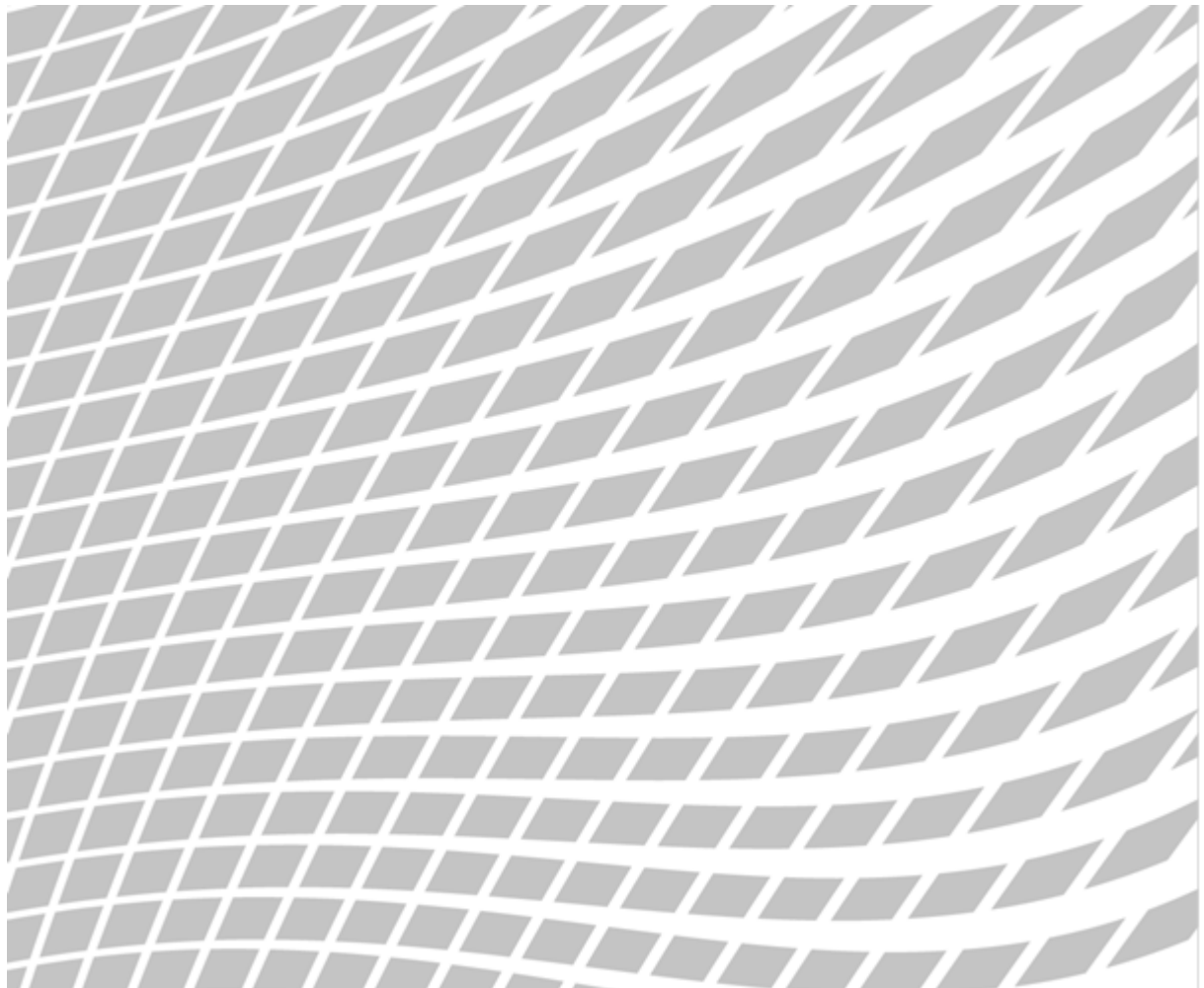


6 July 2016

FINMA Guidance 01/2016

Financial Market Infrastructure Act: FINMA's next steps



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Abbreviations

CCP	Central counterparty	(Art. 48 FMIA)
FC	Financial counterparty	(Art. 93 para. 2 FMIA)
FC-	Small financial counterparty	(Art. 99 para. 1 FMIA)
NFC	Non-financial counterparty	(Art. 93 para. 3 FMIA)
NFC-	Small non-financial counterparty	(Art. 98 para. 1 FMIA)
OTF	Organised trading facility	(Art. 42 FMIA)

