

New rules for derivatives and exchange-traded products with crypto-assets as underlying instruments listed on SIX Swiss Exchange

On February 15, 2024, the Regulatory Board of the SIX Swiss Exchange (the "SIX") announced that it was updating the regulatory framework for crypto-assets as underlying instruments for derivatives and exchange-traded products ("ETPs"). The new rules will impact both issuers wishing to list new derivatives or ETPs with crypto-assets as underlying instruments, as well as issuers of products with such underlyings that are currently listed on the SIX. These new rules will come into force on April 1, 2024 with a transitional period of six months for products already listed on the SIX.

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Introduction

On February 15, 2024, the Regulatory Board of the SIX announced that it was updating the regulatory framework for crypto-assets as underlying instruments for derivatives and ETPs. The main impact of these new regulatory framework is to broaden the range of crypto-assets that can

be used as underlying instruments, and to introduce new rules concerning, among others, market capitalization and liquidity. SIX is also introducing new requirements regarding the custody of crypto-assets which serve as collateral to ETPs. Open-ended ETPs will also be required to include "a right of return" in favor of investors and a call option in favor of the issuer.

Key Changes

New requirements with respect to eligible crypto-assets as underlying instruments

The key changes concerning regulatory requirements for crypto-assets are as follows:

- **Underlying:** Previously, only cryptocurrencies could serve as underlying assets for products listed on SIX. Starting April 1, 2024, both cryptocurrencies (referred to as "**coins**" by SIX) and digital tokens representing financial instruments and other assets (referred as "**tokens**" by SIX) will be eligible underlyings for listing on the SIX. However, privacy coins will remain non-eligible. The same is true for tokens that represent an entitlement similar to that of an equity security, including "hybrid" tokens that may also incorporate other rights or functions.
- **Capitalization:** Crypto-assets eligible as underlying for a listing on the SIX will no longer need to be within the top 15 of the largest crypto-assets market capitalization. Instead, all crypto-assets with a market capitalization of at least USD 500 million will be eligible.
- **Liquidity:** To balance the reduced capitalization threshold, SIX will require that the crypto-assets' average daily liquidity be at least USD 50 million over the past 30 calendar days before the submission of the relevant listing application.
- **Trading history:** SIX also introduces new requirements with respect to trading history of the crypto-assets. From April 1, 2024, a crypto-asset must have been traded for at least 180 calendar days before it can be listed on the SIX.
- **References:** SIX will rely on data/information from the following reference sites: <https://coinmarketcap.com/>; <https://www.coingecko.com/en> and <https://www.cryptocompare.com/>.

New requirement for issuers to provide a written confirmation

Starting April 1, 2024, SIX will require that all issuers issue a written declaration confirming that the requirements of Articles 70 of the Financial Services Act ("**FinSA**") and 96 of the Swiss Financial Services Ordinance ("**FinSO**") have been complied with. In accordance with these statutory provisions, the issuer must confirm that it or the guarantor of the ETP to be listed is either:

- A bank under the Swiss Banking Act ("**BA**")
- An insurance company under the Swiss Insurance Oversight Act ("**ISA**")
- A securities firm under the Swiss Financial Institutions Act ("**FinIA**")
- A non-Swiss financial institution subject to equivalent prudential supervision

If the above conditions are not met, as is the case, for example, when major asset managers create SPVs specifically dedicated to issuing ETPs, the ETP must be offered by a regulated financial intermediary and the issuer must confirm that collateralization is guaranteed by the provision of real collateral held by an eligible custodian (as discussed in point 3 below) and be readily available for investors.

New ETP collateralization requirements

ETPs with crypto-assets as underlying will continue to be collateralized by the deposit of the relevant crypto-assets with a custodian. As part of the updated rules, SIX is however introducing more stringent requirements in this respect.

First, issuers will be required to use (Swiss or foreign) prudentially supervised custodians to keep the relevant crypto-assets in custody. Second, custodians will need to comply with requirements that are substantially those of Article 16 para. 1bis BA, *i.e.* keep the crypto-assets available at all times and either (a) maintain a segregated wallet for the issuer of the ETP, or (b) keep an internal record of which crypto-assets belong to the issuer. As a fallback, if the above requirements are not met, the issuer retains the option to obtain a bank guarantee covering the amounts due by the issuer under the relevant ETP.

Ostensibly, the new requirements aim to improve investors' protection by ensuring that the crypto-assets are segregated in the event of a bankruptcy of the custodian. However, as FINMA recently recognized, Article 16 para. 1bis BA is not the only way to achieve an off-balance sheet treatment of crypto-assets. It remains to be seen if the new SIX rules will be interpreted consistently with FINMA's position.

Investors rights and additional disclosure requirements

For open-ended ETPs, SIX is introducing a requirement that investors be granted "*a right of return*" and that the issuer be granted a right to terminate the product. The new rules do not specify how these rights must be implemented.

SIX will also require issuers to clearly inform investors (in a prospectus or in another information document) as to the risks associated with crypto-assets. Further, the prospectus itself will be required to disclose that the product may be suspended from trading in exceptional circumstances, including *e.g.* suspicions of price manipulation on the crypto-assets.

Amendment of the SIX Directives

The extension of the requirements applicable to the listing of derivatives and ETPs with crypto-assets as underlying instrument require the issuance of a new Directive on Crypto Assets as Underlying Instruments ("**DCA**"), as well as the revision of existing directives, such as the Additional Rules for the Listing of Derivatives ("**ARD**") and the Additional Rules for the Listing of Exchange Traded Products ("**ARETP**"), which will enter into force on April 1, 2024.

Timeline

The new SIX regulations will come into force on **April 1, 2024**. Derivatives and ETPs already listed on the SIX with crypto-assets as underlying instruments will remain listed but they have until **October 1, 2024** to submit an updated prospectus, a written confirmation from the issuer confirming collateralization requirements in compliance with Articles 70 FinSA and 96 FinSO. Failure to meet the above requirements by October 1, 2024 will result in the delisting of affected derivatives and ETPs for extraordinary reasons.



Outlook

The broadening of the scope of crypto-assets eligible to serve as underlying assets for products listed on the SIX offers new possibilities for market players. It is not known yet whether BX Swiss AG, the other exchange offering the trading of derivatives with crypto-assets as their underlying, will make similar changes to its listing rules. Further, it remains to be seen if SIX will allow further (non-crypto-related) assets to serve as underlying instruments, in particular emission allowances and carbon rights, which are in high demand.

Please do not hesitate to contact us if you have any further questions on this subject.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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