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Financial Market Infrastructure Act REFIT

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Key Take-aways

- 1.** While the Swiss Financial Market Infrastructure Act (FMIA) by and large achieved the intended goals, some adjustments are proposed in the context of the first FMIA REFIT that is currently in consultation.
- 2.** As regards the derivatives regulation, the distinction of small and large Parties shall become an annual determination and small non-financial counterparties shall no longer be subject to a reporting obligation.
- 3.** The order book of exchanges shall include data on beneficial owners and become available to FINMA; the transaction reporting will be centralized with FINMA and shall become more standardized.

1 Introduction

The proposed reform goes back to the recommendations made by the Federal Department of Finance (**FDF**) in the context of its assessment of the Swiss Financial Market Infrastructure Act of 19 June 2015 (**FMIA**) five years after its entry into force on 1 January 2016 that was conducted similar to a “**regulatory fitness and performance programme**” (**REFIT**) for new EU financial market laws. The FDF came to the conclusion that the FMIA by and large achieved the intended goals but that, in some areas, adjustments should be made with the aim to increase the **competitiveness of the Swiss financial center** by taking into account **technological changes** and **developments in international standards and regulations**. The FDF, in consultation with the financial industry, prepared a reform package that was now adopted by the Swiss Federal Council and released as a consultation report (the **FMIA REFIT Report**) together with a proposed draft of the revised FMIA (**D-FMIA**) on 19 June 2024. The consultation will run until 11 October 2024.

Key proposals include the following:

2 Payment Systems

The FMIA currently defines a **payment system** as a system with uniform rules and processes that clears and settles payment transactions. While foreign payment systems are not subject to licensing requirements, they may be subject to **surveillance by the Swiss National Bank**, to the extent they are of systemic importance. Swiss payment systems do at present only require a license by FINMA if this is deemed necessary for the **proper functioning of the financial market** or the **protection of financial market participants**, except if the payment system is operated by a **bank**.

Small non-financial counterparties are excluded from derivatives reporting obligations.

To increase legal certainty with respect to the question when a payment system is subject to a licensing requirement, the D-FMIA provides that the Federal Council shall define thresholds set by reference to **transaction volumes**.

Further, as regards **payment systems operated by banks**, the D-FMIA will require that the following types are distinguished: (1) to the extent it is a payment system of systemic importance, it must be operated by a separate legal entity and be licensed as such; (2) in the event it is not systemically important, but would be subject to a FINMA license if it was operated in a legal entity separate from the bank, i.e. the payment system crosses the materiality thresholds, it must meet the same regulatory requirements as payment systems that would be subject to a FINMA license and (3) any others are, as currently, only subject to the banking regulation.

Like under the current legal framework, **foreign payment**

systems may provide their services in Switzerland on a cross-border basis and have Swiss participants **without being subject to a FINMA license**.

3 Regulation of Financial Market Infrastructures

Key proposals include the following:

- **Liquidation plan:** not only systemically important, but all financial market infrastructures subject to FINMA licensing requirements shall prepare a liquidation plan as part of the FINMA licensing process.
- **Listing of securities with multilateral trading facility (MTF) for DLT instruments:** in line with the rules for exchanges, securities may be listed, not only admitted to trading, on a DLT MTF.
- **Admission and exclusion of participants:** all financial market infrastructures shall be required to define rules and procedures for the admission, the suspension and the exclusion of participants (e.g. in an event of a participant's default).
- **Systemic importance:** the criteria to determine whether a financial market infrastructure is of systemic importance are adjusted to take into account also whether a financial market infrastructure may be subject to operational failures.
- **Rules for systemically important financial market infrastructures:** the new rules will introduce going concern and gone concern capital requirements. They will further specify the requirements for recovery and resolution planning and they will tweak the measures available to FINMA in the process of reorganizing a financial market infrastructure of systemic importance.

4 Trading Venues

4.1. Trade and Transaction Reporting, Record Keeping

While Swiss trading venues remain responsible to oblige their participants to submit trade reports for purposes of compliance with the post-trade transparency requirements, the transaction reporting framework will be changed. Participants of a Swiss trading venue and securities firms will, according to the rules proposed in the D-FMIA, no longer have to submit the transaction reports according to article 39 FMIA and article 51 of the Financial Institutions Act of 15 June 2018 to a reporting office of the trading venue, but to FINMA. FINMA will then, if needed for trade surveillance, share the collected data with the trade surveillance units of the relevant trading venues.

With regard to transaction reporting to FINMA, article 39 para. 2 D-FMIA also stipulates a uniform format for such trade reports to improve their quality and usefulness. The Swiss Federal Council shall issue rules on ordinance level governing the specific information required, exemptions, the form of the transaction reporting and the timing.

The rules on record keeping of transactions (Journalführungspflicht) will continue to apply to all participants of a Swiss trading venue and securities firms without changing the content of such requirement.

4.2. Order Book

As regards the order book held by a Swiss trading venue, the revised rules introduce an obligation for participants to identify the beneficial owners and record such information in the order book (order book-flagging). This information shall be useful for the identification of market abuse. Also, the trading venues will be required to make the order book data available to FINMA within five trading days of the trade date.