1 Introduction

With the entry into force of the Financial Market Infrastructure Act (FMIA) and the Financial Market Infrastructure Ordinance (FMIO) on 1 January 2016, FINMA was given responsibility for issuing implementing provisions and carrying out specific authorisation and recognition processes. To this end, FINMA issued its own Financial Market Infrastructure Ordinance (FMIO-FINMA) on 1 January 2016.

On 29 June 2016, the Federal Council passed amendments to the transitional periods set out in Article 129 FMIO and Article 58a of the Stock Exchange Ordinance (SESTO) under which specific provisions relating to trading venues and organised trading facilities (OTFs) will now not come into effect until 1 January 2018. The amendments to FMIO also have an indirect impact on the record-keeping and documenting requirements (Art. 1 FMIO-FINMA) and the reporting requirements for securities and derivatives transactions (Arts. 2-5 FMIO-FINMA). The new time limits are intended to give financial market participants the time they require for technical implementation.

Furthermore, FINMA authorises Swiss financial market infrastructures (Art. 4 FMIA) and recognises foreign financial market infrastructures such as trading venues (Art. 41 FMIA), central counterparties (Art. 60 FMIA) and trade repositories (Art. 80 FMIA). This is associated with the phased introduction of the requirement to clear derivatives transactions through authorised or recognised central counterparties (Art. 85 FMIO) and the requirement to report derivatives transactions to a trade repository (Art. 130 FMIO). Owing to the lack of urgency¹, FINMA Guidance 01/2016 does not cover the FINMA requirement to trade certain derivatives on a trading venue or an OTF in accordance with Articles 112-115 FMIA.

The new provisions set out in FMIA, FMIO and FMIO-FINMA require FINMA to make changes to its previous supervisory practice as reflected in its circulars and other documents (specifically, Circular 2008/4 "Securities Journals" and Circular 2008/11 "Disclosure Requirements for Securities Transactions") and issue new circulars (a new circular on OTFs is planned).

The statutory framework relating to the authorisation of foreign participants in trading venues (Art. 40 FMIA) and the recognition of foreign trading venues (Art. 41 FMIA) will remain largely unchanged.²

Ultimately, in order for the requirements for derivatives trading under foreign law to be met, FINMA must recognise foreign law as equivalent and must also recognise foreign financial market infrastructures (Art. 95 FMIA; Art. 81 FMIO). In this context, FINMA will concentrate initially on assessing the equivalence of European regulations. Since some European provisions relating to the definition of requirements for derivatives trading have not yet been passed, FINMA recognises specific European

¹ Entry into force of the requirement to trade derivatives on trading venues in accordance with Article 28 MiFIR has been postponed to 3 January 2018 (see Art. 55 MiFIR and Art. 1 para. 14 Regulation (EU) 2016/1033 of 23 June 2016).

² Updated FINMA guidelines on these issues are available at: [https://www.finma.ch/en/authorisation/financial-market-infrastructures-and-foreign-market-participants/.](https://www.finma.ch/en/authorisation/financial-market-infrastructures-and-foreign-market-participants/)

Union rules as provisionally equivalent and extends the transitional periods for the exchange of collateral. This enables counterparties which are subject to Swiss regulations to meet these requirements under the European rules provisionally, provided that the relevant conditions are met.

