# New Features in Swiss Foundation Law

by
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# I. Overview

During the years 2000 – 2004, selected aspects of the Foundation Law and the Foundation Tax Law were revised. The most important changes under the new rules, which are primarily aimed at the classic foundations, include:

- the permissibility of establishing the foundation by means of an inheritance contract (and not just, as was formerly the case, by means of a will);
- the possibility of reserving a change in the purpose of the foundation at the founder's request, whereby a change is permissible only after ten years and a public or charitable purpose must again be chosen;
- rendering it easier to make minor changes to the deed of foundation;
- provisions for the protection of creditors (auditor, obligation to keep accounts, measures in the event of over-indebtedness and insolvency);
- a tax exemption for charitable foundations and an increase in the amount of foundation donations that may, for purposes of the direct federal tax, be deducted from taxable income or profit to up to 20% of the taxable income or profit.

The new provisions entered into force on January 1, 2006. The Foundation Law revision does not include any provisions stipulating the continued application of former law or the retroactive application of new law. Accordingly, the concluding section of the Swiss Civil Code ("SCC"), in particular art. 1 thereof and its rule stipulating that no retroactive effect applies, is determinative.



# II. The Changes in Foundation Law

## 1. Establishment of the Foundation by Means of Dispositions upon Death (Art. 81 paras. 1 and 3 of the SCC)

Under art. 81 para. 1, the foundation could be established in the form of a *public deed* (establishment of foundation *inter vivos*) or by means of a *disposition upon death* (establishment of foundation upon death). A testamentary disposition in accordance with art. 498 of the SCC means the following: the public registration, i.e., the public will (art. 499 et seq. of the SCC), the handwritten will (art. 505 of the SCC) and the oral declaration before two witnesses (art. 506 et seq. of the SCC).

In addition to the testamentary disposition, inheritance law also offers the inheritance contract pursuant to arts 512 et seq. of the SCC. Based on the case law of the Swiss Federal Tribunal, however, it was formerly not permissible to establish a foundation by means of a contractual provision in an inheritance contract. Now, the *establishment of a foundation by means of an inheritance contract* is permitted as well.

If a foundation is established by means of a testamentary disposition, it cannot be precluded that the heirs will fail to comply with the intent of the decedent and "forget" the foundation, even though art. 556 of the SCC sets out a duty to deliver testamentary dispositions. In order to redress this, the authority that discloses the testamentary disposition pursuant to art. 557 of the SCC is required to notify the competent Commercial Registrar about the establishment of the foundation. The Commercial Registrar must then notify the supervisory authority about the foundation entry and have the latter confirm that it will assume the supervision.

## 2. Deficiencies in Organization (Art. 83 of the SCC)

If the Commercial Register administrator finds deficiencies in the legally mandatory organization of a foundation, he must notify the competent supervisory authority. The supervisory authority may take *all required measures* to remedy the deficiency, e.g.:

- set a deadline for the foundation to (re-)establish the proper legal status;
- appoint the missing executive body;
- appoint an administrator (official or provisional administrator), together with an assignment of competence.

According to art. 83 para. 4 of the SCC, the foundation bears the costs of these measures.

Under former law, in the event that it was impossible to ensure an appropriate organization of the foundation, the foundation assets could not be donated to a different foundation having a similar purpose if the founder objected to this or if the deed of foundation precluded this option. In art. 83 para. 3 of the SCC, this restriction has now been waived. Accordingly, from now on, such a transfer of the assets to another foundation having a purpose that is similar in type is required. This provision of law takes precedence over provisions in the deed of foundation to the contrary or volitions on the part of the founder or the foundation board to the contrary.

## 3. Auditor (Art. 83a of the SCC)

With respect to the auditor of classic foundations, the following legal situation exists pursuant to art. 83a of the SCC:

- Each classic foundation is basically required to have a "normal" auditor (art. 83a para. 1 of the SCC).
- The supervisory authority *may* exempt a foundation from this obligation if the conditions of the Swiss Federal Council are met. If this is not the case, an exemption is precluded; otherwise, the exemption is at the discretion of the supervisory authority (art. 83a para. 4 of the SCC).
- The foundation must call in a *specially-qualified auditor* if the conditions therefor set down by the Swiss Federal Council are met (art. 83a para. 3 of the SCC).

