PRIVATE
Das Geld-Magazin

Datum: 11.05.2017

Private

Consolidation of the Private Banking Sector in Switzerland and Liechtenstein: Fatca Compliance Considerations

By Tom Plank, *U.S. Tax Lawyer PwC Switzerland*

and Bruno Hollenstein, *Director Financial Services Tax and Legal, PwC Switzerland*

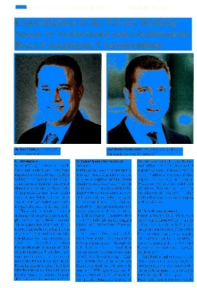
I. Introduction

Since the 2008 global financial crisis, the Swiss and Liechtenstein private banking sectors have faced lower profitability and higher compliance costs. Consequently, a wave of private bank consolidations has occurred in Switzerland. Although Liechtenstein has not faced a wave of consolidation in the private banking sector yet, market consolidation is expected to occur in the near future.

The acquisition of another Financial Institution's (FI) accounts can be a complex undertaking. If a bank is considering an acquisition of another FI's accounts, it should be aware that there are several important Foreign Account Tax Compliance Act (Fatca) issues to take into consideration. Likewise, if a bank has already made an acquisition of another FI's accounts, then it should consider how such an action may have affected the bank's Fatca registration. Particular attention should be paid to what the acquisition of accounts means for the bank's Responsible Officer's (RO) Fatca certifications due in 2018.

II. Fatca Options for Acquired Accounts

For Fatca compliance purposes, the U.S. Treasury's Fatca Regulations provide three possible options for the treatment of acquired accounts. These options are best framed by first asking: (1) Whether acquiring banks may treat the accounts of the acquired bank as Preexisting Accounts according to the U.S. – Switzerland or U.S. – Liechtenstein Intergovernmental Agreements (IGA), respective-



ly. (2) If so, whether the acquiring bank can indefinitely rely on the acquired bank's Fatca classifications of these accounts.

No sources of law outside of the Fatca Regulations provide answers to these questions directly. Although the FFI (Foreign Financial Institution) Agreements do not address these issues directly, they do point the way to where these matters are addressed in the Fatca Regulations. Both the updated and the superseded FFI Agreements cite the Fatca Regulations as the authority for the specific obligations referred to. Section 1.1471-4 of the Fatca Regulations addresses the Fatca treatment of acquired accounts. Likewise, Section 1.1471-3 addresses the issue of when acquired accounts may be treated as Preexisting Accounts and under what stipulations. These two sections in the Fatca Regulations constitute so-called "safe harbor" provisions for FIs making such acquisitions.

II.I Safe Harbor Option 1

Under the Fatca Regulation's first safe harbor (Safe Harbor Option 1), an acquiring bank may rely on the Fatca status determinations of the acquired bank for a transitional period of six months. On condition that the acquired bank was a Participating FFI, a Registered Deemed-Compliant FFI or a U.S. Financial Institution.

Safe Harbor Option 1 does not explicitly require that the acquiring bank re-paper the acquired accounts within the transitional period of six months; it merely says that the acquired bank's Fatca status determinations may be relied upon during the transitional period. This means that during the transitional period, the acquiring bank is not liable for Fatca withholding tax that was not properly levied because the acquired bank's Fatca status determinations were incorrect.

After the transitional period, the acquiring bank may continue to rely upon the account documentation provided by the acquired bank to determine the Fatca statuses of the accounts. However, once the transitional period expires, the acquiring bank is responsible for the Fatca status of its payees and is liable for any underwithheld tax resulting from an incorrect Fatca status. Therefore, acquiring banks may wish to mitigate risk by re-papering the acquired accounts during the six-month transitional period.

II.II Safe Harbor Option 2

The Fatca Regulations also offer a second safe harbor (Safe Harbor Option 2) that allows an acquiring bank to effectively treat acquired accounts as Preexisting Accounts. Safe Harbor Option 2 differs from Safe Harbor Option 1 by allowing the acquiring bank to rely on the Fatca status determinations of accounts made by the acquired FI indefinitely so long as certain conditions are met. Under Safe Harbor Option 2, a Participating FFI that acquires accounts may apply certain limitations on its "reason to know" obligations concerning the accounts' Fatca statuses as determined by the acquired bank. Furthermore, the acquiring bank will not have to re-paper the accounts unless there is a Change in Circumstances (CIC) or a tax withholding certificate expires. Tax liability for underwithholding may not attach to the acquiring bank given that the required tests for taking refuge in this safe harbor are passed.

