

FINMA Guidance

03/2019

**Recognition of equivalence of CFTC risk mitigation obligations
for transactions in OTC derivatives that are not cleared
centrally**

24. September 2019

To fulfil the risk mitigation obligations applying to transactions in non-centrally cleared OTC derivatives (Arts. 107-111 FMIA; Arts. 94-107 FMIO) under foreign law, it is necessary that FINMA recognises the foreign law as equivalent (Art. 95 FMIA; Art. 81 FMIO). However, this does not require recognition of a financial market infrastructure as the latter is not necessary to fulfil the aforementioned obligations.

So far, FINMA has recognised certain areas of derivatives regulations of the EU and the United Kingdom as provisionally equivalent in its Guidance 01/2016 and 01/2019. Furthermore, FINMA has drawn up principles in number 2.1 of its Guidance 01/2016 for recognising foreign derivative obligations. According to these, when assessing other foreign jurisdictions, FINMA will observe the overarching objective of the FMIA of equivalence with the European regulations. In its Implementing Decision (EU) 2017/1857 of 13 October 2017¹, the European Commission recognised the legal, supervisory and enforcement arrangements of the USA for derivatives transactions supervised by the Commodity Futures Trading Commission as equivalent to certain requirements of Article 11 of Regulation (EU) No. 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories.

The basis according to US law of the risk mitigation obligations for non-centrally cleared OTC derivatives is Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("DFA"). Section 1a (47) of the US Commodity Exchange Act ("CEA"; 17 U.S. Code, Chapter I²) defines the group of OTC derivatives which the CFTC is responsible for regulating (so-called swaps). The regulatory framework of the risk mitigation obligations applicable to the trading of swaps is set out in section 4s(i) CEA (17 U.S. Code, chapter I, section 6s). As regards the personal scope, these obligations apply to swap dealers ("SD") and major swap participants ("MSP") registered with the CFTC. Section 4s(i) CEA is supplemented by part 23³ of the CFTC Regulations.

The provisions contained in part 23 of the CFTC Regulations concerning the timely confirmation, portfolio reconciliation, resolution of disputes, portfolio compression, valuation, and initial and variation margin satisfy the relevant international standards⁴ that also underlie Arts. 107-111 FMIA; Arts. 94-107 FMIO.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D1857&from=EN>

² <https://www.law.cornell.edu/uscode/text/17/chapter-1>

³ <https://www.ecfr.gov/cgi-bin/text-idx?SID=bff89807d5c4f0784ab1f3d343fd7d60&mc=true&node=pt17.1.23&rgn=div5>

⁴ Cf. Dispatch of 3 September 2014 on the Financial Market Infrastructure Act (FMIA), BBl. 2014 7483, 7497.

Against this background, FINMA recognises the law of the United States with regard to risk mitigation obligations including initial and variation margin for transactions in non-centrally cleared OTC derivatives that are regulated and supervised by the CFTC as equivalent in accordance with Art. 95, let. a FMIA and Art. 81 FMIO.