The fact that it will now basically be mandatory for foundations to have an auditor increases the transparency and credibility of the foundations and also strengthens the confidence of donors.



As a counterpart to the *principle* that foundations must designate an auditor (para. 1), the *exception* is set out in para. 4: according to this paragraph, the supervisory authority may exempt the foundation from the duty to designate an auditor if certain conditions are met. The Swiss Federal Council has specified these conditions in art. 1 of the *Ordinance on the Auditor of Foundations*. An exemption is possible under two cumulative conditions:

- The balance sheet total of the foundation amounts to less than CHF 200,000 in two successive business years (subpara. (a)), *and*:
- The foundation does not make any public calls for donations or other contributions (subpara. (b)).

The condition of subpara. (a) means that, before a foundation may submit a request for an exemption, it must have completed at least two business years. This appears to require each *newly established foundation* to have an auditor for at least two years. The second condition means that an exemption may only be granted to foundations that are not in the market for donations. The exemption of a foundation from the duty to designate an auditor does not occur ex officio but occurs, instead, at the request of the foundation board.

The exemption is unlimited in duration, but may be revoked. Art. 83 para. 2 of the SCC provides that the supervisory authority must revoke the exemption if

- either the conditions under para. 1 are no longer met (subpara. a), *or*
- this is necessary for purposes of a reliable assessment of the financial situation and profitability of the foundation (subpara. b).

Even foundations that are exempted from the duty to designate an auditor are (naturally) subject to the duty to keep accounts (by analogous application of the provisions of the Code of Obligations relating to commercial bookkeeping, art. 84b para. 1 of the SCC) and the duty to annually render accounts to the supervisory authority, as clarified in art. 83a para. 3 of the SCC. Foundations must submit to the supervisory authority comprehensible annual accounts and all related documents and provide all information that the supervisory authority needs in order to review the annual accounts.

The auditor (as in the case of the other executive bodies of the foundation) will be entered in the Commercial Register.

Under art. 87 para. 1bis of the SCC, *family foundations* and *church foundations* are exempted from the duty to designate an auditor. They may nonetheless designate an auditor on a voluntary basis.

The auditor may be an individual or a legal entity. Therefore, the foundation itself may also (with respect to another foundation) be an auditor (to the extent that this activity is permissible within the scope of the purpose) and, as such, must then satisfy the requirements of independence under the law governing audits.

Under art. 83a para. 2 of the SCC, the persons charged with the audit must be *independent of the foundation*. The requirement of independence is thus laid down by law for the first time. An irrebuttable presumption that independence is not assured arises in four situations that are expressly described:

- The persons charged with the audit may not be members of another executive body of the foundation. There must be a clean separation between the scopes of functions of the various foundation executive bodies.
- Such persons are not permitted to be in an *employment relationship* with the foundation. Thus, for example, they may not simultaneously keep the accounts or manage the secretariat of the foundation as employees.
- They may not have any "close relative connections to members of foundation executive bodies". What is meant by such "close" connections is to be assessed on a case-by-case basis.
- They may not be *a beneficiary* of the foundation.

There is no room for discretion in these four cases: if the cases are on hand, independence is precluded and the relevant persons cannot serve as auditor.

The words "in particular" show that there may be additional circumstances over and beyond these in which independence might be negated. Therefore, the foundation board cannot limit its review to whether the four cases can



be precluded but must, instead, undertake a comprehensive review of independence.

The independence of the auditor must exist not only at the time of the auditor's designation, but also for the entire duration of the mandate.

The new rule does not describe the *qualifications* of the auditor in detail. The persons charged with the audit must possess the qualifications required in order to fulfill their tasks, i.e., to audit the accounts and the financial situation of the foundation.

For the time being, *voluntary* and *non-professional* auditors continue to be permitted. When the new law governing audits enters into force, however, this possibility will terminate: from then on, all foundations that are not exempted from an audit must have a recognized auditor.

