



Circular 2008/3 Public deposits at non-banks

Commercial acceptance of public deposits by non-banks
under the Banking Act

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| Reference: | FINMA circ. 08/3 „Public deposits at non-banks“ |
| Issued: | 20 November 2008 |
| Entry into force: | 1 January 2009 |
| Last amendment: | 26 June 2019 [amendments are denoted with an * and are listed at the end of document] |
| Concordance: | previously SFBC circ. 96/4 „Public deposits at non-banks“ dated 22 August 1996 |
| Legal bases: | FINMASA Article 7(1)(b) BA Article 1 BO Articles 1-7 |

Addressees

| BA | ISA | SESTA | FMIA | CISA | AMLA | OTHERS |
|--|-----|-------|------|------|------|--------|
| Banks | | | | | | |
| Financial groups and congl. | | | | | | |
| <input checked="" type="checkbox"/> Other intermediaries | | | | | | |
| Insurance companies | | | | | | |
| Ins. groups and congl. | | | | | | |
| Distributors | | | | | | |
| Securities dealers | | | | | | |
| Trading Venues | | | | | | |
| Central Counterparties | | | | | | |
| Central depositories | | | | | | |
| Trade repositories | | | | | | |
| Payment systems | | | | | | |
| Participants | | | | | | |
| Fund management companies | | | | | | |
| SICAV | | | | | | |
| Limited partnerships for CIS | | | | | | |
| SICAF | | | | | | |
| Custodian banks | | | | | | |
| Managers domestic CIS | | | | | | |
| Distributors | | | | | | |
| Representatives of foreign CISs | | | | | | |
| Other intermediaries | | | | | | |
| SROs | | | | | | |
| DSFIs | | | | | | |
| SRO Supervised | | | | | | |
| Audit firms | | | | | | |
| Rating Agencies | | | | | | |

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I. Object and scope of application

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| Repealed | 1* |
| The commercial acceptance of deposits from the public (with a few exceptions) shall only be allowed by banks, which are supervised by FINMA pursuant to the Banking Act. | 2 |
| Individuals or legal persons who intend to accept deposits from the public on a commercial basis must obtain a relevant license before commencing their activities. | 3* |
| Repealed | 4* |
| Repealed | 5* |

II. Penal provisions

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| Article 46(1)(a) and (2) BA, respectively, shall make the unauthorized acceptance of deposits from the public or savings deposits a punishable act. Similarly, the use of the terms “bank”, “banker” or “savings” by non-banks is forbidden (Article 49(1)(a) and (2) BA, respectively). Finally, the communication of false information to the FINMA shall be punishable (Article 45(1) and (2) of the Financial Market Supervision Act [FINMASA; SR 956.1]). | 6 |
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III. Criteria for the Assessment of Deposits

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| Existing deposits must be returned if all of the three following questions (paragraphs A through C) are in the affirmative: | 7 |
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A. Are deposits from the public accepted on a commercial basis (Article 6(1)-(4) BO)?

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|---|------|
| Repealed | 8* |
| Limiting the acceptance of deposits from the public to a total of CHF 1 million (Article 6(2)(a) BO) shall mean that the liabilities to clients and investors as per Article 5(1) BO shall never exceed CHF 1 million. | 8.1* |
| Repealed | 8.2* |
| The clients shall be informed individually that the institution is not subject to FINMA supervision nor part of a depositor protection scheme at the latest at the time of the commitment before the deposit (Article 6(2)(c) BO). A generic indication (for instance in the terms and conditions) is not deemed to be equal to fulfilling the information requirements. Informing the client through the website, for instance, is possible if the information regarding the lack of supervision and depositor protection scheme is provided separately from other information and provably and the client has to explicitly confirm having acknowledged this information. | 8.3* |

Repealed 8.4*

Companies shall continue to adhere to the conditions stipulated in Article 6(2)(b) and (c) BO during the reporting period and the period used to submit the license application as per Article 6(2)(b) and (c). FINMA shall allow the continued acceptance of deposits from the public during the licensing procedure if the applicant adheres to the terms of Article 6(2)(b) and (c) and in doing this, proves 8.5*

1. that the deposits accepted from the public are present at all times and are liquid,
2. there is no overindebtedness,
3. the minimum capital requirements for the applied license under BA are met and
4. there are no indications that something could hinder the granting of the license under BA.

