

In 2013, FINMA once again devoted much attention to the legal and reputational risks to Swiss banks from cross-border financial services. The framework for a solution with the US was set up at the political level, but a similar agreement has yet to be reached with countries such as Germany and France.

When a Swiss bank offers financial services to clients abroad or to clients in Switzerland with ties to foreign countries, it inevitably comes into contact with foreign law. Swiss financial market legislation does not explicitly require financial institutions supervised by FINMA to comply with foreign law, nor does it yet prohibit banks from receiving untaxed money.

A long-standing issue for FINMA

However, supervised institutions are required to capture, limit and monitor their legal and reputational risks appropriately, and to put in place an effective internal control system. This obligation also extends to the risks arising from cross-border financial services, including the issue of taxation. FINMA published a position paper on this topic in 2010 followed, in 2012, by a supplementary FAQ. For some years now, FINMA has addressed this issue in depth, also during its supervisory interactions, and has, for instance, discussed the termination of business relationships with clients whose assets may not have been taxed, and the onboarding of such clients by other institutions.

Making up for the past

On 1 January 2013, bilateral agreements came into force with Austria and the UK which aim to correct past irregularities in taxation and introduce a withholding tax for foreign bank clients that has the effect of discharging their tax liability. No such solution has yet been reached with Germany. The German Parliament rejected an agreement to this effect in December 2012.

In countries such as the US, Germany and France, individuals subject to tax have the option of voluntary disclosure, with a view to putting their own tax situation in order. Clients who do not take up this option may find themselves facing criminal charges. This would have an indirect impact on the banks, since servicing such clients could in many places be construed as aiding and abetting tax offences.

Investigations at over twenty institutions

In 2013, FINMA once again arranged for independent internal investigations to take place at a number of institutions concerning areas of their cross-border financial services business. In all, FINMA has now had such investigations conducted at more than 20 institutions. Enforcement proceedings related to cross-border wealth management were carried out against eight institutions. Where necessary, FINMA ordered targeted measures to be adopted in order to restore compliance with the law.

Individuals subject to proceedings and letters of assurance

When initiating enforcement proceedings against individuals, FINMA normally adopts a cautious approach in line with its enforcement policy,²¹ which was published in December 2009 and updated in November 2011. It focuses primarily on correcting any irregularities identified at supervised institutions. Enforcement proceedings were initiated against certain individuals in response to suspicions of serious breaches of obligations related to cross-border financial services. FINMA would also initiate proceedings against

²¹ See http://www.finma.ch/e/sanktionen/enforcement/Documents/pl_enforcement_20111110_e.pdf.

further individuals if they wished to return to a position at a supervised institution that required them to provide assurance of proper business conduct. In line with its practice, FINMA delivered letters of assurance²² to those concerned.

In further cases, FINMA provided administrative assistance to foreign authorities, carried out supervisory reviews as part of its supervisory activities or, depending on the circumstances and the expediency of investigation, limited itself to monitoring the situation.

Developments in the relationship with the US

The tax dispute with the US concerned not only FINMA but also politicians. In early 2013, following negotiations with the U.S. Department of Justice (DoJ), the Federal Council submitted to Parliament the Lex USA, which would have permitted any bank affected to regularise its situation vis-à-vis the DoJ. The National Council rejected the proposed law on 19 June 2013. To end the tax dispute between the banks and the US, however, the Federal Council and the DoJ signed a joint statement on 29 August 2013. Simultaneously, the DoJ published a programme under which the banks concerned can, depending on their situation, apply to the DoJ for a non-prosecution agreement²³ or for the issuance of a non-target letter.²⁴

