



New Fintech regulations: Amendment of the Banking Act and the Banking Ordinance

31.05.2017

1. Introduction

Fintech has grown explosively and now describes a broad variety of technological interventions into personal and commercial finance, such as mobile payment services, blockchain-tools, krypto-currencies or crowdfunding platforms. Despite the rapid growth, currently no specific rules exist for companies that offer financial technology (so-called fintech) products and/ or services.

Because many of the fintech business models depend on taking deposits from the public, such fintech companies – in fact – fall within the scope of the Swiss Federal Banking Act (BA) and are therefore subject to a bank license and subsequent supervision of the Swiss Financial Market Supervisory Authority (FINMA).

To ensure the competitiveness of the Swiss financial centre, the Federal Council took the first steps on 2 November 2016 towards reducing market entry barriers for fintech companies and instructed the Federal Department of Finance (FDF) to draw up a consultation draft by the beginning of 2017. On 1 February 2017, the Federal Council initiated this consultation on the new fintech regulations and, as such, the amendment to both the BA and the Swiss Federal Banking Ordinance (BO). The consultation period ended on 8 May 2017.

This revision of the BA and the BO aims to regulate fintech companies (and other companies), according to their risk potential if they provide services outside of the normal banking business.

The amendments will consist of three supplementary elements as further shown in section 2 below.

2. Three elements of "deregulation"

2.1 Extension of grace period for settlement accounts

According to the current art. 5 para 3 lit. c BO, deposits in settlement accounts of securities dealers or precious metal traders, asset managers or any similar market participants, do not qualify as deposits from the public if they are interest-free and exclusively used to settle client transactions. Pursuant to the FINMA practice, this exception only applies if the funds are transferred within seven days.

The new art. 5 para. 3 lit. c BO should apply explicitly to settlements within sixty days instead of only 7 days. For securities dealers, however, it remains crucial that the planned main transaction is not only organized but also directly foreseeable.

In particular, crowdfunding platforms and similar service providers that take investors' funds while raising funds for a project and proceeding to transfer such funds to a project, will benefit from this amendment (i.e., will be exempt from the requirement to get a bank license for their services).

2.2 Creation of an innovation area ("Sandbox")

In Switzerland a bank license is required when the market participant acts commercially. An institution or person shall be deemed to act commercially if it accepts, on an ongoing basis, more than twenty deposits from the public or recommends itself publicly for accepting deposits from the public, even if fewer than twenty deposits result.

Fintech business models often target more than twenty persons and thus may fall within the scope of the Swiss banking provisions. Being so positioned causes issues for fintech companies, especially during the market entry, because the current provisions do not allow these companies to test their business models regarding their efficiency without requesting a (expensive) FINMA license. In this scenario, they encounter an innovation-hampering effect. Therefore, it is intended to create an innovation area that is exempt from a bank license requirement (so-called "Sandbox"). The Sandbox approach allows the acceptance of public funds from more than twenty persons up to CHF 1 million without any license, provided that the deposits are not re-invested (i.e., they are not subject to loans). As a matter of course, fintech companies shall be obliged to inform the depositors in advance that their deposits will not be secured in case of bankruptcy and that their activities are not subject to the supervision of FINMA."

2.3 Creation of a new license category

Many fintech business models neither focus on nor implement the classic banking business. For such companies less stringent regulatory requirements should apply compared to fully developed banks.

Thus, the third element is the creation of a new type of license to promote innovation in Switzerland ("bank license light"). This new license category covers the areas of accounting, auditing and deposit protection for companies that accept public funds of up to a maximum of

CHF 100 million, provided that these deposits are not re-invested (i.e., they are not subject to loans) and that they are not interest bearing. Due to the dynamic developments in the fintech area, it is foreseen that the Federal Council will be authorized to adjust the threshold of CHF 100 million. Furthermore FINMA may authorize a higher threshold in individual cases, but only when special precautions guarantee that the individual client is protected. As a result, less stringent requirements, in particular in the areas of minimum capital, organization, private funds, and liquidity apply. It is foreseen that companies that hold such a "bank license light" will be requested to hold a minimum capital of 5 % of the accepted funds and in any case not less than CHF 300,000.

3. "One-size-fits all" approach

The new license category is designed as a technologically neutral regulation. Thus, the revision aims at a "one-size-fits-all" approach. The creation of such a "bank license light" is pioneering by international standards because the fintech regulations abroad are tailored to specific business activities. The FDF argues in its explanatory report to the consultation draft that the "one-size fits all" approach should prevent regulation lagging behind technological developments because the business models in the fintech area are varied and intended to be subject to future developments.

4. Swiss anti-money laundering rules

The Swiss anti-money laundering rules are not subject to any amendments. Therefore these rules will continue to apply in case of a "Sandbox" or in case of a company that satisfies the requirements for a "bank license light."

5. Criticism in the consultation process

The FDF has yet to publish the results of the consultation process. Several organizations, however, have published their statements concerning the consultation proposal. Inter alia, the following has been criticized:

- According to the banks and the Swiss umbrella association of Swiss economy ("economiesuisse"), it must be ensured that the new fintech regulation will not lead to competitive distortion in favor of newly established fintech companies and that the money laundering regulations will continue to apply to fintech companies (in particular, in the area of crowdfunding).
- In the area of promoting innovation, the banks and economiesuisse have determined that all service providers (e.g., startups or well established companies) should have the opportunity to benefit equally from the new fintech regulations. In particular, they have argued that a discrimination of group structures should be prevented (e.g., also newly established subsidiaries of large banks should have the opportunity to get a "bank license light").

According to the explanatory report to the FDF's consultation proposal, the CHF 100 million threshold (see 2.3) will be calculated on a consolidated basis. This statement must be understood as follows: the aggregate amount of the accepted public funds of all newly established affiliated companies does not exceed the CHF 100 million threshold.

The calculation of this threshold, however, is not entirely clear at this stage. To create more legal certainty, it would be desirable that the threshold's calculation be regulated by law.

- The banks suggest that the conditions, under which FINMA may authorize a higher threshold than CHF 100 million (see 2.3), be determined clearly in the BA to create more legal certainty.

6. Next steps

Currently, the Federal Council is reviewing the responses to the consultation draft, after which the Federal Council will publish a report about the results of the consultation (expected this summer) and will announce the next steps.

For the first two elements (i.e., to extend the time for settlement accounts and to create an innovation area), a final decision by the Federal Council is required. Therefore, the BO's amendments will be finalized within a short period and can be expected to enter into force this year.

The new license category, however, requires an amendment of the BA. Therefore, the parliament must be involved. The BA-amendment will take some more time. The "bank license light" is expected to enter into force in the course of next year.

Raphael Widmer

Associate
Attorney at Law, LL.M.

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 76
raphael.widmer@pestalozzilaw.com



Robert Furter

Senior Counsel
Attorney at law

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 91 55
robert.furter@pestalozzilaw.com

