



Financial Market
Infrastructure Act (FMIA)
Swiss Derivative Regulation



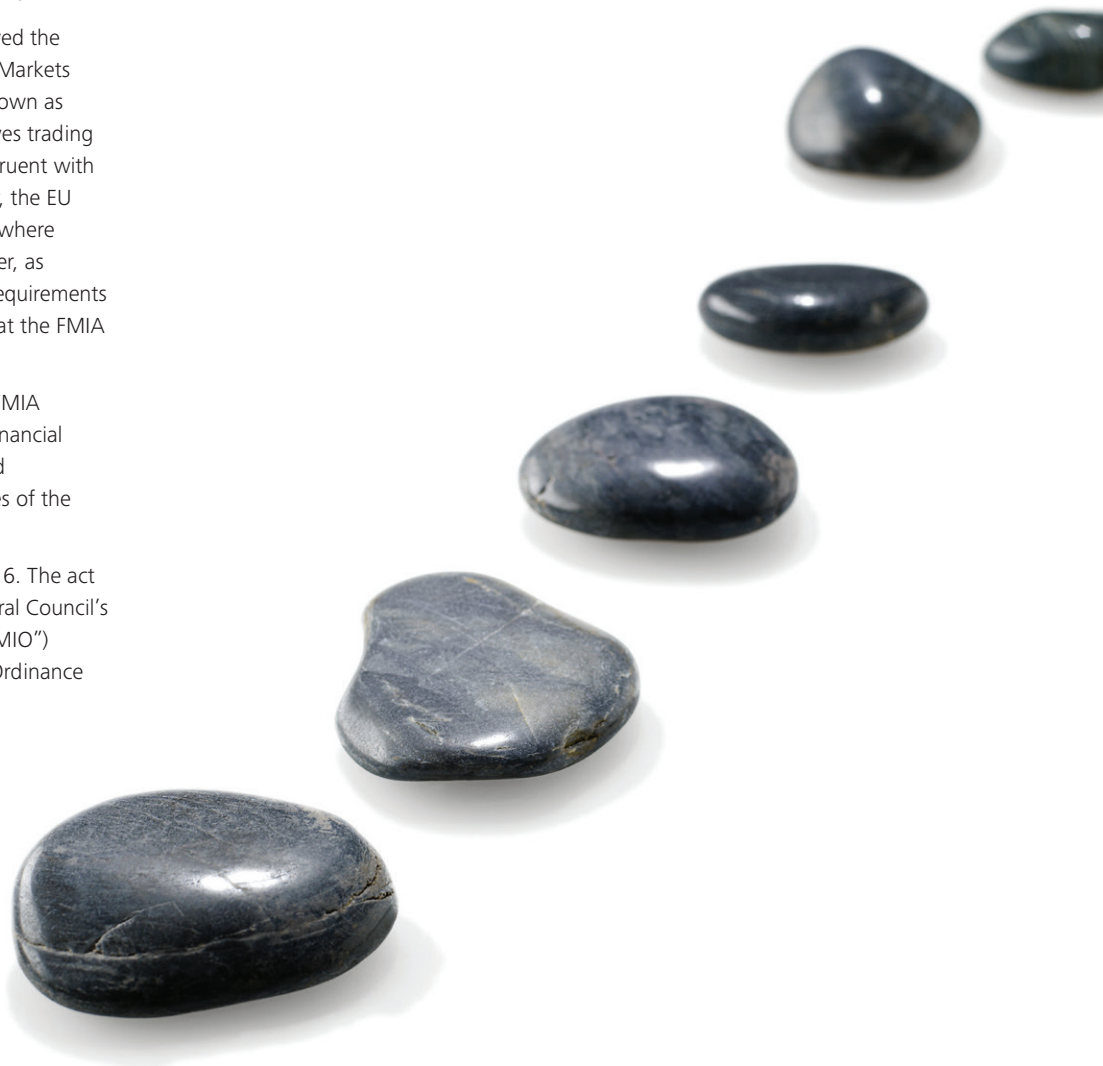
I. Introduction

In the aftermath of the financial crisis, G20 leaders agreed at the Pittsburgh Summit in 2009 on a stricter regulation of over-the-counter (“OTC”) derivatives.¹ As a result the European Union passed the European Market Infrastructure Regulation (“EMIR”)² in 2012 with similar aims as the Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”)³ passed in the US in 2010.

On 19 June 2015 the Swiss Parliament approved the Swiss answer to EMIR and DFA, the Financial Markets Infrastructure Act (“FMIA”, in German also known as “FinfraG”). The Swiss requirements on derivatives trading (see III. hereinafter) are to a large extent congruent with international standards and, most importantly, the EU regulatory framework⁴ with minor deviations where the legislator considers it appropriate. However, as international obligations⁵ and EU regulatory requirements request only “equivalence”⁶, it is expected that the FMIA will receive the necessary EU recognition.