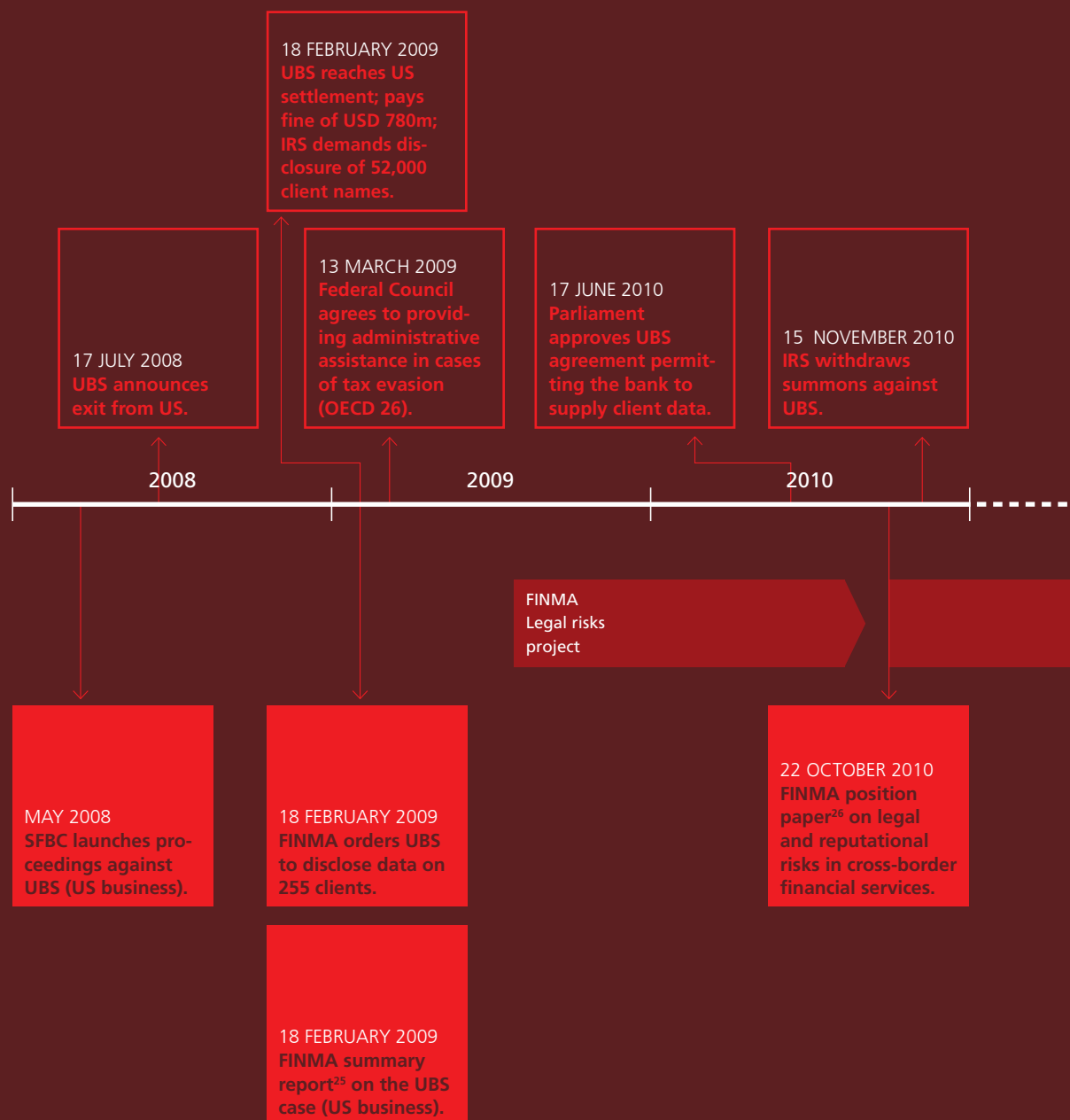
The US programme is open to all Swiss banks and various deadlines apply. It does not apply to banks against which the DoJ had already launched a criminal investigation (category 1). Banks in category 2, which have good reasons to believe that they have violated US tax law, had until 31 December 2013 to request a non-prosecution agreement from the DoJ. They were required to supply the DoJ with information about their relationships with US clients, but not the names of those clients. Institutions in category 2 must additionally pay a fine, the amount of which will be in relation to the volume of untaxed US assets they hold and the date on which the accounts were opened. To comply with their obligation to supply information, the banks may apply to the Federal Council for individual authorisation under Article 271 of the Swiss Criminal Code (CC). Banks which believe that they have not violated US tax law (categories 3 and 4) can report to the US authorities between 1 July 2014 and 31 October 2014 at the latest to request a non-target letter.

²² See Glossary, p. 112.

