

BANKING & FINANCE BRIEFING

Update on FATCA Implementation in Switzerland – No Need to Register for Swiss Investment Advisers and Assets Managers?

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1. Background

On March 18, 2010, the U.S. Hiring Incentives to Restore Employment Act of 2010 (known as the Hire Act) amended sections 1471 through 1474 of the U.S. Internal Revenue Code of 1986. Such amendment now commonly referred to as the Foreign Account Tax Compliance Act ("FATCA"), has been implemented through the **Final Regulations**¹. In addition, for Switzerland, FATCA is implemented through (i) a so-called Model 2 intergovernmental agreement ("IGA") adopted on February 14, 2013 and approved by the Swiss Parliament on September 27, 2013 ("Implementation Agreement"²) and (ii) the Swiss Federal Act on the Execution of the Implementation of FATCA ("FATCA-Act"), which shall enter into force shortly.

administering, or managing of funds or money on behalf of other persons.

Article 3 paragraph 1 of the Implementation Agreement provides that "*Switzerland shall direct all Reporting Swiss Financial Institutions*" to register with and report directly to the U.S. Internal Revenue Service ("IRS") the information regarding U.S. Accounts as required by FATCA. U.S. Accounts (either pre-existing or new) are defined as those financial accounts "*maintained*" by a "*Reporting Swiss Financial Institution*".

However, under the Implementation Agreement, certain Non-Reporting SFIs, such as registered deemed-compliant SFIs, are in principle required to register with the IRS⁵.

Swiss investment advisers and assets managers qualify as investment entities, and thus as SFIs, even though they do not "*maintain*" any account in the name of their clients (such accounts being maintained with a depository banking institution).

2. Duties under the Implementation Agreement

2.1. In General – Swiss Financial Institutions

Financial institutions located in Switzerland, whether organized under the laws of Switzerland or another jurisdiction (Swiss Financial Institutions or **SFIs**³), are defined as custodial institutions, depository institutions, investment entities or specified insurance companies⁴. The term "investment entity" includes, among others, any entity that conducts as a business the (i) managing of individual and collective portfolios and/or (ii) investing,

2.2. Investment Advisers and Assets Managers as Non-Reporting SFIs

Annex II of the Implementation Agreement entitled "Non-Reporting Swiss Financial Institutions and

1 The Final Regulations are available for download on the website: <http://www.irs.gov/PUP/businesses/corporations/TD9610.pdf>.

2 The "Agreement Between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA" adopted on February 14, 2013.

3 Article 2.1(13) of the Implementation Agreement.

4 Article 2.1(7) of the Implementation Agreement.

5 See Annex II.II.A of the Implementation Agreement and Article 4 par. 1 FATCA-Act.

"Exempt Products" sets forth the list of those SFIs which do not have to report to the IRS the information regarding U.S. Accounts under FATCA.

The "Swiss Investment Adviser" is defined in Section II.A.2 of Annex II of the Implementation Agreement as "[...] *an entity the sole activity of which is to render investment advice to and act on behalf of a customer [...] based on a power of attorney or a similar instrument [...] for the purposes of investing, managing or administering funds deposited in the name of the person or entity granting the power [...]*".

Such definition of a "Swiss Investment Adviser" covers, in our view, both the investment advice and assets management activities.

Section II of Annex II of the Implementation Agreement provides that "Swiss Investment Advisers" are deemed to be "*Non-Reporting Swiss Financial Institutions that are treated as registered deemed-compliant [foreign financial institutions ("FFIs")] for purposes of section 1471 of the U.S. Internal Revenue Code*" (our underlining).

As a consequence, Swiss investment advisers and assets managers are to be considered Non-Reporting SFIs. This is in line with the fact that they do not "maintain" accounts in the name of their clients. As Non-Reporting SFIs, they are treated as registered deemed-compliant FFIs within the meaning of the Implementation Agreement, respectively FATCA, and are in principle required to register with the IRS.

