Update

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EMIR Refit and what it means for Swiss Counterparties

Following the European Commission's initial review of the European Market Infrastructure Regulation ("EMIR"), the EU legislators have agreed on certain amendments to EMIR (commonly referred to as EMIR Refit). EMIR Refit will enter into force on June 17, 2019, and is expected to have a positive impact on smaller counterparties and relaxes some of the current EMIR obligations. This newsflash summarizes certain key points of EMIR Refit and discusses what these changes mean for Swiss counterparties.

1. Changes to the definition of financial counterparty

Under the present EMIR, only those alternative investment funds ("AIF") managed by an AIF manager authorized or registered under the Alternative Investment Fund Managers Directive are categorized as financial counterparties ("FC"). EMIR Refit will widen the definition of FC to include all AIFs established in the EU irrespective of the location or status of its manager.

For funds established in Switzerland, this means that they need to determine whether they would qualify as an FC had they been established in the EU.

2. Introduction of a new category: Small financial counterparties

As is the case under the Swiss Financial Market Infrastructure Act ("FMIA"), EMIR Refit will introduce a new category of small FCs ("FC-"). Any FC that does not exceed the clearing threshold in any of the derivative categories set out below will qualify as an FC- and will be exempt from the clearing obligation under EMIR. If an FC exceeds the threshold in one derivative category, it will be subject to the clearing obligation in all derivative categories. The relevant thresholds are EUR 1 billion for each of credit and equity derivatives and EUR 3 billion for each of interest rate, FX and commodity and other derivatives. While these thresholds correspond to the ones applicable to non-financial counterparties ("NFC") when determining whether it is an NFC- or an NFC+, hedging transactions will have to be included for this calculation in the case of an FC.

This approach differs from the one taken in Switzerland. Under the FMIA, whether or not an FC is small is tested against a single threshold (set at CHF 8 billion) and not for various derivative categories separately. As a result of this

disparity, a Swiss counterparty that is an FC- under the FMIA will have to separately verify whether it is also a FC- for purposes of EMIR.

3. Changes to the clearing obligation for non-financial counterparties

Under the current EMIR regime, NFCs that exceed the clearing threshold in one of the derivative categories need to clear their OTC derivatives contracts in all derivative categories that are subject to mandatory clearing.

Under EMIR Refit, the clearing obligation for NFCs will be relaxed so that NFCs will only have to clear derivatives of such derivative categories for which they actually exceed the clearing threshold and which are subject to mandatory clearing.

This new approach is, hence, more liberal than the one taken in Switzerland in line with the present EMIR. Under the FMIA, a NFC exceeding the relevant threshold in one derivative category must clear its OTC derivatives contracts in all derivative categories subject to mandatory clearing. Accordingly, a Swiss counterparty that needs to clear under the FMIA may not be obligated to do so under the revised EMIR.

4. Certain other changes

Any obligation to clear will be limited to contracts that are entered into or novated after the date on which the clearing obligation comes into effect, i.e. the frontloading obligation for clearing will be removed. Similarly, the backloading obligation on reporting (for transactions entered into before February 12, 2014) will be removed by EMIR Refit.

Where a transaction is concluded between an FC and an NFC-, the FC will be solely responsible and liable for reporting the transaction. In all other constellations, the obligation to report will remain with each counterparty.

5. What does EMIR Refit mean for Swiss counterparties?

EMIR Refit does not have the force of law in Switzerland. As was the case with EMIR, EMIR Refit will, however, have certain indirect implications on Swiss counterparties transacting with EU counterparties as for such purpose, the Swiss counterparty will have to determine in which EMIR category it falls in. Swiss FCs in particular should verify whether they might fall into the new FC- category under EMIR thereby eliminating the obligation to clear. As the relevant thresholds under EMIR differ from the threshold under Swiss law, this test will have to be run separately from any determination under the FMIA, i.e. an FC- under the FMIA may not be an FC- for purposes of EMIR.

Funds established in Switzerland should determine if they would be a FC had they been established in the EU. If so, such Swiss fund will qualify as an FC for purposes of EMIR.

Finally, the FMIA with respect to the qualification as an NFC- is now stricter than EMIR and applies a different test with respect to FCs-. An alignment would, hence, require an amendment of the FMIA by the Swiss parliament. It is at this time open if and when the FMIA may be amended.

Please do not hesitate to contact us in case of any questions.

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 Hünerwadel
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 de Rhodanie 58
CH-1007 Lausanne
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

www.lenzstaehelin.com