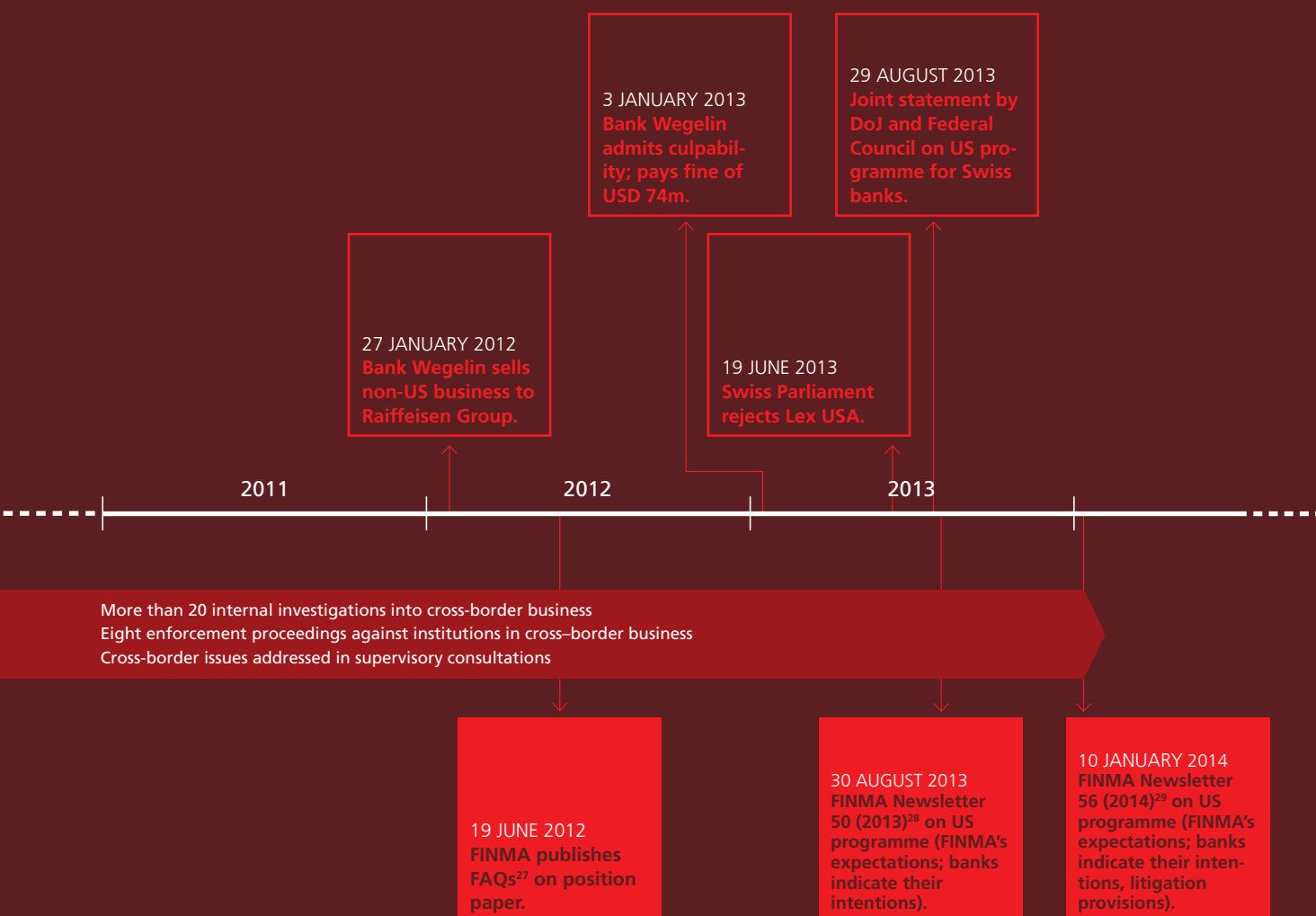
²³ See Glossary, p. 113.

²⁴ See Glossary, p. 113.

At a glance: cross-border issues – developments related to the US



The increase in legal risks in the US cross-border financial services business since 2008 is being followed closely by FINMA. From 2010 onwards, it has conducted several investigations and proceedings related to the cross-border business. Since August 2013, the U.S. Department of Justice (DoJ) programme has provided the opportunity for banks to resolve the issue in a regulated manner.



²⁵ See FINMA Summary report 'EBK investigation of the cross-border business of UBS AG with its private clients in the USA' (<http://www.finma.ch/e/aktuell/pages/mm-ubs-xborder-20090218.aspx>).

²⁶ See FINMA position paper 'Legal and reputational risks in cross-border financial services' (http://www.finma.ch/e/finma/publikationen/Documents/positionspapier_rechtsrisiken_e.pdf).

²⁷ See FAQs 'Legal and reputational risks in cross-border financial services' (<http://www.finma.ch/e/faq/beaufschlagte/pages/faq-grenzueberschreitendes-geschaefte.aspx>).

²⁸ See FINMA Newsletter 50 (2013) 'The US programme to end the tax dispute between the Swiss banks and the United States' (German version) (<http://www.finma.ch/d/finma/publikationen/Lists/ListMitteilungen/Attachments/67/finma-mitteilung-50-2013-d.pdf>).

²⁹ See FINMA Newsletter 56 (2014) 'The US programme to end the tax dispute between the Swiss banks and the United States – FINMA's expectations' (German version) (<http://www.finma.ch/e/finma/publikationen/Lists/ListMitteilungen/Attachments/68/finma-mitteilung-56-2014-d.pdf>).