# The Financial Technology Law Review

**Editor**
Thomas A Frick

The LawReviews

# The Financial Technology Law Review

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# PREFACE

This first edition of *The Financial Technology Law Review* is published at a time when most players in the finance sector are concerned about the new developments that information technology (IT), big data and artificial intelligence (AI) will trigger in the finance sector. Hence, it is often forgotten that the use of IT in the finance sector is not new and that many applications that would come under fintech are already quite old, at least by today's standards. Financial market participants – and their legal advisers – already have considerable experience in implementing such changes. As far as improved support products are concerned, the general rules of financial regulations can be applied quite easily to new developments.

However, there are indeed some recent developments that are entirely new, such as AI and the blockchain and its various applications, such as other tokens (e.g., cryptocurrencies and security tokens). These do have the potential to disrupt the industry, in at least some of its sectors.

The regulators worldwide were taken by surprise by the sheer dynamism of this development, both by the speed of the technical developments and the speed with which such new possibilities were implemented: long before there were any established rules for ICOs, startups could already raise up to several hundred million dollars by issuing tokens. This may have been a golden window of opportunity, but also, as one article published put it, 'good times for money launderers'.

Therefore, it is little wonder that we are currently witnessing a strengthening of regulations in the field of fintech. However, the national solution chosen (and the speed with which regulators are willing to react by providing guidelines to market participants) varies considerably between jurisdictions. This may be a consequence of different regulatory cultures, but in addition, the existing legal systems may pose varying and unplanned obstacles to some of the new applications. It may, for example, be difficult to transfer rights on the blockchain if the national code prescribes that rights can only be assigned in writing. Therefore, a structured collection of overviews of certain aspects of fintech law and regulation – as this publication provides – is valuable not only for the international practitioner, but also for anyone who is looking for inspiration on how to address hitherto unaddressed and unthought-of issues under the national law of any country.

The authors of this publication are from the most widely respected law firms in their jurisdictions. They each have a proven record of experience in the field of fintech; they know both the law and how it is applied. We hope that you will also find their experience invaluable and enlightening when dealing with any of the varied issues fintech raises in the legal and regulatory fields.

The emphasis of this collection is on the law and practice of each of the jurisdictions, but discussion of emerging or unsettled issues has been provided where appropriate. The views expressed are those of the authors and not of their firms, the editor or the publisher. In a fast-changing environment, every effort has been made to provide the latest intelligence on the current status of the law.

**Thomas A Frick**
Niederer Kraft Frey
Zurich
April 2018

Chapter 14

# SWITZERLAND

*Thomas A Frick*[1]

## I OVERVIEW

The approach taken in Switzerland to fintech is a supportive and positive one, both by the government and by the ecosystem. Although no separate financial regulatory regime exists for fintech companies, the existing rules are applied in such a way that enables a lively fintech scene to grow. Furthermore, rules were and are about to be changed in order to enable crowdfunding, for example, to operate more effectively or to enable banks to do a fully digital onboarding of clients. The Swiss Financial Markets Supervisory Authority (FINMA) set up a special fintech desk and declared that it intends to structure regulation in a technology-neutral way. The Swiss government initiated a Crypto Initiative and set up a working group blockchain/ICO in January 2018.

A summary of the regulatory framework can be found on FINMA's website;[2] regular updates on developments are available on the (private) site http://fintechnews.ch/.

The regulatory framework (equally applicable to any other financial service provider in Switzerland) is particularly based on the Federal Act on Banks and Savings (Banking Act), the Stock Exchange Act (SESTA), the Anti-Money Laundering Act (AMLA), the Collective Investment Schemes Act (CISA) and the Financial Market Infrastructure Act (FMIA). In addition provisions of the Federal Act on Data Protection (FADP), the Consumer Credit Act (CCA) or the Federal Act against Unfair Competition (UCA) may be applicable. FINMA and the Swiss Federal government have on various occasions emphasised that they regard innovation as a key for the Swiss financial centre and encourage digitalisation as well as technological advancements. FINMA holds regular fintech roundtables and has designated a team as fintech desk to be the contact for fintech companies.