4.3. Foreign Trading Venues

Foreign trading venues (exchanges, multilateral trading facilities) will no longer require an authorisation by FINMA before admitting direct participants domiciled in Switzerland, to the extent that they are regulated in a jurisdiction that has been recognized by FINMA as a jurisdiction, where trading venues are adequately regulated, and the relevant foreign authorities provide administrative assistance to FINMA.

4.4. OTFs

As regards organized trading facilities (OTFs), the new rules of D-FMIA will align the FMIA with the current FINMA practices, as set out in FINMA Circular 2018/1, which includes a reporting of the OTF to FINMA prior to going live and FINMA keeping a public register of all OTFs.

5 Derivatives Trading

5.1 Tweaking the rules of counterparty classification

In line with the rules of EMIR, the rules for the determination whether a non-financial counterparty or a financial counterparty is small or large shall no longer require a continuous calculation looking back 30 working days, but it shall become an annual calculation by reference to the month-end amounts of the past 12 months. The other parameters for the determination shall remain as currently in place under the FMIA.

5.2 Substituted compliance

The rules on substituted compliance shall also be simplified in the following respects:

- i. To the extent that a jurisdiction is eligible for being applied instead of the FMIA on a substituted compliance basis, this will allow the application of such rules also for the determination of the **counterparty status** (i.e. the question of the counterparty classification will not remain subject to a Swiss law analysis).
- ii. To the extent that a jurisdiction is applied on a substituted compliance basis, the relevant foreign jurisdiction will not only determine the compliance with the relevant rules (i.e. **“how to comply”** with the clearing obligation or the risk mitigation obligations), but also the scope of the obligations as such (i.e. the question **“whether”** the relevant obligations apply at all).

However, an obligation that would exist under the FMIA, but that is not applicable under a foreign jurisdiction applied on a substituted compliance basis (e.g. EMIR, UK EMIR or the US CFTC rules), must nevertheless be taken into account in the **risk management framework** of a FINMA supervised party.

The revised rules also clarify that obligations that must be complied with on a **one-sided basis without the cooperation of the counterparty** (e.g. the reporting obligations) cannot be complied with by way of substituted compliance.

5.3 Reporting Obligation

As regards a potential reporting obligation for small non-financial counterparties, the current rules provide that such obligations would apply from 1 January 2028 onwards, to the extent that the derivatives transactions are entered into with foreign counterparties. This reporting obligation for **small non-financial counterparties shall no longer be applicable** under the proposed new rules of the D-FMIA.

As regards the content of the **reporting fields**, the FDF further proposes to amend the content of reports to the trade repository by harmonizing such content with **international standards** on ordinance level (e.g. with regard to LEI, UTI and other critical data points). In this way the quality of the reported data shall be improved which should allow to determine financial stability risks more easily.

Also, it is intended that foreign financial market supervisory authorities must be granted **free access to data, to the extent required for the supervisory duties**, provided that there is an agreement between the Swiss and foreign authorities confirming that the **foreign financial market supervisory authority is subject to statutory confidentiality**.

The lowest threshold for the disclosure of shares listed on a Swiss trading venue shall be raised to 5%.

5.4 Obligation to value transactions

In line with the prevailing interpretation of the current rules of FMIA, the D-FMIA clarifies that the obligation to value transactions applies in the event that transactions are entered into between large and small financial or non-financial counterparties. However, the obligation to value **outstanding derivatives transactions applies only to the large counterparty**.

6 Disclosure of Shareholdings

As regards the disclosure of shareholdings, the new rules will raise the lowest disclosure threshold from **3% to 5%**. This will apply generally as well as during a public takeover.

Pursuant to the new rules, **shareholders domiciled or resident abroad** who directly, indirectly or in concert with third parties or in joint agreement with third parties hold at least **10% of the voting rights** of a company shall **designate a domicile for service in Switzerland** as part of the information they disclose in Switzerland. If no such address is communicated, FINMA may publish notices to such shareholders via the Federal Gazette.

Stock exchanges and DLT MTFs that are listing securities must have a dedicated **disclosure office**. While these rules **remain largely unchanged**, disclosure offices will be obligated to (i) **notify the person subject to the disclosure obligation directly in case of a breach** and ask for correction and (ii) **report a criminal offence directly to the FDF**.

7 Insider lists, ad hoc notifications, disclosure of management transactions

The D-FMIA will introduce a new requirement for issuers of securities listed on a Swiss trading venue as well as persons acting of their behalf to keep a **list of persons who have access to inside information** (material non-public information) as part of the intended involvement of such persons (insider lists). Such lists must be kept up to date and they must be kept on record for at least 15 years.

The D-FMIA will also include the obligation to public **ad hoc notifications** and the obligation to **disclose management transactions** that were previously part of the regulations of the relevant trading venue.

8 STORs

The D-FMIA will introduce an obligation to provide **suspicious transaction and order reports (STORs) to FINMA** for all regulated market participants subject to FINMA authorisation or registration in the sense of article 3 of the Financial Market Supervision Act executing or intermediating transactions in financial instruments. They must have relevant systems and processes in place to supervise transactions in financial instruments and be organized in a way that they can detect insider trading and market abuse. They must report any orders and transactions to FINMA, if they have a suspicion that there is or could be insider trading or market abuse.



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