

# Update

## Newsflash July 2017

---

### **FinfraG Update V – Swiss Federal Council sets date for the entering into force of the revision of the Financial Market Infrastructure Ordinance**

**The purpose of this Newsflash is to provide Swiss market participants with an update on the revision of the Swiss Financial Market Infrastructure Ordinance (the revised-FMIO) regarding the implementation of the obligation to exchange collateral under the Swiss Financial Market Infrastructure Act (FMIA). The consultation process was launched by the Swiss Federal Department of Finance (FDF) on February 13, 2017 and lasted until April 13, 2017 (see previous FinfraG Update III). The revised provisions will enter into effect on August 1, 2017.**

---

#### **Background**

The FMIA and its implementing Ordinance (FMIO), which entered into effect on January 1, 2016, impose on Swiss counterparties a number of obligations, inter alia the obligation to exchange collateral (variation margin and initial margin) for OTC derivatives not subject to clearing via a central counterparty.

The provisions of the FMIO regarding the implementation of the obligation to exchange collateral follow the existing EU regulations and international standards. Since 2016, the EU regulations have faced several amendments. In the context of the obligation to exchange collateral, the recent EU Regulation 2016/2251, which entered into effect on January 4, 2017, lays out the final implementation requirements for the timely, accurate and appropriately segregated exchange of collateral.

In the same vein and with the purpose of aligning the Swiss requirements with the corresponding provisions of the EU Regulation 2016/2251, the FDF, on February 13, 2017, launched a consultation on the amendment of the FMIO provisions regarding the implementation of the obligation to exchange collateral. Following this consultation, the Federal Council has now finalized the amendments and the new provisions will enter into force on August 1, 2017.

#### **Overview of the Amendments**

The revised-FMIO provides for the following amendments:

##### **a) Obligation to exchange collateral (Art. 100 revised-FMIO)**

As regards the obligation to exchange initial margin, the existing FMIO provides that the

calculation of the group aggregated month-end average gross position of OTC derivatives shall include all non-centrally cleared OTC derivatives of the group including all intragroup non-centrally cleared OTC derivatives. The revised-FMIO clarifies that such calculation shall take intra-group OTC derivatives transactions into account only once (para. 2). In addition, the obligation to provide initial margin applies during the full following calendar year (para. 3).

In addition, para. 3 and 5 have been moved to a new Art. 100a revised-FMIO. All exceptions to the obligation to exchange margin are now centralized under Art. 100a revised-FMIO. The possibility to waive the exchange of initial margin where the amount to be exchanged would be below CHF 50 million has been moved to a new Art. 100b revised-FMIO.

#### **b) Exemptions from the obligation to exchange collateral (Art. 100a revised-FMIO)**

In addition to the exceptions formerly listed under para. 3 to 5 of Art. 100 FMIO, the new Art. 100a revised-FMIO provides for an additional exception to the obligation to exchange initial margin. Indeed, such obligation may be waived if the initial margin were to be provided for the currency components of “currency swaps” (para. 2). In addition, if one of the counterparties is a guaranteed bond issuer or the legal entity of a guaranteed bond fund, this counterparty may, subject to the conditions set out under Art. 86 para. 3 revised-FMIO, agree with the other counterparty to waive the exchange of initial margin (para. 3 let. a) or to waive the exchange of variation margins vis-à-vis the counterparty who is a guaranteed bond issuer or the legal entity of a guaranteed bond fund and that the other counterparty may provide variation margin in cash (para. 3 let. b).

#### **c) Reduction of initial margin (Art. 100b revised-FMIO)**

The counterparties may reduce their initial margin by an amount up to CHF 50 Mio (para. 1). In the case of counterparties which are part of a financial or insurance group or of a group of companies, the amount of initial margin is determined including all group companies (para. 2). In the case of intra-group transactions

the initial margin may be reduced by an amount up to CHF 10 Mio. (para. 3).

#### **d) Timing of the calculation and posting of initial margin (Art. 101 revised-FMIO)**

The purpose of the amendment of Art. 101 FMIO is to provide clarification as regards the timing of posting of initial margin.

Now, Art. 101 revised-FMIO provides that the initial margin must be calculated (before, the term used was: “exchanged”) for the first time within one business day of the execution of the derivatives transaction in question and must thereafter be calculated regularly, but at least every ten days (para. 1). Where both counterparties are located in the same time-zone, the calculation shall be based on the netting set of the previous business day. By contrast, where the counterparties are not located in the same time-zone, the calculation shall be based on the transactions in the netting set which are entered into before 4PM of the previous business day in the time zone where it is first 4 PM (para. 2). It is further specified that the initial margin must be provided on the day of the calculation under para. 1; as regards settlement, the settlement-standard deadlines shall apply (para. 3).

#### **e) Timing of the calculation and posting of variation margin (Art. 101a revised-FMIO)**

Similar to initial margin, the revised FMIO explicitly addresses the timing of the calculation and posting of variation margin. This rule was initially set in Art. 101 para. 2 FMIO. It has now been moved to a new Art. 101a revised-FMIO.

The variation margin must be re-calculated at least on each business day (para. 1). It is further specified that the variation margin must be delivered on the day of the calculation under para. 1. It is noteworthy, though, that the revised-FMIO also distinguishes between delivery and settlement of such delivery as regards settlement, the settlement-standard deadlines shall apply (para. 3). By way of derogation to para. 3, it is possible to post variation margin within two business days from the valuation date provided that (i) a counterparty that is not obliged to post initial margin has provided prior to the calculation date additional collateral which

fulfills certain conditions, or (ii) the counterparties have posted initial margin respecting a specific margin period of risk (para. 4).