There is also no separate tax law system applicable to fintech companies in Switzerland. Fintech projects and investments in digital currencies and tokens are therefore taxed like any other traditional investment vehicle. However, the tax administration declared that, for example, Bitcoin will be treated like a foreign currency for tax purposes, so that no value added tax is levied; further clarification is expected in 2018. As the Swiss tax authorities are willing to issue tax rulings, fintech projects can obtain a ruling and thereafter operate with certainty about the tax regime applicable to them.

Overall Switzerland can be considered a fintech-friendly jurisdiction, despite the fact that no fintech-specific regulation or tax regime exists. Many fintech start-ups and projects

1 Thomas A Frick is a partner at Niederer Kraft Frey.

2 https://www.finma.ch/de/bewilligung/fintech/.

show that the legal environment is considered advantageous. The main impediment for fintech projects in the field of cryptocurrencies is currently to find suitable partners in the traditional finance industry, although the number of cyber brokers, for example, is increasing.

## II REGULATION

### i Licensing and marketing

Under Swiss law no specific fintech licence exists at present, as the Swiss regulation is technology-neutral and principle-based. Nonetheless, a fintech company may be subject to a licence or ongoing compliance and reporting obligations. Some forms of financial business activities are prudentially supervised by FINMA on an ongoing basis and require a licence granted by FINMA, while others only have to join one of Switzerland's self-regulatory organisations that were set up to ensure compliance with anti-money laundering requirements. The regulations of these self-regulatory organisations (SRO) are recognised by FINMA as minimum standard for AML compliance.

Depending on their business model, fintech companies are particularly likely to fall within the scope of the Banking Act, the SESTA or the AMLA.

***Banking Act***

According to the Swiss Banking Act, anyone who accepts 'deposits from the public on a commercial basis' is subject to banking licence requirements (Article 1, Paragraph 2 of the Banking Act). This is the case if either (1) deposits of more than 20 investors are actually held, or (2) the person or entity publicly announces to a non-limited number of persons that it is willing to accept such funds (regardless of the final actual number of investors). Thus, fintech companies that accept or raise funds stemming from the public as in crowdfunding or initial coin offerings (ICOs) may fall under bank licence requirements. Bond issues do not qualify as deposits, and capital contributions that do not entail a repayment obligation also do not qualify as deposits, which is why ICOs are possible – under certain conditions – under Swiss law.

In order to better accommodate Swiss fintech projects, the Swiss government (the Federal Council) in 2017 amended the Ordinance on Banks and Savings Banks (the Banking Ordinance) to include exemptions from the requirement to obtain a licence. As from 1 August 2017, the holding of client funds (of more than 20 investors and for a period longer than 60 days) will no longer trigger banking licensing requirements (as it is no longer deemed to meet the requirement of 'on a commercial basis') if certain requirements are met. These requirements are: (1) the funds do not at any time exceed 1 million Swiss francs, (2) the funds are neither reinvested nor interest-bearing (with exceptions), and (3) 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 is not supervised by FINMA. With regards to (1), the threshold will be calculated on the basis of the aggregate deposits held at any given period.

In addition, funds on settlement accounts may be held for 60 days (previously only seven days) if they are not interest bearing (Article 5, Paragraph 3(c) of the Banking Ordinance). This provision in particular aims to allow crowdfunding companies to hold assets for a longer period without requiring a banking licence.

***SESTA***

A licence from FINMA is required in order to act as a securities dealer (Article 10, Paragraph 1 of the SESTA). A securities dealer is any natural person or legal entity or partnership that commercially buys and sells on the primary market on its own account for short-term resale or on behalf of third parties, offers them publicly on the primary market or even creates or publicly offers derivatives (Article 2 lit. d of the SESTA). The term 'securities' is now defined in the FMIA and means, in accordance with Article 2 lit. b of the FMIA, 'standardized certificated and uncertificated securities, derivatives and intermediated securities, which are suitable for mass trading'. Further clarification is provided by Article 2 of the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, which states in Paragraph 1: 'Securities suitable for mass standardized trading encompass certificated and uncertificated securities, derivatives, and intermediated securities which are publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, insofar as they have not been created especially for individual counterparties'. Therefore, for trading tokens it is relevant whether these are qualified as 'securities' within the meaning of SESTA (see below, on ICOs).