In contrast to the *principle* under art. 83a para. 1 of the SCC that foundations must have a "normally-qualified" auditor, art. 3 stipulates that, as an *exception*, the Swiss Federal Council may determine circumstances under which the foundation must, by way of exception, engage a *specially-qualified auditor*. The corresponding Ordinance of the Federal Council relies on the criteria under Corporation Law, i.e., those in the revision to the Swiss Code of Obligations relating to the audit, primarily because the Federal Council deemed it appropriate to set out the same criteria for all legal entities whenever possible.

Art. 2 para. 1 of the Ordinance first stipulates two foundation-specific criteria that, with a view to the interests of the donors – and ultimately also those of the beneficiaries – justify the duty to engage a specially-qualified auditor:

- The foundation makes public calls for donations or other contributions, *and*:
- The foundation receives donations or other contributions of more than CHF 100,000 in each of two successive business years (subpara. a).

Thus, these two criteria must be fulfilled on a cumulative basis.

Art. 2 para. 1 of the Ordinance then sets out as additional criteria:

- The foundation exceeds any *two* of the following parameters in two successive business years (subpara. b):
  1. Balance sheet total of CHF 10 million, *or*
  2. Sales revenues of CHF 20 million, *or*
  3. An annual average headcount of 50 full-time positions.
- The foundation is under a duty to draw up consolidated financial statements (subpara. c).
- The foundation has outstanding bond issues (subpara. d).

If the criteria under para. 1 are met, the foundation must engage a specially-qualified auditor and the supervisory authority is not authorized to exempt the foundation from this duty.

The new law governing auditors for foundations – as it currently stands – is definitely an improvement. It tends to lead to an easing of the burden on the foundation board and an increase in the professionalism in the accounting system of foundations as well. What is problematic is, on the one hand, that the law is scattered throughout various enactments. The foundation corporate bodies of the foundation must consult the SCC, the provisions on the auditor in the CO and the Federal Act on the Licensing and Oversight of Auditors. The extent to which the harmonizing alignment with the audit under the remainder of company law is conducive to the foundation audit remains to be seen.

The auditor must be entered in the Commercial Register no later than December 31, 2007. Likewise, any decision by the supervisory authority on an exemption from the duty to designate an auditor must also be submitted to the Commercial Register within this deadline.

## 4. Activities of the Auditor (Art. 83b of the SCC)

New art. 83b of the SCC governs the *activities* of the auditor. The auditor must annually audit the accounts and the financial situation of the foundation, particularly in terms of whether the annual accounts (cf. in this regard art. 84b of the SCC) were drawn up in accordance with the provisions of law and the deed of foundation.



The results of the audit must be stated in a *report*. The report must set out the names of the persons who conducted the audit and confirm that these persons satisfy the requirements of art. 83a of the SCC in terms of their qualifications and independence.

In addition to auditing activities in the more narrow sense, the auditor also takes on certain tasks in the event of over-indebtedness and insolvency (cf. in this regard art. 84a of the SCC).

The duty to audit the annual accounts applies for the first time with respect to the 2006 accounts. The designation of the auditor must be timed to allow the audited 2006 annual accounts to be submitted to the supervisory authority in connection with the annual rendering of accounts within the deadline, i.e., by June 30, 2007.

## 5. Centralization of the Oversight (Art. 84 para. 1$^{bis}$ of the SCC)

New art. 84 para. 1$^{bis}$ of the SCC expressly permits the cantons to centralize the oversight of foundations and therefore eliminate or set limits on the oversight exercised by the municipalities.

## 6. Measures in the Event of Over-Indebtedness and Insolvency (Art. 84a of the SCC)

A condition for measures according to new art. 84a of the SCC are serious concerns that the foundation

- is either over-indebted, or
- can no longer fulfill its commitments in the longer term.

If one or both of these conditions are met, the foundation board must promptly

- draw up an interim balance sheet based on realizable values, and
- present this to the auditor for review (art. 84a para. 1 sentence 1 of the SCC). If the foundation does not have an auditor, the foundation board must present the interim balance sheet to the supervisory authority (art. 84a para. 1 sentence 2 of the SCC).

If the auditor finds that the foundation is in fact over-indebted or illiquid in the longer term, he must submit the interim balance sheet to the supervisory authority (art. 84a para. 2 of the SCC).

