

THE PRIVATE EQUITY
REVIEW

EIGHTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

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REVIEW

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PREFACE

The eighth edition of *The Private Equity Review* follows an extremely active 2018. While the number of global private equity deals completed declined from 2017, the total value of such deals was the highest since 2007, and the third-highest of all time. Deal activity was weighted towards the upper end of the market, and included several large take-private transactions. Fundraising activity was also strong, as institutional investors remained extremely interested in private equity as an asset class because of its strong performance relative to public markets. As a result, private equity funds have significant amounts of available capital, leading to very competitive transactions being completed at increasing purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise. Given all of this, we expect private equity will continue to play an important role in global financial markets, not only in North America and western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. In addition, we expect the trend of incumbent private equity firms and new players expanding into new and less established geographical markets to continue.

While there are potential headwinds – including trade tensions, a slowing Chinese economy, Brexit and an eventual end to one of the longest-running recoveries in US history – on the horizon for 2019 and beyond, we are confident that private equity will continue to play an important role in the global economy, and is likely to further expand its reach and influence.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 25 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this eighth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie

Kirkland & Ellis LLP

Chicago, Illinois

April 2019

Part I

FUNDRAISING

SWITZERLAND

Fedor Poskriakov, Maria Chiriaeva and Isy Isaac Sakkal¹

I GENERAL OVERVIEW

The year 2017 was a successful one for fundraising, with an aggregate amount of €4.275 billion raised by private equity funds in Switzerland.² This figure is significantly higher than the amount raised in 2016 (€704 million), in 2015 (€1.280 billion) and 2014 (€3.301 billion).³ Most of the fundraising activity was related to buyout transactions. Large institutional investors such as pension funds and insurance companies remained the decisive driving force for the private equity sector. The Swiss regulator, together with the Swiss Funds and Asset Management Association (SFAMA) and the Swiss Private Equity and Corporate Finance Association (SECA), are keen on aligning the Swiss legal framework with the developments in the European Union and are actively working to promote Switzerland as an attractive fundraising location.

In recent years, innovation has been at the centre of attention across the different industries. In 2018, Switzerland was ranked in top position, for the eighth consecutive year, as the world leader for innovation by the Global Innovation Index. According to the Swiss Venture Capital Report of 2018, financing rounds increased by 15.9 per cent in 2017 from 151 in 2016 to 175 in 2017. That said, the total amount of money invested in Swiss start-ups increased by only 3.2 per cent, from 909 million Swiss francs in 2016 to 939 million Swiss francs in 2017.⁴ Biotech and information and communications technology continued to grow in 2017 with an increase of more than 10 per cent over the previous year. The financial technology (fintech) industry also rose sharply, by 61.8 per cent, to reach 75.7 million Swiss francs, with a high number of financing rounds above 3 million Swiss francs.⁵ For the fintech industry, the decisive considerations remain financing and fundraising.

The venture capital market has gained in size and this trend is likely to continue in view of the Swiss Entrepreneurs Foundation's aims to raise a fund of up to 500 million Swiss francs to support Swiss start-ups. The fund is expected to be launched in the first half of 2019, upon receipt of authorisation from the Swiss Financial Market Supervisory Authority (FINMA). Venture capital investments in start-ups are popular with private equity investors seeking to take advantage of favourable borrowing conditions and negative interest rates.

1 Fedor Poskriakov is a partner, Maria Chiriaeva is a senior associate and Isy Isaac Sakkal is an associate at Lenz & Staehelin.

2 Invest Europe yearbook – 2017 European Private Equity Activity, Overview, Europe and country tables.

3 Invest Europe yearbook – 2017 European Private Equity Activity, Overview, Europe and country tables.

4 Swiss Venture Capital Report 2018, available at: <https://www.startupticker.ch/en/home>.

5 Swiss Venture Capital Report 2018, available at: <https://www.startupticker.ch/en/home>.

Correlatively, and as a result of, *inter alia*, the Ordinance Against Excessive Remuneration at Listed Companies, various obligations have increased the cost of investment in public companies therefore many investors choose to invest in start-ups.