***AMLA***

Even if neither a banking nor a securities dealer's licence is required, anti-money laundering (AML) regulations and provisions may apply. Swiss AML regulations apply to institutions that are considered as financial intermediaries *per se* (e.g., banks, securities dealers, fund management companies and insurance companies) and institutions that engage in a 'financial intermediary' activity (e.g., asset managers, investment advisers with power of attorney). If a fintech company is engaged in 'financial intermediary' activity, it is required to join a recognised Swiss AML SRO or submit to direct supervision by FINMA on AML matters, and needs to comply with the applicable AML duties (such as identification of customer, establishment of beneficial ownership). Some of the AML duties entail sanctioning provisions under criminal law, and such provisions are equally applicable to fintech companies.

***Further rules***

Fintech companies may market their products and services under the same rules as established financial service providers; restrictions apply in particular if a company looks for funds and contacts more than 20 potential investors (see above).

If an institution were to set up an automated digital advisory in Switzerland, the same licence requirements would apply as for any other institution offering non-digital advisory services. Currently, a 'pure' investment advisory service without any power of attorney over a client's accounts is not subject to licence requirements. Investment advisory with a power of attorney is not subject to a licence requirement; however, the institution will be required to subject itself to the supervision of an AML SRO (or, alternatively, directly to supervision by FINMA).

Credit information services may be provided subject to the FADP; under Swiss law, this Act applies not only to persons but to legal entities as well, so that any information about corporate credit ratings may fall under the scope of the Act.

***FINIG and FIDLEG***

In 2020 the Financial Institutions Act (FinIA) and the Financial Services Act (FinSA) are expected to enter into force simultaneously and they will bring major changes to the regulation of the Swiss financial market. According to the current draft of the FinSA, the provision of personal recommendations in respect of financial instruments (i.e., investment advice) also falls within its scope, so that the respective conduct duties must also be complied with when providing 'pure' investment advisory services to clients.

**ii Cross-border issues**

As Switzerland is not a member of the European Union, regulated or licensed activities may not be 'passported' into Switzerland. Holding a licence abroad may sometimes make a licensing process in Switzerland more cumbersome, as FINMA may reach out to the foreign authority in order to find an agreement on consolidated supervision that may prove to be a lengthier process.

Companies that provide services to clients in Switzerland on a purely cross-border basis ('cross-border inbound') without a physical presence, may require a licence in certain instances. The distribution of collective investment schemes is permitted only if done by 'reverse solicitation' (i.e., on the initiative of the investor itself). The same applies with respect to insurance products. Both collective investment schemes and insurance products are subject to strict rules on marketing. Under today's rules, however, cross-border inbound marketing of banking products, as a rule, does not require a licence.

A service provider is deemed to have a physical presence in Switzerland if it has a branch or similar formal presence in Swiss territory, or the presence of individual persons in Swiss territory on a permanent basis who are employed or mandated by the licensee to act on its behalf. The term 'on a permanent basis' means having individuals permanently on the ground in Switzerland, or individuals who frequently travel to Switzerland for the purposes of carrying out sales or marketing activities in Switzerland. FINMA has not published guidance on what constitutes 'frequent' travel; whether travel is frequent is assessed by evaluating all relevant facts and circumstances (i.e., frequency of travel, number of persons travelling to Switzerland). FINMA has substantial discretion when assessing whether physical presence is established in Switzerland.

There are no Swiss laws of general application prohibiting or subjecting to prior approval foreign investments in Switzerland. Therefore, foreign investors do not generally need formal approval for their investments in Switzerland and no special governmental authority monitors foreign investments. Foreign investments in certain regulated industries might require governmental permission. If foreign nationals have a controlling influence on a bank, a securities' trader or certain other prudentially supervised entities active in the financial sector ('finance company'), the granting of a respective licence by FINMA is subject to certain additional requirements. Investment restrictions also apply to the acquisition of residential (but not commercial) real estate in Switzerland by foreign or foreign controlled persons and under the Telecommunications Act for radio communication licences, under the Nuclear Act for nuclear power plants, under the Radio and TV Act for broadcasting licences and under the Aviation Act for the professional transport of passengers or goods.