In addition, FINMA will undertake a regular equivalence assessment process regarding the relevant European regulations. FINMA will report on its decision regarding any definitive confirmation of the provisional equivalence recognition in due course.

Conversely, the relevant foreign authorities will, where applicable, assess the equivalence of the Swiss regulations in terms of the relevant foreign legislation and recognise them where appropriate. FINMA is already in contact with the European Union regarding the assessment and recognition of the equivalence of Swiss regulations on derivatives trading in relation to the European regulations.³

Against this background and in the context of FINMA's statutory remit and supervisory practice, FINMA is required to carry out a variety of follow-up activities in addition to the issuing of FMIO-FINMA, which has already occurred. The objective of this guidance is therefore to inform financial market participants about the current status of both the follow-up activities and the next steps to be taken.

2 Equivalence assessments

2.1 Equivalence assessments by FINMA

Within the scope of its statutory remit, FINMA assesses foreign law to determine its equivalence with the Swiss requirements set out in the section on derivatives trading (Art. 95 let. a FMIA; Art. 81 FMIO). Consequently, Swiss counterparties could meet their derivatives trading obligations for cross-border derivatives transactions and – given a sufficient objective connection with foreign law as defined in Article 81 para. 3 FMIO – those for some domestic transactions, where appropriate, under foreign law which is recognised as equivalent.⁴

It should be noted that these requirements under equivalent foreign law, apart from the risk mitigation obligations, must be met through a foreign financial market infrastructure which is recognised by FINMA (Art. 95 let. b FMIA).

FINMA will concentrate initially on assessing the equivalence of the corresponding European regulations (see 2.2 below). When assessing other jurisdictions, FINMA will observe the claim, which underlies FMIA, of equivalence with the European regulations. The recognition of jurisdictions which have not (yet) been recognised as equivalent by the European Union could jeopardise this goal.

³ See Article 13 of Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

⁴ See dispatch of 3 September 2014 on the Financial Market Infrastructure Act (FMIA), BBl. 2014 7483, 7566 (in German) and the explanatory report of 25 November 2015 on the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, p. 36 f. (in German).

FINMA will report publicly whenever it recognises the equivalence of regulations.

2.2 Provisional recognition of the equivalence of the European regulations

When FINMA undertakes an equivalence assessment under Article 95 let. a FMIA, the foreign regulations submitted to it must, as a rule, be definitive and have been adopted.

In Regulation No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR), the European Union introduced provisions for regulating OTC derivatives. This took place – as was the case with FMIA – primarily in view of the findings of the September 2009 G-20 summit in Pittsburgh.⁵

The Financial Stability Board regularly publishes reports on the progress of implementation in its member states, which include both Switzerland and the European Union. The current (tenth) progress report of 4 November 2015 notes that as of the end of September 2015 the European Union had largely issued the relevant regulations with the exception of the exchange of collateral in the case of OTC derivatives transactions (see section 3 below).⁶

Since the European Union has not yet definitively passed all its regulations for derivatives trading, a corresponding results-oriented comparison with the definitively passed Swiss regulations on derivatives trading may at present be only partially possible at implementing provision level. At the statutory level, however, both EMIR and FMIA define very similar regulations for the clearing of OTC derivatives transactions through a central counterparty (Art. 97 para. 1 FMIA; Art. 4 EMIR), the reporting of derivatives transactions to a trade repository (Art. 104 para. 1 FMIA; Art. 9 EMIR) and risk mitigation for OTC derivatives transactions (Art. 107 para. 1 FMIA; Art. 11 EMIR).

In this context and to give financial market participants sufficient lead time for technical implementation, FINMA recognises the above-mentioned European Union regulations as provisionally equivalent within the meaning of Article 95 let. a FMIA. This permits the counterparties which are subject to the Swiss requirements set out in Article 97 para. 1 FMIA, Article 104 para. 1 FMIA and Article 107 para. 1 FMIA to meet these requirements under the European regulations from the date on which they come into force, provided that the relevant conditions are met. Apart from the risk mitigation obligations, where Swiss requirements are met by adhering to European regulations, this must be done through a foreign financial market infrastructure recognised by FINMA (Art. 95 let. b FMIA).