In this case – and when it itself finds over-indebtedness or illiquidity –, the supervisory authoritymust advise the foundation board to institute the necessary measures (art. 84a para. 3 sentence 1 of the SCC).

The foundation board – already based on its duty to mitigate damages – is required to immediately review such measures at its own initiative. Only if the foundation board remains idle is the supervisory authority required to itself institute the necessary measures (art. 84a para. 3 sentence 2 of the SCC). Under the original draft legislation, the supervisory authority was to be required to directly institute the necessary measures. The legislators then, however – justifiably – regulated the procedure so that the foundation board is first required to take action, and the supervisory authority must intervene only in the event that the board fails to act.

The law does not specify what the "necessary measures" are. They relate in the first instance to the financial restructuring of the foundation and may consist of

- a (temporary) restriction of the foundation's purpose rather implementation of the same;
- a reduction in the administration costs;
- an attempt to acquire new foundation assets and new liquidity through additional endowment contributions or through donations.

On the other hand, the *revocation of the foundation as a matter of civil law* does not represent a financial restructuring measure and may no longer be made at the time of the over-indebtedness, in any case, against the will of



the creditors. Such a revocation is possible again only if the enforcement law proceedings have been concluded and a surplus is left over.

If it is not possible to financially restructure the foundation, the enforcement law measures provided for in the Federal Law on Debt Enforcement and Bankruptcy (DEBL) are to be requested. According to art. 39 para. 1 clause 12 of the DEBL, the foundation not only has capacity to be subject to bankruptcy, it can also itself provide a declaration of insolvency. In all other respects, the provisions of Corporation Law on the commencement and suspension of bankruptcy proceedings apply by analogy.

## 7. Bookkeeping (Art. 84b of the SCC)

New art. 84b of the SCC governs the *bookkeeping* of foundations. So far, based on the case law of the Swiss Federal Tribunal, foundations were subject to a legal obligation to keep accounts only if they carried on a trade or manufacturing or other commercial enterprise within the meaning of art. 934 para. 1 of the CO and art.s 52 et seqq. of the Commercial Register Ordinance. Art. 84b para. 1 sentence 1 of the SCC now expressly provides that the foundation is under a legal obligation to keep accounts. This is an indispensable prerequisite for the audit of the annual accounts required under art. 83a of the SCC. The provisions of the Code of Obligations on commercial accounting (arts. 957 et seq. of the CO) apply by analogy.

## 8. Change in the Organization (Art. 85 of the SCC)

Under former law, the Swiss Federal Council was permitted to change the organization of the foundation at the request of the supervisory authority, after having granted the foundation board a hearing, if the foundation was subject to the oversight of the Swiss Confederation. The Federal Council has delegated this competence to the Federal Department of Home Affairs. The new wording of art. 85 of the SCC takes this delegation of competence into account.

## 9. Change in Purpose (Art. 86 of the SCC)

Art. 86 para. 1 of the SCC was revised in two respects:

- On the one hand – as under art. 85 of the SCC – the competence to change a foundation's purpose is now assigned to the competent federal authority, and no longer to the Swiss Federal Council.
- Second, the law formerly provided that only the supervisory authority could apply to the competent authority for a change in the purpose of a foundation. This authority has now been expanded to also cover the foundation board.

The competent federal or cantonal authority must grant a hearing to the foundation board or supervisory authority, as the case may be, before it makes its decision. The condition for a change continues to be that – objectively – "the original purpose has attained an entirely different meaning or impact such that" – subjectively – "the foundation is manifestly estranged from the intent of the founder". Here, it will be possible to continue the previous practice – the attempt by the supervisory authorities to reach a consensual solution with the foundation board.

## 10. Change in Purpose at the Founder's Request (Art. 86a of the SCC)

So far, the reservation by law of a general right to change the foundation's charter (deed of foundation and foundation regulation[s]) in favor of the founder was incompatible with the nature of the foundation. The founder determined once and for all what he wished to support with the contributed assets. He had no possibility of requiring the foundation to use the endowed assets either in accordance with his changed interest or for new societal needs.

