

Government adopts first part of revised fintech rules to ease regulatory framework

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Introduction

The Federal Council recently adopted an amendment to the Banking Ordinance scheduled to enter into force on August 1 2017. Following the announcement of the revised rules, the Swiss Financial Market Supervisory Authority (FINMA) published a guidance note regarding the new rules on public deposits. The revision will reduce some of the barriers to market entry for financial technology (fintech) firms. The revision follows a public consultation procedure in early 2017 in which the council put forward several proposals for debate regarding modifications to existing rules regarding Swiss banking regulations – both in the Banking Act and the Banking Ordinance (for further details please see "[FINMA supports regulatory changes in favour of fintech industry](#)" and "[Federal Council proposes revisions to boost fintech innovations](#)"). The purpose of the proposed revisions is to enhance the competitiveness of Switzerland as a major fintech hub and to create an appropriate regulatory framework for fintech companies providing services outside traditional banking business by taking into account the specific risk profile of their business models and service offering. The amendments to the Banking Ordinance include, in particular, two important changes:

- an enhanced settlement account exemption which extends the maximum holding period to 60 days for funds on settlement accounts, without qualifying as client deposits; and
- an innovation area (a so-called 'sandbox') allowing fintech companies to operate without a banking licence, even when holding deposits from clients of up to Sfr1 million.

However, in order to provide a level playing field these rules will not be limited to fintech companies, but are available to all players operating in the financial market in Switzerland (ie, also existing financial service providers).

Settlement account exemption

As a general rule, pursuant to the Swiss regulatory framework, any market participant accepting deposits from the public on a commercial basis must, in principle, before becoming operative, obtain a banking licence. An exemption from the term 'deposits from the public' already exists with respect to client funds accepted on (non-interest-bearing) settlement accounts for the purpose of the settlement of client transactions. However, since FINMA has restricted the maximum holding period under the existing exemption to seven days, it was of limited use and thus too restrictive for fintech companies. The new rules extend the maximum holding period on settlement accounts to 60 days, allowing, for example, the processing of payments in batches by payment service providers and longer settlement periods for crowdfunding platforms or certain initial coin offerings. Settlement accounts need to be interest free in order to qualify and the specific regime applicable to settlement accounts of securities dealers will remain in force.

Innovation sandbox

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As a second element, a sandbox will be created which allows the acceptance of funds from clients or third parties of up to Sfr1 million without prior authorisation as a bank by FINMA. Thus, the holding of public funds of less than Sfr1 million no longer qualifies as operating on a commercial basis. This new exemption will apply in parallel to the exemption for settlement accounts. Under the banking regulation regime, a market participant taking public funds from more than 20 persons is automatically deemed as operating on a commercial basis, regardless of the amounts involved. The new rules amend the definition of 'acting on a commercial basis' to allow firms to accept funds from the public of up to Sfr1 million, regardless of the number of clients or counterparties providing funds. Further, the new exemption requires that such funds be neither invested nor interest bearing. The use of such funds mainly for the firm's own commercial or industrial activity does not qualify as investment activity (ie, the raising of funds by way of crowdlending in order to finance its own commercial business is allowed, but is capped at Sfr1 million (unless structured and documented as a bond issue)). In addition, the investors or depositors (ie, the persons providing the funds) must be informed (in writing or otherwise in text form) before making any transfers to the recipient that the recipient is not supervised by FINMA and that therefore the funds do not fall under the deposit insurance regime (ie, they are not protected by the Swiss depositor protection scheme) (for further details please see "[Protection of deposits with banks and savings banks](#)" and "[Federal Council – banking deposit protection scheme and segregation of custody assets](#)"). This change creates a regulatory sandbox allowing fintech companies to try out new business models before being required to obtain a banking licence and thus without having to build up a costly structure and being subject to a costly prudential supervision inevitably linked to lengthy procedures, considerable red tape and an administrative burden. In case any such unregulated entity exceeds the Sfr1 million threshold, it must notify FINMA within 10 days and apply within 30 days for a banking licence (or, if qualifying, another licence, including, once enacted, a fintech 'light' licence).

The new exemption does not apply only to fintech companies, but also applies to established financial service providers. Further, the amendments have no influence on the applicability of the Anti-money Laundering Act, since they apply to any financial intermediary, independently of any prudential supervision.

Planned Banking Act amendment

The third element of the proposed fintech regime, providing for a new type of licence for fintech companies, requires an amendment of the Banking Act. This was addressed by Parliament in the context of its debate on the Financial Services Act and the Financial Institutions Act. In December 2016 the Council of State advocated that a new authorisation category be created for smaller market participants that accept public funds of up to Sfr100 million, provided that they do not invest such funds and pay no interest on them. For the new authorisation category, a simplified authorisation procedure and operating requirements relative to the banking licence regime in the areas of accounting, auditing and deposit protection have been proposed.

The enactment of these amendments to the Banking Ordinance and the proposed new light licence for fintech companies will help to facilitate the establishment and operation of fintech businesses in Switzerland. Further re-assessments and efforts to adapt the regulatory regime to the legitimate needs of a wide range of rapidly developing new business models will be necessary. In particular, in the crowdborrowing and crowdlending area, further revisions will be necessary, particularly since the raising of funds through crowdfunding in order to fund the company's own commercial business remains capped at Sfr1 million without any obvious prudential need for such a restriction. Consumer organisations seem to push for the application of consumer credit protection regulations to crowdlending players. In its report, the Federal Council pledged to monitor the effects of the revised regulation and potentially propose further amendments at a later stage.

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