In addition, FINMA will carry out a regular equivalence assessment process to evaluate the requirements in Article 81 paras. 1 and 2 FMIO under due consideration of the regulations then definitively passed by the European Union. FINMA will then report on its decision regarding any definitive confirmation of the provisional equivalence recognition in due course.

⁵ See dispatch of 3 September 2014 on the Financial Market Infrastructure Act (FMIA), BBl. 2014 7483, 7497 (in German).

⁶ See OTC Derivatives Market Reforms, Tenth Progress Report on Implementation of 4 November 2015, page 4.

2.3 Equivalence assessment by the European Union

EMIR defines a third country regulation under which the European Commission can declare the regulations enacted in a third country to be equivalent to the European regulations (Art. 13 EMIR).

The European Commission is responsible for the equivalence assessment in EMIR in line with its applicable rules and procedures. FINMA is in contact with the European Commission regarding the assessment and recognition of the equivalence of the Swiss regulations on derivatives trading. The European Commission will decide the next steps to be taken.

3 Deadline extension for the exchange of collateral

On 8 March 2016, the three European supervisory authorities (EBA, ESMA and EIOPA) referred the draft of the regulatory technical standards on risk mitigation techniques for non-centrally cleared OTC derivatives transactions (RTS) to the European Commission for their scrutiny. At present, therefore, there are no definitively passed RTS regarding the exchange of collateral. However, based on the draft RTS it can be assumed that the definitive regulations will be based substantially on international standards; this is also true of the corresponding Swiss regulations.⁷

Previously certain Swiss regulations on the exchange of collateral would have been in force as of 1 September 2016 on the basis of the transitional provisions in the FMIO (Art. 131 para. 4 let. a; Art. 131 para. 5 let. a FMIO). However, the FMIO empowers FINMA to extend the deadlines defined in Article 131 FMIO generally or on a case-by-case basis in order to give due consideration to recognised international standards and developments in foreign law (Art. 131 para. 6 FMIO).

FINMA aims to align the deadlines in accordance with Article 131 paras. 4 and 5 FMIO with those of the EU, and subsequently with the relevant international standards. As entry into force of the RTS has not yet been specified, there has been some uncertainty about the actual deadlines to be respected. **Based on Article 131 para. 6 FMIO – where Article 131 paras 4 and 5 FMIO are appropriate – FINMA is extending the transitional deadlines for the relevant Swiss requirements until such a time as the corresponding future requirements must be met in line with the relevant European regulations.** This deadline extension applies only where the deadlines in the forthcoming, finalised European regulations differ from those in Article 131 paras. 4 and 5 FMIO with regard to the entry into force of the relevant requirements.

Once the corresponding European regulations on the exchange of collateral are finalised and adopted, FINMA will provide more details about the parallel deadline(s) in Switzerland in accordance with Article 131 paras. 4 and 5 FMIO.

⁷ See explanatory report of 25 November 2015 on the Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading, page 45 ff., and the draft of the regulatory technical standards on risk mitigation techniques for non-centrally cleared OTC derivatives transactions of 8 March 2016, page 5 (in German and French).

4 Organised trading facilities

4.1 Authorisation and recognition requirement for the operation of organised trading facilities (OTFs)

The operator of an OTF requires a licence as a bank or securities dealer or authorisation or recognition as a trading venue (Art. 43 para. 1 FMIA). Accordingly, in contrast to financial market infrastructures, there is no separate authorisation or recognition requirement for the operation of an OTF as such, provided that the conditions set out in Article 43 FMIA are met.

As a matter of principle, there is no recognition requirement for foreign OTFs under FMIA. Operators are, however, at liberty to undergo a recognition process for Switzerland (see FINMA guidelines on submitting applications for recognition of foreign trading venues of 5 April 2016, page 5⁸).