Therefore, anyone accepting funds from more than 20 depositors or who publicly advertises as doing so, even if this results in fewer than 20 depositors, shall be deemed to act commercially under legal presumptions and with the exception of Article 6(2)-(4) BO. Whoever is prohibited from commercially accepting deposits from the public may under no circumstances advertise to offer this service, for instance by way of direct marketing or advertisement (also see Article 7 BO; Article 49(1)(c) and (2) BA). 9*

B. Do the liabilities have the attributes of deposits (Article 5(3)(a)-(f) BO)?

The Banking Ordinance shall assume in principle that all liabilities have the character of a deposit. Article 5(3)(a)-(f) BO provides an exhaustive list of the exceptions: 10

a) Third-party funds without the characteristics of a loan or a deposit (Article 5(3)(a) BO)

Repealed 11*

For example, advance payments made for a purchase contract or for an order, rental deposits, etc., do not possess the character of a deposit. 12

b) Bonds (Article 5(3)(b) BO)

Repealed 13*

In contrast to an interest-bearing deposit made individually, the financial instruments mentioned in Article 5(3)(b) BO represent standardized bonds, which Article 1(2) BA expressly exempts if the minimum information prescribed by the Code of Obligations is available. Individually issued cash certificates are not deemed to be bonds. 14*

c) Settlement accounts (Article 5(3)(c) BO)

Repealed 15*

The purpose of such accounts is to maintain the necessary liquid funds to settle the client's business. The rapid turnover (i.e. maximum 60 days) and limitation of the volume of such funds is ensured by the interest ban applicable to such funds. Securities dealers are not restricted by the 60-day period when settling client transactions. Article 5(3)(c) BO shall also encompass business models with forwarding characteristics, such as money transmission, crowd funding or debt collection. 16*

Credit balances on customer accounts of precious metal traders are included in this exemption if a precious metal trader is in physical possession of the precious metal credit of its clients and if these are entitled to preferential claim in the case of the precious metal trader's bankruptcy. In this case, precious metal dealers are not restricted by the 60-day period. 16.1*

Because of Article 5(3)(c) BO, foreign exchange traders who maintain accounts for investment in various currencies for their clients shall no longer be covered by the exception as of 1 April 2008. If engaged in similar activities, cryptocurrency dealers shall also not be covered by the exception. 16.2*

d) Funds for life insurance contracts and occupational benefit funds (Article 5(3)(d) BO)

Repealed 17*

The deposits stated in Article 5(3)(d) BO shall be permitted on the basis of other federal acts; moreover, they are made at supervised institutions. 18

e) Means of payment and payment systems (Article 5(3)(e) BO)

Funds which feed into a means of payment or a payment system (payment cards, possibilities to pay per internet or mobile phone, etc.) are not considered deposits, provided that 18.1*

- they are only used to acquire goods and services,
- the maximum credit balance per customer per issuer of a payment instrument or provider of a payment system does not exceed CHF 3,000 and
- no interest is paid on them. Rebates or other pecuniary advantages are only allowed on goods and services and may not relate to the amount of the credit balance.

