

## Briefing July 2017

# FinTech – First Part of New Regulation Enacted

On 5 July 2017, the Swiss Federal Council (Bundesrat) amended the Swiss Federal Banking Ordinance to ease the Swiss regulatory framework for providers of innovative financial technologies (FinTech; see our briefings in November 2016 and February 2017).

Specifically, the following elements of the new FinTech regulation have now been adopted and will enter into force on 1 August 2017:

- (i) longer maximum holding period of third party monies in settlement accounts without qualifying as client deposits: 60 days instead of seven; and
- (ii) creation of a regulatory sandbox by allowing, subject to certain safeguards, the acceptance of client deposits in an amount of up to CHF 1 million without triggering a banking licence requirement.

The third element of the new FinTech regulation, a new licence type for FinTech innovators allowing the acceptance of client deposits in an amount of up to CHF 100 million, requires an amendment of the Swiss Federal Banking Act which will have to be passed by the Swiss Parliament.

### **New Exemptions and Reliefs for FinTech and other Businesses**

The newly adopted rules aim, in particular, at facilitating crowdfunding and payment processing services and other business models that involve – in some form – the acceptance of funds from the public. This is achieved by two amendments to the Swiss Federal Banking Ordinance ("**BankO**") creating a broader room for manoeuvre for firms intending to engage in these types of businesses without becoming subject to a prudential banking licence requirement. These rules will, however, not be limited to FinTech, but are available to all market participants in Switzerland.

### **Extension of the Maximum Holding Period of Monies on Settlement Accounts**

Pursuant to Swiss banking regulation, persons accepting deposits from the public on a commercial basis require, in principle, a banking licence. An exception from the term "deposits from the public" applies in respect of third-party monies accepted on non-interest bearing accounts for the purpose of settlement of client transactions (article 5 (3)(c) BankO). So far, this exemption was of limited relevance for FinTech businesses such as crowdfunding platforms because the Swiss Financial Market Supervisory Authority FINMA applied a maximum holding period of seven days for such third-party monies not to qualify as deposits from the public.

The new rules specify the maximum holding period on settlement accounts codified in the BankO and, at the same time, extend it to 60 days (article 5 (3)(c) revBankO). This will, for example, enable crowd-funding platforms to have longer campaigns and allow payment service providers to process payments in batches. The settlement accounts still have to be non-interest bearing. Furthermore, the exemption does not apply to settlement accounts of securities dealers, for which the previous FINMA practice will continue to apply.

Based on investor protection considerations, the Federal Council did not pick up a proposal brought forward in the consultation suggesting that new rules should allow for a 90 day maximum holding period. However, the explanatory report of the Federal Department of Finance accompanying the changes to the BankO notes that the Federal Council will monitor the effects of the revised regulation and may potentially amend the maximum holding period at a later stage.

### **Innovation Sandbox**

Under current Swiss banking regulation, a person is deemed to accept deposits from the public on a commercial basis (requiring a banking licence) if it accepts deposits from more than 20 persons on an ongoing basis, regardless of the individual or total amounts, or publicly solicit deposits (article 6 BankO).

The new rules amend the definition of "acting on a commercial basis" to allow firms to accept deposits from the public in an amount of up to CHF 1 million, regardless of the number of depositors, without requiring a banking licence (art. 6 (2) revBankO). The exemption requires that the deposits are neither invested, with the exception of financing a mainly commercial or industrial activity (e.g. by taking deposits through crowdlending to finance a commercial business), nor interest-bearing. In addition, the depositors must be informed prior to making any deposits, in writing or otherwise in the form of text, that the institution is not supervised by FINMA and that the deposits are not covered by the Swiss depositor protection regime. This exemption will apply in addition to the exemption for settlement accounts.

The new exemption creates a regulatory sandbox to allow businesses in an early stage of development to experiment without being subject to the cumbersome burden of prudential supervision. As such businesses can potentially grow rapidly, the final rule now includes a provision for the event that the threshold of CHF 1 million is exceeded: Such occurrence must be notified to FINMA within 10 days and an application for a banking licence (or, if enacted, a FinTech licence) submitted within 30 days. Depending on each individual case, FINMA can prohibit the further acceptance of deposits until a licence is granted.

### **FINMA Guidance 03/2017**

On 6 July 2017, following the Federal Council's announcement, FINMA published a guidance note regarding the new rules on public deposits (FINMA Guidance 03/2017). The guidance acknowledges that the Federal Council enacted a revised version of the BankO and briefly summarizes the new rules. Furthermore, according to the guidance, FINMA is reviewing the potential impact of the revised BankO on its Circular 2008/3 "Public deposits with non-banks", which sets out the current regulatory practice in the area of deposits. FINMA expects that amendments to the circular will be required and will initiate a public consultation procedure on proposed amendments in Autumn 2017.

In its guidance, FINMA also invites interested parties to participate in a survey regarding the planned FinTech licence (the third pillar of the new FinTech rules, which is expected to be debated in the plenary session of the National Council (*Nationalrat*), the lower chamber of the Swiss Parliament, during its Autumn session). The aim of this survey, which will be conducted on the basis of a questionnaire prepared by FINMA, is to gauge interest in the new licence category and to establish what types of businesses might consider applying for a FinTech licence. The questionnaire can be viewed online at:

<https://www.finma.ch/en/~media/finma/reg/fragebogen-fintech-de.xltx?la=en>

## Outlook

The enactment of the first two pillars of the new FinTech regulation is an important step towards creating a more attractive legal framework for financial innovators in Switzerland, with the new FinTech licence likely to follow not far behind. The new rules do not, however, extend to anti-money laundering regulations. Therefore, FinTech firms acting as financial intermediaries remain in principle subject to the Federal Anti-Money Laundering Act.

There are still many areas that have not been addressed so far by the FinTech-friendly (but technology-neutral) regulation. These include the rules on consumer credit, which affect the business of crowd-lending platforms and other FinTech businesses in Switzerland. That said, according to a June media

release by the Economic Affairs and Taxation Committee of the National Council (*Kommission für Wirtschaft und Abgaben des Nationalrates, WAK-N*), the Federal Council has proposed to include amendments to the Federal Consumer Credit Act in the FinTech Bill. The details of the envisaged amendments have not yet been disclosed but they should be published in August, when the Economic Affairs and Taxation Committee of the National Council will conclude its review of the FinTech Bill.

Another area that has so far been excluded from the FinTech regulation project are cryptocurrencies and other blockchain-enabled business models. FINMA has recently shown an increased interest in discussing and supporting these types of businesses in Switzerland, but more concrete developments are currently not on the horizon.

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