

[By James B. Stewart](#)

As the Justice Department weighs the possibility of criminal charges in the unfolding Libor rate-setting scandal, it may want to consider the record of the Swiss banking giant UBS.

At UBS, a series of immunity, nonprosecution and deferred prosecution agreements in recent years — evidently the government's preferred approach to corporate crime — seems to have had scant, if any, deterrent effect. "It's depressing," Representative Peter Welch, Democrat of Vermont, a member of the House oversight committee, told me this week after we discussed UBS's recent transgressions. "The Justice Department has to decide: Is the day of consent decrees and settlements, where you pay a fine, one passed on to shareholders, are those days over? Are the days of jail time here?"

UBS, one of more than a dozen banks being investigated for manipulating interest rates for their own benefit, is hardly the only major global bank with a record of recidivism. Just this week, HSBC apologized after a Senate committee exposed a pattern of money laundering for "drug kingpins and rogue nations." HSBC, which had been cited twice in the last decade for repeatedly violating money laundering laws, remains under civil and criminal investigation.

It was a rival, Barclays, that set off an international furor when it admitted to a wide-ranging conspiracy to manipulate the London interbank offered rate, commonly known as Libor, which is the benchmark for countless interest rate determinations and an estimated \$450 trillion in derivative contracts. It obtained a nonprosecution agreement, in large part because of what the Justice Department called its "extraordinary" cooperation, and agreed to pay American and British authorities a \$450 million penalty. Barclays has had its own problems with accusations of money laundering and paid \$298 million to settle charges that it circumvented United States prohibitions on funneling money to Iran.

But in many ways, UBS is in a league of its own given its track record for scandals. Should UBS be implicated in the Libor rate-fixing conspiracy, it's hard to imagine a better corporate candidate for a criminal indictment — even though it has already been granted conditional immunity from some aspects of the Libor scandal.

As the Justice Department points out in its guidelines for charging a corporation with a crime: "A corporation, like a natural person, is expected to learn from its mistakes," and "a history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to noncriminal guidance, warnings or sanctions."

UBS, with dual headquarters in Zurich and Basel, traces its roots to 1854. Last year, it had more than \$26 billion in revenue and nearly 65,000 employees worldwide. It was deemed too big to fail during the financial crisis, and had to be bailed out by the Swiss government after a \$50 billion write-down on mortgage-backed securities.

The bank's recidivism seems rivaled only by its ability to escape prosecution:

¶ UBS obtained a deferred prosecution agreement in 2009 for conspiring to defraud the United States of tax revenue by creating more than 17,000 secret Swiss accounts for United States taxpayers who failed to declare income and committed tax fraud. UBS bankers trolled for wealthy clients susceptible to tax evasion schemes at professional tennis matches, polo tournaments and celebrity events. One UBS banker smuggled diamonds in a toothpaste tube to accommodate a client. In return for the deferred prosecution agreement, UBS agreed to pay \$780 million in fines and penalties and disclose the identities of many of its United States clients. At the same time it settled Securities and Exchange Commission charges that it acted as an unregistered broker-dealer and investment adviser to American clients and paid a \$200 million fine. In October 2010 the government dropped the charges, saying UBS had fully complied with its obligations under the agreement.

¶ In May 2011, UBS admitted that its employees had repeatedly conspired to rig bids in the municipal bond derivatives market over a five-year period, defrauding more than 100 municipalities and nonprofit organizations, and agreed to pay \$160 million in fines and restitution. An S.E.C. official called UBS's conduct "a 'how to' primer for bid-rigging and securities fraud." UBS landed a nonprosecution agreement for that behavior, and the Justice Department lauded the bank's "remedial efforts" to curb anticompetitive practices.

¶ In what the S.E.C. called at the time the largest settlement in its history, in 2008 UBS agreed to reimburse clients \$22.7 billion to resolve charges that it defrauded customers who purchased auction-rate securities, which were sold by UBS as ultrasafe cash equivalents even though top

UBS executives knew the market for the securities was collapsing. Seven of UBS's top executives were said to have dumped their own holdings, totaling \$21 million, even as they told the bank's brokers to "mobilize the troops" and unload the securities on unsuspecting clients. As Andrew M. Cuomo, who was New York's attorney general then, put it: "While thousands of UBS customers received no warning about the auction-rate securities market's serious distress, David Shulman — one of the company's top executives — used insider information to take the money and run." Besides reimbursing clients and settling with the S.E.C., UBS paid a \$150 million fine to settle consumer and securities fraud charges filed by New York and other states. It again escaped prosecution.

There's more — including UBS's prominent role and big losses in the mortgage-backed securities debacle that helped bring on the financial crisis. The federal agency overseeing Fannie Mae and Freddie Mac sued UBS for securities law violations, accusing it of "materially false statements and omissions." The agency is seeking \$1 billion in damages. (UBS has denied the charges and the case is pending.) UBS hasn't been charged with any civil or criminal misconduct related to mortgage-backed securities.

In the continuing global interest rates investigations, UBS last summer revealed that it had received conditional immunity from the Justice Department and other authorities. It was shown this leniency even though the Justice Department has pointedly said that Barclays, not UBS, was the first bank to cooperate.

