Private Equity

Contributing editor
Bill Curbow

2019

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Private Equity 2019

Contributing editor
Bill Curbow
Simpson Thacher & Bartlett LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2019
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2005
Fifteenth edition
ISBN 978-1-83862-084-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Preface

Private Equity 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE DEAL THROUGH

London
February 2019

Switzerland

Shelby R du Pasquier and Maria Chiriaeva

Lenz & Staehelin

Formation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

The two main legal vehicles available in Switzerland for private equity investments are the Swiss limited partnership (the Swiss LP) and the Swiss investment company with fixed capital (the SICAF). The applicable legal and regulatory framework is enshrined in the Collective Investment Schemes Act of 23 June 2006 (CISA), its implementing ordinance of 22 November 2006 (CISO) and the Swiss Financial Market Supervisory Authority (FINMA) ordinance on collective investment schemes of 27 August 2014 (FINMA-CISO).

The Swiss LP

The Swiss LP is a collective investment scheme that is specifically aimed at alternative investments, private equity investments and real estate projects and that has been designed to mirror the legal form of certain offshore limited partnership structures. The Swiss LP is subject to the supervision of FINMA. As a rule, the Swiss LP is a closed-ended investment scheme, meaning that the investors do not benefit from a redemption (namely, exit) right. The Swiss LP benefits from a quasi-legal personality and, as such, is entitled to hold assets or claims.

The Swiss LP is managed by one or more general partners (GPs) with unlimited liability for the commitments of the Swiss LP. The GP may delegate certain tasks to third parties to the extent that such delegation is in the best interest of the Swiss LP. The asset management function may, however, only be delegated to a regulated investment manager of Swiss collective investment schemes.

The investors in the Swiss LP are the limited partners. They may not be involved in the management of the Swiss LP, which is of the exclusive competence of the GP (see also question 5). That being said, the limited partners benefit from extensive information rights as well as certain governance rights, such as the delivery of periodic financial information on at least a quarterly basis as well as information on the financial accounts at any time. The Swiss LP is only open to qualified investors (see question 24 for the definition of this concept and for exceptions to this general rule).

The partnership agreement of the Swiss LP sets out the key rules that apply among the GPs and the limited partners. Swiss law allows a significant freedom to the parties in the regulation of their relationship in the partnership agreement, subject to a limited set of contractual provisions, which are required as a matter of law.

The Swiss LP must appoint a Switzerland-based independent auditor (see question 10) and a depository and paying agent. The designation of a custodian bank is not required (see question 2).

The SICAF

The SICAF is a Swiss company limited by shares, whose corporate purpose is limited to the management of its own assets. The SICAF is not allowed to pursue any entrepreneurial activity. The regulatory framework set forth in the CISA as regards the SICAF is rather limited. The SICAF is substantially governed by the provisions of the Swiss Code of Obligations. The SICAF has a separate legal personality from its investors.

It is to be noted in this context that a SICAF is not subject to the CISA if its shares are listed on a stock exchange or its shareholders are exclusively qualified investors (see question 24).

To our knowledge, all Swiss SICAFs have so far relied on this regulatory safe-harbour and there is currently no Swiss SICAF that is regulated by FINMA. Consequently, the answers to this questionnaire will be limited to the Swiss LP.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

The formation of a Swiss LP presupposes an authorisation to be granted by FINMA. The application is to be reviewed by an audit firm recognised by the Federal Audit Oversight Authority (FAOA) (being noted that the audit firm in charge of reviewing the application is barred from acting as auditor of the Swiss LP). The authorisation is generally issued within a three to four-month time period, subject to FINMA's workload and in the absence of any unforeseen complications.

As regards fees, the initial registration fee levied by FINMA amounts to between 10,000 and 40,000 Swiss francs. In addition, FINMA levies a yearly supervision fee, which is computed on the basis of the assets of the Swiss LP.

The Swiss LP is not subject to any capital requirements. The minimum share capital of the GP is 100,000 Swiss francs, which must be fully paid up.

Finally, the Swiss LP must appoint a Switzerland-based independent auditor and a depository and paying agent.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

As indicated above, the Swiss LP is managed by the GP, which must be a Swiss company limited by shares with a registered office in Switzerland. The Swiss LP and the GP must establish financial statements in accordance with the provisions of Swiss law, in particular the FINMA-CISO. They are also subject to the record-retention obligations generally applicable under Swiss corporate law (generally speaking, corporate records shall be kept for a period of 10 years, which starts running at the end of the business year to which each document refers). In turn, Swiss law does not require the appointment of a corporate secretary for the Swiss LP or for the GP.