II LEGAL FRAMEWORK FOR FUNDRAISING

Fundraising in or from Switzerland through the use of collective investment schemes (CISs) is governed by the Collective Investment Schemes Act of 23 June 2006 (CISA) and its implementing ordinances (CISO and FINMA-CISO). Switzerland is not a Member State of the European Union and is therefore not subject to the EU Alternative Investment Funds Managers Directive (AIFMD). That being said, the 2013 revision of the CISA, among other things, aligned the Swiss legal framework with the third-country requirements of the AIFMD, in a bid ultimately to benefit from the extension of passporting to third countries.

The regulatory framework applicable to CISs has not materially changed since the 2013 revision of the CISA. That said, a number of significant changes to the CISA are contemplated as part of the Swiss financial regulation overhaul through the Swiss Federal Financial Services Act (FinSA) and the Swiss Federal Financial Institutions Act (FinIA), which will enter into force on 1 January 2020. The Swiss parliament enacted these two statutes on 15 June 2018. On 24 October 2018, the Swiss Federal Council opened a consultation procedure, which will run until 6 February 2019, on the implementing ordinances of the FinSA and FinIA, namely the Financial Services Ordinance (FinSO) and the Financial Institution Ordinance (FinIO). The new statutes are largely inspired by the EU financial markets and services regulations (MiFID, Prospectus Directive, PRIIPs) and will provide, among other changes, for (1) an abolition of licensing requirement for Swiss distributors, (2) the concept of 'offer' to replace the existing concept of 'distribution', (3) an alignment of the client categorisation rules based on EU MiFID concepts, and (4) a limitation of the requirement to appoint a Swiss representative and paying agent for offers of collective investments to qualified investors. In addition, non-Swiss financial service providers acting on a cross-border basis will be subject to Swiss rules of conduct, as well as, under certain circumstances, registration duties, or they may be required to set up a business presence in Switzerland with respect to their Switzerland-based customers.

i Preferred vehicle for private equity funds

Private equity firms investing in Switzerland are free to choose to set up both Swiss and non-Swiss structures (typically Jersey, Guernsey or Cayman structures) for fundraising and investment purposes. The preferred legal form depends on different drivers such as (1) the tax transparency of the vehicle, i.e., whether it is subject to Swiss corporate taxes on income or capital gains, (2) restrictions and limitations on the investment activities of the private equity fund, (3) the limited liability of the management and the investors and (4) the close-ended nature of the fund.

Private equity funds investing in Switzerland may structure their investment by setting up either a Swiss structure contemplated by the CISA, namely a Swiss limited partnership for collective investments (the Swiss LP), a Swiss investment company (including the CISA-specific form called the SICAF) or any foreign law structure – whichever is the most appropriate for fundraising and investment. In practice, the predominant legal form chosen by sponsors is a non-Swiss structure – the Anglo-Saxon limited partnership (LP).

ii Swiss LP

The Swiss LP is a CIS specifically aimed at alternative investments, private equity investments and real estate development, construction or infrastructure projects. This legal form mirrors the LP or the Luxembourg SICAR.

The Swiss LP is a partnership whose sole purpose is collective investment. It benefits from a quasi-legal personality and is entitled to hold assets or claims. It conducts investments in risk capital and it is subject to particularly flexible investment guidelines.

A Swiss LP is based on a partnership agreement, with at least one member being subject to unlimited liability for the commitments of the Swiss LP (the general partner). The general partner must be a Swiss company limited by shares and can only be appointed as a general partner of a single Swiss LP. While the Swiss LP is not subject to any capital requirements, the minimum share capital of the general partner must amount to 100,000 Swiss francs and be fully paid in. In the event that the Swiss LP has several general partners, those must together have a minimum paid-up share capital of 100,000 Swiss francs. The general partner may delegate investment decisions or other activities to third parties, provided that the delegation is in the best interest of the Swiss LP. In addition, the partnership agreement must be supplemented by a prospectus, which must be consistent with the statutory provisions.

The investors in the Swiss LP are the limited partners. They are liable only up to a specific amount. Although the limited partners may not be involved in the management of the Swiss LP, they benefit from information and certain governance rights (e.g., delivery of periodic financial information or information on the financial accounts). The Swiss LP is only open to qualified investors as defined in the CISA (see Section II.iv).⁶ Finally, the Swiss LP is a regulated entity that must have a prior licence from FINMA and is subject to FINMA's ongoing supervision (see Section III.i).

iii Investment company and SICAF

The SICAF is a Swiss company limited by shares whose corporate purpose is limited to the investment and management of its own assets, to the exclusion of any entrepreneurial activity. Along with its prospectus, the SICAF defines its private equity investments, investment policy and investment restrictions in its articles of association, as well as in the investment guidelines. The regulatory framework set out in the CISA with respect to the SICAF is quite limited. As a result, the SICAF is substantially governed by the provisions of the Swiss Code of Obligations that are applicable to ordinary companies limited by shares.