Besides the rules on derivatives trading,⁷ the FMIA regulates the organization and operation of financial market infrastructures⁸ (see II. hereinafter) and incorporates the existing market behavior rules of the Stock Exchange Act.⁹

The FMIA entered into force on 1 January 2016. The act is supplemented by two ordinances, the Federal Council’s Financial Market Infrastructure Ordinance (“FMIO”) and FINMA’s Financial Market Infrastructure Ordinance (“FMIO-FINMA”)¹⁰.



II. Overview of regulatory framework

With regard to financial markets infrastructure, the EU and Swiss regulations are structured differently.

The EU regulatory framework on trading and post-trading (clearing, settlement and custody) consists primarily of the following four directives and regulations:

- MiFID II¹¹ addresses organizational rules and regulatory duties on multilateral systems such as regulated markets ("RM"), multilateral trading facilities ("MTF") and organized trading facilities ("OTF").¹² Custody services are defined as ancillary services according to MiFID II. Additionally, MiFID II sets out standards for position limits for commodity derivatives.¹³
- MiFIR¹⁴ sets out pre- and post-trade transparency rules for trading venues and systematic internalisers on equity instruments¹⁵ and non-equity instruments.¹⁶ It establishes transaction reporting duties as well as a platform trading obligation for "standardized" OTC derivatives and stricter clearing obligations for platform traded derivatives.¹⁷
- EMIR requires certain OTC derivative contracts to be cleared over a central counter party ("CCP") and to be reported to a trade repository ("TR"). Furthermore, EMIR establishes a governance framework for CCP and TR.¹⁸
- CSDR¹⁹ lays down requirements on the settlement of financial instruments and sets out rules on the organization and conduct of central securities depositories ("CSD").²⁰

In contrast, the financial markets infrastructure regulation in Switzerland mainly consists of two acts. The FMIA covers organizational and behavior rules for all financial market infrastructures and sets out regulations for OTC derivative contracts as well as general requirements on market behavior rules, while the Financial Services Act ("FinSA") governs the relationship between financial intermediaries and their clients for financial products. Furthermore, the FinSA introduces uniform prospectus requirements for all securities that are publicly offered or traded on a trading platform, although, where it makes sense, these are geared to EU regulations.

Chart 1

	Trade	Clearing	Settlement	Reporting	Custody
EU	MiFID II	EMIR	CSDR	EMIR	MiFID II
CH	FinSA	FMIA	FMIA	FMIA	FinSA



III. FMIA rules on derivatives trading

1. Overview

Regulatory framework

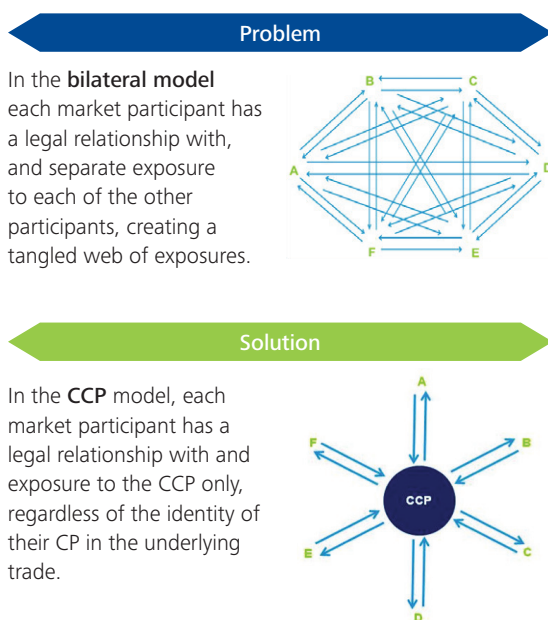
The FMIA requirements on derivative contracts are closely aligned to the European regulatory framework and incorporate the three key duties established under EMIR:

- Mandatory clearing via a CCP, applicable to all standardized OTC derivatives contracts.²¹
- Reporting to a TR for almost all OTC derivative contracts and exchange traded derivative contracts ("ETDs").²²
- Risk mitigation measures in relation to non-centrally cleared OTC derivative contracts (including collateral margining).²³

The overall purpose of these new regulatory requirements is to reduce systematic risks: The clearing over a CCP and the risk mitigation for non-centrally cleared derivatives aim to reduce counterparty risks, while the reporting to a TR ensures increased transparency.

The FMIA and EMIR together will redesign the derivative market from an OTC bilateral market according to the Swiss Code of Obligations ("SCO") to a regulated, centrally cleared market with improved transparency.

Chart 2



Basis for regulatory initiatives

Furthermore, the FMIA provides the legal basis for the implementation of two future regulatory initiatives already in the pipeline:

- Obligation for platform trading.²⁴
- Introduction of position limits for commodity derivatives.²⁵

The two requirements will only be implemented once they have become internationally accepted standards.

2. Scope

The scope and impact of the FMIA may vary depending upon the scope of the business and legal seat of the parties to the derivative contract as well as the nature of the assets involved.

Business scope

The FMIA is applicable to derivative contracts between financial as well as non-financial counterparties. Therefore, Swiss industrial companies as well as trading companies fall under the FMIA.