Furthermore, as indicated above, the Swiss LP must appoint a depository and paying agent, but the designation of a custodian bank is not required.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

The Swiss LP and the GP must be registered with the Swiss Register of Commerce. The excerpt of the Register of Commerce is available to the public and provides general information with respect to the Swiss LP and the GP (for example, capital, registered office, authorised signatories). Furthermore, the partnership agreement establishing the Swiss LP must be filed with the Register of Commerce and is therefore available to the public. The provision of such information is a prerequisite for the registration with the Register of Commerce.

As regards the investors (namely, the limited partners of the Swiss LP), the aggregate amount of their capital commitments (but not the names of the limited partners, nor the latter's commitments on an individual basis) is to be registered with the Register of Commerce and thus available to the public. By reviewing the partnership agreement, the public could also be in a position to ascertain whether the investors have made any additional financial commitments. Under Swiss law, the liability of the limited partners of the Swiss LP is capped at the amount registered with the Register of Commerce, but the limited partners may agree, in the partnership agreement, to make additional financial commitments.

In contrast, the financial statements of the Swiss LP are only available to the investors and not to the general public.

5 Limited liability for third-party investors

In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?

As a matter of principle, the liability of the limited partners (namely, the investors) is capped at the amount of the capital contribution registered in the Register of Commerce. The limited liability of the investors can, however, be disapplied in the event the investors are involved in the management of the Swiss LP. In other words, a limited partner who or which is involved in the management of a Swiss LP may face an unlimited liability for the commitments of the Swiss LP (as is the case for the GP; see question 1).

6 Fund manager's fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

The Swiss LP is managed by the GP. The liability of the GP as regards the limited partners depends upon the provisions of the partnership agreement. As a matter of principle, it should be possible to insert in the partnership agreement a provision that would limit the liability of the GP towards the limited partners (for example, providing for a liability only in the event of gross negligence and wilful misconduct). It is to be noted, however, that the model documentation for a Swiss LP, which has been developed jointly by the Swiss Funds and Asset Management Association (SFAMA) and the Swiss Private Equity and Corporate Finance Association and acknowledged by FINMA, does not contain any provision limiting the liability of the GP.

Under the CISA, the GP fiduciary duties include loyalty, due diligence and information duties (see question 32). These are specified in the SFAMA Code of Conduct, which has been recognised as the minimum standard by FINMA. According to this Code of Conduct, all CISA authorisation holders are to formalise their fiduciary duties in internal guidelines.

The above would also apply in the context of the asset management agreement that could be entered into between the Swiss LP and a third-party investment manager, if the GP has decided to delegate the asset management function to a regulated investment manager of Swiss collective investment schemes (see question 1).

7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?

Swiss law distinguishes between 'gross negligence' and 'ordinary (or simple) negligence' in the context of the assessment of the validity of liability exclusion clauses.

In a nutshell, under Swiss law, a contractual exclusion of liability for 'gross negligence' or for 'wilful misconduct' is not enforceable. In turn, an exclusion of liability for 'simple negligence' is valid. That being said, the validity of an exclusion of liability for 'simple negligence' may be subject to judicial review, in the event the beneficiary of such exclusion is conducting 'commercial activities under an official licence' (pursuant to the case law of the Swiss Supreme Court, this applies, for instance, to banks). There is a risk that a Swiss court would consider that a GP (or a regulated investment manager) is conducting 'commercial activities under an official licence' and would thus review the validity of a liability exclusion for simple negligence.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

The minimum number of investors in a Swiss LP has been set at two investors. The Swiss LP is only open to qualified investors (see question 24). A Swiss LP can, however, also be formed as a single investor fund, provided said investor is either a regulated insurance company or a public entity or pension fund with professional treasury management.

The partnership agreement regulates, among other things, the restrictions on the transferability of the interests, the expulsion of a limited partner in certain circumstances (for example, if the limited partner no longer meets the requirements of a qualified investor) and the possibility for the general meeting to remove the GP.

