

Client Alert

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Access to German Market being simplified for Swiss Banks

Recent developments

Germany and Switzerland have entered into a tax treaty which will regulate the taxation of undeclared assets held through Swiss banks. The treaty is also relevant for Swiss banks from another perspective: a separate “protocol” will improve their access to German retail customers.

Implications for Swiss Banks

Once ratified, the treaty will create opportunities for Swiss banks that wish to provide banking or financial services to German clients. Currently, where a Swiss bank does not have a BaFin-licensed branch office or subsidiary in Germany, it will not be permitted to actively solicit business from German residents. It can apply for an exemption from the license requirement, but even then it is still obliged to channel all (retail) client intake in Germany through a licensed German or European Economic Area (EEA) institution. Under the new treaty, this requirement will be waived. The administrative burden involved in obtaining the exemption will be reduced and direct market access granted. Swiss banks should familiarize themselves with the new opportunities available.

What the Treaty says

In September 2011, the Swiss and German finance ministers signed the new tax treaty between Switzerland and Germany. The treaty must still be adopted by the relevant legislative bodies of the two countries. It is expected to come into force at the beginning of 2013. The adoption of the treaty in Germany cannot be taken for granted, given that approval is required to be given by Germany’s Federal Council (Bundesrat) and the government currently does not have a majority in the Bundesrat. The opposition parties have already raised strong objections against the ratification of the treaty.

The protocol will simplify access to the German market for Swiss banks. To that end, the protocol creates a simplified exemption procedure. Basic elements of the simplified exemption for Swiss banks are:

- BaFin will create specific guidance notes for Swiss banks to facilitate the exemption procedures.
- BaFin will, as a rule, grant or deny the exemption within a period of three months. If this period is exceeded, BaFin will be obliged to explain the specific reason(s) why.
- Customer identification for AML purposes can be delegated to reliable third parties, including group companies or German post offices.
- Where there is cross-border solicitation of German residents, the German investor and consumer protection laws must be observed.

- The Swiss bank must agree that BaFin is permitted to participate in on-site inspections in Switzerland performed by FINMA regarding compliance with German investor and consumer protection laws (based on procedures still to be agreed between the two regulators, together with other technical details).

In addition, the distribution of Swiss securities funds in Germany (and vice versa) will be simplified, in particular by accepting and confirming the UCITS conformity in a relevant agreement.

Unfortunately, the new rules will not apply to Swiss investment firms such as asset managers and investment advisers. Nor will they apply to financial services such as leasing, factoring or payment services, if operated by non-banks.

Actions to consider

As soon as both parliaments have ratified the treaty, Swiss banks that do not yet have an exemption and that are interested in expanding their business to Germany should reconsider their current approach:

- They should follow any developments in this area, particularly once the technical details for the simplified exemption procedure have been published.
- They should assess whether doing business under the simplified exemption could fit their current (German) set-up from a regulatory and also from a tax perspective. The alternative would be to establish a branch office or subsidiary fully licensed by BaFin.
- Before contacting BaFin, they should assess whether they have been fully compliant in the past. The rules are quite restrictive and any cross-border business targeted at German clients in breach of German law would result in prosecution.

Conclusion

The new tax treaty significantly simplifies access to the German market for Swiss banks. Therefore, Swiss banks should closely follow the developments in this area and assess the new opportunities available, as well as the compliance of their current German set-up with German supervisory law.

Baker & McKenzie can advise clients comprehensively in this area. We have significant experience and expertise in advising Swiss financial institutions on German regulatory law.

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