3. Recent Developments

3.1. Evolution of the Model 2 IGA

The fate of Swiss investment advisers and assets managers seemed to be sealed in that – although relieved from their reporting obligations – they would nevertheless have an obligation to **register** with the IRS under the Implementation Agreement.

Recent developments started to challenge the logic of this reasoning:

- On November 4, 2013, the U.S. Department of the Treasury published a revised version of the Model 2 IGA treating investment advisors and investment managers⁶ as certified deemed-compliant FFIs for purposes of section 1471 of the U.S. Internal Revenue Code (Annex II Section IV.D.). Certified deemed-compliant FFIs are not subject to registration with the IRS.
- On December 19, 2013, the United States signed an IGA with Bermuda (which substantially follows the Model 2 IGA revised as of November 4, 2013) according to which an investment adviser and asset manager is a "*Non-Reporting Bermuda Financial Institution treated as a certified deemed-compliant FFI for purposes of section 1471 of the U.S. Internal Revenue Code*".

One could therefore start to observe inconsistencies over the FATCA status of investment advisers and asset managers across jurisdictions having entered into model 2 IGAs.

3.2. Modification of the Final Regulations

On February 20, 2014, the IRS announced that it had submitted for publication additional guidance revising and further clarifying the Final Regulations. These temporary regulations (the "**Temporary Regulations**") have been published on and are effective as of March 6, 2014⁷. They are expected to be adopted as final regulations later this year.

The Temporary Regulations reveal an intent of the U.S. authorities to harmonize and coordinate the Final Regulations with the IGAs. They define a non-reporting IGA FFI as including "*an FFI that is a resident of, located in, or established in a Model 1 or Model 2 IGA jurisdiction, as the context requires, and that meets the requirements for certified deemed-compliant*

⁶ The definition of an investment advisor or manager, in the revised version of the Model 2 IGA, is substantially the same as in the Implementation Agreement.

⁷ The Temporary Regulations are available for download on the website: [http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-\(FATCA\).](http://www.irs.gov/Businesses/Corporations/Foreign-Account-Tax-Compliance-Act-(FATCA).)

*FFI status under the temporary regulations*⁸ (our underlining). Specifically, certain investment advisors and investment managers that do not maintain financial accounts may qualify as certified deemed-compliant FFIs subject to certain conditions as providing specific documentation and information to withholding agent(s)⁹.

The option given by the Temporary Regulations of "by-passing" the Implementation Agreement to obtain the status of a certified deemed-compliant SFI is compatible with the FATCA related rules applicable in Switzerland (Article 4 paragraph 2 letter b. of the FATCA-Act) and has been recently pointed out as such by the Swiss Association of Asset Managers – SAAM¹⁰.

4. Conclusion

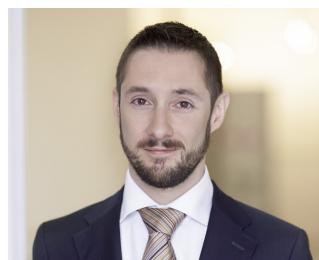
Recent developments lead to the conclusion that Swiss investment advisers and asset managers may choose to rely directly on U.S. legislation to claim the status of a certified deemed-compliant financial institution.

Any interested Swiss investment advisers and asset managers should actively explore this avenue to determine whether it is eligible for such treatment while bearing in mind that a registered deemed-compliant SFI wishing to appear on the June 2014 IRS FFI List should register on the FATCA Registration Portal by April 25, 2014.

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⁸ Temporary Regulations, pages 12813 and 12827.

⁹ Temporary Regulations, pages 12822, 12854 and 12855.

¹⁰ See the Newsletter of March 10, 2014 http://www.vsv-asg.ch/uploads/file/news/2014/20140310_fatca-alternativen-fr.pdf. The SAAM is the leading industry association of independent asset managers in Switzerland.



WHO IS FRORIEP?

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