Multilateral development banks, central banks and non-financial counterparties publicly owned or guaranteed (social security funds etc.) are only subject to the TR reporting requirements.²⁶

Geographic scope

The FMIA applies to counterparties with legal seat in Switzerland, including branches of Swiss legal entities abroad.²⁷ Swiss branches of foreign legal entities are as a general rule not captured by the regulation.²⁸ Where the transaction takes place and whether the derivatives contract is governed by Swiss or foreign law is irrelevant. Accordingly, the territorial scope of the FMIA is worldwide.

Product scope

The product scope is limited to derivatives transactions.²⁹ Accordingly, the act does not apply to structured products and all other transferable securities and structured deposits³⁰ nor to sales and repurchase agreements and – as genuine exception – to securities lending transactions and commodity derivatives which are physically (rather than cash) settled and not traded on an exchange or an organized trading platform.³¹

3. Equivalence

The FMIA and EMIR establish procedures to avoid double regulation of cross-border transactions.³² Thus, a counterparty ("CP") could fulfill its obligations under the FMIA either according to Swiss or foreign law. In the latter case, however, FINMA must accept the relevant foreign regulation and financial market infrastructure (if applicable) as "equivalent".³³

It is expected that EMIR will be recognized as an equivalent regulation. Accordingly, Swiss counterparties undertaking derivative transactions in the EU may fulfil their duties under the FMIA by either complying with the specific FMIA or EMIR rules.

4. Qualification of Counterparties

Financial and non-financial counterparties

The FMIA categorizes counterparties as financial counterparties ("FCP") or non-financial counterparties ("NFCP").

FCPs are inter alia:³⁴

- Banks (including private bankers);
- Securities dealers;
- Insurance and reinsurance companies;
- Fund management companies and asset managers of collective investment schemes;
- Collective investment schemes³⁵ and occupational pension schemes.

In contrast to EMIR, custody banks and representatives of foreign investment schemes and fund distributors are not considered FCPs.³⁶ Asset managers and financial advisors are out of scope.

All other counterparties are considered NFCPs (e.g. trading and industrial companies).³⁷

"Small" counterparties

Small Financial Counterparties ("FCP-") and small non-Financial Counterparties ("NFCP-") are exempt from certain obligations.³⁸ It is worth noticing that the FCP-category does not exist under EMIR.

- A NFCP is considered small under the FMIA if all its open rolling average gross positions³⁹ of derivatives transactions over the last 30 days are below the thresholds for each derivatives category.⁴⁰

The NFCP- changes to an NFCP if it exceeds the relevant threshold for one or more of the derivative categories. After a transition period of four months, the NFCP must clear all open derivative contracts.⁴¹ The NFCP changes to a NFCP- with immediate effect if its open rolling average gross positions for all its relevant derivative categories are below the thresholds.⁴²

- An FCP is considered small under the FMIA if its open rolling average gross positions of all derivative contracts over the last 30 days are below the threshold.⁴³

Only one threshold per FCP applies for all open derivative contracts of an FCP.⁴⁴

Regarding the change of status, the same provisions apply as to NFCP.

Thresholds

The Federal Council defined in the FMIO the following thresholds:⁴⁵

Derivative category	NFCP	FCP
Interest rate derivatives	3.3 bn	8 bn
Commodity derivatives	3.3 bn	
FX derivatives	3.3 bn	
Equity derivatives	1.1 bn	
Credit derivatives	1.1 bn	

When calculating the average gross positions, the following rules apply:⁴⁶

- The notional amount of open derivatives positions is to be considered.
- The calculation is based on current exchange rates.
- OTC derivative contracts voluntarily cleared over a CCP must be included.
- The transactions of all companies of a fully consolidated group must be reflected in the calculation; including companies with a legal seat abroad if they qualify as an NFCP or FCP in Switzerland.⁴⁷
- Under certain conditions, netting of opposite positions is possible.
- NFCP derivative contracts, established for reducing risks (hedging) directly relating to the commercial activities, the liquidity or asset management of the CP or the group, do not need to be included in the calculation.⁴⁹ For FCP these hedging positions are to be considered.

- Derivative contracts which are out of scope of the clearing obligations as well as physically settled currency swaps and currency forward contracts⁵⁰ do not need to be included in the calculation.

5. Clearing with CCPs

The FMIA requests that certain derivative contracts are cleared over a FINMA licensed or recognized⁵¹ CCP.⁵²

After a trade has been executed, the position must be established, net obligations calculated and financial instruments and/or cash made available to secure the positions ("clearing").

The counterparties could fulfill their clearing duty either as direct clearing member of a CCP (direct clearing) or enter into an agreement with a clearing member acting as an intermediary (indirect clearing).

Intra-group transactions and transactions with FCP- and NFCP- are not subject to central clearing.⁵³

Standardized OTC derivatives

Only standardized OTC derivatives must be cleared over a CCP. FINMA will define the derivatives (classes) which must be traded over a CCP.⁵⁴ The regulator will take into consideration:⁵⁵

- Contractual (legal) terms reflecting generally accepted terms, definitions and documents for a specific class of OTC derivative contracts.⁵⁶
- Operational processes of a specific class of OTC derivative contracts include automated post-trade processing and life-cycle events⁵⁷ that are managed in a common manner according to a timetable which is widely agreed among counterparties.

