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New FinTech License: **What will be the Requirements?**

On 21 June 2018, the Swiss Federal Department of Finance initiated a consultation regarding a newly created FinTech license which will enable companies that are not banks to accept public deposits up to an aggregate amount of CHF 100 million. The consultation will run until 21 September 2018 so that the new rules – in the interests of the market participants – can enter into force on 1 January 2019 already.

Back in February 2017, the Swiss Federal Council held a FinTech consultation proposing three measures to promote innovation in the financial sector and to remove barriers to market entry for FinTech companies including a "sandbox" exemption, a settlement accounts exemption and a FinTech license (banking license "light"). The amended Swiss Federal Banking Ordinance (BO) has been entered into force on 1 August 2017 already introducing the "sandbox" exemption and the extended timeframe for settlement accounts.

A. "Sandbox" Exemption

As a first measure, a "sandbox" exemption has been introduced as of 1 August 2017 that allows to engage in certain activities which under the previous regulation would have triggered a banking license.

Under the "sandbox" exemption, public deposits can be accepted without a banking license, provided that liabilities towards clients and investors never exceed the threshold of CHF 1 million in aggregate, irrespective of the number of public deposits and the deposits accepted are neither invested nor interest-bearing. These client deposits must be liquid and available at any time. This exemption is not only available to FinTechs but also to any other type of business.

In addition, clients must be informed individually and not later than at the time of the contractual commitment (Verpflichtungsgeschäft) that there is neither a prudential supervision nor a deposit insurance. A disclaimer in the general terms and conditions is not sufficient, however, information the client via a website is permitted if the lack of prudential supervision and deposit insurance is showed separately to the client. Such information must be displayed in text and in a form which is reproducible. Also, explicit acknowledgement of the client is required.

Should the company exceed the threshold of CHF 1 million, it must notify the Swiss Financial Market Supervisory Authority (FINMA) within 10 days and an application for a banking license must be filed within 30 days. The company does not need to reduce or return the amount exceeding CHF 1 million if the license application is filed within such timeframe.

B. Extended Timeframe for Settlement Accounts

Secondly, according the amendment of the BO as per 1 August 2017, the settlement accounts exemption has been extended from 7 days to 60 days. It has been specifically created to facilitate the operation of business models with the purpose of transmitting funds (e.g. money transmitting, crowdfunding or payment collection). Securities dealers, however, are not affected by the settlement period and, therefore, are not limited in their activities. Further, crypto currency dealers do not benefit from the exemption, provided that their activity is comparable to the one of a foreign currency dealer. Lastly, credit balances on client accounts of precious metal dealers fall under the exemption if a precious metal dealer is in physical possession of the precious metal credit of its client and such client is entitled to a preferential claim in case of the precious metal dealer's bankruptcy. Precious metal dealers are not limited in their activities by the 60 day-period.

Certain amendments to the Consumer Credit Act have been passed by the Swiss Parliament on 15 June 2018 affecting the crowdlending business. In particular, a crowdlending intermediary will be required to review the credit standing of the consumers (art. 27a of the revised Consumer Credit Act) and will have to report loans granted to the consumer credit information office (art. 25 of the revised Consumer Credit Act).

C. New FinTech License

A third measure – a FinTech license under art. 1b of the Swiss Federal Banking Act (BA) – was discussed by the Swiss Parliament in connection with the introduction of the Financial Services Act (FIDLEG) and the Financial Institutions Act (FINIG) which were passed on 15 June 2018 and are expected to enter into force on 1 January 2020. This new type of "banking license light" will be available – if certain requirements are met – not only to FinTech firms but also to any other company not engaging in commercial banking and not accepting public deposits of more than CHF 100 million in total. The deposits accepted can neither be invested nor bear interest.

The proposed details of the new FinTech license will be discussed below in greater detail. Please note that the proposed amendment of the BO is still subject to change. These new provisions are expected to enter into force – ahead of FIDLEG and FINIG – as of 1 January 2019.

