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Update

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New derivative reporting for securities dealers and participants to Swiss trading venues

- **New rules create an additional reporting obligation for derivatives with an underlying admitted to trading on a Swiss trading venue**
- **Structured and basket products are also in scope provided an underlying representing 25% or more of the weighting of the instrument is admitted to trading on a Swiss trading platform**

Starting from October 1, 2018, particiants to Swiss trading venues and securities dealers will be required to report all derivative transactions, if the relevant derivative's underlying is admitted to trading on a Swiss trading venue. Backloading is required for transactions entered into between January 1, 2018 and September 30, 2018.

From October 1, 2018, the trade reporting obligation imposed on securities dealers and participants to Swiss trading venues (*i.e.* exchanges and MTFs) will be expanded to include derivatives. Securities dealers and other participants will therefore need to report trades on derivatives whose underlyings are admitted to trading on a Swiss trading venue.

The trade reporting regime derives from Article 15 of the Stock Exchange and Securities Trading Act ("**SESTA**") for securities dealers and from Article 39 of the Financial Market Infrastructures Act ("**FMIA**") for participants (including foreign participants, *i.e.* so-called remote members) of a Swiss trading venue. The general principle governing this regime is that securities dealers and participants should communicate sufficient information to ensure the transparency of the markets. Currently, only trades in securities admitted to trading in Switzerland are covered by the trade reporting obligation. However, the Financial Market Infrasturcture Ordinance ("**FMIO**") adds to the reportable events the transactions on derivatives, if the derivative's underlying is admitted to trading on a Swiss trading venue. The recently published FINMA Circular 2018/2 ("**Circular 2018/2**") clarifies important aspects of the new rules.

Double reporting regime for derivatives

Under Article 104 FMIA, derivatives transactions are to be reported to a trade repository. The regime set forth in Article 104 FMIA is however different from the securities dealers' and participants' trade reporting obligation:

- first, the trade reporting obligation only applies to Swiss securities dealers and to other participants of Swiss trading venues;

- second, a reporting obligation is required only with respect to derivatives having an underlying admitted to trading on a Swiss trading venue. The relevant underlyings need not be equity securities listed or admitted to a trading venue, but can also be another exchange-traded product (*e.g.* derivative or commodity);
- third, structured products are also in scope.

Reporting requirement for products with several underlyings

Structured or basket products with more than one underlying are not excluded from the reporting obligation. A basket or structured product is subject to the reporting obligation if the weighting of one or more in scope underlyings exceeds 25%. For passively managed products, the reference date used to determine whether an ûnderlying exceeds the 25% threshold is the date of issuance. For actively managed products, however, changes in the composition of the underlyings will have to be taken into account.

Content of the disclosure and addressees

The mandatory content of the disclosure is primarily determined by the FINMA Ordinance on Financial Market Infrastructures. Although the report must identify the derivative that has been traded, there is no explicit requirement to mention the underlying.

The reporting must be made to the Swiss trading venue where the underlying is admitted to trading. In case the underlying is admitted to trading on more than one Swiss trading venue or the derivative has more than one underlying admitted to trading on a Swiss trading venue, the entity subject to the reporting obligation can choose between the relevant trading venues.

Practical steps for brokers and issuers of derivatives and structured products

Although Circular 2018/2 allows securities dealers to voluntarily report trades that are not in scope of the trade reporting regime (*e.g.* because the underlying is not actually admitted to trading in Switzerland), entities subject to the reporting obligation may only cautiously rely on this rule. Indeed, if an underlying is admitted to trading on a Swiss trading venue, disclosing the transaction to another trading venue is unlikely to be sufficient to fulfill the reporting obligation. Brokers who offer the possibility to trade derivatives and structured products to their clients will therefore need to map the products they offer to determine at least to which Swiss trading venue these products' underlyings are admitted to trading, if any.

To avoid unnecessary disclosures (and associated costs), brokers will also likely seek to determine whether, in connection with a specific product, the 25% threshold is crossed (or may at some point be crossed, for actively managed products). This will be especially relevant for structured products, which frequently have more than one underlying. While the simplified prospectus required for structured products must list the underlyings, their respective weighting is currently not required. To avoid a situation where brokers refuse to offer certain products pending clarification regarding whether they are in scope of the trade reporting regime or not, it may be advisable for issuers to adopt terms that exclude any possibility for one single underlying to reach the 25% threshold and therefore to become a reportable product.

Backloading period

The obligation to report derivatives trades will apply from October 1, 2018. However, the new rules contemplate a "backloading" period. All derivatives transactions which would be reportable under the new rules occuring between January 1, 2018 and September 30, 2018, will have to be reported by December 31, 2018.

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.

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