It should be noted that Swiss limited companies are not subject to the CISA and therefore not regulated by FINMA if their shares are listed on a Swiss stock exchange⁷ or their shareholders are exclusively qualified investors as defined under the CISA (see Section II.iv). To our knowledge, all investment companies have relied to date on this regulatory safe harbour. As a result, there are no SICAFs incorporated in Switzerland under the CISA. Most of the following developments will therefore be limited to the Swiss LP as the typical Swiss vehicle for private equity funds.

6 As a consequence of the limitation of the circle of investors, a Swiss LP cannot be listed on a securities exchange.

7 Where this is the case, listing rules of the Swiss exchange where the Swiss limited company is listed (SIX Swiss Exchange or BX Berne Exchange) must be complied with.

iv Other forms

Foreign private equity vehicles are frequently used by promoters active in the Swiss market. The choice of the specific foreign structure used will primarily depend upon the domicile and type of target investors, as well as on tax aspects, jurisdictions of investee entities and other factors. For example, an EU structure may be used to get access to the EU market without having to obtain an authorisation in every country in accordance with the AIFMD regulation (i.e., passporting). The Swiss private equity community frequently uses foreign structures, mostly based in other countries in Europe, such as UK limited partnerships or Luxembourg SICARs. Those would, therefore, solely be subject to Swiss requirements regulating fundraising (i.e., fund distribution), as described below.

v Key legal terms

Generally, a Swiss LP may be set up for an unlimited period. That being said, in practice, a Swiss LP's duration is usually contractually restricted to 10 to 12 years, with an extension option for another three years.

The partnership agreement governs the relationship between the limited partners and the general partner. Swiss law allows a significant freedom to the parties with respect to the regulation of their relationship, subject to a certain number of mandatory provisions. As a matter of principle, the partnership agreement includes provisions on the following items:

- a* total capital commitment;
- b* repayment of capital;
- c* duration of the fund and possible extension;
- d* management participation in the fund;
- e* management fees;
- f* investment policy, investment restrictions, risk diversifications, investment techniques;
- g* reporting;
- h* conditions for admission of new and withdrawal of existing investors;
- i* voting quorums and majorities;
- j* restrictions on the transferability of the interests; and
- k* distribution of proceeds.

The SFAMA and the SECA jointly developed a model prospectus and a company agreement for the Swiss LP, which has been recognised by FINMA for the purposes of authorisation applications.⁸

vi Key items for disclosure

Both the Swiss LP and the general partner must be registered with the Commercial Register of the canton where they are incorporated. The Commercial Register is public and provides general information regarding the Swiss LP and the general partner, such as the capital, the registered office and the authorised signatories. The partnership agreement establishing the Swiss LP must also be filed with the Commercial Register after its approval by FINMA and is, therefore, generally available to the public. However, the financial statements of the Swiss LP, although available to its investors, are not available to the public. The aggregate amount of the capital commitments of the limited partners must also be registered with the

⁸ Available at: <https://www.seca.ch/Templates/Templates/LP-Musterdokumentation.aspx>.

Commercial Register. However, neither the names of the limited partners nor the individual commitments are available to the public. Although the liability of the limited partners of the Swiss LP is capped at a specified amount registered in the Commercial Register, additional financial commitments may be required by the partnership agreement.

