

Update

Newsflash December 2017

FinfraG Update VII – FINMA revises FMIO-FINMA to introduce the clearing obligation for certain OTC derivatives

The purpose of this Newsflash is to provide Swiss market participants with an update on the proposed amendment of the Swiss Financial Market Infrastructure Ordinance of the Swiss Financial Market Supervisory Authority (FMIO-FINMA) regarding the introduction of the clearing obligation for certain over the counter (OTC) derivatives under the Swiss Financial Market Infrastructure Act (FMIA). The consultation process was launched by the FINMA on December 18, 2017 and will last until February 12, 2018. The clearing obligation will only enter into effect when FINMA has authorized or recognized the central counterparties (CCP) which clear trades involving the FINMA-designated categories of OTC derivatives.

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 clear certain OTC derivatives via a CCP authorized or recognized by FINMA.

The clearing obligation applies to financial (FC) and non-financial counterparties (NFC), but to the exclusion of OTC derivatives with or between minor FC or minor NFC. The clearing obligation applies, as a matter of principle, also to cross-border business with foreign counterparties. Intra-group transactions are exempt from this obligation under certain conditions.

Pursuant to Article 101 FMIA, FINMA shall

determine the specific categories of OTC derivatives which must be cleared via a CCP taking into account a number of criteria further specified in the FMIA and the FMIO-FINMA.

On December 18, 2017, FINMA launched a consultation on the amendment of the FMIO-FINMA with the aim of designating the categories of OTC derivatives that will for the first time be subject to the clearing obligation. The consultation process will last until February 12, 2018.

OTC Derivatives in scope

The FINMA is introducing the clearing obligation for certain OTC standardized interest-rate and credit derivatives listed in Annex 1 of the proposed draft FMIO-FINMA. These OTC derivatives are already subject to the clearing obligation under EU regulations.

Central counterparties

The CCPs through which OTC derivatives are cleared must be authorized or recognized by FINMA.

FINMA has declared that the clearing obligation will only enter into effect when it has authorized or recognized significant CCPs which clear trades involving the FINMA-designated categories of OTC derivatives.

FINMA has also stated that it may on a case by case basis allow clearing for a limited period of time through foreign CCPs that are not yet recognized by it if there isn't a sufficient number of CCPs available to market participants by the time of the entry into force of the clearing obligation.

Timing

FINMA is conducting a consultation exercise running until February 12, 2018. The results of the hearing will be published in a hearing report. After any necessary adjustments have been made, the publication of the amended Annex 1 FMIO-FINMA is scheduled for summer 2018.

Transitional periods ranging from 6 to 18 months, depending on the counterparty classification, dating from the entry into effect of the amended Annex 1 FMIO-FINMA, are applicable before the clearing obligation becomes mandatory.

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.

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