Overview of Proposed Requirements for New FinTech License

A. General Provisions

Pursuant to art. 1b para. 1 of the BA, anyone active in the financial sector, accepting deposits from the public up to CHF 100 million in a commercial capacity and neither investing these deposits nor paying any interest will benefit from the new FinTech license with simplified requirements. Anyone within the scope of art. 1b of the BA must inform its clients in a clear and comprehensive manner about the risks related with the business model, the services and technologies used and that deposits accepted under the FinTech license will not be covered by a deposit insurance. As these points are crucial for clients, the information duty cannot be fulfilled via disclaimer in the general terms and conditions and clients must be informed individually and at the latest at the time of contractual commitment (Verpflichtungsgeschäft). Group companies shall be deemed affiliated companies if they are perceived as economic units or if they are obliged to support each other. The threshold of CHF 100 million will generally apply to the entire group.

B. Organizational Requirements

An application for a FinTech license shall provide the same information and documents on the persons either entrusted with its administration and management or in their capacity as holders of qualifying equity interests as currently applicable for banks in art. 8 BO. Form of legal entity pursuant to art. 1b of the BA can either be a stock corporation (Aktiengesellschaft), a partnership limited by shares (Kommanditaktiengesellschaft) or a limited liability company (Gesellschaft mit beschränkter Haftung).
The company must have its registered office and its core business in Switzerland. As for banks, the company must describe in detail its business areas in its articles of association or organizational regulations. The description must remain objective and exactly define the geographical scope of the activities. Business area and geographical scope shall correspond to the company's financial capacities as well as to its board and management organization. Any subsequent changes in the articles of association or organizational require prior FINMA approval.

Factually, the company shall be managed from Switzerland. The management team members must have their place of residence at a location which is suitable for the proper management of the business operations. Like for banks or asset managers of collective investment schemes if the company's purpose or volume of business call for a special governing body to enable adequate guidance, supervision and control, the respective body must consist of at least three members. Moreover, at least one third of the board members must be independent from the management team, taking into consideration that FinTech companies often are start-up companies. Further, qualified shareholders of the licensed company with a stake of 10% or higher do not need to be independent from the management team. This certainly makes sense for start-up constellations but constitutes an unequal treatment of asset managers of collective investment schemes – notably a lower type of license in the FINIG licensing cascade – where at least two thirds of the board members cannot engage in operative activities and at least on third of the board members needs to be independent from the qualified shareholders.

Pursuant to art. 1b BA, the respective persons must ensure compliance with legal and regulatory requirements and establish an effective risk management framework as well as an internal control system must be ensured.
The functions supervising compliance and risk management must be segregated from the profit-oriented business, but under certain circumstances, the FINMA can grant

easement from such requirement if the gross proceeds are lower than CHF 1.5 million and the business model only has limited risks. Supervision of compliance and risk management can be outsourced to third parties if certain requirements are met. Instruction and supervision of third parties must be provided by the license holder pursuant to art. 1b of the BA.

Public deposits must be kept in Switzerland separate from own funds of the company. A separation per client, however, will not be required by law. The funds must be liquid at any time, and no investment or payment of interest will be permitted. Further, specific rules for conflicts of interests will apply. This new provision takes into consideration that certain FinTech business models may not offer financial services within the scope of the FIDLEG so that additional rules will apply in this respect.

c. Capital Requirements

Capital and audit requirements are substantially reduced compared to the fully-fledged banking license. The minimum capital pursuant to art. 1b BA shall amount to 5% of the public deposits received in the sense of art. 5 BO but at least CHF 300,000. It must be fully paid-in, kept at any time and cannot be borrowed or invested. The capital shall solely be used for the purpose of the company. Taking into consideration specific risk aspects, FINMA can implement stricter requirements in certain cases. The Capital Adequacy Ordinance for banks will not apply to license holders pursuant to art. 1b BA. With respect to accounting and audit standards, the general standards of the Swiss Code of Obligations will apply and not the standards of the BA.

Conclusion

The implementation of the FinTech license will boost innovation and significantly lower the market entry hurdles for FinTechs accepting public deposits. To enable the establishment of a level playing field, however, regulatory practice for comparable financial institutions subject to prudential revision such as asset managers should also be reviewed by FINMA.

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