Pursuant to the SFAMA guidelines on the charging and use of fees and costs (the Transparency Guidelines), which, in accordance with FINMA Circular 2008/10, are recognised as the minimum standard, certain information duties are imposed on distributors and Swiss representatives (see Section II.iv) of both Swiss and foreign funds. In a nutshell, investors are to be informed on fees, costs, rebates and retrocessions paid or received in relation to the fund. This information shall be disclosed in the fund documentation. Furthermore, with respect to retrocessions, their recipients must spontaneously inform the investor of the amount of the compensation received by giving the calculation parameters or the spread of those inducements. Upon an investor's request, the recipients are to further disclose the amount actually received. Finally, the existence and nature of any conflict of interest that may arise from the payment of the retrocessions is to be disclosed to investors in this context.

vii Marketing rules and investor classification

Concept of 'distribution'

Any offer or advertisement for a CIS that is not exclusively directed towards regulated financial intermediaries (e.g., banks, insurance, companies, securities dealers, fund administration companies, fund asset managers and central banks) is construed as distribution, which is subject to specific CISA requirements both for the CIS and the distributor. Indirect distribution is also subject to the same requirements (e.g., offering managed accounts in CISs or fund-linked notes, depending on the specific facts).

The CISA excludes the four situations outlined below from the definition of distribution. As result, the provision of information or the offer of CISs are deemed not to constitute a form of distribution if they take place:

- a* at the investor's request within the context of a long-term and remunerated advisory agreement or an execution-only relationship with a regulated financial intermediary or with an independent asset manager (subject to certain conditions);
- b* at the instigation of investors or on their own initiative in relation to a specific CIS and without any intervention or prior contact made by the financial intermediary (reverse solicitation);
- c* within the context of a written discretionary management agreement entered into by the investor with a regulated financial intermediary or an independent asset manager (subject to additional conditions); and
- d* the publication of prices, net asset values and tax data by regulated financial intermediaries.

Notably, the new regulatory framework that enters into force on 1 January 2020 will replace the concept of 'distribution' with the concept of 'offer'. The latter is defined as an invitation to acquire a financial instrument that contains sufficient information on the conditions of the offer and the terms of the financial instrument. Under the current understanding and pending the adoption of the draft FinSO, the definition of offer is expected to be more limited than the current concept of 'distribution', but the final approach will be known once the ordinances have been finalised and FINMA's regulatory practice firmed up.

Further, the distributor licence currently existing under the CISA will be abolished. That said, financial services providers offering CISs will probably have to (1) comply with the

rules of conduct provided under the FinSA and (2) register their client advisers in the newly introduced adviser register (subject to exceptions). The obligation to register in the adviser register is expected to be applicable as of 1 July 2020, after a transition period.

Concept of ‘qualified investors’

The concept of ‘qualified investors’ is another important regulatory concept in the context of the distribution of CISs. Under the CISA, the concept of ‘qualified investors’ comprises:

- a regulated qualified investors:
 - regulated financial intermediaries, including banks, securities dealers, fund administration companies and managers of collective investment schemes, as well as central banks; and
 - regulated insurance companies; and
- b unregulated qualified investors:
 - public entities, retirement benefit institutions (pension funds) and companies with professional treasury management (this concept presupposes that the entity has at least one qualified professional in charge of the management of its financial assets);
 - companies with professional treasury management;
 - investors who have concluded a written discretionary asset management agreement, provided they do not exercise their right to opt out of the ‘qualified investor’ status and the agreement is entered into with a regulated Swiss financial intermediary (namely, those that are referred to as ‘regulated qualified investors’) or with an independent asset manager (subject to certain conditions); and
 - high-net-worth individuals (HNWIs) and private investment structures created for HNWIs that have requested, in writing, to be considered qualified investors (opt-in declaration), provided they, in addition, confirm that they hold a minimum net wealth of 5 million Swiss francs, or establish that they have, based on their professional training and experience, the technical competence of a qualified investor combined with a minimum net wealth of 500,000 Swiss francs.

Investors who are not included in one of the above categories are non-qualified investors. The characterisation of an investor as being qualified has a bearing on the regulatory restrictions applicable to the distribution of interests in CISs (see below).

Upon the entry into force of the revised CISA on 1 January 2020, the distinction between qualified and non-qualified investors will be maintained. The definition of the qualified investor will nevertheless be adjusted to be in line with the new client segmentation system that is contemplated by the FinSA. In a nutshell, all professional investors under the FinSA will be deemed qualified investors. The concept of ‘professional investors’ will include all institutional clients and, *inter alia*, investment vehicles for HNWIs with a professional treasury management, large companies (under certain conditions) and HNWIs opting to be treated as professional investors. In this regard, the current minimum threshold of 5 million Swiss francs for the HNWI opt-in declaration will be lowered to 2 million Swiss francs (regardless of knowledge or experience).