The limited ability to change the purpose of the foundation was a point of criticism for many years. New art. 86a of the SCC now enables the founder to apply to the competent authority for a change in the foundation's purpose. In this manner, he may give the foundation a new orientation. This offers an approach towards flexibility, but the form of this flexibility will ultimately be judged by the practice, including whether adequate attention is given to the protection of existing rights and legitimate interests of third parties, particularly of donors, as well as those of beneficiaries and corporate bodies of the foundation.

Art. 86a of the SCC only speaks of changes in purpose at the request of the founder in the case of classic foundations, and not in the case of *family foundations* and *church foundations*, which are not subject to any type of governmental oversight (art. 87 para. 1 of the SCC). This constitutes a qualified silence on the part of the law. The introduction of a right on the part of the founder to apply for a change in the purpose of a family foundation or a church foundation would require special provisions that would exceed the scope of the present revision. On the other hand, as can indirectly be seen from para. 2, *all* classic foundations are covered by art. 86a of the SCC, thus, even those that do not have any public or charitable purpose.

For a change in the purpose of a foundation at the request of the founder or based on his testamentary disposition, the *conditions* laid down in art. 86a of the SCC must be met.

a. *Reservation of change in purpose*: In connection with the establishment of the foundation, the founder must have reserved the possibility of a change in the foundation's purpose in the deed of foundation.

b. *Request*: The founder must submit a request for a change in the purpose of the foundation to the competent federal or cantonal authority. The request may also arise under a testamentary disposition of the founder (will or inheritance contract). The authority that discloses such testamentary disposition must inform the competent supervisory authority about the disposition relating to a change in the foundation's purpose (para. 5). Para. 3 expressly states that the right to apply for a change in purpose is of a *highly personal nature*. It extinguishes upon the death of the founder and cannot be transferred to third parties, not even to the heirs. If the founder dies after he has submitted a request, this request must still be decided on and the foundation's purpose changed, as the case may be, because a disparity in treatment with a testamentary disposition would not be justified. With respect to the submission of the request for a change in purpose, it is irrelevant whether the founder is still alive at the time of the actual change in purpose. Para. 4 governs the exercise of the right to a change in the foundation purpose in the event of *more than one* founder (individuals or

legal entities). In order to coordinate the exercise of this right, the provision stipulates that the request must be *submitted by all founders jointly*.

c. *Expiration of ten years*: At least ten years must have elapsed since the establishment of the foundation or since the last change in purpose requested by the founder. Therefore, *two* successive ten-year periods will run:

- The first period commences upon the establishment of the foundation; in the case of classic foundations, this is deemed to be the date of the entry in the Commercial Register (art. 81 para. 2 of the SCC; so-called "normative system").
- The second period commences upon "the most recently requested change"; what is determinative here, in my view, is – contrary to the wording – not the date of the submission of the request but, rather, the date on which the change enters into force. Namely, if a request does not result in a change, the request must be disregarded in terms of the relevant period.

The first period elapses once and for all; the second period may commence to run anew more than once. As already mentioned, the founder may bring about a change in the purpose of the foundation *more than once*. He must, however, always observe the minimum ten-year period between the individual changes. In the view of the legislators, this is intended to ensure a certain amount of stability for the foundation and prevent its activities from being hampered by frequent changes in purpose.

d. *Expiration of maximum period of twenty years in the event that the founder is a legal entity*: If the founder is a legal entity, the right to change the foundation's purpose extinguishes, at the latest, 20 years after the establishment of the foundation. This is intended to avoid one's being able to perpetuate the ability to change the foundation's purpose by interposing a legal entity in connection with the establishment of the foundation and to therefore circumvent the restriction on the highly personal nature of the right to request a change.

With respect to foundations that pursue a *public or charitable purpose* in accordance with art. 56 subpara. g of the Direct Federal Tax Act, para. 2 sets out an additional condition:



e. *Public or charitable purpose*: The revised purpose must also be public or charitable within the meaning of federal tax law. This additional limitation is intended, on the one hand, to allay the fears that were expressed repeatedly during the consultation proceedings that the system of the reservation of a change in purpose would be abused based on tax considerations and would practically be equivalent to a right to repatriation on the part of the founder. On the other hand, it is intended that the persons who contribute to a foundation in view of its purpose be provided a guarantee that their monies will always be used for a public or charitable purpose, even if such purpose should no longer be the original purpose.

