

The Financial Market Infrastructure and Market Conduct in Securities and Derivatives Trading Act (FMIA; Financial Market Infrastructure Act) – Changes in the approval and organisation of financial market infrastructures

The FMIA and its associated Financial Market Infrastructure Ordinance (FMIO) and FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA) came into force on 1 January 2016. Through this, the following areas of Swiss capital markets law have been pooled in one act: (i) the licensing and organisation of financial market infrastructures, (ii) trading of derivatives, (iii) the disclosure of shareholdings and public takeover offers, (iv) insider trading and market manipulation and (v) administrative assistance. In three issues of «Short & Simple», we will give you an overview of the relevant changes in these areas. This issue of «Short & Simple» addresses the changes in the areas of licensing and organisation of financial market infrastructures as well as trading platforms and organised trading systems.

You can find the other two issues of «Short & Simple» at the following links: Disclosure of shareholdings, public takeover offers, insider trading, market manipulation and administrative assistance: [Link](#); trading of derivatives: [Link](#).

I. New licensing requirements for central counterparties, central depositories, trade repositories and payment systems

The FMIA regulates the organisation and operation of all financial market infrastructures (stock exchanges, multilateral trading systems, central counterparties, central depositories, trade repositories and payment systems). It introduces new licensing requirements for the following financial market infrastructures:

- Central counterparties
- Central depositories
- Trade repositories
- Payment systems

Licensing conditions and requirements specially tailored for these types of financial market infrastructures have been introduced. These infrastructures were previously subject to the requirements of the Banking Act (BankA) or the Stock Exchange Act (SESTA) under certain conditions. There was previously no regulation of trade repositories, as they have only become neces-

sary due to the new regulations on the OTC trade of derivatives ([Link](#)). For systemically important financial market infrastructures, there continues to exist a complementary supervision and monitoring regime by the FINMA and the SNB. The SNB can lay down special requirements.

Transaction systems that are operated by a bank are exempted from the licensing requirements because the functioning of the financial market and the protection of its participants are already guaranteed by the legislation on banks in this case.

Foreign financial market infrastructures does not require approval by the FINMA, but is required to obtain acknowledgment by the FINMA in certain cases (art. 41, 60, 80 FMIA) or is subject to monitoring by the SNB (art. 19 National Bank Act, NBA).

II. Conditions for approval

The conditions for approval of financial market infrastructures are based on the regulations currently in force, European law and the international Principles for financial market infrastructures (PFMI) of the IOSCO and the Committee on Payment and Settlement (CPSS).

A financial market infrastructure must be a legal person with its seat and central administration in Switzerland (art. 8 para. 1 FMIA). Like other supervised financial intermediaries regulated in other financial market legislation, the financial market infrastructures must be appropriately organised (art. 8 para. 2 FMIA) and have effective regulations on essential controlling functions (internal controlling system, risk management and compliance) (art. 8 para. 3 FMIA). These requirements are substantiated in art. 9 FMIO. An internal auditing system that is independent from the infrastructure's management must also be set up. Furthermore, the financial market infrastructure must identify the instruments and processes it needs for suitable business continuity management so that it can maintain its business operations in case of damaging events or crises (art. 13 FMIA). In this context, the financial market infrastructures must also maintain reliable IT systems (art. 14 FMIA).

The same requirements contained in other financial market legislation also apply to guaranteeing proper management by the persons entrusted with the administration and management of the financial market infrastructures (art. 9 FMIA). In addition, as in previous regulations applying to stock exchanges, the financial market infrastructures must themselves be able to guarantee proper management, which might no longer be given in the case of infighting in the Board of Directors, for example. The law now mentions explicitly that not only individual persons must possess the necessary professional qualifications for their function, but the entire body they are a member of must also possess them as a whole. The financial market infrastructure must provide to the FINMA yearly and within 60 days of the end of the financial year a list of the persons reaching the thresholds for qualified participations, including any changes compared to the previous year (art. 10 para. 3 FMIO).

The necessary minimum capital is specified in art. 13 FMIO for each type of financial market infrastructure (trading platforms CHF 1m, central counterparties CHF 10m, central depositories CHF 5m, trade repositories CHF 500k, payment systems CHF 1.5m).

An approved financial market infrastructure may in principle not operate any other type of financial market infrastructure (art. 10 FMIA). However, operating several financial market infrastructures within the same group of companies is permitted. Offering ancillary services that are subject to approval pursuant to other financial market legislation is permitted if the necessary licenses are obtained. With regard to the consolidated supervision of financial groups with one or more financial market infrastructures, the provisions of the Banking Act apply analogously (art. 15 FMIA).