As a matter of principle, the transfer of a non-Swiss collective investment scheme to Switzerland and the reincorporation as a Swiss LP should be feasible. In this context, the corporate documentation, and in particular the partnership agreement, must be adjusted to reflect the provisions of the CISA and to take into account the practice of FINMA. From a practical perspective, it is advisable that the partnership agreement mirrors as closely as possible the provisions of the model documentation referred to in question 6.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?

From a Swiss regulatory perspective, there is no need for a Swiss LP to have a sponsor.

In practice, Swiss LPs can, however, be launched by, or closely associated with, financial groups. To the extent the Swiss LP benefits from a quasi-legal personality and the GP is a distinct legal entity, the latter should not be affected by a corporate event affecting the sponsor. That being said, such corporate event may have a reputational impact for the Swiss LP.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?

The Swiss LP and the GP are subject to ongoing supervision by FINMA. The Swiss authority benefits from extensive audit and inspection rights as regards regulated entities.

Furthermore, it is worth noting that the Swiss regulatory regime is based on a 'dual supervisory regime', which requires regulated entities to appoint a FAOA-recognised auditor. The task allocated to such auditor is to verify whether the regulated entity complies with all applicable legal, statutory and regulatory requirements. The auditor's findings are set out in a report, which is delivered both to the regulated entity and to FINMA (the long-form report).

The limited partners (namely, the investors in the Swiss LP) benefit from information rights, such as the delivery of periodic financial information on at least a quarterly basis as well as information on the financial accounts at any time.

11 Governmental requirements

What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?

Both the Swiss LP and the GP must be authorised by FINMA. These authorisations are generally obtained through a single regulatory process. This authorisation requirement is triggered by the creation of the Swiss collective investment scheme, but not by the conduct of investment activities in Switzerland. In other words, a non-Swiss collective investment scheme would be in a position to make investments in Switzerland without being subject to a FINMA authorisation requirement. This presupposes that the non-Swiss collective investment scheme is not deemed to be centrally administered in Switzerland. Indeed, the 'central administration' of a collective investment scheme in or from Switzerland would result in the scheme being deemed a Swiss collective investment scheme, something that would trigger a registration requirement with FINMA.

12 Registration of investment adviser

Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?

As indicated above, the Swiss LP is managed by the GP. The GP must obtain an authorisation from FINMA.

The GP may delegate the asset management function to a regulated investment manager of Swiss collective investment schemes. Such investment manager must obtain an authorisation from FINMA. Otherwise regulated financial intermediaries, such as fund management companies, banks, securities dealers and insurance companies, are exempted from the licence requirement.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?

Requirements applicable to the GP

In order to obtain the authorisation as GP, the individuals controlling the GP and the qualified participants in the GP (namely, persons or entities owning 10 per cent or more of the capital or voting rights of the GP or who can materially influence it in any other manner) are subject to a fit and proper test (somewhat similar to the one applicable under Swiss banking regulations).

Requirements applicable to the investment manager

To obtain the required licence from FINMA, the investment manager of a Swiss or non-Swiss collective investment scheme must demonstrate that it fulfils a number of financial requirements (for instance, a fully paid-in share capital of at least 200,000 Swiss francs and compliance with capital adequacy requirements, capped at an amount of 20 million Swiss francs) and personal criteria (in particular a fit-and-proper test, somewhat similar to the one applicable under Swiss banking regulations).

CISA further requires non-Swiss managers of collective investment schemes having a branch in Switzerland to register with FINMA.

Registration of the Swiss branch is subject to the following:

- the non-Swiss asset manager being subject to 'adequate' supervision by its home regulator;
- fulfilment by the non-Swiss asset manager of specific financial and organisational requirements; and
- a cooperation agreement being in place between FINMA and the non-Swiss asset manager's home regulator.

Finally, a limited de minimis exemption is available to asset managers of non-Swiss collective investment schemes whose investors are 'qualified investors' (see question 24), provided they satisfy one of the following requirements:

- the assets under management (including leverage) do not exceed 100 million Swiss francs;
- the collective investment schemes:
- have assets under management of below 500 million Swiss francs; and
- are unleveraged and closed-ended (such as the Swiss LP) for a five-year period; or
- the investors are exclusively group companies.

According to the FINMA-CISO, the assets whose management is entrusted to third party managers are to be taken into account for the calculation of the above thresholds. The value of the assets under management is also to be determined, for each collective investment scheme, in light of the valuation rules provided in the legislation of the home jurisdiction of the collective investment scheme.