Switzerland does not have currency controls in place. Hence, both investments and repatriation of the capital and profits is possible.

## III DIGITAL IDENTITY AND ONBOARDING

Today, there exists no generally recognised digital identity in Switzerland. However, there have been various efforts undertaken to raise the digital awareness in Switzerland and to introduce a generally recognised digital identity. On 22 February 2017, the Federal Council presented a draft for a Federal Act on Recognised Electronic Identification (the E-ID Act). Under the E-ID Act, private providers would be authorised to issue recognised digital identities. On 22 November 2017, two private project groups (one consisting of the Swiss Federal Railway and the Postal Services, the other one by the former state telecommunications company, Swisscom, and the two major banks UBS and Credit Suisse) announced that they will join forces and set up such a private provider. It is expected that this will lead to the establishment of a broadly accepted Swiss E-ID. It is expected that it is not only available to nationals; the details of the limitations are still subject to discussions.

Switzerland has known for some time already electronic signatures that guarantee the authenticity of a document, a message or other electronic data and ensures the identity of the signatory.

As of 2016, financial service providers may carry out fully digitised onboarding of clients. On 17 March 2016 FINMA published Circular 2016/7 on Video and Online Identificatiom, which entered into force on 18 March 2016 and stipulated the AML requirements with regards to the onboarding process of clients via digital channels. The circular applies directly to financial intermediaries. Subject to adherence to specific requirements, financial intermediaries may onboard clients by means of video transmission. The Circular is under revision.

## IV DIGITAL MARKETS, FUNDING AND PAYMENT SERVICES

### i Collective investment schemes

Collective investment schemes governed by CISA are assets raised by investors for the purpose of collective investment that are managed for the account of such investors, whereby the investment requirements of the investors are met on an equal basis (Article 7, Paragraph 1 CISA). Open-ended collective investment schemes are organised under company or contract law, closed only under company law.

### ii Crowdfunding

Under Swiss law, crowdfunding is permitted and does not *per se* trigger a licence requirement. However, in case crowdfunding includes 'assets raised from investors for the purpose of collective investment' and these crowdfunding assets would be managed for the account of such investors (by a third party), subject to equal treatment provisions, they would qualify as a collective investment scheme within the meaning of CISA. In such case, the respective requirements according to CISA would have to be adhered to.

### iii Crowd lending

Crowd lending, also known as peer-to-peer lending, is not *per se* regulated. However, depending on its specific set-up, it may fall within the scope of the Banking Act, SESTA, AMLA, etc. In addition, a consumer credit agreement is a contract whereby a creditor grants or promises to grant credit to a consumer in the form of a deferred payment, a loan or other similar financial accommodation (Article 1, Paragraph 1 CCA). In general, the CCA will

be applicable to crowd-lending activities if the counterparty were to qualify as a consumer. In such case, the respective rules of the CCA would have to be adhered to, for example, the maximum interest possible for consumer credits currently amounts to 10 per cent (Article 14 CCA and Article 1 of the Ordinance on the Consumer Credit).

Platforms providing crowdfunding and crowd-lending services do not require a licence if the funds of the investors are directly sent to the projects (i.e., not through the platform). If funds are sent via accounts of the platform, this can only be done without a banking licence if the account is non-interest-bearing, the funds are kept not longer than 60 days on the account and the client is informed that the platform does not hold a licence. The platform will need to register as a financial intermediary with an SRO and to comply with AML obligations.

Even the project developer may qualify as a bank if it accepts more than 20 loans and the amount exceeds 1 million Swiss francs.

Loans can be traded on secondary markets, subject to compliance with AML laws. However, the transfer of a loan requires either transfer of the contract or assignment of the claim. Assignment of claims can only be done in writing (i.e., with a handwritten (or electronic) signature of the assignor).

### iv Payment systems

Payment systems only require a licence from FINMA if they are deemed relevant for the proper functioning of the financial market or for the protection of financial market participants and if the payment system is not operated by a bank (Article 4 FMIA). In order to be eligible for a FINMA licence as a payment system, certain requirements have to be met, for example, the applicant must be a legal entity under Swiss law and have its registered office and head office in Switzerland (Article 8 FMIA), it provide a guarantee of impeccable business conduct (Article 9 FMIA), the minimum capital of the applicant must be fully paid in (Article 12 FMIA) and the applicant must have appropriate IT systems (Article 14 FMIA).