4.2 Amended transitional provisions

For one part of the Federal Council's regulatory provisions, the transitional provisions which apply to the operation of an OTF provide for transitional periods which were extended by the Federal Council on 29 June 2016 to 1 January 2018 (Art. 129 para. 1 FMIO in conjunction with Art. 40 sentence 2 FMIO and Arts. 41-43 FMIO).

The transitional provisions do not apply to Articles 38, 39 and 40 sentence 1 FMIO. Consequently, these provisions are to be applied irrespective of the transitional provisions (for the new FINMA circular on OTFs, see section 4.3 below).

4.3 New circular

FINMA plans to publish a new circular on the operation of OTFs by the spring of 2017 and will run a consultation on it towards the end of 2016. The circular will define the regulatory provisions relating to the operation of an OTF (Arts. 38-43 FMIO). The new circular will establish FINMA's practice in this area, whereby the provisions on operating an OTF within the meaning of the interpretation set out in the circular are to be met. FINMA will then base its ongoing supervision on the circular on operating organised trading facilities. Concerning the requirements which are set out in Articles 39 and 40 sentence 1 FMIO and are already in force, FINMA currently expects supervised institutions to interpret the corresponding provisions in a responsible manner when applying the law.

⁸ These guidelines are available at <https://www.finma.ch/en/authorisation/financial-market-infrastructures-and-foreign-market-participants/>.

5 Record-keeping and documenting requirements and the reporting requirements for securities and derivatives transactions

5.1 Amended transitional provisions

The amendments to the transitional provisions passed by the Federal Council on 29 June 2016 for specific provisions relating to trading venues and the operation of OTFs extend the previous transitional periods to 1 January 2018 (Art. 129 FMIO; Art. 58a SESTO). The new time limits are intended to give financial market participants the time they require for technical implementation.

The amended transitional provisions also have an indirect impact on record-keeping and documenting requirements (Art. 1 FMIO-FINMA) and the reporting requirements for securities and derivatives transactions (Arts. 2-5 FMIO-FINMA). Since the legal provisions governing transition are therefore addressed in FMIO, FINMA is not empowered to issue transitional provisions at FMIO-FINMA level.

5.2 Amendments to existing circulars

Following the introduction of the new and amended provisions on record-keeping and documenting requirements and the reporting requirements for securities and derivatives transactions, FINMA intends to update its supervisory practice by revising and issuing existing circulars by the spring of 2017. FINMA will therefore conduct consultations towards the end of 2016 in order to take account, where possible, of the needs of financial market participants.

The circulars affected are Circular 2008/4 "Securities Journals" and Circular 2008/11 "Disclosure Requirements for Securities Transactions". Issues to be addressed include the reference for identifying the beneficial owner involved in the transaction (Art. 3 let. k FMIO-FINMA in conjunction with Art. 37 para. 1 let. d FMIO and Art. 31 para. 1 let. d SESTO) and the revision of the rules governing exceptions.

Where appropriate, other circulars may be updated; in which case the changes may also be of an editorial nature (e.g. updates of legal references).

6 Introduction of the reporting requirement for derivatives

6.1 Subject matter of the report to a trade repository

Both derivatives transactions which counterparties execute between themselves without using the services of a trading venue (OTC derivatives transactions) and derivatives transactions which are executed through a trading venue must be reported by the counterparty specified in law to a trade repository which has been authorised or recognised by FINMA (Art. 104 FMIA).

6.2 Phased introduction of the reporting requirement

The reporting requirement will be phased in over time and will depend on the character of the counterparty in question as defined by law. The deadlines run from the date on which FINMA authorises a Swiss trade repository or recognises a foreign trade repository (Art. 130 para. 1 FMIO). This has not yet occurred.