Asset managers of non-Swiss collective investment schemes who are exempt under the de minimis rule have, however, the possibility to 'opt-in' and apply for a licence with FINMA, provided their registered office is in Switzerland and a registration is required either by Swiss law or by the law of the jurisdiction in which the collective investment scheme is registered or distributed.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.

There are no such rules in Switzerland. That being said, anti-bribery laws may apply.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund's manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund's investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

There are no such rules in Switzerland that would apply to the Swiss LP or the Swiss GP. In turn, certain conflict of interest rules may apply to the intermediaries acting on behalf of Swiss pension funds.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

There are no such specific rules in Switzerland. In particular, Switzerland has refrained from enacting the Volcker Rule.

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Swiss LPs are typically viewed in a transparent manner from a Swiss corporate income tax perspective. They are thus generally not subject to Swiss corporate income taxes on their income or gains (except if they directly hold Swiss real estate situated in Switzerland).

The tax treatment of distributions made by Swiss LPs depends upon their nature. Capital gain distributions or capital repayments are not subject to any tax at a Swiss level. On the other hand, distribution of income (eg, dividends or interest) by the Swiss LPs, which do not correspond to distributions of capital gains realised by the funds or real estate income realised directly by the funds, are subject to a 35 per cent Swiss withholding tax. Said withholding tax applies to distributions to Swiss or foreign investors.

Foreign investors may qualify for an exemption from Swiss withholding tax under the affidavit procedure (exemption provided for by Swiss internal law irrespective of the applicability of a treaty). This requires that more than 80 per cent of the Swiss LP's assets are of a non-Swiss source and that the investors demonstrate (typically via their bank) that they are not Swiss residents.

The foreign resident investors may further qualify for a partial or total exemption from Swiss withholding tax in application of a double tax treaty existing between their country of residence and Switzerland. The relief is typically granted by way of reimbursement rather than by way of exemption.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

No. The only tax forms that may be required are those necessary to obtain an exemption or reimbursement of Swiss withholding tax (see question 17).

19 Local tax authority ruling

Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?

The laws and regulations applicable to Swiss LPs have now been clarified. It is usually not necessary to confirm in a ruling that a Swiss private equity fund (namely, the Swiss LP) will be treated as such for Swiss tax purposes. Investors that are Swiss residents are subject to ordinary income taxes on the ordinary income distributed by the Swiss LP. The value of their units in the Swiss LP is also subject to Swiss wealth taxes. Every year the Swiss Federal Tax Administration publishes a list indicating the taxable income per unit and the tax value per unit.

20 Organisational taxes

Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?

No. See question 2 regarding the registration and supervision fees levied by FINMA.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Management fees and carried interest payments paid to the Swiss resident sponsor are typically viewed as ordinary income. If the Swiss LP is structured via a loan or a capital commitment structure, it may be possible to obtain a ruling from the tax authorities confirming that the units held by Swiss resident individual managers qualify as private assets. In such a case, sales of units and distributions of capital gains realised by the Swiss LP on these units would be characterised as tax exempt private capital gains.

It is, however, important to note that this is typically subject to the compliance with restrictive conditions (the loan commitment qualifies as a loan, the managers receive an arm's-length salary for their professional activities, etc). The practice of the tax authorities may further vary from one Swiss canton to another.

22 Tax treaties

Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.

Switzerland has concluded double tax treaties with the following countries: Albania, Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Bulgaria, Belarus, Canada, Chile, China, Colombia, Croatia, the Czech Republic, Cyprus, Denmark, Egypt, Ecuador, Estonia, Finland, France, Ghana, Germany, Georgia, Greece, Hong Kong, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, the Ivory Coast, Jamaica, Japan, Kazakhstan, Korea, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Morocco, Mexico, Moldova, Mongolia, Montenegro, Norway, New Zealand, the Netherlands, Oman, Pakistan, Peru, the Philippines, Poland, Portugal, Qatar, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Taipei, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uruguay, Uzbekistan, Venezuela and Vietnam.

Swiss funds would typically not qualify as 'residents' as per the respective treaties.

An investor in a Swiss LP residing in a treaty country may obtain the reimbursement of Swiss withholding tax levied on distributions (if any). The reimbursement is typically granted in application of the 'other income' provision of the treaty. In certain cases, such as the Switzerland-Germany treaty, fund distributions are characterised as dividends (so that German investors may only qualify for a partial reimbursement of the Swiss withholding tax (reduction from 35 per cent to 15 per cent)).