II.III New-Account Treatment

The above two safe harbor provisions allow an acquiring bank to not treat the acquired accounts as new. If a bank is ineligible for these safe harbors or simply chooses to treat the acquired accounts as new accounts, then the acquiring bank must onboard each of them with fresh Fatca documentation and determine the new accounts' Fatca statuses individually. This would be a challenging exercise for a private bank.

III. Effect on Fatca Registrations

A bank that acquires or merges with another FI may see its Fatca registration and even its Global Intermediary Identification Number (GIIN) affected. Examples of such events include a bank buying another FI but taking the acquired FI's name, a bank making an acquisition and taking on a new name unrelated to the parties and a bank acquiring another FI that wishes to become a member entity of the acquiring bank's Expanded Affiliated Group (EAG).

IV. Acquired Accounts and Responsible Officer Certifications

In 2018, ROs in Model 2 IGA jurisdictions must make two Fatca certifications to the Internal Revenue Service (IRS) that cover three subject areas in total. The acquisition of accounts without having applied an appropriate Fatca compliance option will complicate a RO's ability to make a so-called "clean" Fatca certification. As Switzerland is a Model 2 IGA jurisdiction, Swiss ROs must complete their certifications on the IRS Fatca portal. A Swiss RO must certify his or her FI's (1) compliance with the completion of Preexisting Accounts reviews and (2) the absence of

PRIVATE
Das Geld-Magazin

Datum: 11.05.2017

any practices or procedures to assist account holders with avoiding Fatca. Furthermore, a Swiss Reporting Financial Institution must implement a Fatca Compliance Program under the responsibility of the RO.

In addition, the bank's RO must certify to the IRS every three years that the FFI has effective internal controls in place as part of the recurring certification process. Periodic effectiveness assessments of these Fatca controls are required to enable the RO's certification. Any deficiencies discovered in the course of a conducted review as part of a bank's internal compliance program or in preparation for the RO certification must be rectified before the RO can make a clean certification to the IRS.

A Liechtenstein FFI is not required to make an RO certification to the IRS, since Liechtenstein is a Model 1 IGA jurisdiction as opposed to a Model 2 IGA jurisdiction. However, many internal compliance programs require such a certification for internal purposes. Internal certifications or attestations are dependent on the acquiring bank's commitment to ensuring the Fatca compliance of acquired accounts. In addition, an EAG will typically require that all entities in-scope for Fatca purposes have an officer with sufficient authority attest to the FI's Fatca compliance. Furthermore, the RO of a Liechtenstein FI that is acting as a Compliance FI for FIs located in Model 2 IGA jurisdictions will have to submit the Fatca certification to the IRS on behalf of the Model 2 FI.

Finally, an acquiring bank should not ignore the possibility that a badly handled acquisition of accounts could jeopardize the bank's Qualified Intermediary (QI) status under its QI Agreement and Chapter 3 of the Internal Revenue Code because of QI-banks' mutually reinforcing QI and Fatca obligations.

V. Conclusion

It is important that private banks making account acquisitions apply the appropriate Fatca due diligence in the manner and in the timeframe prescribed. If neither of the safe harbors found in the Fatca Regulations are available to an acquiring bank, then the acquiring bank must treat the accounts as new and re-document their respective Fatca statuses. A failure to conduct the appropriate Fatca due diligence on acquired accounts could expose the acquiring FI to tax liability for underwithholding. Such failures would result in a review that would have to be remediated before the RO could sign a clean RO certification regarding both (A) compliance with the Preexisting Account due diligence procedures and (B) the periodic certification of effective internal controls regarding Fatca compliance.

If an acquiring bank has already absorbed accounts but has failed to apply the options mentioned above, then these issues should be resolved promptly. A failure to remediate will complicate an RO's ability to make a clean certification to the IRS in 2018. Such a failure could put the bank's Fatca status in jeopardy and may even affect its status as a QI.

thomas.plank@ch.pwc.com
bruno.hollenstein@ch.pwc.com
www.pwc.ch