

July 14, 2017

## NKF Banking, Finance & Regulatory Team – Update 5/2017: Swiss Banking Regulations become more FinTech-Friendly

On August 1, 2017 the first part of Switzerland's new FinTech rules will enter into force. The following provides an overview of the changes.

### 1. Introduction

On July 5, 2017 the Swiss government (the Federal Council) adopted an amendment to the Ordinance on Banks and Savings Banks ("BankO"), resulting in exemptions from banking license requirements, from which FinTech companies (and others) may benefit.

### 2. Key Issues

The exemptions address one of the most important triggers of banking license requirements in Switzerland: accepting funds from the public on a commercial basis.

#### ■ Funds on settlement accounts may be held up to 60 days

The time-period during which a financial intermediary may hold funds from third parties on its own accounts solely for the purpose of settling client transactions without being deemed to have "accepted funds" will be extended from seven days (according to the current practice of the Swiss Financial Market Supervisory Authority FINMA) to 60 days. The funds in question must not be interest-bearing. If the settlement occurs during the 60-day period, no banking license will be required. Crowd-funding platforms may capitalize on this exemption in particular, since it makes the routing of funds through the platform easier. Similar advantages result for payment service providers. However, securities dealers are expressly excluded from invoking the aforementioned exemption. As a result of the 60-day rule set forth in the BankO, FINMA will no longer have discretion to determine the period of time within which an account qualifies as a settlement account, except in the case of securities dealers.

#### ■ "Sandbox" up to the amount of 1 million Swiss francs

The rule whereby a banking license is required whenever either (i) funds of more than 20 investors are actually held or (ii) the person/entity publicly announces that it is willing to accept such funds (regardless of the actual number of investors) will be amended. As from August 1, 2017 the holding of client funds (of more than 20 investors and for a period longer than 60 days) will not trigger banking licensing requirements (as this is no longer deemed to be acting "on a commercial basis") if (i) the funds do not at any time exceed one million Swiss francs (approx. \$1 million), (ii) the funds are neither re-invested nor interest-bearing (except in the cases outlined below), and (iii) the depositors have been informed in writing or otherwise in text form prior to making the deposits that their funds are not covered by the Swiss depositors protection regime and that the institution (here, the FinTech firm) is not supervised by FINMA.

There are good reasons to argue that the one million Swiss francs threshold does not have to be calculated on a consolidated basis: the explanatory report to the new FinTech rules points out that it is not only FinTech startup-companies who are eligible to capitalize on the new exemptions, but also other companies within the banking sector. Furthermore, the language of the amendments to the BankO does not suggest a consolidated calculation.

According to the explanatory report to the new FinTech rules, the prerequisite that the funds must not be invested is usually fulfilled if the funds are held on the person/entity's own account. If the person/entity accepting such funds (i) is primarily engaged in commercial/industrial (i.e. not financial) activities and (ii) the funds are used to finance such activities, the requirement that the funds must neither be interest-bearing nor re-invested is not applicable at all.

The new rule is unofficially named the "sandbox" rule and aims to allow for developing FinTech solutions without the relevant person/entity being subjected to (prudential) supervision by the Swiss regulator. If the one million Swiss franc threshold is exceeded, the institution must notify FINMA within 10 days and file an application for a (regular) banking license within 30 days. FINMA may prohibit the institution from accepting additional funds from the public until a banking license is granted, should FINMA consider this necessary, taking into account market and customer protection.

### **3. Conclusion and outlook**

According to the explanatory report to the new FinTech rules, FinTech startup-companies and other banking sector participants are equally eligible to profit from these aforementioned exemptions. However, even if a person/entity qualifies for an exemption from obtaining a banking license, whenever it acts as financial intermediary it may still have to comply with anti-money laundering provisions.

FINMA has announced a revision of its circular concerning public deposits with non-banks (FINMA Circular 2008/3) in line with the new FinTech rules, following a public consultation which will take place this fall.

Even prior to the above changes, in February 2017 the Council of States of the Swiss Parliament adopted the so called "**banking license light**". The proposed amendment to the Swiss Federal Act on Banks and Savings Banks ("BankA") – which is yet to be approved by the National Council of the Swiss Parliament – states, inter alia, that an entity does not qualify as a bank if its acceptance of funds from the public is limited to the amount of 100 million Swiss francs (approx. \$100 million) and if the assets are neither invested nor interest-bearing. Instead, the BankA shall only apply mutatis mutandis to such entities, potentially with lower requirements regarding accounting standards, auditing and depositor protection. Whether such banking license light will undergo further changes in the course of the debate in the lower chamber of Swiss Parliament remains to be seen. The Swiss government has indicated that it will continue to monitor current regulations to assess whether they are technology-neutral.

## Contacts



**François M. Bianchi, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8352 (direct dial)  
E-mail: francois.m.bianchi@nkf.ch



**Thomas Frick, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8349 (direct dial)  
E-mail: thomas.a.frick@nkf.ch



**Sandro Abegglen, Partner**

PD Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8310 (direct dial)  
E-mail: sandro.abegglen@nkf.ch



**Adrian W. Kammerer, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8328 (direct dial)  
E-mail: adrian.w.kammerer@nkf.ch



**Marco Häusermann, Partner**

lic. iur., Attorney-at-law, LL.M., C.B.A.  
Telephone: +41 58 800 8453 (direct dial)  
E-mail: marco.haeusermann@nkf.ch



**Bertrand G. Schott, Partner**

Dr. iur., Attorney-at-law, LL.M.  
Telephone: +41 58 800 8345 (direct dial)  
E-mail: bertrand.schott@nkf.ch