23 Other significant tax issues

Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?

No.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.

One must distinguish between the restrictions applicable to the investors in a Swiss LP and the limitations that apply in the context of the distribution in Switzerland of interests in non-Swiss collective investment schemes, which have not been authorised for distribution to non-qualified investors in Switzerland.

Investors in a Swiss LP

The investors in a Swiss LP (namely, the limited partners of the Swiss LP) must be qualified investors. Under the CISA, the concept of 'qualified investors' comprises the following categories of investors:

- 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
- unregulated qualified investors:
  - public entities and pension funds with professional treasury management (the concept of a 'professional treasury management' presupposes that the relevant entity has entrusted at least one qualified professional with the management of its financial assets on a permanent basis);
  - companies with professional treasury management;
  - independent asset managers, subject to certain conditions;
  - investors who have concluded a written discretionary asset management agreement, provided the following is true:
    - they do not exercise their right to 'opt-out' of the 'qualified investors' 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 (HNWI) and private investment structures created for HNWI that have requested, in writing, to be considered as 'qualified investors' (opt-in declaration), provided they, in addition, execute the following:
    - 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.

Private investment structures created for HNWI may qualify as qualified investor provided that the opt-in declaration form is signed by a person in charge of the administration of the structure. For the rest, private investment structures may also be considered as qualified investors if they benefit from a professional treasury management.

According to FINMA Circular 2013/9 on the distribution of collective investment schemes, independent asset managers may also be considered as qualified investors, subject to certain conditions and provided they undertake, in writing, to use any information or materials in relation to the collective investment scheme for the benefit of qualified investors only.

From a practical perspective, the limited partners will generally be required to confirm their status as qualified investors by signing a corresponding declaration on the subscription form for an interest in the Swiss LP.

Finally, the individuals controlling the GP may also invest in the Swiss LP (even if they do not meet the requirements of a qualified investor), provided the following is true:

- the possibility of such an investment is set forth in the partnership agreement;
- the investment is made using private assets of the concerned individuals; and
- the investment is made at the time the Swiss LP is launched.

Distribution of non-Swiss collective investment schemes not authorised for distribution to non-qualified investors in Switzerland

Under the CISA, any offer or advertisement for collective investment schemes, which is not exclusively directed towards regulated financial intermediaries (such as banks, securities dealers or insurance companies), is, as a rule, construed as a regulated activity (defined as 'distribution'), irrespective of its being public or not.

As a result, the distribution of non-Swiss collective investment schemes to Swiss-based unregulated qualified investors is in principle subject to a licensing requirement under the CISA. Whereas Swiss distributors must be licensed by FINMA, foreign distributors of non-Swiss collective investment funds are required to be subject to appropriate supervision in their country of establishment (ie, have a regulated status that allows them to distribute collective investment schemes in their own jurisdiction). The collective investment scheme itself must appoint a Swiss representative with whom the foreign distributor is to conclude a distribution agreement, as well as a paying agent. The non-Swiss collective investment schemes themselves do not need to be approved by FINMA to be distributed to unregulated qualified investors in Switzerland. In contrast, the distribution of non-Swiss collective investment schemes to non-qualified investors is subject to FINMA's prior approval of the collective investment scheme at hand. It is to be noted that distributors and promoters of collective investment schemes are to comply with the revised guidelines on the distribution of collective schemes of the SFAMA, which impose certain duties and provide for minimum provisions to be inserted in the distribution agreements concluded between foreign distributors and the Swiss representative of the foreign collective investment scheme (see question 27).

Limited exceptions from this distributor's licensing requirement are available under the CISA. They relate to the provision of information or the offer that takes place as follows:

- at the initiative of the investor, in relation to a specific fund and without any intervention or initial contact by the fund manager, distributor or representative of the collective investment scheme at hand (reverse solicitation);
- in the context of long-term onerous advisory agreements in place or as execution-only transactions; or
- within the context of a written discretionary asset management agreement entered into by the investor with a regulated financial intermediary (eg, a bank, a securities dealer or a fund management company) or with an independent asset manager (subject to certain conditions).