The further condition that the new purpose not be illegal or contrary to public policy (art. 52 of the SCC) or be unattainable (art. 88 of the SCC) is not expressly mentioned in art. 86a due to its self-evident nature.

The competent supervisory authority must review whether the conditions stipulated by law are met. On the other hand, it is not required to review whether the request is based on any specific reasons. It does not have any latitude for discretion and is also not required, in particular, to clarify whether the change in purpose appears appropriate (as is the case in connection with a change in purpose based on art. 86 para. 1 of the SCC). Instead, it must order the change in purpose if the conditions named in art. 86a are met. If this is the case, it will order the change in the purpose of the foundation and report the new purpose for entry to the competent Commercial Registry Office.

The legislators did not envisage *any explicit rule for foundations under "former law"* and, in particular, for the question of whether the change in purpose should be applied to foundations established prior to January 1, 2006, i.e., whether the requirement that a change in purpose be reserved in the deed of foundation may be waived in the case of foundations established prior to December 31, 2005. The Administration rejects a retroactive effect of art. 86a of the SCC to existing foundations, with reference to art.s 1 and 2 of the concluding section of the SCC and based, above all, on the Committee report.

The ability to change the purpose represents a blatant encroachment on the principle of the permanence of the foundation. It is true that the foundation as such continues to exist and that its legal identity remains unchanged. The foundation purpose, however, is the "soul" of the foundation; if it is

changed, the entire foundation is changed. Because the purpose exerts an influence over all aspects of the foundation, a change in purpose will in most cases also entail changes in other issues. Care should also be taken that changes in purpose – for example, through the change to a for-profit foundation purpose – do not lead to disguised repatriations of assets, which the legislators have expressly rejected.

If the founder has included a reservation of a change in purpose in the deed of foundation, a corresponding annotation will be entered in the Commercial Register (art. 102 subpara. (e) of the Commercial Register Ordinance).

### 11. Minor Changes to the Deed of Foundation (Art. 86b of the SCC)

New art. 86b of the SCC codifies the principles developed under the case law of the Swiss Federal Tribunal that a simplified procedure will be provided for in the case of minor changes to the deed of foundation (purpose or organization).

### 12. Exemption from the Duty to Designate an Auditor for Family Foundations and Church Foundations (Art. 87 para. 1$^{bis}$ of the SCC)

Under art. 83a of the SCC, foundations are required to designate an auditor. Family foundations and church foundations, however, are exempted from this duty pursuant to art. 87 para. 1$^{bis}$ of the SCC.

### 13. Revocation (Art. 88 of the SCC)

The new version of art. 88 of the SCC does not fundamentally change the former law. The article closes certain gaps and introduces a simplified rule.



## III. The Revision to the Code of Obligations

New art. 941a of the CO is related to art. 83 para. 2 of the SCC, which governs the procedure in the case of deficiencies in the organization of the foundation. If the Commercial Register authorities detect a deficiency in the mandatory organization of the foundation as laid down in the law, they are required *ex officio* to inform the competent supervisory authority.

## IV. The Tax Law Revisions

### 1. Federal Law on the Value-Added Tax

Together with the revision of the law governing foundations, an adjustment was also made to the Federal Law of September 2, 1997, on the Value-Added Tax (VATL). New art. 33a of the VATL contains a special rule that regulates the value-added tax (VAT) treatment of the public announcement of donations *to* charitable organizations or *from* charitable organizations. It is intended to provide clarification in an area that consistently gave rise to time-consuming clarifications and discussions.

Based on the new statutory rule, donations may be publicly mentioned in neutral form by companies (including through use of the logo and original company name) without this resulting, as was formerly the case, in VAT consequences.

The most important aspects of the new rule are also to be found in the Practice Announcement of the Swiss Federal Tax Administration, Main Division VAT, on Sponsor Funds and Donations dated March 3, 2006.