Distribution of units in Swiss LPs

As mentioned above, private equity funds that are incorporated as a Swiss LP may only be distributed to qualified investors. In practice, limited partners will generally be required to confirm their status as qualified investors by signing a declaration on the subscription form for an interest in the Swiss LP.

It should be noted that, in accordance with the CISO, individuals controlling the general partner or partners may participate in the company as limited partners if (1) this is provided in the partnership agreement, (2) the participating interest stems from the private assets of the concerned individuals and (3) the investment is made at the time of the launch of the Swiss LP.

Distribution of foreign private equity funds to non-qualified investors

Foreign private equity funds may be distributed to non-qualified investors (i.e., retail investors) in Switzerland if those are registered with FINMA. The main approval requirements are the following:

- a* the CIS, the fund management company or the fund company, the asset manager and the custodian must be subject to public supervision with a focus on investor protection;
- b* investor rights, investment policy, the company or fund management company and custodian must be subject to regulation equivalent to the provisions of the CISA;
- c* the CIS must not be described in such a way as to deceive or confuse, namely with respect to its investment policy;
- d* a representative and paying agent must be appointed for units distributed in Switzerland;
- e* there must be a cooperation and information exchange agreement between FINMA and the foreign supervisory authorities responsible for distribution; and
- f* foreign CISs may not be distributed in Switzerland unless and until the fund management company has appointed a representative to assume the representation obligations set out in the CISA.

In practice, foreign private equity funds are typically not eligible for registration for distribution to non-qualified investors in Switzerland, insofar as many of the requirements (typically, items (a) and (b) above, are not met).

Distribution of foreign private equity funds to qualified investors

Notwithstanding the above, foreign funds may still be distributed to qualified investors. By contrast to distribution to regulated qualified investors (which is excluded from the scope of any requirements on distribution), distribution to unregulated qualified investors (see above) is permissible provided that:

- a* the distributor is subject to appropriate supervision in its home jurisdiction in respect of fund distribution;
- b* a Swiss representative, as well as a paying agent, is appointed by the CIS;
- c* the name of the CIS is not confusing for the investors; and
- d* the distributor enters into a written Swiss-law-governed distribution agreement with the Swiss representative of the CIS, based on the requirements of the SFAMA guidelines on the distribution of CISs (the Distribution Guidelines).

In this context, anyone who distributes foreign CISs to unregulated qualified investors in Switzerland (as opposed to an exclusive cross-border activity) is deemed to be a fund distributor and must further be authorised by FINMA as such.

It should be noted that, as of 1 January 2020, the revised CISA will introduce a new regime for the offer of foreign CISs to qualified investors. Foreign CISs offered exclusively to qualified investors, other than to HNWIs who opted in to be treated as professional clients or qualified investors, will be exempt from the requirement to appoint a representative and a paying agent in Switzerland. This is expected to facilitate access to the Swiss distribution channels in most instances.

Other distribution and marketing rules

The Distribution Guidelines, which are recognised by FINMA as minimum standards, provide, *inter alia*, for due diligence and information duties both for promoters and distributors of CISs. In particular, non-qualified investors are to be provided with objective information on investment character, opportunities and risks associated with a specific CIS on the basis of their experience and knowledge and the complexity of the CIS. In addition, as mentioned above, the Transparency Guidelines provide for further disclosure duties with respect to fees, costs, retrocessions and rebates that apply in this context. This regulatory framework will evolve, as of 1 January 2020, with the removal of all provisions regarding distribution within the CISA.

Further, marketing activities in Switzerland are also subject to the Swiss legislation against unfair competition that addresses commercial communication with customers and prohibits unfair business practices. Under the Swiss Unfair Competition Act, any behaviour or business practice that is deceptive or that infringes the principle of good faith in any other way with the result of affecting the relationship between suppliers and customers is deemed unfair and unlawful.

