

Update

Newsflash July 2016

FinfraG update II – FINMA publishes an update on the next steps for the implementation of the FMIA obligations

- › **Provisional recognition of the equivalence of the European regulations**
 - › **Extension of the deadlines for the exchange of collateral**
 - › **Update with respect to the authorization and recognition requirements for the operation of organized trading facilities (OTFs)**
 - › **Extension of the deadlines for the record-keeping and the reporting requirements to a trading venue**
 - › **As of yet, no trade repository has been authorized or recognized by FINMA, but two applications are pending**
 - › **FINMA has not yet published a list of derivatives subject to the clearing obligation**
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Further to Lenz & Staehelin's Newsflash published on July 1, 2016 and entitled "Federal Council extends the transitional periods for financial market infrastructures", the purpose of this Newsflash is to summarize the most recent decisions of FINMA as regards the implementation of the Financial Market Infrastructure Act (FMIA).

FINMA is responsible for issuing and implementing the provisions of and for carrying out the specific authorization and recognition processes under the FMIA and its Ordinance (FMIO). One of the main responsibilities of FINMA is to authorize Swiss financial market infrastructures and to recognize foreign financial market infrastructures, such as central counterparties (CCPs) and trade repositories (TRs).

With a view of carrying out these tasks, FINMA has defined various follow-up activities and published on July 6, 2016 a new guidance 01/2016 to provide an update on the status and next steps for the implementation of the FMIA

obligations and the authorization and recognition process.

Provisional recognition of the equivalence of the European regulations

The FMIA provides for a substituted compliance regime in that a counterparty may satisfy its obligations under the FMIA under foreign laws, if (i) the relevant foreign law is recognized as being equivalent (art. 95 lit. a FMIA) and (ii) the foreign financial market infrastructure used to satisfy such obligations is recognized by FINMA.

In order to provide market participants with sufficient time to achieve technical implementation, FINMA has decided to initially concentrate on assessing the equivalence of the corresponding European regulations (but not at this stage other foreign legislations, such as the US Dodd Frank Act). Although, not all European regulations have come into force, with respect to EMIR, it has already been confirmed that EMIR and the FMIA are quite similar in nature.

Therefore, in order to avoid any further delay with the recognition process, FINMA has decided to recognize the European regulations as provisionally equivalent within the meaning of Art. 95 lit. a FMIA. The purpose of this provisional recognition is to allow the counterparties, which are subject to the Swiss obligations, to discharge such obligations under the European regulations from the date on which they come into force. We understand that FINMA will carry out a full equivalence process to determine whether the conditions provided under Art. 81 para. 1 and 2 FMIO are met once the European regulations have been definitively passed. FINMA will provide further information once the provisional equivalence recognition has become final.

FINMA's pragmatic approach of provisional equivalence recognition is in line with FINMA's decision to carry out the comparison at the level of the principal rules rather than the detailed regulations, which may differ on a number of points between EMIR and FMIA. One can therefore be optimistic as to the final confirmation of the equivalence of the EMIR rules and the FMIA rules. FINMA has not, though, set itself any deadline for such final confirmation which will largely depend on its cooperation with the European Commission and ESMA.

Extension of the deadlines for the exchange of collateral

The first compliance date for the margin requirements was September 1, 2016, for major financial counterparties. The compliance with this deadline would have created major challenges due to the short implementation period.

FINMA has thus decided, based on its competence provided under Art. 131 para. 6 FMIO, to postpone the deadlines for the margin requirements as provided under Art. 131 para. 4 and 5 FMIO until such time as the corresponding European regulations shall have entered into force so as to keep the Swiss deadlines in line with the corresponding deadlines in the EU.

FINMA will further inform on transitional periods when the European regulations on the exchange of collateral shall have entered into force.

Update on the operation of OTFs

On June 29, 2016, the Swiss Federal Council extended the deadlines which apply to the operation of an OTF to January 1, 2018. However, based on Art. 129 para. 1 and 2 FMIO, the transitional provisions and hence such extension do not apply to Art. 38, 39 and 40 sentence 1 FMIO. Consequently, FINMA notes that these obligations apply as of now irrespective of the transitional periods.

FINMA is expected to publish a new circular on the operation of OTFs by spring 2017. The purpose of this circular shall be to define the regulatory obligations relating to the operation of an OTF (Art. 38 to 43 FMIO).

Extension of the deadlines for record-keeping and the reporting requirements for securities and derivatives transactions

On June 29, 2016, the Federal Council extended the transitional periods for the record-keeping obligation as per Art. 36 FMIO and the reporting requirements for securities and derivatives transactions as per Art. 37 FMIO to January 1, 2018 so as to align the entry into force with international standards and to give market participants enough time for the technical implementation of these new obligations. This extension is a significant relief for market participants as the implementation of the transitional periods set out under Art. 36 and 37 FMIO would have caused major challenges in practice.

Circular 2008/4 "Securities Journals" and Circular 2008/11 "Disclosure Requirements for Securities Transactions" will be revised by spring 2017.

Update on the reporting requirement for derivatives

Pursuant to Art. 104 FMIA, all OTC derivatives as well as all exchange-traded derivatives must be reported to a TR authorized or recognized by FINMA. The reporting obligation is phased in over time, whereby the different transitional periods will only start from the date of the first authorization or recognition of a TR by FINMA. As of yet, there has been no TR authorized or recognized by FINMA, but a request for approval as well as a request for recognition are currently pending. Such approval and recognition are expected to be granted in the course of the second half of 2016.

Update on the clearing requirement for derivatives

The start of the clearing requirement mainly depends on the authorization or recognition of a CCP by FINMA and on FINMA's publication of derivatives subject to the clearing obligation. FINMA has not yet published the list of relevant derivatives. FINMA also informed that it has not yet authorized or recognized any CCP.

As stated by FINMA, the establishment of the list of derivatives subject to the clearing obligation is linked to the authorization or recognition of a CCP.

It is expected that the derivatives subject to mandatory clearing under Swiss law will be aligned to the derivatives subject to mandatory clearing under the European regulations.

FINMA will publish the list of categories of derivatives subject to mandatory clearing in an Appendix to the FMIO-FINMA.

Please do not hesitate to contact us should you have 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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