

FINANCIAL MARKETS BRIEFING

APRIL 2013

FATCA Implementation in Switzerland – A General Overview

Jean-Luc Herbez / Vincent S. Reardon-Kofmel

1. Background

On 18 March 2010, the U.S. Hiring Incentives to Restore Employment Act of 2010 (known as the Hire Act) amended the U.S. Internal Revenue Code of 1986, respectively its sections 1471 through 1474 which are commonly referred to as the Foreign Account Tax Compliance Act (“FATCA”). FATCA is implemented through the Final Regulations¹ issued by the U.S. Treasury Department and the Internal Revenue Service (the “IRS”) on 17 January 2013 (the “Final Regulations”).

FATCA targets non-compliant U.S. taxpayers with offshore accounts by requesting foreign (i.e., non U.S.) financial institutions (“FFIs”) to report certain information to the IRS regarding their United States accounts (“U.S. Accounts”)².

Participating FFIs³ will have the obligation to (i) register, and as the case may be enter into an agreement, with the IRS in order to (a) identify U.S. Accounts, (b) report certain information to the IRS regarding U.S. Accounts and (ii) withhold a 30 percent tax on all payments originating from the United States to **Non-Participating FFIs**⁴ and/or account holders who are unwilling to provide the required information⁵. A Non-Participating FFI will therefore be subject to the 30 percent withholding tax under FATCA upon receipt of such funds.

1 The Final Regulations relating to reporting by FFIs and withholding on certain payments to FFIs and other foreign entities are available at the website: <http://www.irs.gov/PUP/businesses/corporations/TD9610.pdf>

2 Unlike the Final Regulations’ definition of a U.S. Account (Final Regulations, 1.1473-1(b)(1)(i)), the Implementation Agreement (see footnote n° 7 below) defines – in substance – a U.S. Account as a financial account maintained by a Swiss Financial Institution and held by one or more specified U.S. persons or by a non-U.S. entity with one or more controlling persons (the natural persons who exercise control over an entity) that is a specified U.S. person (see Article 2.1 (20), (22) and (32) of the Implementation Agreement and further references).

3 i.e., an FFI complying with FATCA.

4 A Non-Participating FFI is an FFI that does not comply with FATCA.

5 U.S. financial institutions are also required to withhold a 30 percent tax on similar payments credited to Non-Participating FFIs or non-cooperative account holders.

Unless an FFI is prepared to lose its access to the U.S. economy or lose commercial relations with Participating FFIs, the only option is to adhere to FATCA’s implementation.

2. Approaches towards Implementation

Participating FFIs face the daunting task of complying with the terms and requirements set forth under FATCA and the Final Regulations (over 540 pages).

In order to reduce FATCA’s administrative and financial burden on domestic financial institutions, any non-U.S. State may negotiate FATCA’s implementation terms through an intergovernmental agreement.

Since FATCA’s adoption, several countries including some of Switzerland’s neighbours (France, Germany and Italy) have concluded, or entered into negotiations with the U.S. Department of the Treasury to conclude, a so-called first model intergovernmental agreement characterized by the establishment of an **automatic exchange of information** between the IRS and the respective national tax authority⁶.

Switzerland, however, has signed with the United States a so-called second model intergovernmental agreement, the **Implementation Agreement**⁷, which excludes such automatic exchange of information. It provides that Swiss Financial Institutions (“SFIs”) shall register with

6 A list of countries having signed either a FATCA Agreement or a Joint FATCA Statement with the U.S. Government is available at: <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx>

7 The “Agreement Between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA” adopted on 14 February 2013.

and report directly to the IRS the information regarding U.S. Accounts as required by FATCA. Through the adoption of the FATCA Message dated 10 April 2013, the Swiss Federal Council submitted to the Swiss Parliament for approval two projects aiming at (i) ratifying the Implementation Agreement and (ii) adopting the draft Federal Act on the execution of said agreement⁸. If approved by the Swiss Parliament, the objects of the FATCA Message may be challenged by a facultative referendum.

In comparison with the requirements set forth under FATCA and the Final Regulations, the Implementation Agreement establishes a simplified procedure for SFIs to identify U.S. clients, thus keeping the administrative burden “*within reasonable limits*”⁹.

3. Swiss Implementation

Unless expressly exempted (or considered “certified deemed-compliant”), all SFIs are required to implement FATCA according to the applicable U.S. legislation (i.e., FATCA and the Final Regulations if applicable) provided that the Implementation Agreement does not state otherwise¹⁰.

The *Swissness* criterion under the Implementation Agreement applies to any financial institution (branch, subsidiary or head office) located in Switzerland, whether such financial institution is organized under the laws of Switzerland or not¹¹.

For a detailed presentation of SFIs under the Implementation Agreement, see page 4.

