

Developments in Swiss business law for the first half of 2009

By Dr. Florian S. Jörg

As always, we are pleased to inform you about the most significant changes in legislation from a business law perspective. This letter concerns developments between 1 January and 30 June 2009.

1. Financial Markets Act (FINMAG)

On 1 January 2009, the Federal Law concerning the National Supervision of Financial Markets (Bundesgesetz über die Eidgenössische Finanzmarktaufsicht vom 22. Juni 2007, FINMAG) came fully into force. With the inception of the new agency, the Federal Financial Markets Supervisory (FINMA), the previous agencies that regulated Swiss financial markets—the Federal Office for Private Insurance, the Federal Banking Commission, and the Anti-Money Laundering Office—were merged into a single supervisory authority. The FINMA takes over the monitoring of the financial markets according to various special statutes. In this way, uniform regulatory oversight over a substantial portion of the Swiss financial market was achieved.

The FINMAG serves as an umbrella regulation, determining the organization of the new authority as well as the principles of financial market regulation. In particular, the Act establishes and harmonizes the regula-

tory instruments to be applied by the new agency. The substantive regulatory rules may be found in the sector-specific regulatory provisions. (Further information is available at <http://www.efd.admin.ch>), by following the links "Topics," "Economic, Monetary and Financial Affairs".)

2. Tax law

On 13 March 2009, the Swiss Bundesrat decided that Switzerland would adopt the standards of Art. 26 of the OECD Model Treaty in its tax treaties and withdraw its existing reservation under this provision. In this way, Switzerland would obligate itself to disclose tax-related information to the tax authorities of partner states upon a specific request that provides supporting reasons, irrespective of the presence of a violation of tax law. The exchange of information according to OECD standards would become legally effective with the entry into force of individual tax treaties.

In order to avoid gaps and contradictions, the Bundesrat also resolved on 29 May 2009 to expand the level of cooperation in cases of tax evasion in the form of judicial assistance between the judicial authorities of partner states, as was already the case in terms of

administrative assistance. The further development of judicial assistance through international treaties will thus be a prominent objective. Appropriate revision of the Federal Law on International Judicial Assistance in Criminal Matters ("IRSG") is not envisioned until some time later. (Further information is available at <http://www.efd.admin.ch>), under the links "Documentation," "Facts and Figures," "Statistics," "Taxation.")

On 1 January 2009, the first provisions of the Corporate Tax Reform II came into force. Since these were already discussed at length in our last client letter, we will refrain from repeating that discussion here.

3. Anti-Money Laundering Act

On 1 February 2009, the partially amended Anti-Money Laundering Act came into force. The amendments implemented the revised recommendations of the Groupe d'Action Financière (Gafi) and thus brought Swiss law into conformity with the international standard for the fight against money laundering and terrorism.

At the heart of the revision of anti-money laundering legislation are more rigorous reporting duties for financial intermediaries. These entities must now promptly report to

the Reporting Office for Money Laundering any reasonable suspicions they may have that assets they handle serve to finance terrorism. Additionally, financial intermediaries must report any negotiations for the establishment of a business relation they have terminated due to a reasonable suspicion that money laundering would be involved.

Reports to the Reporting Office for Money Laundering can now be anonymized to the extent that only the name of the financial intermediary appears but not that of the reporting employee. This feature is intended to better protect against potential reprisals on the part of affected clients. In addition, the conditions for immunity from criminal and civil liability have been relaxed in favour of financial intermediaries to boost the number of reports and overall effectiveness of the reporting system. Duties concerning the identification of clients and the nature and object of business relationships have also been more explicitly defined. (Further information concerning the revision of anti-money laundering legislation may be found at <http://www.efd.admin.ch/>, under the links "Topics," "Economic, Monetary and Financial Affairs.")

4. Securities Law

At the same time, new legislation also came into force in the area of M&A law. One aspect of this legislative activity took the form of adjustments to the Federal Act on Stock Exchanges and Securities Trading which also provided a basis for the complete revision of the Ordinance of the Takeover Board on Public Takeover Offers. Additionally, a new set of regulations governing the Takeover Board came into force, which included organizational provisions. Moreover, the Stock Exchange Ordinance of the FINMA, which likewise contains relevant adjustments to takeover law, also became effective.

The most important changes in takeover law concern the procedures for actions before the Takeover Board. These procedures are now oriented toward those applicable under the Federal Act on Administrative Proceedings, apart from a few exceptions. The position of the Takeover Board has been strengthened. Its decisions will now be rendered as injunctions and no longer represent mere recommendations. Additionally, shareholders who hold at least 2 percent of the votes within the offeree company are now granted party-standing next to the offerors,

those persons who act in joint agreement with the offerors, and the target organization. These so-called "qualified shareholders," however, must assert their standing before the Takeover Board.

In addition, the announcement of potential offers will be governed according to the "put up or shut up principle." This means that the Takeover Board can obligate potential offerors to either publish an offer within a certain time period, or to publicly announce that they will neither submit an offer nor exceed the threshold of interest that triggers offeror duties for a period of six months. Other significant features of the new law concern the publication and notice provisions.

Furthermore, the provisions governing swap offers and the approval of offer conditions were made more stringent and the catalogue of unlawful defensive measures was expanded. Further changes, among others, concern the lapse of possibilities for escaping the cooling-off period, the amendment of offers that must be generally favourable to the recipients and certain notification obligations.

Since 4 May 2009, the entire trade in Swiss blue chip stocks is once again processed from within Switzerland and no longer over the Virt-x trading platform in the UK. Due to this change in addition to other internal reorganization, the need to harmonize regulations, and to adapt to developments within the last ten years, revisions were made to the listing rules of the SIX Swiss Exchange on 1 July 2009.

(Further information on the revision of listing formalities may be found at <http://www.six-exchange-regulation.com/index.html>, under the links "Publications," "Communiqués," "Regulatory Board," "Chronological Order," "Number 3/2009 dated 29 May 2009.") ■

Dr. Florian S. Jörg, MCJ, is a partner in the Zurich office of Bratschi Wiederkehr & Buob, one of the ten largest independent Swiss law firms. He graduated from the University of St. Gallen Law School and obtained a postgraduate degree from NYU Law. His areas of practice include corporate law, M&A and banking law. Florian S. Jörg is also a lecturer for private law at the University of St. Gallen Law School. In addition to the Swiss bars he is also admitted to the bar in New York (not practising) and a member both of the New York State Bar Association and of ABA. He may be contacted at: Tel.: +41 58 258 10 00 / E-Mail: florian.joerg@bratschi-law.ch.

THE GLOBE

Published at least four times per year.

Annual subscription rate for ISBA members: \$20.

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OFFICE

Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

EDITOR

Lewis F. Matuszewich
453 Coventry Lane, Ste. 104
Crystal Lake, IL 60014

MANAGING EDITOR/

PRODUCTION

Katie Underwood
kunderwood@isba.org

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