- Volume of liquidity: The stability of the market size and depth in respect of the product so the execution of larger transactions is possible without decisive influence on the market.
- Volume of trades as aggregated nominal value of the traded derivative contracts.
- Availability of pricing information⁵⁸ by providers of market data to market participants on a regular basis.
- Related counterparty risks.

In contrast to EMIR, the FMIA already exempts currency swaps and forward transactions settled on a payment versus payment basis from central clearing.⁵⁹

Enactment

The clearing obligation starts after FINMA has informed the market about the clearing obligation for a specific derivative category and after a transition period between 6 and 12 months, depending on the categorization of the counterparties.⁶⁰

6 months	Derivative transactions newly concluded between clearing members of the same CCP.
12 months	Derivative transactions newly concluded between a clearing member of a CCP and other FCP.
12 months	Derivative transactions newly concluded between FCPs.
18 months	All other derivative transactions newly concluded.

Only transactions that take place after the ending of the transition period fall under this obligation.⁶¹

6. Reporting to Trade Repository

New derivative contracts as well as any modification or termination thereof must be reported to a FINMA licensed or recognized⁶² TR.⁶³

Reporting obligation

The reporting duty is very wide and applies to all derivative contracts, including intra-group transactions and transactions with counterparties excluded from a central clearing obligations. Whether the derivatives are bilaterally or centrally cleared or traded on a regulated market is irrelevant.



Transactions between two NFCP- are exempted from the reporting requirements.⁶⁴

Reporting responsibility

Similar to the US-regulation, the FMIA incorporates a cascade mechanism for the counterparty responsible for reporting.⁶⁵

1st Counterparty	2nd Counterparty	Reporting responsibility
Swiss CCP	any CP	Swiss CCP
non Swiss CCP ⁶⁶	any CP	any CP
Swiss CP	non Swiss CP	Swiss CP ⁶⁷
FCP	FCP	selling FCP
FCP	FCP-	FCP
FCP	NFCP	FCP
FCP	NFCP-	FCP
FCP-	FCP-	selling FCP-
NFCP	NFCP	selling NFCP
NFCP	NFCP-	NFCP
NFCP-	NFCP-	n/a

Transactions over a trading platform or an OTF are reported by the CP closest to the CCP.⁶⁸

The reporting responsibility can be delegated to a third party, e.g. another group company, the other CP or a CCP.⁶⁹ The CP, however, remains responsible and liable for the correct and timely reporting.⁷⁰

Timing and content of report

The requested data is to be submitted to a TR no later than the business day following the conclusion, modification or termination of the derivative contract.⁷¹ The report must as a minimum contain the following information:⁷²

- The CPs of the derivative contracts (the company and its registered seat);
- Type
- Maturity
- Nominal value
- Price
- Settlement date
- Currency
- A valid Legal Entity Identifier (LIE).

Unlike EMIR⁷³, the beneficiary of the rights and obligations arising from the derivative contract should not be reported.⁷⁴

Reports to a foreign TR do not require an exemption according to Art. 271 of the Swiss Penal Code. However, if the report discloses personal data beyond the FMIA, the approval of the affected person is required.⁷⁵

CP must store its documents in relation to derivative contracts in accordance with the general rules on bookkeeping of the SCO.⁷⁶

Enactment

The reporting obligation starts 6 to 12 months after FINMA has licensed or recognized the first TR.⁷⁷ The duration of the transitional period depends on the categorization of the CP:

6 months	For derivatives transactions open at that time if the CP responsible for reporting is a CCP or a FCP.
9 months	For derivatives transactions open at that time if the CP responsible for reporting is a FCP- or a NFCP.
12 months	For all other derivative transactions open to that time.

It is expected that FINMA will license or recognise the first TR in 2016 or early 2017. Therefore, the reporting duty will apply step by step in 2017. If such license or recognition is not requested or cannot be provided or if the process is delayed, the Federal Council has the power to designate another reporting infrastructure.⁷⁸

For derivatives transactions traded over an exchange or an OTF, the transition periods are extended by another 6 months.⁷⁹

7. Risk Mitigation

Applicability

The risk mitigation measures apply only to OTC derivative contracts which are not centrally cleared over a FINMA licensed or recognised CCP.⁸⁰ The reason for a lack of central clearing can be:

- Not all derivative contracts may reach a level of standardization that allows a clearing over a CCP.
- A CP⁸¹ and, due to the bilateral obligation, its CP is exempt from the clearing obligations.
- A transaction is exempt from clearing.⁸²

Since these contracts are bilaterally and not centrally cleared and represent a higher risk potential, the FMIA requests the implementation of risk mitigation measures.⁸³

However, currency swaps and forward transactions (even if bilaterally cleared) are exempted from the risk mitigation measures.⁸⁴

