Chapter Legal & Tax

Corporate Law Reform

As reported in the 2017 SECA Yearbook, the Swiss Federal Council presented its new draft of the corporate law reform along with the explanatory report (Botschaft) on 23 November 2016 and submitted it to parliament. The main proposals of the draft are:

- The Ordinance against Excessive Compensation in Public Companies is incorporated into the Swiss Code of Obligations. Several proposals to further tighten the compensation regime for listed companies have been dropped.
- A target gender quota of 30% for the board of directors and 20% for the executive committee of publicly listed companies on a "comply or explain" basis is proposed. This is in line with the preliminary draft except that the percentage for the executive committee has been reduced.
- Major companies in the natural resource exploitation industry will be required to disclose payments to public authorities.
- Numerous changes in "traditional" corporate law will be implemented, such as facilitating the process of incorporating and dissolving companies under simple circumstances, permitting a share capital denominated in foreign currency, a minimum par value below one cent, a "capital band" to give companies more flexibility to increase and reduce their share capital, clarification of the requirements for distributions out of capital reserves and interim dividends, and the enhancement of shareholders' rights in terms of better corporate governance.

As a next step, the draft law will be submitted to the parliament for deliberation and is not expected to be enacted before 2019. SECA will monitor the further progress of the corporate law reform and will inform about significant developments of particular relevance for VC/PE investments in Swiss companies.

Proposed Implementation of "Global Forum" recommendations

On 17 January 2018, the Swiss Federal Council opened the consultation process for a proposed law to implement the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. The draft new law aims at further tightening the transparency rules following the introduction of notification duties for holders of bearer shares and holders of participations of 25% or more in 2015 in the course of the implementation of the FATF recommendations (Financial Action Task Force):

- Although the anonymity of the holders of bearer shares has already been lifted since 1 July 2015 and holders of bearer shares must identify themselves to the company, bearer shares are now proposed to be abolished entirely.
- Violations of the notification duties are proposed to be punishable by fines.
- Companies would be required to hold a bank account with a Swiss bank.

The Federal Council hopes that with the proposed measures Switzerland will achieve a positive assessment in the next country review by FATF. The consultation process lasts until 24 April 2018. Based on the results of the consultation, the bill will be revised and is expected to be submitted to parliament for deliberation in winter 2018/19. SECA will monitor the progress of the legislative project and inform about significant developments with particular relevance for VC/PE investments in Swiss companies.

FinTech Regulation

In February 2017, the Swiss Federal Council issued for consultation proposed amendments to the Banking Act (BA) and the Banking Ordinance (BO) aimed at facilitating the emergence of innovative business models based on financial technology (FinTech) – see 2017 SECA Yearbook. The Swiss Federal Council enacted corresponding amendments to the Banking Ordinance (BA) with entry into effect as per 1 August 2017. The risk-based and technology-neutral amendments are meant to lower market entry barriers and are based on three pillars: (1) banking license "light" to cater for the specific risk profile of FinTech business models, (2) creation of an innovation area (ie, "sandbox"), and (3) regulatory adjustments with respect to the holding period for settlement accounts:

- The new licence type proposed under the draft regulatory amendments of the Banking Act (BA) targets companies accepting public deposits while not using such deposits to fund traditional lending business. Under the licence, the aggregate amount of public deposits must not exceed CHF 100m (a higher threshold may be individually authorised) and may neither be invested nor be interest bearing. Companies licensed accordingly would be subject to a more lenient capital adequacy framework intended to ease the regulatory burden in cases where FinTech or other companies take deposits, while, from a risk perspective, it would seem disproportionate to impose a full traditional banking licence given their specific business model.
- The sandbox is aimed at creating an innovation environment wherein providers of financial services are not subject to licensing as a result of public deposit taking and it allows company to accept deposits without a banking licence up to an aggregate deposit amount of CHF 1m and irrespective of the number of public deposits, provided that the deposits are not invested, no interest is being paid and the funds are used for commercial/industrial purposes. The sandbox allows FinTech and other companies to test and develop business models without blocking capital and incurring the cost that a full banking licence entails.
- The revised BO provides for an extended holding period for settlement accounts in that third-party monies accepted on accounts for the sole purpose of settling client transactions would not qualify as deposits. The maximum holding period was extended from previously seven days to 60 days, which allows alternative finance platforms to hold monies during the (collection) time period without requiring a banking licence, again provided that no interest is paid and funds are not invested.

Initial Coin Offerings (ICOs)

On 29 September 2017, FINMA published its guidance note 04/2017, set out its position on initial coin offerings (ICOs) and highlighted areas in which ICOs – be it in the form of payment tokens/crypto-currencies, utility tokens, asset tokens or hybrid tokens – may be covered by existing financial market regulation. Further and in response to the market demand for regulatory clarification on classification aspects and questions relating to the regulatory treatment of ICOs, FINMA published on 16 February 2018 its guidelines for enquiries regarding the regulatory framework for ICOs. In these guidelines, FINMA provides market participants with information on how it will deal with enquiries regarding the supervisory and regulatory framework for ICOs. The guidelines specify the information required by FINMA to process enquiries from market participants and also set out the principles on which FINMA will respond to them.

Swiss Financial Services Act / Swiss Financial Institutions Act

In November 2015, the Swiss Federal Council presented the draft bills on the the Financial Services Act (FinSA) and the Financial Institutions Act (FinIA). The legislative project primarily aims at creating a level playing field for financial service providers, at strengthening investor protection and at harmonizing the Swiss regulatory framework with international, particularly EU standards.

