it continues to be concerned about the collateral consequences of corporate charging decisions. This means that the DOJ will likely continue to be circumspect about indicting corporations. It also means that, in the

context of negotiating a resolution, companies can and should continue to make forceful arguments about collateral consequences in seeking NPAs and DPAs as alternatives to charges.

Indeed, to the extent that the Credit Suisse guilty plea sets the floor for the circumstances in which corporations face criminal charges, it may serve as a useful precedent. Companies may argue that fairness requires that criminal charges not be levied unless similar assurances can be achieved that collateral consequences will be avoided.

For companies that find themselves in such unfortunate circumstances – having committed conduct that the government believes warrants criminal sanction where collateral consequences essentially can be eliminated – criminal charges may be more likely than before the Credit Suisse plea. That, of course, is bad news: No corporation wants to be convicted of a crime, and any corporation that is convicted of a crime is on worse footing with the government if it finds itself the subject of another criminal probe. But such circumstances are likely to be rare. Accordingly, it seems unlikely that the Credit Suisse guilty plea is the start of a new era of corporate charging.

To the extent that the government charges corporations in the future, companies would be wise to monitor whether and to what extent assurances are obtained that limit or eliminate collateral consequences and whether such assurances are effective. If unforeseen collateral consequences materialize, companies may argue that criminal charges should not be contemplated precisely because not all collateral consequences can be anticipated or obviated. But there is a risk, if such consequences materialize, that the government begins to find tolerable or acceptable a certain level of collateral consequences to business. This, of course, would be the worst outcome for companies caught in the crosshairs of a government investigation.

1. Stephen Labaton, *Drexel Concedes Guilt of Trading; To Pay \$650 Million*, N.Y. Times, Dec. 22, 1988, available at <http://www.nytimes.com/1988/12/22/business/drexel-concedes-guilt-on-trading-to-pay-650-million.html?ref=drexelburnhamlambert>.
2. Peter Truell, *Daiwa Bank Admits Guilt In Cover-Up*, N.Y. Times, Feb. 29, 1996, available at <http://www.nytimes.com/1996/02/29/business/daiwa-bank-admits-guilt-in-cover-up.html>.
3. Benjamin Weiser, *Bankers Trust Admits Diverting Unclaimed Money*, N.Y. Times, March 12, 1999, available at <http://www.nytimes.com/1999/03/12/nyregion/bankers-trust-admits-diverting-unclaimed-money.html>; John Schmid, *Bankers Trust Takeover to Save Companies \$1.7 Billion a Year: Deutsche Bank to Chop 5,500 Jobs*, N.Y. Times, Dec. 1, 1998, available at <http://www.nytimes.com/1998/12/01/news/01iht-bank.t.html>.
4. Memorandum from Eric J. Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys, *Bringing Criminal Charges Against Corporations* (June 16, 1999) § I.A., available at <http://www.justice.gov/criminal/fraud/documents/reports/1999/charging-corps.PDF> (the “Holder Memo”).
5. Holder Memo § IX.A (emphasis added).
6. Holder Memo § I.A (emphasis added).
7. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005).
8. *See e.g.*, Kurt Eichenwald, *Enron’s Many Strands: The Investigation; Andersen Charged with Obstruction in Enron Inquiry*, N.Y. Times, Mar. 15, 2002, available at <http://www.nytimes.com/2002/03/15/business/enron-s-many-strands-investigation-andersen-charged-with-obstruction-enron.html>; Jan Crawford Greenberg, *Andersen’s conviction overturned*, Chicago Tribune, June 1, 2005, available at http://articles.chicagotribune.com/2005-06-01/news/0506010265_1_arthur-andersen-chicago-based-andersen-document-retention-policy; Kathleen F. Brickey, *Andersen’s Fall From Grace*, 81 WASH. U. L. Q. 917, 921-22 (2003).
9. *See e.g.*, Julie R. O’Sullivan, *How Prosecutors Apply the ‘Federal Prosecutions of Corporations’ Charging Policy in the Era of Deferred Prosecutions, and What that Means for the Purposes of the Federal Criminal Sanction*, 51 AM. Crim L. Rev. 29, 52 (Winter 2014); Jan Crawford Greenberg, *Andersen’s conviction overturned*, Chicago Tribune, June 1, 2005, available at http://articles.chicagotribune.com/2005-06-01/news/0506010265_1_arthur-andersen-chicago-based-andersen-document-retention-policy.

10. See e.g., Kathleen F. Brickey, *Andersen's Fall From Grace*, 81 WASH. U. L. Q. 917, 917 (2003); Jan Crawford Greenberg, *Andersen's conviction overturned*, Chicago Tribune, June 1, 2005, available at http://articles.chicagotribune.com/2005-06-01/news/0506010265_1_arthur-andersen-chicago-based-andersen-document-retention-policy; Bill Mears, *Arthur Andersen conviction overturned*, CNN Washington Bureau, May 31, 2005, available at <http://www.cnn.com/2005/LAW/05/31/scotus.arthur.andersen/>.
11. Gibson Dunn, 2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs), Jan. 7, 2014, available at <http://www.gibsondunn.com/publications/pages/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx>.
12. *Id.*
13. *Id.*
14. Then-Assistant Attorney General Lanny A. Breuer, *The Role of Deferred Prosecution Agreements in White Collar Criminal Law Enforcement*, Address Before the New York City Bar (Sept. 13, 2012), text of speech available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html>.
15. *Id.*
16. Press Conference: Attorney General Eric Holder Announces Guilty Plea in Credit Suisse Offshore Tax Evasion Case (May 19, 2014), text of speech available at <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1405192.html>.
17. See e.g., Ben Protess and Jessica Silver-Greenberg, *In Tax Case, Credit Suisse Is Denied Milder Penalty*, N.Y. Times, May 19, 2014, available at <http://dealbook.nytimes.com/2014/05/19/feeling-the-force-of-the-law/>.
18. See *In the Matter of Certain Current Funds, Third Party Issuers and Portfolio Companies affiliated with Credit Suisse AG*, Order under Rule 506(d) of the Securities Act of 1933 Granting a Waiver of the Rule 506(d)(1)(i) Disqualification Provision, Release No. 9589 (May 19, 2014), available at <http://www.sec.gov/rules/other/2014/33-9589.pdf>.
19. Andrew R. Johnson, *New York Fed to Allow Credit Suisse to Remain a Primary Dealer*, Wall Street Journal, May 21, 2014, available at <http://online.wsj.com/news/articles/SB1001424052702303749904579576394273448848?KEYWORDS=credit+suisse&mg=reno64-wsj>.

White Collar Defense & Investigations is published by the Litigation Department of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

For more information about Weil's White Collar Defense & Investigations practice, please contact:

Editors:

Steven A. Tyrrell (DC)	Bio Page	steven.tyrrell@weil.com	+1 202 682 7213
Christopher L. Garcia (NY)	Bio Page	christopher.garcia@weil.com	+1 212 310 8896
Adam Safwat (DC)	Bio Page	adam.safwat@weil.com	+1 202 682 7236

© 2014 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please [click here](#). If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.