Risk mitigation measures

CPs measure, monitor and mitigate operational and counterparty risks based on derivative contracts. The measures include particularly:⁸⁵

- Timely confirmation of contractual terms; the terms of the relevant OTC derivative contract between the counterparties have to be confirmed within one working day after the conclusion of the transaction.⁸⁶
- Portfolio reconciliation; before concluding a derivative transaction, the CPs must have procedures in place to reconcile their portfolios and master the associated risks, unless the other CP is a NFCP-.⁸⁷ It is possible to delegate the portfolio reconciliation to a third party, e.g. a bank.⁸⁸

The frequency of reconciliations depends on the number of open OTC derivative positions between the relevant CPs.⁹⁰

- Dispute settlement process; CPs shall agree on

> 500	Each business day if this number of OTC derivative positions is open.
51–499	Once a week if between the CPs at least at one moment in a week this number of OTC derivative positions was open.
< 50	Once a quarter if between the CPs at least at one moment in a week this number of OTC derivative positions was open.

procedures to identify disputes between parties early on and resolve them. “Jurisdiction” and “applicable law” can be defined in general terms of business.⁹¹

- Portfolio compression; regular and at least twice a year a portfolio compression is required if this is considered an appropriate measure⁹² to reduce counterparty risks and if the counterparties have 500 or more open OTC derivative contracts which have not been centrally cleared.⁹³

- Daily valuation of outstanding transactions; FCPs and NFCPs which are not small shall monitor daily on the basis of actual market price the value of all outstanding derivative contracts (mark-to-market). If market conditions do not allow marking-to-market of a derivative contract⁹⁴ a marking-to-model shall be carried out. The CP must define the valuation model in its internal guidelines and duly document it.⁹⁵

NFCPs may delegate the daily valuation.⁹⁶

- Exchange of adequate collateral; CPs shall exchange adequate collaterals. The collateral is to be appropriately segregated from their own assets.

Transactions with NFCP- are exempt from the obligation to exchange collateral.⁹⁷ Also, no exchange of collateral is required for intra-group transactions if:⁹⁸

- both CCP are included in the same consolidation;
- both CCP are subject to appropriate and centralized risk-assessment, risk-measurement and risk-control procedures;
- there is no current legal or practical impediment to the prompt transfer of own funds or repayment of liabilities;
- transactions do not take place in circumvention of the obligation to exchange collateral.

However, the requirements apply to non-Swiss CP and therefore, a Swiss CP can only execute the derivative contract with a non-Swiss CCP if it has received collaterals from the foreign entity.

The details of the duties to exchange collateral for non-centrally cleared OTC derivatives are set out in the FMIO. The ordinance describes among others the regulatory amount of initial and variation margin to be posted and collected, the methodologies by which that minimum amount would be calculated and outlines the collateral eligible for the exchange of margins and methods for determining appropriate collateral haircuts.⁹⁹

Enactment

The duty for timely confirmation, for portfolio reconciliation, dispute settlement and portfolio compression shall be implemented within 12 to 18 months after the entry into force of the FMIO. The duration of the transitional period depends on the categorization of the CPs.¹⁰⁰

Timely Confirmation, Portfolio Reconciliation, Dispute Settlement, Portfolio Compression

1 January 2017 (12 months)	For derivative transactions open at that time between either (i) two FCP/NFCP or (ii) a FCP/NFCP with a FCP-.
1 July 2017 (18 months)	For all other derivative transactions open to that time.

The obligation for a daily valuation of outstanding transaction is carried out from 1 January 2017 onwards.¹⁰¹

The duty to exchange adequate collateral in the form of initial and variation margin applies only for derivatives contracts concluded after the end of the relevant transition periods.¹⁰²

The duration of the transitional period of the initial and variation margin requirements depends on the aggregated month end average gross positions of non-centrally cleared derivative contracts.

Initial Margin

1 September 2016–31 August 2017	The CP's aggregated month end average gross positions from March to May 2016 on the group level exceed CHF 3'000 bn.
1 September 2017–31 August 2018	The CP's aggregated month end average gross positions from March to May 2017 on the group level exceed CHF 2'250 bn.
1 September 2018–31 August 2019	The CP's aggregated month end average gross positions from March to May 2018 on the group level exceed CHF 1'500 bn.
1 September 2019–31 August 2020	The CP's aggregated month end average gross positions from March to May 2019 on the group level exceed CHF 750 bn.

Variation Margin

1 September 2016	The CP's aggregated month end average gross positions from March to May 2016 on the group level exceed 3'000 billion CHF.
1 September 2017	All other CPs for non-centrally cleared derivative contracts concluded after 1 March 2017.

