

Federal Council proposes changes to derivatives trading rules

On June 19, 2024, the Swiss Federal Council published a proposed revision of the Financial Market Infrastructure Act. Among a wide-ranging set of amendments relating to the Swiss market infrastructure and the Swiss market conduct framework, the Federal Council's draft bill also includes a range of amendments relating to derivatives trading rules, including to reporting obligations, counterparty categorization and cross-border transactions. The draft bill is open for comments until October 11, 2024.

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The Financial Market Infrastructure Act ("**FinMIA**"), which entered into force in 2015, provides for a comprehensive set of rules on derivatives trading, substantially in line with international standards. The Swiss Federal Council's draft bill intends to adapt the FinMIA to technological progress and further developments of international standards and provides for certain simplifications.

Improving the derivatives transactions reporting

The obligation to report derivatives transactions to a trade repository under Article 104 FinMIA was adopted in line with international standards to enhance the stability and transparency of the derivatives market following the 2008 financial crisis. However, according to an earlier report of the Swiss Federal Department of Finance, these objectives have not been achieved. This is primarily due to insufficient data quality as well as a lack of cooperation between Swiss and non-

Swiss trade repositories, namely because of the current absence of recognition of Swiss trade repositories by the European Securities and Markets Authority. As a result, the risks arising from derivatives transactions by Swiss counterparties have not been systematically monitored to date.

To address this situation, the Swiss Federal Council proposes to align the reporting data with updated international standards at an ordinance level, in order to improve the use of the data so collected. The draft bill further proposes to facilitate the access to trade repositories by non-Swiss financial market supervisory authorities. Where a cooperation agreement with a non-Swiss authority confirms that it is subject to a statutory duty of confidentiality, the Swiss trade repository will grant free access to the relevant transaction data.

Facilitation for small non-financial counterparties

For reasons of proportionality, the draft bill further introduces various simplifications for small non-financial counterparties, in particular by providing for an exemption from transaction reporting obligations. While derivatives transactions must generally be reported to a trade repository, this is currently only applicable to small non-financial counterparties where its non-Swiss counterparty does not itself report the derivatives transaction. The Swiss Financial Markets Authority ("**FINMA**"), however, has not yet implemented the reporting obligations for small non-financial counterparties and with the adoption of the draft bill, such obligation would definitely be abolished.

Separately, the calculation method for defining whether a non-financial counterparty qualifies as small will be aligned with the EU calculation method. Instead of the average gross position, calculated on a rolling basis over a 30 business days period, the draft bill looks at the average of the aggregated gross month-end positions for the previous twelve months in the relevant outstanding OTC derivative transactions per derivative category. This simplification is proposed in an effort to reduce the administrative burden on counterparties for monitoring the thresholds. In order to maintain consistency, the same calculation method would be adopted for financial counterparties.

Simplified categorization and clarifications for cross-border transactions

Currently, the rules applicable to derivatives trading can generally be satisfied under non-Swiss law (*substituted compliance*) where FINMA recognizes such law as *equivalent*. In a first step, however, market participants must currently determine if there is an obligation under the FinMIA and for such purposes categorize their non-Swiss counterparties in accordance with the FinMIA.

To simplify matters for market participants, the draft bill proposes that, where a non-Swiss law is recognized as equivalent, such law also applies for purposes of counterparty categorization.

The draft Article 95a FinMIA now regroups the rules of the FinMIA that apply to cross-border transactions and provides for a list of derivative trading rules of the FinMIA that apply to such cross-border transactions. Such derivative trading rules apply where the non-Swiss counterparty would be subject to such rules under the FinMIA if it had its seat in Switzerland. It is, however, not required to adhere to such rules, if the non-Swiss counterparty has its seat in a jurisdiction that is deemed equivalent and the non-Swiss counterparty is not bound by such rule under the laws of its jurisdiction. Where a rule can be satisfied without contribution of the counterparty, though, the Swiss counterparty has to comply with such rule.

Next steps

The Federal Council's draft bill has been released for public consultation, which will run until October 11, 2024. After this period, the Federal Council will draft a revised version to submit to the Swiss Parliament, with this step likely occurring in 2025. Should the Parliament pass the draft bill into law, the implementation will be gradual, with numerous details to be determined by the Federal Council.

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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