

FINMA circular 'Public deposits with non-banks': what it means for FinTech

Loyens & Loeff

Switzerland | December 18 2017

The Swiss Financial Market Supervisory Authority (FINMA) recently issued a partial revision of Circular 2008/3, “Public deposits with non-banks”. The revised version, which came out on 14 December 2017 and will take effect on 1 January 2018, provides guidance on FINMA’s supervisory practice pursuant to the entry into force, on 1 August 2017, of a revised version of the Swiss Federal Banking Ordinance (BO) on FinTech regulations.

Of particular note are the introduction of a new sandbox concept, and the extension of the timeframe for settlement accounts. These changes reduce the number of unnecessary regulatory obstacles to the creation and implementation of innovative business models, including in FinTech. They will also help raise Switzerland’s profile as a world-class FinTech hub.

What has changed?

Based on the revised BO, FINMA made the following amendments to Circular 2008/03:

- **Requirement for a banking licence scrapped:** Public deposits can be accepted even if the FinTech company in company does not have a banking licence, in accordance with Article 6 para. 2 lit. a of the BO, provided that total liabilities to customers and investors, in the sense of Article 5 para. 1 of the BO do not exceed CHF 1 million.
- **Availability of assets:** The prohibition on charging interest and on investment activities under Article 6 para. 2 lit. b of the BO requires that customer deposits must:
 - be liquid and available at any time
 - be kept separately from other accounts used for the ordinary business of the FinTech company or other non-bank in question
- **Notification requirements:** Under Article 6 para. 2 lit. c of

the BO, the FinTech company or other non-bank must inform each client individually no later than the moment at which the contract is concluded (*Verpflichtungsgeschäft*) that the FinTech company or other non-bank is not supervised by FINMA and that it does not carry deposit insurance.

Inclusion of a disclaimer in the general terms and conditions cannot be held to constitute notice to the client. However, information that the FinTech or other non-bank provides on a website isolated from other information may count as notice of the absence of prudential supervision and of deposit insurance, if the client acknowledges that it has thus been notified on both counts.

- **Definition of commercial or industrial activity:** In particular, no commercial or industrial activity in the sense of Article 6 3 of the BO is carried out if financial services are provided or mediated for the provider itself or third parties or in case of private activities.
- **Further exemption:** If certain requirements set out in the Circular are met, the amount of public deposits exceeding CHF 1 million has not to be reduced during the reporting deadline or the deadline for submitting a licensing application, or during the authorisation process. Those requirements are as follows:
 - the accepted customer deposits are liquid and available at any time
 - no over-indebtedness
 - the minimal capital requirements for the requested license pursuant to the Banking Act are met
 - there are no indications which would conflict with the requested license pursuant to the Banking Act

Extended timeframe for settlement accounts

The Circular 2008/3 specifies that the settlement period within the settlement-account exemption is now 60 days, and that such an exemption under Article 5 para. 3 lit. c of the BO has been introduced specifically to facilitate the operation of business models whose purpose is to transmit funds, such as wire transfers, crowdfunding and the collection of payments. Pursuant to Article 5 para. 3 lit. c BO, the settlement period does not apply to securities dealers, who are therefore not limited in their activities by the 60-day period. Also, crypto-currency dealers will not benefit from the exemption, provided that their activities are comparable to those a foreign currency dealer engages in.

Lastly, credit balances on the client accounts of a dealer in precious metals do fall under the exemption if the dealer is in physical possession of the precious-metal credit of his clients and if that client is entitled to make a preferential claim if the dealer goes bankrupt. Precious-metals dealers are in such situation not limited in their activities by the 60-day period.

Loyens & Loeff - Andrea Huber

Powered by

LEXOLOGY.