Finally, under the CISA, foreign fund documentation, marketing materials and any other publications or websites, offered or advertised to unregulated qualified investors must disclose the identity of the Swiss representative and paying agent, the home jurisdiction of the CIS, the place where the relevant fund documents are available, as well as the place of performance and jurisdiction at the registered office of the Swiss representative. In practice, a specific wording with respect to Swiss investors is added to those materials.

viii Fiduciary duties to investors

From a Swiss regulatory perspective, a Swiss LP is not required to have a sponsor. The general partner is bound by fiduciary duties towards the investors (limited partners) that depend upon the provisions of the partnership agreement. Generally, under the CISA, the general partner fiduciary duties include loyalty, due diligence and information duties. The SFAMA Code of Conduct, which has been recognised by FINMA as the minimum standard, gives specific guidance on these duties. In a nutshell, the general partner must manage the Swiss LP in accordance with the principle of equal treatment and must refrain from favouring certain investors at the expense of others. Furthermore, all CISA institutions must have internal regulations and appropriate organisation to ensure compliance with their fiduciary duties.

Although the model documentation for Swiss LPs (see Section II.ii) does not contain provisions limiting the liability of the general partner towards the limited partners, such

a limitation may generally be inserted in the partnership agreement. However, contractual provisions limiting or excluding a party's liability for wilful misconduct or gross negligence are null and void under Swiss law.

III REGULATORY DEVELOPMENTS

i Regulatory oversight

The formation of a private equity fund established in the form of a Swiss LP must be authorised by FINMA prior to perform any activity. Both the Swiss LP and the general partner must obtain a licence from FINMA (generally through a single regulatory process). The application is to be reviewed by an audit firm recognised by the Federal Audit Oversight Authority (FAOA). In addition, individuals controlling the general partner and any qualified participants (i.e., any person or entity directly or indirectly owning at least 10 per cent of the capital or voting rights in the general partner or who can have a material influence in another way) are subject to a fit-and-proper test by FINMA. The constituting documents (partnership agreement) also require FINMA's approval. In terms of timing, subject to FINMA's workload and in the absence of any unforeseen complications, the authorisation is generally issued within a three- to four-month period once all the required documents are filed. With respect to the fees, initial registration fee amounts to between 10,000 and 40,000 Swiss francs. FINMA further levies a yearly supervision fee, which is computed on the basis of the assets of the Swiss LP.

The Swiss LP, and its general partner, are then subject to the ongoing supervision of FINMA. The Swiss authority benefits from extensive audit and inspection rights over regulated entities. The Swiss regulatory regime is based on a 'dual supervisory regime', which requires regulated entities to appoint a FAOA-recognised auditor (which cannot be the audit firm that was in charge of reviewing the application), whose task is to verify whether the regulated entity complies with all applicable legal, statutory and regulatory requirements. The auditor's report is addressed to both the entity and FINMA. Finally, the Swiss LP must appoint a depository and a paying agent, but the appointment of a custodian bank is not required.

It is worth noting that non-Swiss private equity vehicles may make investments in Switzerland without being subject to FINMA's authorisation, provided that the vehicle is not deemed to be centrally administered in or from Switzerland (which would result in the fund being viewed as a Swiss fund). By contrast, as previously mentioned, a registration with FINMA is required before foreign CISs can be distributed in or from Switzerland to non-qualified investors (see Section II.iv).

Furthermore, Swiss management companies or investment managers of a Swiss or non-Swiss CIS are in principle subject to a mandatory licence requirement in Switzerland. An exception applies to asset managers of foreign CISs whose investors are unregulated qualified investors if:

- a the assets under management, including those resulting from the use of leverage, are below the threshold of 100 million Swiss francs;
- b the assets under management are below 500 million Swiss francs (unleveraged) and closed-ended (such as the Swiss LP) for a period of five years; or
- c the investors are exclusively group companies of the asset managers group.

Non-Swiss managers of both Swiss and non-Swiss CISs having a branch in Switzerland are also required to register with FINMA. This presupposes that the foreign asset manager:

- a* is subject to adequate supervision by its home regulator;
- b* has sufficient financial resources, adequate organisation, as well as competent staff to operate a branch in Switzerland; and
- c* is incorporated in a jurisdiction where its home regulator has concluded a specific cooperation agreement with FINMA.

As a matter of principle, the sponsor or promoter of a fund is not subject to Swiss regulatory registration, as long as it does not perform any specific regulated activity, such as fund asset management, distribution of CISs or representation of foreign CISs. The mere advisory activity is not subject, for the time being, to any licensing requirement. It should, however, be noted that, according to FINMA Circular 2013/9 on distribution of CISs, discretionary management mandates aiming at investing solely or predominantly in funds (e.g., 'managed fund accounts') may be considered an activity of (indirect) distribution of funds by FINMA therefore requiring a distributor licence.

ii Taxation

The Swiss LP is treated as a transparent entity for tax purposes and is therefore not subject to Swiss corporate income tax on its income or gains, provided it does not directly hold real estate located in Switzerland. Income taxes are generally levied at the level of the investors. Swiss residents are subject to ordinary income tax on the ordinary income distributed by the Swiss LP. The value of their units in the Swiss LP is also subject to Swiss wealth tax.