C. Are the deposits from the public (Article 5(2)(a)-(f) BO)?

The Banking Ordinance shall assume that all deposits are from the public, with exceptions to this assumption listed in Article 5(2)(a)-(f) BO. 19

Not deemed to be public deposits are those from:

a) Banks (Article 5(2)(a) BO)

Repealed 20*

Enterprises which are authorized to take deposits according to the law of the state under which they are organized, are deemed to be foreign banks. Examples of other enterprises under state supervision are insurance companies. 21

b) Related parties (Article 5(2)(b) and (c) BO)

Repealed 22*

Qualified shareholders i.e. those with more than 10% of the voting rights or capital (Article 3(2)(cbis) BA) and persons economically affiliated (e.g. parent, subsidiary and sister companies) are particularly close and shall not be treated like the remaining public. In contrast to the public, they regularly receive information in advance and can exercise their influence earlier. 23

c) Institutional investors (Article 5(2)(d) BO)

Repealed 24*

This category of investors who cannot be deemed equivalent to the public shall include pension funds, municipalities, industrial corporations or commercial corporations. The professional treasury operations presupposes at least one person with experience in the financial field with designated specialized knowledge whose principal activity is the treasury operations of the enterprise on an on-going basis. 25

d) Associations, foundations and cooperatives (Article 5(2)(f) BO)

Repealed 26*

Associations and foundations could be associations for sports, nature conservation or cultural heritage conservation, foundations with a religious nature or for promoting home ownership or for cultural purposes. Among others, cooperatives could be production, distribution, sales, housing or also agricultural cooperatives. The group of depositors is not limited to members. However, deposits shall be regarded as deposits from the public if made to an association, foundation or cooperative where the purpose or activity consists principally of the acceptance and investment, on an interest-bearing basis, of deposits of its members. 27

Article 5(2)(f) BO shall emphasize the difference between money accepted on a commercial basis and that for ideational purposes or mutual assistance. In order to clearly differentiate such deposits from banking activities, a minimum period of investment of six months shall be mandatory. 27.1*

e) Employees (Article 5(2)(e) BO)

Repealed 28*

The permitted group of investors shall be restricted to those actually employed by the company in question (including retirees connected to their final employer) who make an investment with their employer. 29

However, Article 5(2)(e) BO does not permit the group of investors to extend beyond the actual employee (such as family members, i.e. spouses and children) of that company. It is also not permitted to make such deposits with a legal entity other than the employer (e.g. with a grouping of employees of the same employer established as an association, cooperative or foundation) unless the employer is liable for the deposits (see margin no. 33 below). 30

IV. Exemptions from the prohibition to accept public deposits on a commercial basis

In addition to banks, the following institutions may accept deposits from the public in accordance with Article 3 BO: 31

- public-law corporations and bodies
- as well as compensation funds for which they are fully responsible.

Despite not being supervised by the FINMA, such institutions are exempted because they are perceived to be at least equivalent to supervised institutions; moreover, the government is liable for such institutions' commitments. 32

Deposits made to company in-house savings institutions legally independent of the employer shall also be permitted if the mutual employer of the depositors guarantees the repayment of the investments plus agreed-upon interest. 33

If a bank subject to the Banking Act guarantees the repayment of the deposits and the agreed-upon interest (default guarantee) (Article 5(3)(f) BO), it shall also be permitted to accept deposits. 34

Repealed 35*

Repealed 36*

Repealed 37*

List of amendments

The circular has been amended as follows:

These amendments were passed on 18 January 2010 and enter into force immediately.

| | |
|---------------------|----------|
| Amended margin nos. | 26, 27.1 |
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The references to the BO have been adjusted to the Banking Ordinance dated 30 April 2014.

These amendments were passed on 7 December 2017 and shall enter into force on 1 January 2018.

| | |
|---------------------|--------------------------|
| Amended margin nos. | 3, 9, 14, 16, 16.1, 16.2 |
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| Newly inserted margin nos. | 8.1–8.5 |
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|----------------------|--------------------------------------|
| Repealed margin nos. | 1, 8, 11, 13, 15, 17, 20, 22, 26, 28 |
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| Other amendments | Amended title before margin nos. 1, 8, 10, 11, 13, 15, 17, 18.1, 19, 20, 22, 24, 26, 28 |
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The references to the BO have been adjusted to the Banking Ordinance dated 5 July 2017.

These amendments were passed on 29.6.2019 and enter into force on 1.7.2019.

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| Amended margin nos: | 8.5 |
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| Repealed margin nos. | 8.2., 8.4 |
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