

Derivative Trading under the FMIA – FINMA Issues Guidance on Phasing in

On 6 July 2016, FINMA published guidance on the implementation of the Federal Act on Financial Market Infrastructures of 19 June 2015 ("FMIA") and its implementing ordinances, which set out new rules on trading of derivatives (see Bär & Karrer Briefings of March 2016). In this briefing, we outline main developments in further details, which are the provisional recognition of the equivalence of the European regulations under EMIR and an extension of the deadline for the exchange of collateral.

Equivalence Assessment

In the wake of the Dodd-Frank Act in the United States and EMIR in the European Union, the FMIA seeks, among others, to regulate market conduct in securities and derivatives trading. In this context, the FMIA provides for following duties:

- **clearing requirements** for OTC derivatives;
- **reporting obligations** for OTC and exchange-traded derivatives; and
- **operational risk mitigation obligations**, including requirements regarding timely confirmation, portfolio reconciliation, portfolio compression, mark-to-market valuation and **obligations to exchange initial and variation margin**.

Swiss counterparties can, however, meet their derivatives trading obligations for cross-border derivatives transactions and – given a sufficient objective nexus with foreign law as defined in article 81 (3) of the Ordinance on Financial Market Infrastructures of 25 November 2015 (FMIO) – the obligations for some domestic transactions, where appropriate, under foreign law which has been recognized as equivalent by FINMA (article 95 (a) FMIA; article 81 FMIO).

In order to provide financial market participants with sufficient time for technical implementation, FINMA has decided to recognize provisionally EMIR¹ that applies in the European Union, as being equivalent to Swiss law within the meaning of article 95 (a) FMIA.

This assessment remains provisional insofar as FINMA reserves its final judgment on this matter for when the European Union will have passed all final regulations for derivatives trading. Since, at the statutory level, both EMIR and FMIA define very similar regulations for the clearing of OTC derivatives transactions through a central counterparty (article 97 (1) FMIA; article 4 EMIR), the reporting of derivatives transactions to a trade repository (article 104 (1) FMIA; article 9 EMIR) and risk mitigation for OTC derivatives transactions (article 107 (1) FMIA; article 11 EMIR), this provisional assessment is very likely to be confirmed in due course and is, already at this stage, a positive signal for market participants.

Based on this recognition, counterparties which are subject to the Swiss requirements will be able to comply with them by applying the requirements provided for by EMIR, once they are fully phased-in. Nevertheless, the road to substitute compliance is

¹ Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

not yet fully open: FINMA will also need to recognize foreign financial market infrastructures to allow counterparties to rely on substitute compliance. Indeed, with the exception of risk mitigation obligations, where Swiss requirements are met by adhering to European regulations, substitute compliance also supposes that the reporting or clearing obligations by performed using a foreign financial market infrastructure recognized by FINMA (article 95 (b) FMIA).

Phasing-in

Margining

FINMA has also decided, based on its authority under article 131 (6) FMIO to extend the phasing-in deadlines for margin requirements in order to align them with those of the RTS² in the European Union to the extent they differ from those provided for under the RTS. This announcement will relieve large counterparties who would have been required to exchange initial and variation margin as of 1 September 2016.

FINMA has announced that it would provide further guidance on phasing-in by the time when the European regulations on margining are finalized and enter into force.

Recordkeeping and Reporting Requirements

This development coincides with another extension of the transitional period. On 29 June 2016, the Federal Council had already amended the transitional periods for trading venues and organized trading facilities ("OTFs") to implement, among others, the new pre- and post-trading requirements under the FMIA. Indirectly, these amendments benefit securities dealers and financial market participants who will have additional time to implement the new the recordkeeping and reporting requirements regarding securities and derivatives transactions (articles 1-5 of the Ordinance of FINMA on Financial Market Infrastructures of 3 December 2015, "FMIO-FINMA").

Overview of Phasing-in Periods

Margining Rules

	1-September-2016	1-September-2017	1-September-2018	1-September-2019
	Postponed until European RTS are finalized and enter into force			
Variation Margin	If average month-end gross positions in non centrally cleared OTC derivatives exceeds CHF 3,000 bn.	All others, for trades entered into after 1 March 2017		
Initial Margin	If average month-end gross positions in non-centrally cleared OTC exceeds CHF 3,000 bn.	If average month-end gross positions in non-centrally cleared OTC exceeds CHF 2,250 bn.	If average month-end gross positions in non-centrally cleared OTC exceeds CHF 1,500 bn.	If average month-end gross positions in non-centrally cleared OTC exceeds CHF 750 bn.

² Final Draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under article 11(15) of Regulation (EU) No 648/2012 of the EBA, ESMA and EIOPA.

Other Duties in connection with Derivative Duties (unchanged)

	Implementation trigger	+6 months	+9 months	+12 months	+18 months
Platform Trading	FINMA introduces requirement to trade a class of derivative on a trading venue	CCP Member	CCP Member-FC FC-FC	All others	–
Clearing	FINMA introduces requirement to trade a class of derivative	CCP Member	–	CCP Member-FC FC-FC	All others
Reporting	FINMA recognizes or authorises a trade repository	FC or CCP Member	FC- or NFC	All others (i.e. NFC-)	–
Confirmation/ Compression/ Reconciliation/ Dispute resolution	Entry in force	–	–	FC-FC/ FC-NFC NFC-NFC Transactions with an FC-	All others
Valuation	Entry in force	–	–	FC/NFC	–

Transitional Provisions

	Current FMIO deadline	New deadline according to Guidance
Transitional provisions for trading venues and OTFs into force	1 January 2017	1 January 2018
Transitional provisions for recordkeeping and the reporting requirements for securities and derivatives transactions	1 January 2017	1 January 2018

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