SWISS FINANCIAL INSTITUTIONS AND THE US TAX AUTHORITIES

Jacqueline Saladin and Thomas Ziegler describe the latest developments in the Swiss response to FATCA

The relationship between Switzerland and the US was set on new foundations with the issuance of the Joint Statement Between Switzerland and the US on 29 August 2013, the Foreign Account Tax Compliance Act (FATCA) of 18 March 2010, the Agreement Between Switzerland and the US for Cooperation to Facilitate the Implementation of FATCA of 4 February 2013 (the FATCA Agreement) and the Swiss FATCA Act. The FATCA Agreement was amended on 30 September 2013 in accordance with the new timetable for implementing FATCA. Swiss Financial Institutions must now implement FATCA from 1 July 2014. The FATCA Agreement and FATCA Act are subject to an optional referendum.

Regulation of the past: joint statement and US programme

With the issuance of the joint statement, the US Department of Justice announced a programme for Swiss banks that offers the possibility to regulate the past and obtain resolution with regard to their status in US investigations.

The programme provides four categories and defines the different criteria for cooperation with the US authorities. Swiss banks that are already under US criminal investigation (category 1) are excluded from the programme. All other Swiss banks that want to participate must classify themselves in one of the other three categories within the deadlines. The formal requirements and the financial consequences are regulated differently for each category.

Participation in the programme is not mandatory. A Swiss bank that decides not to take part in the programme risks, however, making itself and its employees targets of a formal US criminal investigation. The Swiss bank also puts its reputation at stake. On the other hand, if a Swiss bank decides to participate in the programme and discloses client data within the scope of the administrative assistance to US authorities, it risks being sued for damages by clients who have not agreed to such disclosure. Either direction bears risks for the Swiss financial institution.

Swiss banks participating in the programme must provide information to the US authorities that will enable them to trace hidden assets that were switched from one Swiss bank to another destination bank. Swiss banks involved in formal US criminal investigations have already established such 'leaver lists', with the intention of sending them to the US authorities after approval by the Swiss government. It is unclear what information on transactions should be selected, and it cannot be excluded that other transactions with ties to the US will be listed. It is up to the Swiss destination bank to decide how to deal with all this information, in particular when its employees are concerned, but also with regard to data protection and legal action to prohibit the disclosure of information.

Regulation of the future: FATCA

All qualifying Swiss financial institutions must register with the US Internal Revenue Service (IRS) and should have finalised their registration by 25 April 2014 to be on the first IRS list of June 2014. After registration they must comply with the requirements for due diligence, reporting and withholding. Swiss financial institutions that do not register, whether intentionally or by negligence, will face fines based on the FATCA Act.

The scope of financial institutions that must register with the IRS is not clear. In particular, the qualification of investment companies causes problems, since the criteria provided by the IRS in its latest version of the final regulations are difficult to interpret. Depending on their structure institutions can qualify as passive non-financial foreign entities or investment entities, under the terms of FATCA and the FATCA Agreement. In the latter case they are obliged to register with the IRS.

Implementing the new regulations is a big challenge for Swiss financial institutions, but it cannot be ignored. Many questions remain unanswered, particularly about the classification of Swiss financial institutions under the US programme, and their qualification as foreign financial institutions under FATCA. Therefore any decision must be based on a thorough examination of the facts and legal provisions, and in collaboration with the financial institution that keeps the accounts. ■

L+P Ludwig + Partner

Ludwig & Partner
Attorneys
St Alban-Vorstadt 110
PO Box 419
CH-4010 Basel

Tel: +41 61 204 02 02
Fax: +41 61 204 02 22

www.ludwigpartner.ch