8 See the press release of the Swiss State Secretary for International Financial Matters (“SIF”) dated 10 April 2013 and available at the website: <http://www.news.admin.ch/message/index.html?lang=en&msg-id=48430>

9 See the SIF press release dated 14 February 2013 and available at the website: <http://www.sif.admin.ch/dokumentation/00513/00772/index.html?lang=en&msg-id=47779>

10 In case of discrepancies, the provisions of the Implementation Agreement take precedence over U.S. legislation. SFIs may however elect to apply the definitions established in the Final Regulations provided that such choice does not undermine FATCA’s general objectives (see Article 2 par. 1 of the project of Federal Act on the execution of the Implementation Agreement).

11 Article 2.1(13) of the Implementation Agreement.

3.1. SFIs – Swiss Financial Institutions

Are defined as financial institutions: custodial institutions, depository institutions, investment entities or specified insurance companies¹². The term “investment entity” includes any entity that conducts as a business (or is managed by an entity that conducts as a business) one or more of the following activities or operations for or on behalf of a customer: (i) trading in (a) short term securities (such as cheques, bills, certificates of deposit, derivatives or other money market instruments), (b) foreign exchange (forex), (c) financial instruments pertaining to exchange, interest rates and indexes, (d) transferable securities or (e) commodities futures, and/or (ii) managing individual and collective portfolios and/or (iii) otherwise investing, administering, or managing funds or money on behalf of other persons.

Further, one notes that the term “investment entity” under the Implementation Agreement has the meaning of the same notion used in the Financial Action Task Force Recommendations¹³.

3.2. Entities considered as SFIs

The extensive notion of SFIs under the Implementation Agreement includes banks, insurance companies (with cash value or annuity contracts), collective investment schemes, investment advisors, asset managers, holding companies, entities granting commercial loans, entities buying and selling claims, providing trust or fiduciary services. Trusts should also be considered as SFIs if they engage in the activities of an SFI.

3.3. Simplified Implementation Procedure

All SFIs do not face the same administrative and/or registering or reporting requirements under the

12 Article 2.1(7) of the Implementation Agreement.

13 The Financial Action Task Force Recommendations’ definition of a “financial institution” uses the notion of “investment entity”. These Recommendations are available at the website: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

Implementation Agreement. The following SFIs, among others, benefit from a simplified procedure:

- (i) SFIs considered as exempt beneficial owners are not required to register with the IRS and are not subject to any reporting obligation under FATCA – their sole remaining obligation being to declare that their accounts are excluded from FATCA's scope¹⁴. The category of exempt beneficial owners encompasses mainly (a) Swiss governmental entities, (b) the Swiss Central Bank, (c) international organizations and (d) social security funds, private pension funds and property and casualty insurers.
- (ii) Certified deemed compliant Financial Institutions, i.e., non-profit organizations and Swiss Condominium Owners' Association, are not required to register with the IRS.
- (iii) The following three categories of SFIs – considered as deemed compliant Financial Institutions – are required to register with the IRS:
 - SFIs with a "*local client base*" – i.e., with at least 98% of their clients' assets being held by residents or entities of Switzerland or the European Union – are not required to comply with identification and reporting obligations under FATCA in connexion with the individual accounts they manage provided the account holders reside in Switzerland. Local client base SFIs must therefore only comply with FATCA obligations when dealing with corporate accounts and individual accounts of which the account holders do not reside in Switzerland;
 - "**Sponsored Entities**" agree to have all due diligence, reporting, withholding, and other requirements

¹⁴ A similar exclusion must be announced for Exempt Products, i.e., (i) certain retirement accounts or products and (ii) certain other tax-favored accounts or products (Annex II.III.A and B of the Implementation Agreement).

performed by another Participating FFI (the "**Sponsoring Entity**")¹⁵; and

- Swiss investment advisors, asset managers and certain collective investment vehicles must register with the IRS but are exempt from obligations arising out of an FFI agreement provided FATCA compliance is guaranteed through another FFI.

3.4. Non-Financial Foreign Entities

Entities that do not engage in the activities described under 3.2 above, do not qualify as SFIs and are therefore considered as Non-Financial Foreign Entities ("NFFEs").

SFIs and Participating FFIs have a duty to examine the status of an NFFE in the exercise of their due diligence requirements under the Implementation Agreement. If they assess that an NFFE holds a U.S. Account¹⁶, they will have to withhold a 30 percent tax on all payments originating from the United States and credited in favour of the NFFE.