As Switzerland is not a Member State of the European Economic Area, it decided not to implement the second Payment Services Directive of the European Union (PSD2), so that there is no harmonisation of the interfaces and no general access to accounts for third-party payment service providers must be granted by Swiss banks. However, as banking services in Switzerland are often cross-border, it is expected that many banks will soon provide open access to account interfaces upon request of their clients.

## V CRYPTOCURRENCIES AND INITIAL COIN OFFERINGS (ICO)

Switzerland does not have a specific regulation for blockchain technology. Blockchain projects fall under the regulatory regimes of the industries they are applied to, such as the finance industry. Cryptocurrencies caught the attention of the Swiss regulator early; already in June 2014, FINMA published a fact-sheet on Bitcoin and confirmed that Bitcoin qualifies as currency (i.e., that payments with Bitcoin do not require a licence). Soon, Switzerland and in particular the so-called 'Crypto Valley' in the Canton of Zug established itself as one of the world's hubs for ICOs, in particular through the Etherum ICO from July to September 2014. Thereafter, there were a number of high-profile ICOs that gained the attention of the fintech world. At the time, FINMA did not provide specific guidance, although its fintech desk was willing to grant negative clearance to projects submitted.

On 16 February 2018 FINMA published the Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (ICOs) (the ICO Guidelines), which describe in some detail how the supervisory and regulatory framework for ICOs is dealt with under Swiss law. It does so by outlining the principles on which it will base its response to specific enquiries and by providing a checklist of information required to be submitted in an application for negative clearance. These ICO Guidelines are available electronically on the FINMA website[3] in four languages (French, German, Italian and English). The guidelines provide some guidance on regulatory matters but do not deal with issues of civil or criminal law. Hence, specific legal advice continues to be needed for any ICO.

A key message given by the Guidelines is that FINMA continues to be ready to review ICOs and to give negative clearance, as far as regulatory aspects are concerned. When reviewing a project, FINMA will consider, among other things, not only the investor categories and ICO targets, compliance with AML regulations and the functionalities of the token generated including the rights it confers to the investor, but also the technologies used (distributed ledger technologies, open source etc.), the technical standards (such as the Etherum ERC20) and the wallets and technical standards to transfer tokens.

FINMA distinguishes three token categories: (1) payment tokens (i.e., cryptocurrencies), which are intended to be used as a means of payment and do not grant any claims against the issuer of the token; (2) utility tokens, which grant access to an application or service, and (3) asset tokens, which represent assets such as a debt or equity claim against the issuer, or which enable physical assets to be traded on the blockchain. If a token combines the functions of more than one of these categories, it is considered a hybrid token and must comply with the requirements of all categories concerned.

To assess whether tokens qualify as securities under Swiss law, FINMA applies the general definition of the Swiss Financial Market Infrastructure Act. For the time being, FINMA will not consider payment tokens to be securities; utility tokens will only be considered securities if they have an investment purpose at the point of issue. Asset tokens will be considered as securities.

FINMA confirms that the creation of uncertificated securities and their public offering are not regulated, unless they qualify as derivative products. However, underwriting and offering (in a professional capacity) security tokens of third parties publicly on the primary market is a licensed activity. Furthermore, the issuing of tokens that are similar to bonds or shares may trigger prospectus requirements under the Swiss Code of Obligations.

FINMA confirms that the issuing of tokens will not qualify as deposits (i.e., it does not require a banking licence), unless the tokens grant claims with debt capital character against the issuer. Collective investment schemes regulations may apply if the funds received by an ICO are managed by third parties.

Issuing payment tokens will trigger the application of the Anti-Money Laundering Act (AMLA) provisions, if the tokens can be transferred technically on a blockchain infrastructure. Issuing utility tokens will not trigger such an application, as long as their main purpose is providing access to a non-financial application of the blockchain technology. Asset tokens are not deemed a means of payment under the AMLA. FINMA clarifies that the application of the AMLA will not only be triggered by an exchange of a cryptocurrency against a fiat currency but also by an exchange against a different cryptocurrency.