Consequently, as set out in Article 104 FMIA, with effect from the initial authorisation or recognition of a trade repository, open derivatives transactions must be reported at the latest by the respective start of the reporting requirement after:

- 6 months if the counterparty which is required to report is a financial counterparty (FC) or a central counterparty (CCP);
- 9 months if the counterparty which is required to report is a small financial counterparty (FC-) or a non-financial counterparty (NFC);
- 12 months in all other cases. However, transactions between two small non-financial counterparties (NFC-) do not have to be reported.

The deadlines are extended by 6 months in the case of derivatives transactions which are executed through a trading venue or OTF (Art. 130 para. 2 FMIO).

6.3 Authorisation and recognition of trade repositories

As financial market infrastructures, Swiss trade repositories must be authorised by FINMA (Art. 4 para. 1 in conjunction with Art. 2 let. a no. 5 FMIA). FINMA issues authorisation if the conditions set out in FMIA are met (Art. 5 in conjunction with Art. 6 ff. und Art. 74 ff. FMIA).

A trade repository with its registered office outside Switzerland must be recognised by FINMA before it can accept reports regarding derivatives transactions under Article 104 FMIA (Art. 80 para. 1 FMIA). The recognition requirements are based on Article 80 paras. 2-4 FMIA.

As mentioned in section 6.2, authorisation of a Swiss trade repository or the recognition of a foreign trade repository triggers the deadlines set out in law by which the counterparty must comply with the reporting requirement. Against this background, FINMA intends, to the extent possible in light of the applications submitted and the processing of these applications, to authorise or recognise several trade repositories at the same time. It should be noted that the process for recognising foreign trade repositories is dependent to some extent on actions to be taken by the relevant foreign authorities (Art. 80 para. 2 let. b FMIA).

FINMA is currently assessing an application for the recognition of a foreign trade repository. FINMA has also been notified that a Swiss trade repository intends to submit a formal application.

FINMA will announce publicly whenever it authorises or recognises one or more trade repositories; information will also be published on FINMA's website.

7 Introduction of the clearing requirement for derivatives

7.1 Subject matter of the clearing requirement

OTC derivatives transactions which are executed between FCs and NFCs (i.e. FC and FC, NFC and NFC and FC and NFC) and are subject to a clearing requirement must be cleared through a CCP which has been authorised or recognised by FINMA (Art. 97 paras. 1 and 2 FMIA). A CCP which has been exempted from the recognition requirement is equivalent to a recognised foreign CCP (Art. 60 para. 4 FMIA).

In the case of cross-border transactions it is important to note that Swiss counterparties are obliged to clear relevant derivatives through a CCP even if the foreign counterparty of the Swiss counterparty subject to this obligation would be subject to the clearing requirement if it had its registered office in Switzerland (Art. 102 FMIA). However, cross-border transactions do not have to be cleared through a central counterparty if the foreign counterparty has its registered office in a country whose law is recognised by FINMA as being equivalent and the foreign counterparty in question is not subject to a clearing requirement under the laws of that country (Art. 90 FMIO).

7.2 Phased introduction of the clearing requirement

The start of the clearing requirement depends on the authorisation or recognition of a CCP with a corresponding clearing offering in OTC derivatives transactions and subsequently on FINMA's definition and publication of derivatives categories which are subject to the clearing requirement (see section 7.3 below). This has not yet occurred. Following publication of the derivatives categories, the clearing requirement would apply on a phased basis and depending on the character of the counterparty subject to the clearing requirement, as defined in law (Art. 85 FMIO).

Following publication by FINMA of the derivatives categories which are subject to the clearing requirement, newly concluded derivatives must be cleared after:

- 6 months between participants of an authorised or recognised CCP;
- 12 months between a participant of an authorised or recognised CCP and an FC as well as between two FCs;
- 18 months for all other derivatives transactions which are subject to the clearing requirement (e.g. between an FC and an NFC).