### 2. Federal Law on the Direct Federal Tax

New art. 33a of the Direct Federal Tax Law (DFTL) deals with the tax deductibility of donations made by individuals for charitable purposes. Under former law, the deductibility was, based on art. 33 para. 1 subpara. (i) of the DFTL, limited *to 10%*. Further, the rule was structured such that

the corresponding deduction had to be calculated on the net income *after the deduction of this donation.*

The deductibility has now been increased *to 20%.* The basis for the calculation of the deduction is now the income that is reduced by the other expenditures pursuant to art. 26– 33 of the DFTL. This change in the deduction basis from "taxable income" to "income" has the advantage that it is readily comprehensible and leads to a deduction in real terms that is determined in accordance with the determined maximum percentage rate of the net income *before the deduction* of the donations.

The donations, formerly limited to money payments, are now – with an impact for the federal level *and* cantons – expanded to include "other assets". This term includes immovable and movable property as well as capital assets (including claims), art objects and intellectual property rights. In contrast, job performance and services are not deemed to constitute assets.

A further expansion occurs due to the fact that voluntary payments to the federal government, the cantons, the municipalities and institutions thereof are likewise deductible from income. Accordingly, it will be possible to provide such payments to, for example, the Swiss Federal Institute of Technology in tax-effective fashion.

Art. 56 subpara. g of the DFTL allows for the partial tax exempt status of a foundation because the tax exemption will be granted solely for the portion of profit that is exclusively and irrevocably dedicated to charitable purposes.

These changes of course affect not only the founders, but also persons who make donations to already-existing foundations. For these persons, too, donations are now even more worthwhile than before. They can also be told that the donation of assets other than money is now also deductible. Thus, a museum foundation may tell its donors that contributions in the form of artworks are also tax-deductible.



### 3. Tax Harmonization Law

Under the Federal Law of December 14, 1990, on the Harmonization of the Direct Taxes of the Cantons and Municipalities (Tax Harmonization Law, THL), basically the same provisions apply as under the DFTL. For this reason, essentially the same explanations are determinative with respect to the THL provisions as with respect to the corresponding DFTL provisions.

## V. The Revisions to the Commercial Register Ordinance

The revisions to the SCC in connection with foundation law also required a modification to the Commercial Register Ordinance of June 7, 1937. The implementing provisions thereunder relating to foundation law were, moreover, outdated, incomplete and confusing due to the absence of a stringent systematic approach. The Swiss Federal Council took the opportunity to improve the Commercial Register legal framework and to eliminate ambiguities. The corresponding modifications to the Commercial Register Ordinance likewise entered into force on January 1, 2006. These modifications relate to

- the modalities for the entry of newly-established foundations and the supporting documents required in this regard;
- the content of the Commercial Register entry for a foundation;
- the duty of the foundation board to report changes;
- the procedure for determining the competent supervisory authority;
- the procedure in connection with the detection of deficiencies in the organization of a foundation; and
- the procedure in connection with the deletion of a foundation.

The most important change is that, in future, *all* members of the foundation board (and not just those authorized to sign) are to be entered in the Commercial Register (art. 102 subpara. g of the Commercial Register

Ordinance). For this change, as well, there is a deadline of until December 31, 2007.

## VI. Evaluation of the Revisions to Foundation Law

The possibility of revoking the foundation that was originally foreseen, *with a reversion of the assets to the founder*, did not survive the legislative procedure. It was the most neuralgic aspect of the reform. Based on the former – and now also based on the future – understanding of the Swiss foundation, such a possibility for a retransfer was, and remains, precluded.

In connection with this revision, the *family foundation* is only dealt with marginally. This is somewhat paradoxical because, based on current law (art. 335 para. 1 of the SCC), the permissible purposes of the family foundation are heavily restricted, which is why hardly any family foundations will be established in future. Family foundations are currently extremely unattractive, due to tax considerations as well. At the same time, they would be a very sensible instrument for estate and succession planning. *De lege lata*, foreign instruments will often be resorted to.

The revision also does not (specifically) deal with *business foundations*. The Commercial Registers have allowed these; the Swiss Federal Tribunal, in a leading decision, declared them to be lawful. In practice, positive cases and other cases have been observed. With regard to statute law much is unsettled. Thus, for example, the question of whether the foundation may also intervene in the operational activities of a corporation that is owned by the foundation, as majority or sole shareholder, continues to be unresolved. Perhaps the business foundation still awaits its finest hour.