Among the dozen or so banks caught up in the investigation, UBS hasn't disclosed what role, if any, it played. But its conditional immunity indicates that UBS confessed and gave evidence against others.

A corporation can avoid criminal conviction and fines for antitrust crimes "by being the first to confess participation in a criminal antitrust violation, fully cooperating with the division, and meeting other specified conditions," according to the Justice Department.

The department's antitrust division stresses that it makes only one grant of immunity per conspiracy, so it isn't clear how both Barclays and UBS managed to get it. Libor is set each day based on submissions from major global banks for a variety of currencies. UBS is a member of the banking panels that determine United States dollar, British pound, euro, yen and Swiss franc Libor rates.

UBS said its antitrust immunity was tied only to yen-related rates. That means it could still be prosecuted for antitrust crimes related to other currencies. Barclays obtained antitrust immunity only for a conspiracy involving the euro interbank offered rate, suggesting that the Justice Department is treating the cases as separate conspiracies.

Unlike Barclays, UBS does not have immunity or a nonprosecution agreement from the criminal division, which means it could be charged with the full range of securities and commodities fraud.

When I asked UBS for comment about its record, a spokeswoman said that the bank "acknowledges and takes responsibility for the mistakes and oversights that occurred in our past, and we have learned a great deal. New senior management is fully committed to protecting the firm's reputation, our employees and shareholders from any misconduct by individuals. We continuously work to ensure compliance with the rules, and improve controls to keep mistakes from happening or to detect them as soon as possible, if they do occur."

In the Libor scandal, UBS's conditional immunity applies only to the company, not to individuals.

While UBS seems to fit the profile for charging corporations with crime, it remains the case that individuals commit crimes, even if companies are liable for their acts. But so far, the only person from UBS to receive a jail term in connection with any of the bank's multiple scandals and offenses is Bradley Birkenfeld, the original whistle-blower in the huge tax evasion case. Mr. Birkenfeld pleaded guilty to conspiracy to defraud the United States and was sentenced to 40 months in prison.

Another UBS banker, Renzo Gadola, pleaded guilty in the tax fraud case, cooperated, and was granted probation. A third was charged but hasn't been tried and remains a fugitive.

In another notorious case, British authorities charged a trader, Kweku Adoboli, with fraud and false accounting after UBS announced it had lost \$2.3 billion in unauthorized trades. He pleaded not guilty and is awaiting trial. And in the municipal securities bid-rigging scandal, three former UBS bankers are facing trial and a fourth pleaded guilty but hasn't been sentenced.

Otherwise, no one at UBS has faced criminal charges, even though two high-ranking UBS officials settled New York and other states' charges of insider trading for dumping their auction-rate securities. One, Mr. Shulman, UBS's global head of municipal securities, who was publicly criticized by Mr. Cuomo, paid \$2.75 million to settle the charges and was suspended as a securities broker for two and a half years. Another, David D. Aufhauser, UBS's general counsel, paid \$6.5 million and was barred from practicing law in New York for two years. Mr. Shulman was suspended by UBS and Mr. Aufhauser left the bank. UBS declined to comment on the reason for his departure and named him an adviser to the bank.

Neither man admitted or denied guilt, but in both cases, the allegations made by the authorities were incriminating. According to the complaints, Mr. Shulman sold his personal holdings within days of learning the market was in distress. Mr. Aufhauser was on an Acela train to Washington when UBS's chief risk officer e-mailed him to warn that the auction-rate securities market was collapsing. Minutes later, he e-mailed his UBS broker to sell the securities in his account. (A lawyer said Friday that Mr. Aufhauser subsequently reversed the trade and didn't profit from the order.)

Today Mr. Shulman is listed as a "managing member" of BasePoint Capital L.L.C., a private investment firm in Greenwich, Conn. Mr. Aufhauser is a partner at the prominent Washington law firm Williams & Connolly. His biography on the firm's Web site references his experience as "managing director and global general counsel of the UBS AG investment bank."

Both Mr. Shulman and Mr. Aufhauser declined to comment.

Is it any wonder that despite repeated apologies and promises to change, UBS and other banks keep getting in trouble?

Last week the New York Times reporters Ben Protess and Mark Scott wrote that the Justice Department was building criminal cases against several individuals and institutions implicated in the Libor scandal, even as rumors swirled that more generous settlements with major banks were in the works.

If prosecutions are forthcoming, it will be a welcome sign that banks and their employees will be held accountable for their misdeeds. As the recent wave of scandals suggests, years of leniency have failed to bring the hoped-for results or respect for the law.

"My view is we're well past the day where we can postpone putting guilty people behind bars," said Mr. Welch, the representative from Vermont, who sent a letter this week to Attorney General Eric H. Holder Jr. urging the department to "aggressively prosecute" bank officials who manipulated Libor.

"The whole point of prison terms is to deter conduct in that community, and we know jail sentences are an effective deterrent," Mr. Welch added. "Restoring public confidence means that people who commit crimes spend some time in jail."