Another important exception applies to distribution activities targeting exclusively regulated financial intermediaries (such as banks, securities dealers, insurance companies), which do not trigger regulation under the CISA. Furthermore, 'outbound' cross-border distributions of non-Swiss collective investment funds to foreign qualified investors (as defined either under Swiss or foreign law) fall out of the scope of the CISA.

25 Types of investor

Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).

As indicated in question 24, only qualified investors (and, under certain circumstances, the individuals controlling the GP) may invest in a Swiss LP. There are no additional restrictions on the types of investors.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

In the case of a change in the circumstances on which the FINMA licence was based at the time it was granted, the Swiss LP must approach FINMA. Among other things, any change to the organisational structure and documents of the Swiss LP, any change in the persons responsible for the management and the business operations of the GP or any change in the qualified participants of the GP (namely, persons or entities owning 10 per cent or more of the capital or voting rights of the GP or who can materially influence it in any other manner) must be notified to, and respectively approved by, FINMA. In practice, these changes are notified in advance to FINMA in order to ensure its prior consent thereon.

As regards the limited partners (namely, the investors) of a Swiss LP, their identity is not to be communicated to FINMA. Furthermore, changes in the limited partners of a Swiss LP are not subject to a notification duty either.

Update and trends

The regulatory framework applicable to collective investment schemes has not changed in the course of the past year. That being said, a number of changes to these rules are expected in the coming two years. Two legislative instruments governing, on one hand, the relationship between the financial intermediary and investors (ie, the Federal Financial Services Act (FinSA)) and, on the other hand, the relationship between the financial intermediary and the regulatory authority (ie, the Financial Institutions Act (FinIA)) will enter into force on 1 January 2020. On 24 October 2018, the Swiss Federal Council opened a consultation procedure on the implementing provisions of both these acts, namely the Financial Services Ordinance (FinSO) and the Financial Institutions Ordinance (FinIO). The consultation will last until 6 February 2019. It is also expected that FINMA will publish its implementing ordinances that will enter into force on 1 January 2020, along with the FinSA, FinIA, FinSO and FinIO.

Among other things, the FinIA and FinSA will provide for a limitation of the requirements as regards the appointment of a Swiss representative and a paying agent and an abolition of the licensing requirement for Swiss distributors. Those would necessarily be private persons and would become subject to a duty to register in a new financial services providers register foreseen in the FinSA. In addition, the FinIA will provide for certain restrictions to the provision of financial services and products on a cross-border basis, which might have indirect consequences for non-Swiss fund asset managers. For the rest, the concept of 'distribution' will be replaced with the concept of 'offering', along with an alignment of the categorisation of investors based on the European terminology (ie, professional clients versus private clients). Finally, Swiss asset managers of collective investment schemes will remain subject to FINMA direct supervision and the CISA provisions currently applicable to them will be directly incorporated in the FinIA without material change.

In September 2018, the Swiss Federal Council instructed the Federal Department of Finance to prepare a draft aiming at introducing in the Swiss legal and regulatory framework a new category of funds that would be exempt from FINMA's authorisation. Those would be open to qualified investors only, such as pension funds and insurers (limited qualified investment funds). The purpose of this proposal is to improve Switzerland's competitiveness in the launch of innovative products, as the case may be, in the private equity sector, by relaxing the current requirements and limiting the costs associated with the launch of funds in Switzerland. The draft proposal will be published in the first quarter of 2019.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

As a matter of principle and for the time being (see 'Update and trends'), the distribution of interests in Swiss or non-Swiss collective investment schemes in or from Switzerland is subject to obtaining a licence as a 'fund distributor', irrespective of whether such activities target the public or not (however, see the exceptions listed in question 24).

The regulated activity is the 'offering' as such, not the actual investment into a collective investment scheme. As a result, a 'distribution' may take place, even though no Swiss-based investor actually subscribes interests in the collective investment scheme. The requirement to obtain a licence as a fund distributor does not apply to a financial institution already regulated in Switzerland as a fund management company, a bank, a securities dealer, an insurance company or a manager of collective investment schemes.

Against this background, one can distinguish between the offering of interests in a Swiss LP and the offering of interests in non-Swiss investment vehicles, which have not been authorised for distribution to non-qualified investors in Switzerland.

Distribution of interests in a Swiss LP

As a matter of principle, the 'distribution' of interests in a Swiss LP triggers a requirement to obtain a licence from FINMA as a fund distributor.