Distributions made by Swiss LPs to both Swiss and foreign investors are generally subject to withholding tax at a 35 per cent rate, unless they correspond to distributions of capital gains or income realised from real estate held directly by the Swiss LP. Swiss investors will receive full refund, provided that they declare the income in their tax return or account for it in their financial statements. Foreign investors may qualify for an exemption from Swiss withholding tax, irrespective of the applicability of a treaty, under the affidavit procedure provided that at least 80 per cent of the underlying income is derived from non-Swiss sources and the investors demonstrate that they are not Swiss residents. In addition, foreign resident investors may also be entitled to a full or partial refund based on a double-tax treaty existing between their country of residence and Switzerland. Such refunds are typically granted by way of reimbursement rather than by way of exemption.

SICAFs and other investment companies incorporated as Swiss corporations and not regulated under the CISA (see Section II.i) are treated as non-transparent for tax purposes and therefore subject to corporate income tax and tax on net equity. The distributions are, in addition, subject to withholding tax. The issuance of shares of a SICAF or any other investment company in the form of a Swiss corporation is further subject to the Swiss issuance stamp duty. The tax treatment of the SICAF and investment company, as common limited companies, partly explains the absence of use of this type of vehicle in practice, other than as a mere intermediate investment subsidiary, as part of a larger investment structure of a foreign private equity fund (typically a foreign LP).

IV OUTLOOK

On 1 January 2019, a new type of licence, the ‘fintech licence’, was introduced into the Swiss regulatory framework for companies accepting public deposits but not using those deposits to finance a traditional banking activity (i.e., lending to business). Where this is the case, the aggregate amount of public deposits is limited to 100 million Swiss francs and may neither be invested nor interest-bearing. This new fintech licence involves less stringent regulatory requirements than a full banking licence, and leaner minimal capital requirements apply. In this context, the minimum nominal capital of companies holding such a licence has to amount to at least 3 per cent of the public deposits and be, in any case, above 300,000 Swiss francs, and in each case to be fully paid in cash.

Traditional fundraising techniques and processes have been challenged in the past couple of years by the emergence of a new form of capital raising by start-ups in the form of ‘initial coin offerings’ (ICOs), token-generating events and token sales. The new cryptocurrency and blockchain business models are challenging legal and regulatory models, and enforcement action by regulators all around the world is increasing. In this context, on 16 February 2018, FINMA issued guidelines addressing the regulatory treatment of ICO structures. Generally, FINMA focuses on the economic function and purpose of the tokens, and on whether they are tradeable or transferable, to classify the tokens as payment tokens (cryptocurrencies), utility tokens or asset tokens. The classification of the tokens has an impact on the applicable legal and regulatory framework, such as the application of the anti-money laundering regime, the CISA and the Banking Act. Further, the classification of tokens as securities triggers the requirement for the issuer to establish a prospectus and, depending on the circumstances, may trigger the requirement to obtain a FINMA licence as a securities dealer.

Overall, the Swiss regulatory framework is expected to remain in a state of flux over the coming years, with changes aiming at promoting innovation in the financial sector while increasing client protection. In this context, the Swiss Federal Council published in December 2018 a report on the legal framework for blockchain and distributed ledger technology in the financial sector. The report noted that the Swiss legal framework is well prepared to deal with new technologies, while a few selective adjustments are expected to be implemented in the next few years.

Separately, as of 1 January 2020, the new FinSA and FinIA regime will overhaul the regulatory framework applicable to the provision of financial services in Switzerland, including in the private equity investments sector.

Switzerland also aims to improve competitiveness in the area of collective investments. In September 2018, the Swiss Federal Council announced its intention to introduce a new category of funds that are neither subject to approval by FINMA nor regulated under the CISA. This new category of funds, ‘Limited Qualified Investment Funds’, would be limited to qualified investors such as pension funds and insurers.

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