The liberalization in terms of *tax law* is highly welcome. Namely, the greatest problem under former foundation law, put somewhat dramatically, was the *tax law* and its practice. The institution of foundations and, with it, the development of the civil society, is primarily furthered through an improvement of the tax parameters. Therefore, the corresponding reforms are of considerable importance. The increased tax deductibility and the changes in terms of the value-added tax by all means deserve an endorsement. They provide an incentive for an environment that is even more



conducive to foundations and donations. Hopefully, the increase in tax deductibility as a matter of the direct federal tax will also lead to analogous increases by the cantons.

The *liability of foundation executive bodies,* including those of employee pension foundations, likewise deserved to have been looked at more closely. Under case law and, in part, under legal doctrine, an analogous application of the liability law provisions under the Corporation Law to foundations is rejected. It is questionable whether this sweeping rejection is appropriate, above all in light of the fact that, under the new foundation law, cross-references are made on a case-by-case basis to rules under the Corporation Law.

Taken as a whole, the outcome is mixed. It is telling that "subsequent improvements" were already considered even prior to the effective date of the revision.

*A current need for modification* exists only with respect to two issues:

1. Must an auditor be designated, and must accounts be prepared, where these are not yet on hand. If need be, an application for exemption from the duty to designate an auditor is to be submitted to the supervisory authority.

2. All members of the foundation, including those who are not authorized to represent the foundation, must be entered in the Commercial Register.

## VII. Further Legislative Revisions Relevant to Foundations

### 1. Revision of the Law Governing Financing Accounting and Auditors

It is anticipated that the revised provisions of the Swiss Code of Obligations relating to the auditor of corporations will enter into force in the summer of 2007. Foundations will also be subject to these provisions. The law

governing foundations in the SCC will cross-reference to the corresponding provisions in the CO. The future law governing audits affirms the duty to designate an auditor for foundations. On the other hand, it entails far-reaching changes in connection with

a. the choice of the auditor: future law forecloses the use of laymen as auditors. The annual accounts of foundations, too, must be audited by state-licensed auditors or rather auditing experts;

b. the conduct of the annual audit. Future law basically distinguishes between two types of annual audits: the ordinary audit and the limited audit. Foundations that meet the aforementioned size criteria must subject themselves to an ordinary audit. The others must subject themselves to a limited annual audit. The audit must be conducted by a licensed auditor.

## 2. Federal Law on the Transparency of Administration

On July 1, 2006, the Federal Law on the Transparency Principle of Administration (Transparency Law) entered into force. This Law is intended to promote transparency in terms of the mandate, organization and activities of the Federal Administration. Each person is entitled to inspect official documents without having to prove a specific interest, unless there are interests that take precedence, including, among others, privacy law interests.

The Law applies to the Federal Administration and therefore also applies to the Swiss Federal Foundation Supervisory Authority. We will have to wait to see the extent to which documents of foundations that are subject to federal supervision will now also be available to the general public.

# VIII. Foundation Governance

In recent years, two task forces were appointed, each with the goal of developing a code of best foundation practices:

- The first task force was appointed by the Conference of the Chairwomen and Chairmen of Major Relief Organizations in September 2003. The task force took it upon itself to create a code aimed at the managing executive bodies of major non-profit organizations – not just those of foundations, but also those of associations. The *Swiss NPO-Code* was resolved on January 19, 2006, and, following editorial corrections, was definitively adopted on March 31, 2006.

  The charitable organizations at which the Swiss NPO-Code is directed have further stakeholders, such as, for example, members, contributors, volunteers. The role of voluntary work is significance. Therefore, the NPO-Code deals with the relationship between voluntary workers and full-time workers. It includes one chapter on associations and one chapter on foundations.

- The second task force was appointed in the summer of 2004 by SwissFoundations, the umbrella association of the Grant-Making Foundations in Switzerland. It developed the *Swiss Foundation Code*, which was completed in the summer of 2005 and published on October 25, 2005. It constitutes the first code for grant-making foundations in Europe.

It is likely that these self-regulatory codes will send out signals resulting in further initiatives.