

The Swiss Financial Market Infrastructure Act: An important milestone in the regulatory framework applying to commodity trading

In order to enhance the stability of the financial markets after the 2008 crisis, the G20 and the Financial Stability Board set up requirements on the trading of over-the-counter derivatives (OTC) in 2009. The US and the EU have adopted regulations and the Swiss authorities are now adapting to the new international standards. It was decided in September 2012 to prepare a consultation draft of the new Financial Market Infrastructure Act (FMIA). The contemplated FMIA introduces new provisions for OTC derivatives in Switzerland and aims at facilitating equivalency recognition in the EU and in the US. The three key obligations for derivatives trading under FMIA will be: the settlement of derivatives transactions via a central counterparty, the reporting to a trade repository and the risk mitigation.

The draft law was submitted for official consultation in mid-December 2013 to run until 31 March 2014. Several members of GTSA are subject to the European Market Infrastructure Regulation ("EMIR") in Europe or to the Dodd-Frank Act in the U.S. They have thus gained first hand experience in implementing those regulations and have identified positive aspects and shortcomings of each. GTSA, therefore, launched a dedicated working group, comprising members' representatives and led by Schellenberg Wittmer to proactively participate in this process and respond to the various requests from the Swiss authorities.

GTSA members first answered a questionnaire about the use of OTC derivatives in the commodity trading sector and then took part in the official consultation process launched by the Federal Department of Finance (FDF) / the State Secretariat for International Financial Matters (SIF). GTSA provided a response paper including specific comments on the considerations of the industry towards the new draft law.

During this consultation phase, GTSA coordinated with relevant professional organisations such as Swissbanking and Geneva Financial Center to make sure that the comments made were coherent. The association also shared feedback about the implementation of already existing comparable regulations with SIF and FINMA.

In its response to the consultation, GTSA underlined the need to take into consideration the specificities of the commodity market participants, who are mainly active in physical transactions (spot and derivative) and, who use OTC derivatives primarily to hedge their risks arising from their commercial and logistic activities. The commodity trading houses are not financial institutions and do not represent a risk for the stability of the wider financial system since they are not highly leveraged; nor are they major sources of credit.

It is important that the planned FMIA should not create an additional layer of complexity and costs for Swiss commodity traders, who already have to comply with U.S. and/or EU regulations. Indeed, unnecessary duplications or conflicting requirements would carry a costly administrative burden, especially on the small and medium enterprises, thus deterring them to participate to the derivatives' market and undermining the competitiveness of Switzerland compared with other jurisdictions. Based on the experience gained with already existing regulation, and where implementation difficulties have been identified, GTSA suggested that the Swiss authorities could adopt a smart mix of coherent EU and U.S. regulations.

The definition of "derivative" or "derivative contracts" remains a key aspect of the new FMIA. The EU regulators experienced implementation's problems in connection with the corresponding definitions in the EU directives and regulations which aim at ensuring a convergent application of regulatory requirements across member States.

The consultation period ended on March 31st and the government should send the FMIA to Parliament by early June 2014.

To learn more about the Swiss OTC regulation: Draft FMIA, explanatory report please go to:

http://www.admin.ch/ch/f/gg/pc/documents/2287/FinfraG_LF_fr.pdf
http://www.admin.ch/ch/f/gg/pc/documents/2287/FinfraG_Rapport_fr.pdf

Draft proposal from Schellenberg Wittmer available on:
<http://www.swlegal.ch/CMSPages/GetFile.aspx?disposition=attachment&nodeid=c6d60981-6cb2-40b1-98a6-bb60e888fbb5>

GTSA response papers (available to members on GTSA Intranet) please go to:

<http://my.gtsa.ch/working-groups/compliance-implementation-working-group>

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