8. Platform Trading

In line with MiFIR¹⁰³ in the EU, the FMIA provides the legal basis to introduce the duty to trade "standardized" derivatives contract on trading platforms.¹⁰⁴

The duty to trade via trading platforms applies only to certain centrally cleared derivatives determined by FINMA at a later stage. Transactions with small counterparties and intra-group transactions are not subject to platform trading.¹⁰⁵

The provisions regarding platform trading only enter into force if this is requested by international standards.¹⁰⁶

9. Position Limits for Commodity Derivatives

To limit large concentrations of commodity derivative positions, the International Organization of Securities Commissions IOSCO published in September 2011 Principles for the Regulation and Supervision of Commodity Derivatives Markets. These principles, which will introduce ex ante position limits, have been implemented in MiFID II and will enter into force in January 2017.¹⁰⁷

The provisions on position limits for derivative commodities have been added to the FMIA during the parliamentary debate. However, the act only establishes a delegation of power to the Federal Council to specify rules which limit the size of net positions of derivative contracts a person can hold.¹⁰⁸

According to FMIA, the Federal Council has the power to legislate:¹⁰⁹

- The measurement of the net positions.
- Exemptions for positions held by NFCP which serve as instruments to reduce risks directly linked to the commercial activity of the NFCP or its liquidity or asset management ("hedging transactions").
- The necessary reporting obligations to ensure transparency for commodity derivative trades.

The enforcement of the position limits will be monitored by the RMs, the MTFs and the OTFs.¹¹⁰

The Federal Council will introduce the positions limits only if this is necessary to ensure an organised price building and settlement process as well as to establish convergence between the price on the derivatives market and the underlying commodity market. Thereby, the Federal Council shall take international standards and developments into consideration.¹¹¹

10. Audit

As part of their audit procedures, the external auditors must assess whether the CP complies with its obligations regarding derivative trading.¹¹² The scope of the audit is defined in Art. 728a SCO (ordinary audit) and 729a SCO (limited audit/review):

- The ordinary audit includes a comprehensive report to the CP's board of directors including the auditor's view (positive assurance) on the CP's compliance with the FMIA requirements and its implementing ordinances.
- In case of a limited audit, the SCO requests only a written report to the general meeting of shareholders. Therefore, the FMIO explicitly states that the auditor must inform the board of directors about the results of the limited audit (negative assurance).¹¹³

For FCPs, the audit depends upon the financial market acts applicable to the relevant FCP.¹¹⁴



11. Overview of FMIA obligations

Obligation	FCP	NFCP	FCP-	NFCP-
Clearing	✓ (1)	✓ (1)	n/a	n/a
Threshold per derivative category	n/a	n/a	✓	✓
Overall threshold	✓	✓	n/a	n/a
Reporting to TR	✓	✓	✓	✓ (2)
Risk mitigation	✓	✓	✓	✓
Confirmation of contractual terms	✓	✓	✓	✓
Portfolio Reconciliation	✓ (3)	✓ (3)	✓ (3)	n/a
Dispute settlement procedures	✓	✓	✓	✓
Portfolio compression	✓	✓	✓	✓
Daily valuation	✓ (4)	✓ (4)	n/a	n/a
Outsourcing monitoring	n/a	✓	n/a	n/a
Exchange of collateral	✓ (5)	✓ (5)	✓ (5)	n/a
Platform trading	✓ (6)	✓ (6)	n/a	n/a
Position limits	✓	✓	✓	✓
Exemption for hedging positions	n/a	✓	n/a	✓

1. No clearing obligation if CP is FCP-/NFCP-.
2. No reporting obligation between two NFCP-.
3. No reconciliation required if CP is a NFCP-.
4. No daily valuation required if CP is FCP-/NFCP-.
5. No exchange of collateral if CP is NFCP-.
6. No platform trading obligation if CP is FCP-/NFCP-.

