

SWITZERLAND

Bär & Karrer



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Fintech rules eased

On July 5 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).

Specifically, the following elements of the new fintech regulation will enter into force on August 1 2017: (i) a longer maximum holding period of third party monies in settlement accounts without qualifying as client deposits: 60 days instead of seven; and, (ii) the creation of a regulatory sandbox by allowing, subject to certain safeguards, the acceptance of client deposits in an amount of up to CHF1 million (approximately \$1.046 million) without triggering a banking licence requirement.

The third element of the new fintech regulation is a new licence type for fintech innovators allowing the acceptance of client deposits in an amount of up to CHF100 million. This will require an amendment to the Swiss Federal Banking Act (Fintech Bill), which will have to be passed by the Swiss parliament.

The implementation of the first two pillars of the new fintech regulation within a very short time period demonstrates the Swiss government's desire to promote digital innovation, in particular in the financial industry. It is an important step towards creating a more attractive legal framework for financial innovators in Switzerland.

Scope

The new 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. Accordingly, Finma expects the requirement of an amendment of its Circular 2008/3 'Public deposits with nonbanks' as it announced in a guidance note on the new rules (Finma Guidance 03/2017). These rules will not, however, be limited to fintech,

but will be available to all market participants in Switzerland. Since the new rules do not extend to the Federal Anti-Money Laundering Act (AMLA), fintech firms acting as financial intermediaries remain, in principle, subject to AMLA.

Extension of the maximum holding period for monies in settlement accounts

Under Swiss banking regulation, persons accepting deposits from the public on a commercial basis require, in principle, a banking licence. An exception to the term 'deposits from the public' applies in respect of third-party monies accepted in non-interest bearing accounts for the purpose of the settlement of client transactions. So far, this exemption has been of limited relevance for fintech businesses because Finma applied a maximum holding period of seven days during which these third-party monies would not qualify as deposits from the public.

The new rules codify the maximum holding period on settlement accounts in the Banking Ordinance and, at the same time, extend it to 60 days. This will, for example, enable crowdfunding 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.

Innovation sandbox

Under existing 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 a continuing basis, regardless of the individual or total amounts.

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 CHF1 million, regardless of the number of depositors, without requiring a banking licence. The exemption requires that the deposits do not bear interest and are not invested, except to finance a mainly commercial or industrial activity (for example, by taking deposits

through crowdlending to finance a commercial business). In addition, the depositors must be informed that the institution is not supervised by Finma and that the deposits are not covered by the Swiss depositor protection regime.

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. Fintech firms must notify Finma within 10 days and apply for a banking licence (or, if enacted, a fintech licence) within 30 days in the event that the threshold of CHF1 million is exceeded.

Fintech Bill

The third pillar of the new fintech rules is expected to be debated in the autumn plenary session of the National Council (*Nationalrat*). The Fintech Bill might as well include amendments to the Federal Consumer Credit Act that may have an impact on fintech businesses, in particular, the business of crowdlending platforms in Switzerland. Cryptocurrencies and other blockchain-enabled business models have so far been excluded from the fintech regulation project. Although Finma has recently shown an increased interest in supporting these types of businesses in Switzerland, more concrete regulatory developments are not as yet on the horizon.

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