7.3 Definition and publication of derivatives to be cleared

Under its statutory remit, FINMA has defined at ordinance level the procedure for defining derivatives which are subject to a clearing requirement (Art. 101 FMIA in conjunction with Arts. 6 and 7 FMIO-FINMA).

Before FINMA can introduce the clearing requirement it is necessary for a Swiss CCP authorised by FINMA or a foreign CCP recognised by FINMA to be in a position to clear the derivatives in question for the financial market participants.

Consequently, the definition of the derivatives which fall under the clearing requirement is tied up with the authorisation or recognition of a CCP. Those derivatives/categories of derivatives which the CCP in question can actually clear are defined as being subject to the clearing requirement (*bottom-up* approach; see also Art. 101 para. 3 FMIA). CCPs are therefore obliged to provide FINMA with this information as part of the authorisation/recognition process (Art. 7 para. 3 FMIO-FINMA). FINMA will also take account of recognised standards and foreign legal developments (Art. 101 para. 2 FMIA; Art. 7 para. 1 FMIO-FINMA). Basically, the derivatives which are subject to a clearing requirement under Swiss law should correspond to those which are similarly subject to this requirement internationally (particularly under European regulations).

When determining the clearing requirement, FINMA will take account of the set criteria, including degree of standardisation, liquidity and available operational processes (Art. 101 para. 1 FMIA; Art. 6 para. 2 FMIO-FINMA).

Following consultation, FINMA will specify in Appendix 1 of FMIO-FINMA the categories of derivatives which must be cleared through a CCP. FINMA will publish any changes to Appendix 1 of FMIO-FINMA in due course.

7.4 Authorisation and recognition of central counterparties

As financial market infrastructures, Swiss CCPs must be authorised by FINMA (Art. 4 para 1 in conjunction with Art. 2 let. a no. 3 FMIA). FINMA issues authorisation if the conditions set out in FMIA are met (Art. 5 FMIA). A CCP registered outside Switzerland must be recognised by FINMA before it grants supervised Swiss participants direct access to its facilities, provides services to a Swiss financial market infrastructure or enters into an interoperability agreement with a Swiss CCP (Art. 60 para 1 FMIA). The recognition requirements are based on Article 60 paras. 2-4 FMIA.

As FINMA has not yet issued an authorisation or recognition under FMIA for a CCP which clears OTC derivatives transactions centrally; the transitional provisions set out in Article 159 FMIA apply; applications for authorisation or recognition of the CCPs concerned must be made before the end of 2016. FINMA will announce publicly whenever it authorises or recognises a CCP; information will also be published on FINMA's website.

Appendix: Overview of postponed deadlines

Section 3 FINMA Guidance: Deadline extension for the exchange of collateral

1 January 2016	1 September 2016	
FMIO enters into force.	Deadline for meeting certain requirements in accordance with Article 131 paras. 4 and 5 FMIO have been aligned with forthcoming, definitive EU regulations (possibly postponed) (see right-hand column).	<i>Deadlines currently undefined for meeting requirements in accordance with definitive EU regulations.</i>
		Transitional deadlines synchronised (extended) in accordance with Article 131 paras. 4 and 5 FMIO until such a time as the corresponding future requirements must be met in accordance with EU regulations.

Section 4.2 FINMA Guidance: Amended transitional provisions for OTFs

1 January 2016	1 January 2017	1 January 2018
FMIO enters into force	Deadline for meeting requirements set out in Article 129 para. 1 FMIO postponed (see right-hand column).	Deadline for meeting requirements set out in Article 129 para. 1 FMIO.

Section 5.1 FINMA Guidance : Amended transitional provisions for record-keeping and documenting requirements and the reporting requirements for securities and derivatives transactions

1 January 2016	1 January 2017	1 January 2018
FMIO and revised SESTO.	Deadline for meeting requirements set out in Article 129 FMIO and Article 58a SESTO postponed (see right-hand column).	Deadline for meeting requirements set out in Article 129 FMIO and Article 58a SESTO.