Distribution of interests in non-Swiss collective investment schemes not authorised for distribution to non-qualified investors in Switzerland

Interests in non-Swiss collective investment schemes, which have not been authorised by FINMA for distribution to non-qualified investors in Switzerland, may only be offered in Switzerland to qualified investors. As a rule, the distribution of such interests to Swiss-based qualified investors is subject to a licensing requirement as a fund distributor under the CISA. As mentioned (see question 24), only limited exceptions are available to the licensing requirements of the distributor. Although the non-Swiss collective investment scheme itself does not need to be approved by FINMA to be offered to qualified investors in Switzerland, the CISA requires that a Swiss representative and a paying agent be appointed for the non-Swiss collective investment scheme. In addition, the foreign distributors are to enter into a written, Swiss law-governed distribution agreement with the Swiss representative, based on the requirements of the SFAMA distribution guidelines and its template distribution agreement (see question 24).

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The Swiss anti-money laundering regulatory framework is enshrined in the Anti-Money Laundering Act (AMLA) and its implementing ordinances. The AMLA applies to 'financial intermediaries'. The duties imposed upon financial intermediaries are essentially 'know your customer' (KYC) rules and procedures, as well as certain organisational requirements (for example, internal controls, documentation, continuing education). In addition to these KYC rules and procedures, financial intermediaries must also comply with the duties to report to the regulatory body in the event they have knowledge or suspicion of criminal activity. The reporting duty presupposes that the financial intermediary is aware of or has reasonable suspicion as regards the criminal origin of the assets involved. In this context, the regulatory body is entitled to request information from third-party financial intermediaries that appear to be involved in the transaction or business relationship that triggered the reporting by another financial intermediary.

Further, financial intermediaries must implement a two-step process after the reporting of suspicions to the regulatory body. First, they have to monitor the account in question for a period of up to 20 days during the review of the case by the regulatory body (with the aim of blocking any transaction that may result in preventing or complicating the confiscation of the concerned assets). As a second step, if the case is assigned to a criminal prosecutor, the financial intermediaries have to implement a full freeze on the account for up to five days until a decision to maintain the freeze is made by the criminal authority. An immediate freezing of assets is however required for assets connected to persons whose details were transmitted to the financial intermediary by FINMA, the Federal Gaming Board or a self-regulatory organisation owing to a suspicion of being involved with or supporting terroristic activities. Financial intermediaries may incur a criminal liability should it fail to comply with the above duties.

The Swiss LP falls within the ambit of the definition of a 'financial intermediary' within the meaning of the AMLA. Consequently, the Swiss LP is subject to the duties deriving from the AMLA, in particular the need to identify the investors (namely, the limited partners) and their beneficial owners. From a practical perspective, the information that the Swiss LP requires to comply with its KYC duties is provided on the subscription form and the attachments thereto.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

A Swiss LP cannot be listed on a securities exchange, in particular because the circle of investors in a Swiss LP is limited to qualified investors (see question 24). That being said, as indicated in question 1, shares in a SICAF may be listed.

30 Restriction on transfers of interests

To what extent can a listed fund restrict transfers of its interests?

As indicated in question 29, a Swiss LP cannot be listed on a securities exchange.

Participation in private equity transactions

31 Legal and regulatory restrictions

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are no such restrictions. That being said, any investment made by the Swiss LP must comply with the investment restrictions set forth in the partnership agreement.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

See question 21 for an overview of the tax considerations that should be borne in mind when structuring the compensation arrangements.

From a regulatory perspective, it is worth noting that the compensation arrangement for the GP is set forth in the partnership agreement, which means that such arrangement is subject to FINMA's review and approval and is available to the public (see question 4). It should also be noted that, in accordance with the SFAMA Transparency Guidelines, which have been recognised as the minimum standard by FINMA, GPs and LPs have a specific duty to inform investors on fees, costs, rebates and retrocessions. Such information must be disclosed in the fund documentation.

LENZ & STAEHELIN

Shelby R du Pasquier **shelby.dupasquier@lenzstaehelin.com**
Maria Chiriaeva **maria.chiriaeva@lenzstaehelin.com**

Route de Chêne 30
1211 Geneva 6
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01
geneva@lenzstaehelin.com

Avenue de Rhodanie 58
1007 Lausanne
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01
lausanne@lenzstaehelin.com

Brandschenkestrasse 24
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01
zurich@lenzstaehelin.com

www.lenzstaehelin.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-83862-084-4