The delegation of significant services is subject to approval and must be regulated in writing; the financial market infrastructures continue to bear the responsibility for the delegated activities (art. 11 FMIA). Significant services are those services necessary to carry out important business pro-

cesses, in particular in the areas of liquidity management, treasury, risk management, master data management, accounting, staffing, information technology and legal and compliance services (art. 12 FMIO).

Pursuant to art. 1 para. 4 BankA and art. 12 Collective Investment Schemes Act (CISA), the names of the financial market infrastructures may not cause confusion or deceive the public (art. 16 FMIA).

The financial market infrastructures are obliged to provide participants with non-discriminatory and open access to their services (art. 18 FMIA). This is not the case when the conditions imposed for using the services offered are excessive or not objectively justified, or when the prices charged are too high. Restricting access to services for certain types of users is permissible, however, if the security or the efficiency of the financial market infrastructure is thereby increased and if the same cannot be achieved through other measures.

III. Systemically important financial market infrastructures

Systemically important financial market infrastructures are infrastructures whose unavailability can lead to serious losses, liquidity bottlenecks or operational problems for financial intermediaries or to serious disturbances on the financial markets. The same criteria apply for systemically important business processes if the participants are unable to find a substitute for the business process on short notice. Systemically important financial market infrastructures can only be central counterparties, central depositories and payment systems. Stock exchanges and other trading platforms cannot be systemically important because they usually do not bear any counterparty risk and because their services are substitutable. Additional licensing requirements apply for systemically important financial market infrastructures (art. 22 et seqq. FMIA). The special requirements must serve to protect against the risks emanating from such infrastructures and must take established international standards into account. They can concern the contractual basis, the payment means used, risk management, business continuity management and IT systems. The details are to be set out by the SNB in an ordinance. Furthermore, systemically important financial market infrastructures

must develop a stability plan and a processing plan in which they set out the measures taken (art. 24 FMIA, art. 20 FMIO).

IV. Stock exchanges, multilateral trading systems and organised trading systems

By newly regulating trading platforms, the FMIA has rectified existing defects in the area of legal requirements for institutions similar to stock exchanges and in the conditions for transparency in trade. Modelled after European law, the FMIA newly distinguishes between stock exchanges, multilateral trading systems and organised trading systems. The vague and by international comparison no longer contemporary term of institutions similar to a stock exchange has been eliminated and replaced by the more precisely defined terms of multilateral trading systems and organised trading systems. Multilateral trading systems are different from stock exchanges in that securities are admitted for trading, but no listing occurs. Organised trading systems, unlike stock exchanges and multilateral trading systems, aim to enable discretionary trading.

Stock exchanges and multilateral trading systems are now captured by the term "trading platforms". They are among the financial market infrastructures regulated in the FMIA and are thus subject to approval. The supervisory requirements for the organisation of stock exchanges and multilateral trading systems are practically identical and are based in large part on the previous provisions of the SESTA. In particular, the principle of self-regulation continues to apply for trading platforms, although the extent of self-regulation has been concretised in the interest of legal security and transparency.

The trading platforms' obligation to ensure adequate pre- and post-trading transparency is regulated in detail in the FMIA. Pre-trading transparency is limited to shares for the time being. Although the Federal Council is authorised to extend pre-trading transparency to other securities while taking into account recognised international standards and the development of foreign law, it has not taken advantage of its powers in the FMIO currently in force.

Due to reasons of efficiency and practicality, foreign stock exchanges and foreign multilateral trading systems are no longer

required to obtain recognition from the FINMA in every individual case. Instead, they are deemed recognised when the state in which they have their seat adequately regulates and supervises its financial market infrastructures.

Most notably, the FMIA has created a legal basis for regulating high frequency trading; the details have been set out by the Federal Council in the FMIO. The trading platform must have the technical capabilities to recognise high frequency trading, including its traders. It must also demand that high frequency traders report high frequency trades and identify orders generated through high frequency trading as such, store records of all such orders given, including order cancellations, and have at their disposal effective precautions and risk control measures in order to ensure that their systems can ensure orderly trading.

Only licensed banks and securities traders as well as licensed operators of trading platforms are authorised to operate an organised trading system, unless the organised trading system is operated within a financial group that is controlled by a financial market infrastructure or is subject to consolidated supervision by the FINMA.

The operator of an organised trading system has certain specific obligations, in particular with respect to organisation and transparency. For example, the operator must satisfy requirements related to pre- and post-trading transparency. For multilateral and bilateral trade on a liquid market, the same requirements apply for pre-trading transparency as for stock exchanges and multilateral trading platforms. For bilateral trade on an illiquid market, quotes on demand satisfy the requirements. These changes aim at addressing investors' concerns about price transparency (dark pools problem) without Switzerland having to adopt EU regulations whose scope is currently unclear.

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