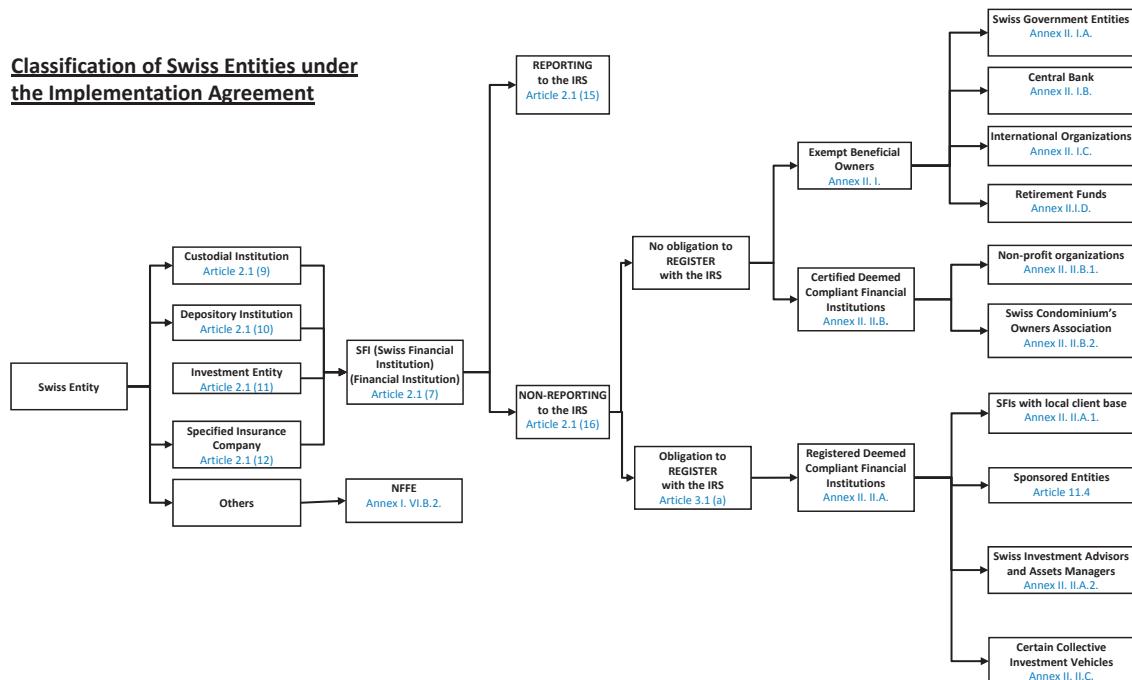
4. Conclusion

As per the Implementation Agreement or the applicable U.S. legislation, SFIs should consider taking the appropriate measures to comply with FATCA and thus avoid the 30% tax withholding on all payments originating from the United States starting on 1st January 2014. Among such measures, registration on the FATCA Registration Portal between 1st July 2013 and 15 October 2013 is highly recommended, failing which SFIs will expose themselves to a fine up to CHF 250'000.–¹⁷.

¹⁵ Among other conditions, the Sponsoring Entity (i) is authorized to manage the Sponsored FFI and enter into contracts on behalf of such Sponsored FFI, (ii) has registered with the IRS as a Sponsoring Entity, (iii) has registered the Sponsored FFI with the IRS (Final Regulations, 1.1471-5 - (f)(1)(i)(F), p. 440). Article 11 par. 4 of the Implementation Agreement refers to Sponsoring Entities as "Third Party Service Providers".

¹⁶ The Implementation Agreement provides that, with regards to the opening of a new entity account, an SFI must identify the controlling persons – any natural person who exercises control over an entity – and determine if the account has to be treated as a U.S. Account. Such will be the case if any controlling person is a U.S. citizen or resident on the basis of self-certification.

¹⁷ See Article 18 par. 1 let. c of the draft Federal Act on the execution of the Implementation Agreement.



Froriep Renggli in Short



The Firm

Founded in Zurich in 1966, Froriep Renggli is one of the leading law firms in Switzerland, with around 90 lawyers and offices in Zurich, Geneva, Lausanne and Zug as well as both in London and Madrid serving clients seeking Swiss law advice.

Our specialists:

GENEVA

- **Jean-Luc Herbez**
jherbez@froriep.ch, tel. + 41 22 839 63 00
- **Adriano Antonietti**
aantonietti@froriep.ch, tel. + 41 22 839 63 00
- **Vincent S. Reardon-Kofmel**
vreardon@froriep.ch, tel. + 41 22 839 63 00

ZURICH

- **Michael Fischer**
mfischer@froriep.ch, tel. +41 44 386 60 00

LONDON

- **Dunja Koch**
dkoch@froriep.ch, tel. +44 20 7236 6000

4 Rue Charles-Bonnet
CH-1211 Genève 12
Tel. +41 22 839 63 00
Fax +41 22 347 71 59
geneva@froriep.ch

Bellerivestrasse 201
CH-8034 Zürich
Tel. +41 44 386 60 00
Fax +41 44 383 60 50
zurich@froriep.ch

Grafenaustrasse 5
CH-6304 Zug
Tel. +41 41 710 60 00
Fax +41 41 710 60 01
zug@froriep.ch

9a Place de la Gare
CH-1003 Lausanne
Tel. +41 21 863 63 00
Fax +41 21 863 63 01
lausanne@froriep.ch

17 Godliman Street
GB-London EC4V 5BD
Tel. +44 20 7236 6000
Fax +44 20 7248 0209
london@froriep.ch

Antonio Maura 10
ES-28014 Madrid
Tel. +34 91 523 77 90
Fax +34 91 531 36 62
madrid@froriep.ch