Endnotes

- ¹ See also Principles for financial market infrastructures 2012 of the Committee on Payment and Settlement Systems of the Bank for International Settlement.
- ² Regulation (EU) No 648/2012 of the European parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR").
- ³ Pub.L. 111–203, H.R. 4173.
- ⁴ During discussion in the Swiss Parliament, the Federal Council confirmed its intention not to regulate beyond EU-Regulations (Official Bulletin - the debates, Council of States, 2 June 2015, AB 2015 p. 344).
- ⁵ General Agreement on Trade in Services, Annex on Financial Services, point 3 (recognition).
- ⁶ See ESMA technical advice of 1 October 2013 on third country regulatory equivalence under EMIR - Switzerland.
- ⁷ Art. 93 - 119 FMIA.
- ⁸ Art. 4 - 92 FMIA.
- ⁹ Art. 120 - 143 FMIA.
- ¹⁰ The consultation process on the draft FMIO and draft FMIO-FINMA was opened on 20 August 2015.
- ¹¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ("MiFID II").
- ¹² Art. 18ff. MiFID II.
- ¹³ Art. 57 and 58 MiFID II.
- ¹⁴ Regulation (EU) No 600/2014 of the European Parliament and of the Council of May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ("MiFIR").
- ¹⁵ Shares, depositary receipts, ETFs, certificates and other similar financial instruments.
- ¹⁶ Bonds, structured finance products, emission allowances and derivatives.
- ¹⁷ Art. 24 - 27 MiFIR; Art. 28 - 34 MiFIR.
- ¹⁸ Art. 1 para. 1 EMIR.
- ¹⁹ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 ("CSDR").
- ²⁰ Art. 1 para. 1 CSDR.
- ²¹ Art. 97 - 103 FMIA. See 5. hereinafter.
- ²² Art. 104 - 106 FMIA. See 6. hereinafter.
- ²³ Art. 107 - 111 FMIA. See 7. hereinafter.
- ²⁴ Art. 112 - 115 FMIA. See 8. hereinafter.
- ²⁵ Art. 118 and 119 FMIA. See 9. hereinafter.
- ²⁶ Art. 93 para. 4 FMIA; Art. 79 FMIO.
- ²⁷ Art. 93 para. 1 FMIA.
- ²⁸ The Federal Council may require Swiss branches of foreign entities to comply with the FMIA rules if they are not subject to an equivalent home country regulation (Art. 93 para. 5 FMIA and Art. 78 FMIO).
- ²⁹ Derivative or derivative contract means financial contracts whose value depends on one or more underlying assets and which do not represent cash transactions (Art. 2 lit. c FMIA). See also MiFID II, Annex I, Section C points 4 - 10.
- ³⁰ Art. 80 FMIO.
- ³¹ According to the delegation norm in Art. 94 para. 4 FMIA, the Federal Council can exempt derivatives from FMIA, if this is required by the implementation of international standards (e.g. electricity and gas when traded over a trading platform).
- ³² Art. 95 FMIA, Art. 13 EMIR.
- ³³ Art. 41 and 95 FMIA; Art. 81 FMIO.
- ³⁴ Art. 93 para. 2 FMIA.
- ³⁵ Art. 76 FMIO.
- ³⁶ Art. 2 point 8 EMIR.
- ³⁷ Art. 93 para. 3 FMIA.
- ³⁸ See, in particular, overview under 11. hereinafter.
- ³⁹ The average price of a financial product over a certain time period, and calculated on an ongoing basis. When a more recent variable is included in the calculation of the average, the latest variable of the series is removed.
- ⁴⁰ Art. 98 para. 1 FMIA.
- ⁴¹ Art. 98 para. 2 FMIA. This includes the hedging derivative class.
- ⁴² Dispatch to the FMIA, p. 86.
- ⁴³ Art. 99 FMIA.
- ⁴⁴ Art. 100 para. 2 FMIA.
- ⁴⁵ Art. 88 FMIO.
- ⁴⁶ Art. 89 FMIO.
- ⁴⁷ The FMIA does not differentiate between domestic and cross-border transactions (vs. Art. 3 EMIR) and a prior approval from the regulator (FINMA) is not required (vs. Art. 4 para. 2 lit. a EMIR).
- ⁴⁸ Art. 103 FMIA.
- ⁴⁹ Art. 98 para. 3 FMIA.
- ⁵⁰ Art. 89 lit. g FMIO.
- ⁵¹ Recognition of foreign CCP according to Art. 41 FMIA.

⁵² Art. 97 FMIA.

⁵³ Art. 97 para. 2 and 103 FMIA.

⁵⁴ Art. 101 FMIA.

⁵⁵ Art. 6 FMIO-FINMA. See also Art. 5 para. 4 EMIR and Art. 7 Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivative contracts not cleared by a CCP (hereinafter "Commission Regulation No 149/2013").

⁵⁶ ISDA Master Netting Agreements etc.

⁵⁷ Trade capture and revision, confirmation, settlement, close-out, termination etc.

⁵⁸ A key factor is that sufficient price transparency in the market is available to allow a fair, reliable and generally accepted pricing.

⁵⁹ Art. 101 para. 3 FMIA.

⁶⁰ Art. 85 FMIO.

⁶¹ Swiss law renounces of the frontloading (Art. 85 FMIO), not the EU (consideration 20 MiFIR).

⁶² Recognition of foreign TR in accordance with Art. 80 FMIA.

⁶³ Art. 104 FMIA (see Art. 9 EMIR).

⁶⁴ Art. 104 para. 3 FMIA.

⁶⁵ See Art. 104 para. 2 - 4 FMIA.

⁶⁶ If the non-Swiss CPP is not reporting (Art. 104 para. 4 FMIA).

⁶⁷ If the non-Swiss CP is not reporting (Art. 104 para. 2 lit. c FMIA).

⁶⁸ Art. 92 para. 2 FMIO.

⁶⁹ Art. 104 para. 5 FMIA. See also Art. 9 para. 1 sub-paragraph 3 EMIR.

⁷⁰ If the reporting is not outsourced, the CP must establish a reporting process including data sourcing and collection as well as establishing the necessary infrastructure and relationship with a TR.

⁷¹ Art. 105 para. 1 FMIA.

⁷² For a full list of items to be reported see Annex 2 FMIO. See also Art. 9 para. 5 EMIR in connection with table 1 and 2 of the Commission delegated Regulation (EU) No 148/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories.

⁷³ See Art. 9 para. 5 EMIR.

⁷⁴ Dispatch to the FMIA, p. 92.

⁷⁵ Art. 105 para. 4 FMIA. See also dispatch to the FMIA, p. 92 f.

