New FinTech License in Switzerland

17.09.2018

- **Companies that accept public deposits of up to CHF 100 million, but that do not invest or pay interest on such deposits, will be eligible to apply for a FinTech license (rather than the normal banking license).**
- **FINMA will amend the AMLO-FINMA to provide specific due diligence requirements under the Swiss AML-regulation regime.**
- **As a rule, under the AML-regulation, FinTech companies must comply with the same due diligence duties as directly supervised financial intermediaries (DSFIs).**

Introduction

On 28 August 2018, the Swiss Financial Market Supervisory Authority (FINMA) announced an open discussion (Vernehmlassung) on the proposed amendments to the Anti-Money Laundering Ordinance (AMLO-FINMA), concerning the new license category "FinTech". The new FinTech license will be regulated by the amended Swiss Banking Act (BA) as well as the amended Swiss Banking Ordinance (BO), both of which shall enter into force on 1 January 2019.

The Swiss parliament adopted the provision on the new FinTech license on 15 June 2018. Under the amended BA, companies that accept public deposits of up to CHF 100 million, but that do not invest or pay interest on such deposits, will be eligible to apply for a FinTech license (rather than the normal banking license).

In addition, FINMA will amend the AMLO-FINMA to provide specific due diligence requirements under the Swiss AML-regulation regime. The discussion (Vernehmlassung) on AMLO-FINMA will continue until 26 October 2018, and the partially revised AMLO-FINMA shall enter into force on 1 January 2019 (simultaneously with the amended BA / BO).

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This newsletter provides an overview on the upcoming regulatory framework regarding the new FinTech license.

FinTech License under the BA / the (draft) BO

As of 1 January 2019, the BA will provide for two types of licenses: a normal banking license and a new FinTech license. Companies that are mainly involved in the financial sector may apply for the new FinTech license if they take deposits from the public of up to CHF 100 million as long as the applying company neither re-invests the funds nor promises to pay interest on them.

One requirement for obtaining the FinTech license is therefore that the company must not operate an interest margin business model nor generate any interest margin profit. It may not grant loans or buy investment products in its own name or for its own account. Further, it is obliged to promptly pass the deposits on (for example, to a business project developer). Subject to certain conditions, however, FinTech companies may hold the funds for an indefinite time period.

Another requirement for obtaining the FinTech license is that the company must comply with certain organisational, risk management, and compliance standards. The (draft) BO specifies that the FinTech companies' information duties as well as the licensing, organisational, risk management, and compliance requirements must be fulfilled before a license is granted.

For example, the (draft) BO sets forth that FinTech companies must be incorporated as share corporations or limited liability companies in Switzerland, and that the minimum capital must be CHF 300'000. Also, FinTech companies must ensure that they have adequate compliance and risk management to record, evaluate, and limit business risks. Some organisational relaxations regarding compliance and risk management may, however, apply for smaller and low risk FinTech companies.

The FinTech companies' business models or activities must also be reviewed by a licensed auditor. Deposits provided to the licensed FinTech companies are not protected or privileged upon their bankruptcy or insolvency. It is thus imperative that FinTech companies inform the creditors about their claims not being protected by law.

FinTech License under the AML-regulation / the draft AMLO-FINMA

FINMA announced that the corresponding AML-due diligence requirements must be defined in detail for licensed FinTech companies that fall within the amended BA / BO scope of applicability.

As a rule, under the AML-regulation, FinTech companies must comply with the same due diligence duties as directly supervised financial intermediaries (DSFIs), in particular if their sizes are comparable. Because FinTech companies are, however, allowed to take deposits up to CHF 100 million, FINMA considers these FinTech companies as engaging in riskier businesses than DSFIs; thus, not all of the regulatory reliefs granted to DSFIs will apply to FinTech companies.

In contrast to DSFIs, for example, FinTech companies are - in any case - obliged to determine risk criteria based on risk analyses (pursuant to the draft AMLO-FINMA). DSFIs would be required to do so only if they have business relationships with at least 20 people. Similarly, FinTech companies must – without exemption – adopt guidelines to prevent anti-money laundering and terrorism financing while a DSFI is exempt from such duty if DSFI employs less than 10 people.

Finally, DSFIs may benefit from organisational relaxation concerning the requirements applicable to the internal anti-money laundering competence center so long as not more than 20 people are employed; in contrast, FinTech companies may only benefit from such an organisational relaxation if the FinTech companies' gross income is less than CHF 1.5 million and if they can provide evidence that they operate a lower-risk business (regardless of the number of people employed).

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