

Update

Newsflash May 2018

FinfraG Update VIII – FINMA publishes revised FMIO-FINMA confirming the categories of OTC derivatives subject to the clearing obligation

The purpose of this Newsflash is to inform Swiss market participants that FINMA has introduced a clearing obligation for standardized interest rate and credit derivatives traded over the counter. The exact categories of OTC derivatives subject to the clearing obligation are listed in Annex 1 of the FMIO-FINMA. This Annex enters into force on September 1, 2018, which will trigger phase-in periods for the clearing obligation.

Background

One of the main obligations arising from the Swiss regulation of derivatives trading is the mandatory clearing of certain over the counter (OTC) derivatives via a central counterparty (CCP) authorized or recognized by FINMA to reduce systemic risks in the event of counterparty default.

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

Pursuant to Article 101 FMIA, FINMA has the competency to 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.

Before introducing a mandatory clearing obligation for certain categories of derivatives, FINMA ran a consultation for the industry which ended in February 2018. Based on the comments submitted, no changes will be made to the categories of derivatives initially proposed by FINMA.

On this basis, FINMA has published the revised FMIO-FINMA confirming the introduction of a mandatory clearing obligation for OTC standardized interest rate and credit derivatives.

OTC Derivatives in scope

As expected, market participants did not raise any specific objections during the consultation procedure to the categories of OTC derivatives proposed by FINMA. To the contrary, market participants welcomed FINMA's decision to align these categories of derivatives on European regulation. In addition, the consultation procedure showed that one of market participants' main concerns is to have a sufficient number of CCPs authorized and recognized in Switzerland to clear the relevant transactions.

Therefore, FINMA confirmed the introduction of a clearing obligation for OTC standardized interest rate and credit derivatives. However, the clearing obligation for interest rate swaps is limited to transactions concluded in EUR, GBP, JPY and USD. For the present, there is no obligation to clear derivatives transactions denominated in CHF.

FINMA further confirmed that if a category of derivatives subject to the clearing obligation in accordance with Annex 1 of the FMIO-FINMA is no longer cleared by a CCP authorized or recognized by FINMA, the Swiss clearing obligation of said category of derivatives will be suspended considering the legal impossibility for market participants to meet their clearing obligation.

Clearing obligation in a cross-border context

Pursuant to Art. 97 FMIA, a Swiss counterparty may satisfy its clearing obligation under the FMIA by clearing with a Swiss CCP authorized or a foreign CCP recognized by FINMA.

FINMA has recently authorized the first Swiss CCP, SIX x-clear AG and, to date the following foreign CCPs have already been recognized by

FINMA: Eurex Clearing AG (Germany), Japan Securities Clearing Corporation (Japan), LCH Ltd. (UK) and LCH SA (France). Note however that at present no US CCPs have been recognized by FINMA. This being said, two recognition procedures of US CCPs are currently being processed by FINMA.

However, FINMA has confirmed that if important CCPs were not being recognized by February 1, 2019, it may on a case-by-case basis allow clearing for a limited period of time through foreign CCPs that are not yet recognized. Indeed, FINMA will ensure that market participants will be given sufficient time to organize themselves accordingly.

Timing

The revision of the FMIO-FINMA enters into force on September 1, 2018, which will trigger transitional periods ranging from 6 to 18 months, depending on the counterparty classification. The mandatory clearing obligation will become effective at the following dates:

- › As of March 1, 2019: for derivatives transactions concluded anew between clearing members of an authorized or recognized CCP;
- › As of September 1, 2019:
 - For derivatives transactions concluded anew between a clearing member and a large FC, and/or;
 - For derivatives transactions concluded anew between two large FCs.
- › As of March 1, 2020: for all other derivatives transactions concluded anew.

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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