

Briefing April 2017

Derivatives Trading under FMIA: FINMA Issues Guidance on Reporting to a Trade Repository

On 3 April 2017, FINMA published guidance on reporting requirements and trade repository (FINMA Guidance 02/2017: Financial Market Infrastructure Act: Reporting Requirements) announcing that, on 1 April 2017, it authorized a Swiss trade repository, SIX Trade Repository AG, Zurich, and recognized a foreign trade repository, Regis-TR S.A., Luxembourg. These two decisions trigger the phase-in period for the trade reporting duties under article 104 Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 (Financial Market Infrastructure Act, **FMIA**, SR 958.1).

Reporting Duty pursuant to article 104 FMIA

Pursuant to article 104 FMIA, subject to certain limited exceptions, Swiss counterparties are required to report their derivatives trades to a trade repository which has been authorized or recognized by FINMA (article 104 FMIA).

Unlike the EU Regulation 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, (**EMIR**), which requires both counterparties to report their trades, FMIA provides for a one-way reporting obligation with the following reporting cascade:

- The central counterparty (CCP), when the trade is cleared centrally (article 104 (4) FMIA);
- Financial counterparties (FC) report when dealing with non-financial counterparties (NFC) (article 104 (2) (a) FMIA);

- Non-small counterparties (FC+ or NFC+) report when dealing with small counterparties (FC- or NFC-) (article 104 (2) (b) (1) and (3) FMIA);
- If two counterparties of the same category trade together, the selling counterparty is required to report, unless the parties agree otherwise (article 104 (2) (b) (2) and (3) FMIA).

As a matter of principle, this cascade also applies when a Swiss counterparty trades with a foreign counterparty. However, if the foreign counterparty does not report to an authorized or recognized trade repository, the Swiss counterparty will need to report, thus potentially imposing a reporting obligation on a NFC- (article 104 (3) FMIA). The same rule also applies to trades with exempted counterparties (article 92 (1) Ordinance on Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading of 25 November 2015 (Financial Market Infrastructure Ordinance, FMIO, SR 958.11)). In contrast, trades among NFC- are not subject to a reporting obligation (article 104 (3) FMIA).

Until the publication of FINMA Guidance 02/2017, the reporting duty was on hold.

Authorisation and Licensing by FINMA

On 1 April 2017, FINMA

- authorized SIX Trade Repository AG, Zurich, to operate as a **Swiss trade repository** in accordance with article 74 FMIA; and
- recognized Regis-TR S.A., Luxembourg, as a foreign trade repository in accordance with article 80 FMIA, but only for **the receipt of reports on derivatives transactions in accordance with the FMIA.**

Both trade repositories are entitled to receive reports about derivatives transactions from persons subject to reporting requirements in accordance with article 104 and 105 (2) FMIA in conjunction with article 93 FMIO.

However, Regis-TR-S.A. was not recognized for acting as trade repository under other regimes. Therefore, Swiss counterparties will not be able to rely on substitute compliance, using filings under EMIR to meet their obligations under the FMIA.

Phasing-in of the Reporting Duty

The authorization of SIX Trade Repository AG and the recognition of Regis-TR S.A. triggered the phasing in of the requirements for Swiss counterparties to report their derivatives transactions, based on the following schedule (article 130 (1) FMIA):

- FC+ and CCP will be subject to the reporting duty from **1 October 2017**;
- FC- or a NFC+ will be subject to the reporting duty from **1 January 2018**; and
- in all other cases counterparties are required to fulfill their reporting obligation as of **1 April 2018**

As suggested above, the latter case will apply mainly when a foreign counterparty does not report the trade. In contrast, transactions between two NFC- do not have to be reported.

The duty to report derivatives under the FMIA applies to both OTC and exchange traded derivatives. In case derivatives transactions are executed through a trading venue or an organized trading facility, the aforementioned deadlines are extended by six months (article 130 (2) FMIO).

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