

**Banking Law**

Capital Markets &  
Stock Exchange Law

**Collective Investment Schemes**

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Compliance

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White-Collar Crime

## Fintech

Digitalization has increasingly gained a foothold in the financial services sector as well. FinTech – a composite term made up of “financial services” and “technology” – includes applications in payment processing (M- and E-Payment, P2P), the use of virtual currencies (bitcoin, Ether), platforms for crowdlending/crowdfunding and trading platforms based on blockchain and distributed ledger technologies.

The evaluation of new technologies by the legislators and regulators can essentially be divided into three categories: technology as a (i) risk factor, (ii) competition factor, and (iii) effectiveness and efficiency factor. In dealing with FinTech, the risk mitigation approach dominated the initial position statements of the Swiss Financial Market Supervisory Authority (FINMA) and the Swiss Federal Council in 2014. Since 2016, however, the focus has been on competition, effectiveness and efficiency.

### FINMA Circular Notice 2016/7 on Video and Online Identification

In the money laundering prevention area, the requirements for the fulfillment of the due diligence obligations under the Anti-Money Laundering Act (AMLA) have been adjusted to the technical changes through a FINMA circular notice. Now, these obligations can be fulfilled through a video communication or by means of online identification.

Other FinTech-friendly steps were announced several times and have led to the following proposed changes to the license requirement under banking law.

### Consultation paper of the Swiss Federal Council on Amendments to the Banking Act (BA) and the Banking Ordinance (BO) of February 1, 2017

#### Current situation

Traditional banking business is an interest margin business in which a maturity transformation occurs. Typically, shortterm deposits will be accepted (depo-

sittaking business), and these funds will then be lent in whole or in part as medium- or long-term credit (lending business).

Under current law, only individuals and legal entities that are subject to the BA are permitted to accept deposits from the public on a commercial basis (Art. 1 Para. 2 of the BA). This banking deposit-taking business consists of a company's entering into liabilities towards third parties on a commercial basis for its own account and thereby itself becoming the debtor liable to repay the amount. Whoever continuously accepts more than 20 public deposits or solicits such deposits publicly, even if fewer than 20 deposits actually result, is deemed to be acting on a commercial basis (Art. 6 of the BO).

In the case of so-called FinTech businesses, often a large number of client funds with obligations to repay the funds, i.e., public deposits, will be accepted. Therefore, these businesses basically fall into the abovedescribed scope of application of the banking legislation and require a corresponding license, in a burdensome procedure and subject to strict requirements that are scarcely capable of being implemented from a financial viewpoint (e.g., equity capital).

#### Proposed relief

The amendments proposed by the Federal Council follow a principlebased approach and are not dependent on specific business models. The intent is for future technologies and business ideas that are currently still unknown to be able to profit from this. Based on the potential risk, relief is intended to be provided in three steps.

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• **Longer settlement period of 60 days based on Art. 5 Para. 3(c) of the B0:** Already under current law, credit balances on client accounts of securities dealers, precious metal traders, asset managers and similar companies that serve the sole purpose of settling client transactions are exempted from being classified as deposits, provided that no interest is paid on such balances. According to the practice of the FINMA, the funds must be forwarded within seven days. Now, this settlement period will be defined by law as 60 days. In this manner, a larger time period will be available, particularly for crowdfunding platforms, in order to collect funds for projects. The payment of interest will continue to be precluded.

The amendment is not intended to apply to securities dealers, who will continue to be subject to the current rule.

• **Innovation area for up to CHF 1 million:** Under the proposed amendments, whoever accepts public deposits in an aggregate amount of up to CHF 1 million will not be treated as acting on a commercial basis within the meaning of Art. 6 of the B0. In connection with activity within this so-called "innovation area", the clients must be informed before making their deposits that these are not protected in the event of bankruptcy and that there is no supervision by the FINMA. Through this measure of relief, the relevant companies are also no longer bound by the 60-day settlement period mentioned above.

To the extent that the company is primarily active in the financial sector, the public deposits may neither be invested nor be interestbearing (prohibi-

tion of the typical bank deposit-taking business). An exception exists for borrowers in connection with onetime crowdfunding projects that pay interest on the funds received and invest these in the own company / project.

• **New license category subject to less stringent requirements:** For business models where deposits are accepted that total more than CHF 1 million, but only up to a maximum of CHF 100 million, licensing requirements that are more lenient than those for banks are to apply in the future. As a prerequisite, the relevant company must limit itself to the deposit-taking business, i.e., neither invest nor pay interest on the accepted public deposits. The license to be issued, under the banner of promoting innovation, is intended to provide relief in the areas of financial accounting, auditing and deposit protection. In a second step, less stringent requirements will be defined within the scope of the implementing provisions, particularly in the areas of organization, minimum capital, equity capital and liquidity. Because the deposit protection and correspondingly higher requirements will be waived in the licensed area as well, the clients must likewise be informed of this before they make their deposits. Furthermore, as a result of the lower requirements, the licensed institution will not be permitted to use the name "bank".

No relief is being proposed in the area of anti-money laundering legislation (with the exception of FINMA Circular Notice 2016/7). In this area, the business of FinTech companies is subject to just as much risk as that of the banks.

### Oversight of the proposed FinTech regulations

<i>Specific adjustments to the regulations</i>	<i>Innovation area</i>	<i>New license category „bank license light“</i>
Extension and statutory definition of the holding period for funds in settlement (pass through) accounts to 60 days	<ul style="list-style-type: none"> <li>• Maximum of CHF 1 million in public deposits from an unlimited number of persons</li> <li>• No investment activity / payment of interest, if primarily active in the financial sector</li> <li>• Duty to inform about the absence of deposit protection / no supervision by the FINMA</li> </ul>	<ul style="list-style-type: none"> <li>• Maximum of CHF 100 million in public deposits from an unlimited number of persons</li> <li>• No investment activity / payment of interest</li> <li>• Duty to inform about the absence of deposit protection</li> </ul>
→ no license	→ no license	→ License, but lower regulatory requirements than for traditional banks, e.g., minimum capital of CHF 300,000 / 5% of the deposits accepted
AML prevention	AML prevention	AML prevention

The consultation period ends on 8 May 2017. The draft BA needs to be approved by the Swiss Parliament. The new regulation may be enacted as early as 2018.

For the legal treatment of the blockchain and distributed ledger technologies as well as virtual currencies such as bitcoins and Ether, a report to the Swiss Federal Council by the end of 2017 is planned.

**SPOTLIGHT AS PDF:**

<http://www.wengerviel.ch/Publications/Spotlights.aspx>