

## NKF Client News



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### FinTech / Startups – Insights on a Success Story

Financial technologies (FinTech) are in the process of becoming the next chapter of Swiss financial market regulation. The rapid growth of the Swiss FinTech ecosystem, the public spotlight as well as the changing perception on the importance and the future prospects of innovative and technology based financial services have triggered a number of interesting regulatory developments. Currently, the center of the attention lies on FinTech startups. Some of them may have the potential to become serious competitors for traditional financial services providers. This Client Alert aims to outline the ongoing progress concerning FinTech related regulatory aspects as well as to point out important general legal issues relating to the launch and successful development of FinTech startups.

#### 1. Introduction

In the light of the ongoing technological change in the financial industry, particular emphasis is placed on the FinTech sector. FinTech covers a broad range of innovative technology-based financial services, e.g. lending platforms, crowdfunding, electronic currencies, digital payment systems, blockchain technologies, InsurTech, RegTech, robo-advisers, big data analytics, mobile payment, digital fund distribution platforms as well as online asset management and investment advisory services. Given the potential and future prospects of these innovative and highly scalable business models, quickly growing FinTech companies may become serious competitors for traditional financial services (providers) in the near future. In addition, this new type of market participants represents a challenge for regulators and legislators.

#### 2. Key Points

##### ■ The Regulation of FinTech (Startups)

FinTech providers should be aware that, from a regulatory perspective, the first task before launching a new FinTech business should be the assessment of potential regulatory licensing or approval duties as well as further regulatory restrictions. The existing regulatory framework regularly seems to be “inappropriate” for new FinTech business models. In addition, FinTech startups are facing further challenges such as a highly dynamic environment with fast developments and the difficulty to implement digital cross-border business models due to different regulatory requirements in different countries.

The Swiss Financial Market Supervisory Authority (FINMA) has, however, indicated its positive attitude towards FinTech and its general intention to reduce regulatory obstacles on numerous occasions. Firstly, this is reflected in FINMA's new webpage with information for financial services providers in the FinTech sector. Secondly, FINMA has specified due diligence requirements for client onboarding via digital channels and, particularly, acknowledged the possibility of video or online client identification. In addition, FINMA has revised its guidelines concerning asset and management agreements which may now be concluded in any form demonstrable via text.

Finally, by planning the implementation of specific regulatory amendments, a regulatory “sandbox”, as well as a FinTech license, the Federal Council aims to support FinTech startups by permitting lower regulatory

requirements when compared to traditional regulated financial services providers in the future. This proposed new FinTech (de)regulation seems to be a major step in the right direction.

## ■ Important Legal Issues for Startups in General

Prior to the founding of a FinTech startup, the company founders are well-advised to analyze the applicable legal framework. With regard to the successful development and roll-out of the FinTech business model, the enhancement of the attractiveness of the FinTech startup for potential investors and a possible future exit, the initial decision on the legal structure of the startup and the arrangements among the founding shareholders are of highest importance. Further (legal) tasks to be dealt with include, among others, the creation of constitutive legal documents, the review and registration of IP rights, or the dealing with questions related to data protection law (data security, outsourcing etc.), tax matters (including tax rulings), employment law and employee participation plans, or social security related questions.

A further important aspect of the successful scaling of a startup is the financing of its growth in one or several financing rounds. In this context, there exist many related opportunities as well as legal pitfalls. Certainly, it is important to identify the suitable type of financing (e.g., equity, debt or convertible debt) or investor (e.g., venture capital / business angels etc.) and to carefully prepare and negotiate term sheets, investment and shareholders agreements, and corresponding contracts. Thereby, possible exit scenarios should already be taken into consideration. In all these aspects, the prevention of early stage mistakes is key.

## 3. Conclusion

Despite the positive recent developments, the high growth of the FinTech sector fundamentally questions the adequacy of the current regulatory framework. Increased demand for financial services and products in the FinTech sector is expected in the next years. An in-depth understanding of the applicable regulations as well as further legal obstacles represent a major advantage for every startup.

Early stage mistakes concerning the regulatory compliance or the incorporation and financing of the startup may adversely affect the fruitful development and the value of the startup as well as the chances of a successful exit. Thus, it is highly recommended to fulfill a high regulatory and legal quality standard from the very beginning of a new venture.

As a leading full service law firm with a broad expertise and experience in financial market regulation and corporate law, Niederer Kraft & Frey can offer a multi-disciplinary FinTech / Entrepreneurs and Startup Desk of specialist lawyers that focuses on developments and opportunities in the FinTech and startup sector. We are happy to advise existing and new clients on their individual options for actions, to possibly launch, finance, sell, or acquire a FinTech business, product, or startup.

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