By imposing new regulatory requirements on market participants in terms of transparency, client segmentation, risk disclosure, reporting, continuing education and learning, duties of care and best execution, by introducing an integrated prospectus regime, and by providing for new or altered license obligations, FinSA and FinIA will deeply impact the Swiss financial industry, including the private equity and investment funds segment.

Following detailed consultations by the Council of States and the National Council it is currently expected that FinSA / FinIA will be passed by Swiss Parliament during this year's summer session and will enter into force in 2019.

Swiss Tax Proposal 17

After the Corporate Tax Reform III was rejected in February 2017, the Swiss Federal Council has launched a revised reform package soon after which has already passed the consultation procedure. The Swiss Federal Council has passed the final dispatch on 21 March 2018. By doing so, the parliamentary debate could be concluded in 2018's autumn session. The first measures could then become effective as of the beginning of 2019 and the main part of the measures as of 2020, if no one called for a referendum.

The main objective of the Tax Proposal 17 is the same as it was for the Corporate Tax Reform III. It aims to boost Switzerland's appeal as a business location of international relevance and it should ensure international acceptance of the Swiss tax system (e.g. by the OECD) by abandoning the preferrential cantonal tax regimes. The Tax Proposal 17 intends to achieve this with very similar instruments and measures which the Corporate Tax Reform III consisted of, except for the notional interest deduction which shall not be included. In addition the reform contains several adjustments (such as a reduction of the partial taxation relief) which have been developed in close collaboration with the cantons which now support the reform proposal.

Spontaneous Exchange of Tax Rulings

As of 1 January 2018, the spontaneous exchange of information has become effective in Switzerland. The exchange also covers tax rulings concerning international matters such as rulings regarding international tax allocation, taxation of principal companies, transfer pricing and withholding tax. Tax rulings which deal with national tax matters only such as stamp duty rulings are generally not in scope.

Swiss companies were asked by the Swiss Federal Tax Authorities to withdraw any tax rulings which they do not want to be exchanged before 31 December 2017. According to the Swiss Federal Tax Authorities, the withdrawal of tax rulings can still be filed in 2018 with a retroactive effect, if no rights have been derived from such rulings in 2018 yet.

New provisions regarding single investor funds

In late 2017 and early 2018, the SFTA slightly adjusted its practice with regard to the tax treatment of single investor funds. First, single investor funds of property insurance companies are now also recognized from a tax perspective.

A further adjustment with respect to the collectivity of investment schemes is that two (instead of five) independent investors are now sufficient in order for a vehicle to be considered collective (and therefore not deemed a single investor fund). The SFTA has thus officially adapted its practice to the legal basis of the Collective Investment Schemes Act. However, it still remains unclear under what circumstances two investors are considered to be "independent". According to the CISA, for instance, two group companies are considered to be independent, whereas the SFTA has denied this so far based on our experience. The question of independence does also arise in the case of family members or if one investors holds 99.9% in the fund and the other one (e.g. a general partner) does only hold 0.1%.

US Tax Reform

In December 2017, the US introduced a comprehensive tax reform, which also affects private equity investments in the USA. The most relevant changes for portfolio companies are the following:

- A reduction of the corporate tax rate from 35% to 21%.
- The privileged Carried Interest taxation has been slightly modified, but not abolished as feared.
- The introduction of a comprehensive limit on the tax deductibility of interest based on a company's EBITDA.
- More leeway for depreciations of certain types of fixed assets
- Conversion of the tax system to territorial taxation with participation relief and repatriation tax
- Introduction of a Base-Erosion-Anti-Abuse Tax (BEAT) in order to discourage international tax planning in corporate groups.

The tax reform also features a significant change regarding the sale of shares in US partnerships. Recently, a US court requalified the gains on the sale of partnership shares as capital gains (and thus exempted them from taxation for foreign investors). The tax reform now reverses this decision and treats the profits as Effectively Connected Income (ECI), subject to a 10% US withholding tax and triggering US filing requirements.

All in all, the US tax reform, which came into force at the end of 2017, is the largest in 30 years and has many advantages but also some disadvantages for taxpayers in the USA. Careful analysis of its impact is advised.

SECA Model Documentation

Last but not least, the Legal & Tax Chapter is finalising its coordination efforts for (i) the launch of a new VC Model Documentation "light" for smaller (pre-institutional investor) financing rounds that will be fully compatible with the regular VC Model Documentation and (ii) the launch of the 3rd edition of the regular SECA VC Model Documentation for financing rounds with institutional investors to reflect regulatory changes as well as market input. SECA envisages both documentation launches to occur in Q2 2018.

This is a glimpse of relevant recent or imminent legal, regulatory and tax changes and past and ongoing initiatives of the Legal & Tax Chapter. We continue to strive to improve the regulatory and fiscal environment for the private market industry. This is an uphill battle in a number of respects in view of the current trends of ever more stringent regulation and of fiscal tightening. Bear with us and please let us have your comments and suggestions.

For the SECA Legal & Tax Chapter:

Dieter Wirth
Partner
PwC
Birchstrasse 160
8050 Zürich
dieter.wirth@ch.pwc.com

Hannes Glaus
Partner
Bratschi AG
Postfach 1130
Bahnhofstrasse 70
8021 Zürich
hannes.glaus@bratschi.ch

Christian Koller
Partner
Blum & Grob Rechtsanwälte AG
Neumühlequai 6
Postfach
8021 Zürich
c.koller@blumgrob.ch

Beat Kühni
Partner
Lenz & Staehelin
Brandschenkestrasse 24
8027 Zürich
beat.kuehni@lenzstaehelin.com

Marc Wicki
Managing Director
Partners Group
Zugerstrasse 57
6341 Baar
marc.wicki@partnersgroup.com