3 www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/.

Rights granted in the pre-sale phase are considered as securities by FINMA if they are standardised and suitable for mass standardised trading. If so, they are not subject to AML regulations.

On 8 January 2018 the Crypto Valley Association, an independent, government-supported association established to support fintech institutions in the Canton of Zug, published a General Code of Conduct that aims to subject its members to a minimum standard with regards to transparency and information when conducting an ICO. The minimum standard entails providing information on technical features, financial situation, the management team involved and the involved risks and respective compliance procedures (e.g., KYC process etc.). In addition, members shall ensure that a pre-deployment and deployment would be audited by an independent auditor. It is not yet certain whether these standards will all prevail.

There is no separate tax regime applicable to digital currencies and tokens. Cryptocurrencies and tokens are therefore taxed like any other traditional investment vehicle. However, on most tokens no VAT, no issuing tax and no withholding tax is levied when the token is issued, subject to certain exceptions. Swiss residents do not pay taxes on capital gains of privately held assets.

Tokens may be offered to Swiss residents from outside Switzerland but are subject to similar requirements as applicable to tokens issued in Switzerland (i.e., they may not qualify as derivative products, security tokens may not be offered by a third party in a professional capacity and tokens that are similar to bonds or shares may trigger prospectus requirements).

## VI OTHER NEW BUSINESS MODELS

Self-executing contracts are generally permitted by Swiss law, as long as the essential terms and conditions of the contract are agreed upon by both parties. Fully automated investment processes such as robo-advisers are not *per se* prohibited by Swiss law, as long as the clients concerned are informed and agreed respectively.

## VII INTELLECTUAL PROPERTY AND DATA PROTECTION

Fintech technology and software may be protected under patent law or copyright law depending on the specific details of the technology or software. Unlike in the European Union, there is no specific protection of the creator's rights in a database. However, databases and software may be protected under copyright law, if and to the extent they are intellectual creations with individual character with regard to their selection and arrangement. To qualify for patent law protection, technology or software must be an invention that is new and applicable in the industry and that solves a technical problem (which is usually not the case in standard software). A technical reproduction process of someone else's market-ready work is prohibited (Article 5 lit. c UCA).

If an employee creates a computer program in the course of discharging his or her professional duties or fulfilling contractual obligations, the employer alone shall be entitled to exercise the exclusive rights of use. Inventions and designs produced by the employee alone or in collaboration with others in the course of his or her work for the employer and in performance of his or her contractual obligations belong to the employer, whether or not they may be protected. By written agreement, the employer may reserve the right to acquire

inventions and designs produced by the employee in the course of his work for the employer but not in performance of his contractual obligations. Business models, as a rule, cannot be subject to intellectual property rights under Swiss law.

Under the Swiss Data Protection Act, protected data are not only data relating to persons but equally data relating to legal entities. Personal data must be protected against unauthorised processing by adequate technical and organisational measures. Processing of data is any operation with personal data, irrespective of the means applied and the procedure, and in particular the collection, storage, use, revision, disclosure, archiving or destruction of data. Thus, merely providing information or comparing products on a website may fall within the scope of Swiss data protection law (unless the data is public). In addition, such a comparison may be considered unfair under the UCA if the services, prices or business situation were reduced by incorrect, misleading or unnecessarily infringing statements. The storage of personal data on a server in Switzerland may be sufficient to trigger application of Swiss data protection law.

Digital profiling may be considered as a personality profile or even include sensitive personal data within the meaning of the Data Protection Act (i.e., a collection of data that permits an assessment of essential characteristics of the personality of a natural person). Consent must be expressly given before processing such data and personality profiles (and sensitive personal data) must not be disclosed to a third party without justification. In addition, the data processor must inform the person concerned of (1) the controller of the data file, (2) the purpose of the processing and (3) the categories of data recipients (if disclosure is planned).

## VIII YEAR IN REVIEW

The past 18 months have been an intense phase for Swiss fintech regulations.

