

Crowdfunding platforms and banking licences

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Introduction

Centrally pooled funds

Anti-money laundering requirements

Project developers

Proposed new licence category

Crowdfunding in draft Act on Financial Services

Introduction

In December 2014 the Swiss Financial Market Supervisory Authority (FINMA) issued a factsheet on crowdfunding, in which it examined the conditions under which crowdfunding platform operators and project developers must obtain a licence from FINMA before commencing activities.

According to the factsheet, crowdfunding is subject to no specific provisions under Swiss supervisory law, which means that all laws governing financial markets apply. In view of the variety of business models that are used in crowdfunding, FINMA considers it necessary to clarify on a case-by-case basis whether a licence is required.

Centrally pooled funds

If a crowdfunding platform operator accepts funds for a commercial activity without immediately passing them on to the project developer – for instance, by holding them in its accounts to ensure that they are available when the collection period ends – a banking licence must be obtained before commencing activities, if these are performed on a professional basis. Those that accept over a long period of time more than 20 deposits from the public, or that publicly advertise the collection of deposits (even if fewer than 20 deposits are ultimately collected) are considered to be acting on a professional basis. The use of the Internet qualifies as public advertising.

By contrast, if the money raised is only brokered via the platform and is not centrally pooled in the operator's accounts the operator is not required to obtain authorisation under the Banking Act.

Anti-money laundering requirements

Funds that are channelled through an operator's accounts are generally also subject to money-laundering provisions. If an operator is not already required to have a banking licence, it must either obtain a licence from FINMA as a directly supervised financial intermediary or become a member of a self-regulatory organisation that is recognised by FINMA for anti-money laundering purposes.

Project developers

Project developers may also need a banking licence if they accept funds from project financiers in their own accounts on a professional basis – in particular, if the funds are accepted in the form of third-party capital (eg, loans). Advertising is sufficient to trigger the requirement to obtain a banking licence.

Proposed new licence category

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Several Swiss platform operators confirmed that FINMA strengthened its practice in 2015 by requiring activities which fall under the Banking Act be compliant. This could mean the end of crowdfunding for small operators, as they may not have the financial means to hire qualified personnel, control the origin of the funds and implement risk management structures.

In light of this, FINMA recently proposed to introduce into law a new category of banking licence that would formally place crowdfunding platform operators under its supervision while alleviating constraints. In a September 10 2015 speech before the Business Club Zurich, FINMA's chief executive officer declared himself in favour of a new licensing category with less stringent requirements than those currently set out in the Banking Act. However, he suggested that there should be two prerequisites for this new category:

- The volumes concerned must be relatively low; and
- The companies must not be allowed to transform maturities (ie, offer long-term loans based on short-term deposits).

Crowdfunding in draft Act on Financial Services

The draft Act on Financial Services, in its revised version circulated on November 4 2015, partially tackles the question of crowdfunding. According to the accompanying report to the draft, crowdfunding operations may qualify as a security, in which case a prospectus duty is triggered. The case being certain exceptions provided by the draft may be applicable to crowdfunding offerings where the public offering:

- does not exceed a total of Sfr100,000 over a 12-month period; or
- is issued by non-profit institutions for raising funds for non-commercial purposes.

In such cases, the crowdfunding platforms should nevertheless issue a basic information sheet explaining the details of the operation.

Crowdfunding operations in the form of crowdlending may also qualify as a series of individual loans and therefore be subject to the Banking Act and the Act on Consumer Credit.

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