

Update

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Draft amendment of FINMA circular “Public deposits with non-banks” - public consultation

On September 1, 2017, FINMA amended its circular “Public deposits with non-banks”. A consultation procedure is open until October 16, 2017. The amendment of the circular follows the entry into force on August 1, 2017 of the modification of the Banking Ordinance (“BO”) relating to financial technology (“FinTech”).

Background

On February 1, 2017, the Federal Council launched a consultation on various amendments of the Banking Act (BA) and the BO aimed at reducing market entry barriers for FinTech firms (regarding these amendments, you may refer to our Newsflash of February 2017: “Consultation on FinTech regulation”). Only three months after the end of the consultation, on August 1, 2017, the first two amendments of the BO entered into force. Shortly thereafter, FINMA updated its circular “Public deposits with non-banks” specifying its supervisory practice and providing useful clarifications regarding the two legislative amendments. The amendments reflect a compromise between investor protection and the fostering of the competitiveness of the Swiss financial center.

Extended holding period for settlement accounts (Article 5(3)(c) BO)

The first modification of the BO is the extension of the execution period for settlement accounts. Whereas the previous FINMA practice was to limit to seven days the settlement deadline before

triggering the obligation to obtain a banking license, the deadline is now extended to **60 days**. Such exemption will be particularly useful for crowdfunding platforms. The amended FINMA circular provides some clarifications on this topic:

- › registered securities dealers are not constrained by the 60-day settlement deadline;
- › the settlement accounts exemption covers business models that involve intermediaries such as money transmitting, crowdfunding or debt recovery; and
- › precious metal dealers can benefit from the exemption without being constrained by the 60-day deadline if the client accounts are covered by existing-physical precious metals provided that the clients have an ownership right on the metals in the event of the bankruptcy of the relevant intermediary.

Although the extension of the deadline from 7 days to 60 days is already a significant step towards facilitating the emergence of innovative business models, many participants of the

consultation process to the amendment of the BO had requested an extension to 90 days. The Federal Council refused this additional extension but has reserved the right to adapt the deadline later on if necessary.

License-exempt space - sandbox (Article 6(2)-(4) BO)

The second modification of the BO introduces a sandbox, i.e. an innovation area in which the providers of financial services may accept public deposits without being subject to a licensing requirement. The sandbox allows FinTech and other companies to accept public deposits of up to a limit of CHF 1 million, coming from more than 20 investors. Two additional requirements have to be complied with. First, the deposits cannot be invested and no interest can be paid if the deposits are not intended to fund a commercial or an industrial activity. Second, the investors must be informed in advance that the sandbox is not subject to FINMA supervision and that the deposits are not covered by the statutory banking deposit protection. The revised Circular 2008/3, together with the Article 6 OB, provides useful details with regards to this new development.

- › The “warning” must be given to the depositors in writing (or equivalent) at the latest at the time of the entering into the contract, i.e. before making the deposit. A general communication on the website of the company or in the terms and conditions is not sufficient.
- › A commercial or industrial activity will generally be recognized when the main activity is not to provide financial services for the company or for a third party (Article 6(3) BO). These financial services would typically include: deposit activities, credit operations, securities trading, capital investment, asset management or qualified participation holding. Similarly, deposits cannot be used for financial investments or investments in financial instruments.

- › If the limit of CHF 1 million is exceeded, the company must notify FINMA within 10 days and require a formal authorization within 30 days (Article 6(4) BO). In such instance, the company may continue to accept public deposits during the authorization process, provided that the applicant demonstrates that (1) the deposits remain permanently available and liquid, (2) there is no overindebtedness, (3) the capital adequacy requirements for the authorization requested can be fulfilled, and (4) there is no preliminary indication against the granting of the authorization. However, until the authorization is granted, the company cannot invest deposits or pay interest on them and must continue to inform the clients prior to accepting additional deposits.

Next steps

The consultation process on the amendment of the circular “Public deposits with non-banks” will end on October 16, 2017. The revised Circular will then be published at the end of 2017 or at the beginning of 2018. The FinTech regulation proposed by the Federal Council also aims at introducing a new category of simplified authorization for FinTech firms in the Banking Act. This “FinTech license” will be the third step of the FinTech regulation and will be applicable to institutions accepting public funds of up to CHF 100 million but that do not conduct lending activities. The Swiss Federal Council has made the competitiveness of the Swiss financial center on FinTech regulation a priority. In a broader context, the new Financial Services Act (FinSA) and Financial Institutions Act (FinIA) expected to enter into force in 2019 shall also have a significant impact on FinTech regulation and public deposits activities. These acts, as well as a proposition of the minority of the Economic Affairs and Taxation Committee of the National Council to consolidate all FinTech provisions into a separate act, are being debated by the Parliament at this moment.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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