It started with FINMA issuing a circular (2016/7) on video and online identification that became effective in March 2016 and permitted online onboarding of bank clients. The circular is currently under review. On 1 August 2016, FINMA revised its circular on asset management contracts, permitting such contracts to be concluded not only in writing but also in digital form.

In early 2017, the Swiss government published its preliminary draft of the E-ID Act, according to which private providers would be authorised to issue recognised digital identities. On 22 November 2017, two private project groups announced that they will join forces and set up such a private provider. The announcement was made at the 'Swiss Digital Day', a country-wide, government-sponsored initiative to promote digitalisation.

On 1 August 2017, changes to the Banking Ordinance became effective, introducing a rule whereby companies are allowed to accept public funds from more than 20 persons of up to 1 million Swiss francs (provided the deposits are not reinvested) without needing a banking licence. Furthermore, deposits in settlement accounts of securities dealers, asset managers or similar market participants do also not qualify as deposits from the public if they are interest-free, used to settle client transactions and settlement takes place within 60 days.

In January 2018, the Swiss State Secretariat for International Financial Matters established a blockchain and ICO working group that will review the existing legal framework and report to the Federal Council by the end of 2018. Also in January 2018, the private

Crypto Valley Associations proposed a first Swiss Code of Conduct for ICOs, proposing detailed and extensive information requirements for enterprises conducting an ICO and suggesting that each stage of the ICO is independently audited.

Finally, on 16 February 2018, FINMA published its long-awaited Guidelines for ICOs, providing a regulatory framework to classify tokens and giving indications as to their treatment under AML laws. Furthermore, several cantonal tax administrations issued guidelines on how they will assess Bitcoin for tax purposes.

## IX OUTLOOK AND CONCLUSIONS

It can be expected that the discussion will continue on the issue of establishing a legal and a distribution framework for a generally accepted digital identity. Results should be available on both aspects by autumn 2018.

FINMA initiated a review process (until 28 March 2018) on its circular (2016/7) on video and online identification. Proposals include that three arbitrarily selected optical safety features of the identity documents are reviewed and that transfers may be made not only from a bank in Switzerland but also from banks in FATF member states. The revised circular may become effective in mid or late 2018. Furthermore, a revision of the AML Ordinance was proposed in 2017 and may become effective in 2018. Among others, the diligence requirements of issuers of payment means will be more clearly defined.

In addition to the Code of Conduct for ICOs of the Crypto Valley Association, other organisations are working on codes of conduct. It is expected that such proposals will be published in 2018.

As part of the draft new acts FinIA/FinSA that are in parliamentary discussions, a new licence category will be introduced ('bank licence light'). Provided deposits are not reinvested and non-interest-bearing, companies should be entitled to accept deposits of up to 100 million Swiss francs, subject to a new licence with significantly reduced requirements compared to the current banking licence (e.g., they must own funds of 300,000 Swiss francs instead of 20 million Swiss francs). The new Acts are expected to become effective in late 2019 or early 2020.

In late 2017, the Federal Council published its draft for a new Data Protection Act that should align Swiss data protection law with the new European regulation, for deliberations in Parliament. However, in January 2018, the Commission of the Chamber of Parliament proposed to amend the existing Act in order to align it with the new Schengen requirements and to only subsequently deal with the new proposals. Hence, it is highly uncertain whether the new Act can be finalised in 2018, as intended.

The sheer number of initiatives and proposals outlined show that the regulatory and legal environment will remain very dynamic. It can be expected that the legal framework for fintech projects will be further developed in 2018. It certainly helps that the Swiss government has stated repeatedly that it wishes to support the development of this new business area.

**Appendix 1**

# ABOUT THE AUTHORS


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Dr Thomas A Frick holds degrees in Swiss and European law and general history and is admitted to the Swiss Bar. For over 20 years he has advised banks, securities traders, other financial intermediaries and start-ups on various legal and regulatory issues. He advises numerous fintech and other finance projects (ICOs, crypto brokers, crowd lending, asset management, payment systems and others) and is actively involved both as a board member in banks and as a business angel in start-up companies. He frequently gives presentations on Swiss fintech regulations, is a regular publisher on the subject and a lecturer on banking and finance law in Zurich University's LLM programme.


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