⁷⁶ 10 years from the end of the business year according to Art. 958f SCO, Art. 106 FMIA (Art. 9 para. 2 EMIR requires that CPs keep a record of any derivative contract they have concluded and any modification for at least 5 years following the termination of the contract).

⁷⁷ Art. 130 para. 1 FMIO.

⁷⁸ Art. 104 para. 6 FMIA.

⁷⁹ Art. 130 para. 2 FMIO.

⁸⁰ Art. 107 para. 1 FMIA.

⁸¹ Art. 93 para. 4 (multilateral development banks etc.) and 94 para. 1 FMIA (Federal Government, Cantons, Municipalities, Swiss National Bank SNB, Bank for International Settlement BIS), NFCP- and FCP- etc.

⁸² E.g. intra-group derivative contracts.

⁸³ Art. 107 FMIA. See also Art. 11 EMIR.

⁸⁴ Art. 107 para. 2 FMIA (providing further exceptions).

⁸⁵ Art. 108 - 110 FMIA.

⁸⁶ Art. 108 lit. a FMIA and Art. 95 FMIO. For FCP- and NFCP- the confirmation period is extended by another working day (Art. 95 para. 3 FMIO). See also Art. 11 para. 1 lit. a EMIR in connection with Art. 12 Commission Regulation No 149/2013 (fn. 55).

⁸⁷ Art. 108 lit. b FMIA and 96 FMIO. See also Art. 14 Commission Regulation No 149/2013 (fn. 55).

⁸⁸ Art. 96 para. 3 FMIO. In this case, the client and the bank sign a reconciliation agreement.

⁸⁹ Art. 96 Abs. 4 FMIO. Derivative contracts which are out of scope of the clearing obligations are not to be included in the calculation (Art. 96 para. 5 FMIO).

⁹⁰ Art. 96 Abs. 4 FMIO. Derivative contracts which are out of scope of the clearing obligations are not to be included in the calculation (Art. 96 para. 5 FMIO).

⁹¹ Art. 108 lit. c FMIA and Art. 97 FMIO. See also Art. 11 para. 1 lit. b EMIR in connection with Art. 15 Commission Regulation No 149/2013 (fn. 55).

⁹² The measures must not impact internal risk and control procedures and should be proportional to the effort (see Art. 98 FMIO).

⁹³ Art. 108 lit. d FMIA and Art. 98 FMIO. See also Art. 14 Commission Regulation No 149/2013 (fn. 55).

⁹⁴ This is the case if the market is inactive or if the range of reasonable fair values estimates is significant and the probabilities of the various estimates cannot reasonably be assessed. A market of an OTC derivative is considered inactive if when quoted prices are not readily and regularly available and those prices available do not represent regularly occurring market transactions on an arm's length basis (Art. 99 para. 1 and 2 FMIO).

⁹⁵ The model must be approved by the board of directors, by the management body or by one of its committees. The model should incorporate all

factors that counterparties would consider in setting a price and must be consistent with accepted methodologies for pricing financial instruments. It should be calibrated and tested for validity using prices from any observable current market transactions in the same financial instrument or based on any available observable market data (Art. 99 para. 3 FMIO).

⁹⁶ Art. 109 para. 4 FMIA. See also Art. 11 para. 1 lit. b EMIR in connection with Art. 16 and 17 Commission Regulation No 149/2013 (fn. 55).

⁹⁷ Art. 110 FMIA. See also Art. 11 para. 3 EMIR.

⁹⁸ Art. 111 FMIA. See also Art. 11 para. 7 EMIR.

⁹⁹ Art. 110 FMIA and Art. 100 - 105 FMIO. See also Second Consultation Paper of ESMA, EBA, EIOPA, Joint Committee of the European Supervisory Authorities regarding draft Regulatory Technical Standards on risk-mitigation techniques for OTC-derivative contracts not cleared by a CCP under Article 11(15) of Regulation (EU) No 648/2012.

¹⁰⁰ Art. 131 para. 1 FMIO.

¹⁰¹ Art. 131 para. 2 FMIO.

¹⁰² Art. 131 para. 3 FMIO.

¹⁰³ Art. 28 para. 1 MiFIR.

¹⁰⁴ Art. 112 FMIA and Art. 108 - 112 FMIO.

¹⁰⁵ Art. 112, 113 and 115 FMIA.

¹⁰⁶ Art. 164 para. 3 FMIA.

¹⁰⁷ Art. 57 and 58 MiFID II.

¹⁰⁸ Art. 118 FMIA. Hedging positions of NFCP are exempt from position limits (Art. 118 para. 2 lit. b FMIA). See also Art. 57 para. 1 MiFID II.

¹⁰⁹ Art. 118 para. 2 FMIA.

¹¹⁰ Art. 119 FMIA.

¹¹¹ Art. 118 para. 1 FMIA.

¹¹² Art. 727 and 727a SCO.

¹¹³ Art. 114 para. 4 FMIO.

¹¹⁴ Art. 116 FMIA.

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