

**Banks & Financial Services
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Banking / FinTech License

The FinTech consultation paper of the Swiss Federal Council of February 1, 2017 has further specified and expanded the definition of a “bank” under Swiss law. Amendments to the Swiss Banking Act (BA) and the Swiss Banking Ordinance (BO) have entered into force, for the most part, as of January 1, 2019. A distinction is to be drawn between two categories of licenses and various exemptions from the licensing requirement.

1. Full banking license

A bank (Art. 1a BA) is deemed to be anyone who is primarily active in the financial sector and:

- a) accepts public deposits on a commercial basis of more than CHF 100 million or publicly offers such services;
- b) accepts public deposits on a commercial basis of up to CHF 100 million or publicly offers these services and invests or pays interest on the public deposits; or
- c) refinances itself to a significant extent by independent banks in order to provide financing to an unspecified number of persons who do not belong to the same group as the financing company.

A **deposit from the public** is basically considered to comprise any liability owed to a client. The obligation to repay constitutes a central element of the definition of “deposit”.

A company acts on a **commercial basis** if it continuously accepts more than 20 public deposits or publicly offers to accept public deposits (advertising), even if fewer than 20 public deposits result from such offer (Art. 6 BA).

The **investment** of deposits received from the public leads to an **interest margin business**. In connection therewith, a transformation of maturities results insofar as short-term deposits are accepted (deposit-taking business) and these funds are handed out in whole or in part on a long-term basis as loans (lending business).

2. FinTech license

In order to promote innovation, the legal requirements for a FinTech license (also known as a banking license “light”) were created in Art. 1b BA. This FinTech license authorizes its holders to accept public deposits on a commercial basis of up to **CHF 100 million** or to publicly offer such services. If the threshold of CHF 100 million is exceeded, this must be reported to the Swiss Financial Market Supervisory Authority (FINMA) within 10 days and an application for a full banking license must be submitted to the FINMA within 90 days.

This new category provides relief, above all, to trading platforms for virtual currencies that offer accounts and wallets to their clients, over and beyond the mere matching of offers and acceptances.

A company with a FinTech license (“FinTech bank”) is not allowed to invest or pay interest on the deposits of its clients. The FinTech bank must hold the funds on deposit in segregated fashion from its own funds or record them in its records in a manner such that they can at all times be shown separately from the own funds. In the latter case, an ordinary audit of the FinTech bank is required.

FinTech banks can be established in the form of a share corporation, limited partnership or limited liability company. The registered office of the company must be in Switzerland, and its core activity must be conducted in Switzerland. The share capital of the FinTech bank must amount to 3% of the

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accepted public deposits or, at a minimum, at least CHF 300,000.

FinTech banks must notify their clients of the fact that no deposit insurance exists before they enter into an agreement. Because this is important for the clients, it is not sufficient for this notice to be merely set out in the general terms and conditions (GTCs). Because FinTech banks may offer different services, it is necessary for them to notify their clients in a comprehensive and understandable fashion about their business models and the risks entailed by the technologies used.

By way of relief, it is foreseen that the Swiss Capital Adequacy Ordinance and the Liquidity Ordinance do not apply to FinTech banks.

FinTech banks must adhere to the requirements of law in terms of compliance and risk management. For these purposes, an effective internal controlling system is also necessary. The persons who are responsible for the supervision of compliance and risk management must be internally independent from the profit-oriented business. An outsourcing of the risk management and compliance to a third party is possible, provided that the third party is selected with due care and possesses the necessary skills, know-how and expertise as well as necessary licenses. In the event of a business model with demonstrably lower risks and a gross income of less than CHF 1.5 million, certain types of relief are possible.

FinTech banks are required to have a supervisory auditor. In terms of the prevention of money laundering, one or more qualified persons must be designated as specific department for the anti-money laundering, although their tasks are less extensive than those of the specialist unit at a full bank.

The Swiss National Bank (SNB) provides access to the interbank payment system SIC and to SNB giro accounts to FinTech banks who operate a relevant business model for payment transactions in Swiss francs.

3. Exemptions

The exemptions from obtaining a license by FINMA are listed in Article 5 paragraphs 2 and 3 and Article 6 paragraphs 2 and 3 of the BO. Of particular note in this regard are the following exemptions:

3.1 Pass through accounts

Credit balances on client accounts that are exclusively used to settle client transactions are exempted from classification as deposits, provided that no interest is paid on them and the settlement deadline of 60 days is not exceeded (Art. 5 para. 3(c) BO).

3.2 Innovation area (sandbox)

An exemption from being considered to accept deposits "on a commercial basis" is available to anyone who (i) accepts public deposits in an aggregate amount of no more than **CHF 1 million**, (ii) neither invests nor pays interest on these deposits, and (iii) notifies the investors in writing that their deposits are not subject to either FINMA supervision or deposit insurance. A mere reference to this in the GTCs does not suffice (Art. 6 para. 2 BO).

An exemption from being considered to accept deposits "on a commercial basis" is also available to companies who are primarily active in the commercial-industrial sector and who require the accepted deposits in order to finance this activity as well as (as from the 2nd quarter of 2019) to persons who use the loans for the financing of private consumption (e.g., private acquisitions, such as student loans or residential property). For these persons, the prohibitions on investments and on the payment of interest do not apply. The CHF 1 million threshold and the obligation to notify, however, must continue to be adhered to. Crowd-lending companies may therefore intermediate loans from more than 20 creditors to consumers, but must in this regard adhere to the provisions of the **Consumer Credit Act**.

This regulation is intended to provide relief from the two types of licenses to companies and private individuals, in particular FinTech startups, even if they accept more than 20 public deposits or publicly offer such services.

In practice, it has become apparent to date that the threshold of CHF 1 million is hardly sufficient in order to effectively test a FinTech business model. If the companies exceed the threshold of CHF 1 million, they must report this to the FINMA within 10 days and submit an application for a license pursuant to Article 1a or Article 1b of the BA within 30 days. It is questionable whether 30 days is long enough in this regard.

3.3 Money laundering

The requirements for the prevention of money laundering apply without change to the companies and persons falling under the exemptions.

4. Summary

The rules presented significantly reduce the regulatory requirements as compared to a full bank license for FinTech companies that engage in the deposit-taking business (acceptance of public deposits) but not in the lending business (granting of loans).