#### **f) Treatment of initial margin (Art. 102 revised-FMIO)**

Art. 102 FMIO has been amended mainly to specify the treatment of initial margin. First, it provides that counterparties may not set-off their respective initial margin obligations (para. 1). Then, it specifies that the initial margin provided in cash must be kept with a Swiss or foreign bank which is either a central bank or a bank that is independent of the party posting initial margin. It is further specified that non-cash initial margin may be held by the secured party or a third party retained by the secured party, additionally that such third party may be the provider of the initial margin (para. 3) and that the use of initial margin for other purposes is not allowed except under very limited circumstances as described in para. 4.

#### **g) Modification of Art. 103 FMIO**

Art. 103 para. 6 has been abrogated. As a result, counterparties may now change the calculation method for a particular derivative category.

#### **h) Admissible collateral (revision of Art. 104 FMIO)**

An additional let. h has been added to Art. 104. As under EU Regulation 2016/2251, securities funds within the meaning of Art. 53 of the Swiss Collective Investment Schemes Act are now considered admissible collateral provided that (i) the fund units are valued on a daily basis and (ii) the collective investment schemes invest exclusively in assets described under Art. 104 para. 1 let. a to g FMIO or in derivatives hedging assets described under Art. 104 para. 1 let. a to g FMIO (para. 1 let. h).

#### **i) Swiss FX Haircut rules (Art. 105 revised-FMIO)**

One of the most anticipated changes was the alignment of the Swiss FX Haircut rules with the EMIR FX Haircut rules. The revised-FMIO now provides that the FX Haircut of 8% shall in the case of initial margin apply to all cash and non-

cash initial margin provided in a currency other than the agreed termination currency (para. 2 let. a) and in the case of variation margin to non-cash variation margin only, and only if such non-cash margin is provided in a currency other than the currency agreed in an individual derivative contract, the relevant master netting agreement or the relevant credit support annex (para. 2 let. b).

#### **j) Cross-border transactions (Art. 106 revised-FMIO)**

A Swiss counterparty may choose not to provide initial and variation margin for cross-border transactions if: (i) the foreign counterparty has its registered seat or is domiciled in a jurisdiction where the netting or collateral arrangement cannot be legally enforced, or (ii) where segregation does not correspond to internationally recognized standards (para. 2<sup>bis</sup>). Furthermore, para. 2<sup>ter</sup> allows the Swiss counterparty to waive the provision, of initial and variation margin by its foreign counterparty if either of the above conditions is fulfilled, and if (i) the reception of such margin in accordance with the FMIA and the FMIO is not possible and (ii) the proportion, of all OTC derivatives transactions, of outstanding unsecured transactions entered into after the entering into force of the obligation to exchange collateral is less than 2.5%. The fulfilment of these conditions must be confirmed by an independent legal opinion.

#### **k) New transitional deadlines (Art. 129 and 131 revised-FMIO)**

In addition to the new transitional deadlines provided for in the FINMA Guidance 01/2017, the revised-FMIO provides for two new transitional deadlines: the record-keeping and reporting duties pursuant to Art. 36 para. 2 and 37 para. 1 let. d and para. 2 apply as of October 1, 2018 and in the case of Swiss securities dealers and foreign participants of a trading venue, January 1, 2019 (Art. 129 para. 1<sup>bis</sup> and 1<sup>ter</sup>) (pushed back from January 1, 2018). A retroactive record-keeping and reporting duty applies for the remainder of 2018.

Furthermore, the obligation to exchange collateral applies only as of January 4, 2020 for

non-centrally cleared OTC derivatives which are single-stock equity options or index options.

**l) New transitional deadlines for occupational pension schemes and investment foundations (Art. 133 revised-FMIO)**

In order to take into account international developments, in particular in the EU, the transitional deadline for occupational pension schemes and investment foundations to implement the clearing obligation has been extended until August 16, 2018. It is further specified that the Federal Department of the Interior may further extend this deadline depending on international developments

**m) Annex 4: Haircuts on collateral**

Annex 4 has been revised to reflect the changes

to Art. 104 (addition of securities funds as admissible collateral).

**n) Modification of Art. 58a SESTO**

The duties set out in Art. 30 para. 2 and 31 para. 1 let. d and 2 SESTO must be fulfilled at the latest as of October 1, 2018. All events occurring between January 1 and September 30, 2018 and resulting in these obligations are subject to retroactive registration and reporting no later than December 31, 2018.

Foreign branches of Swiss securities dealers must fulfill their obligations listed in Art. 30 para. 2 and 31 para. 1 let. d and 2 no later January 1, 2019.

**For any further questions regarding this matter please do not hesitate to contact us.**

**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.

# Your contacts

---

## **Geneva / Lausanne**

François Rayroux  
francois.rayroux@lenzstaehelin.com  
Tel: +41 58 450 70 00

## **Zurich**

Patrick Hünérwadel  
patrick.hunerwadel@lenzstaehelin.com  
Tel: +41 58 450 80 00

# Our offices

---

## **Geneva**

Lenz & Staehelin  
Route de Chêne 30  
CH-1211 Genève 6  
Tel: +41 58 450 70 00  
Fax +41 58 450 70 01

## **Zurich**

Lenz & Staehelin  
Brandschenkestrasse 24  
CH-8027 Zürich  
Tel: +41 58 450 80 00  
Fax +41 58 450 80 01

## **Lausanne**

Lenz & Staehelin  
Avenue du Tribunal-Fédéral 34  
CH-1005 Lausanne  
Tel: +41 58 450 70 00  
Fax +41 58 450 70 01

[www.lenzstaehelin.com](http://www.lenzstaehelin.com)