Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Derivatives 2025

Definitive global law guides offering comparative analysis from top-ranked lawyers

Contributing Editor
Carl Kennedy
Katten Muchin Rosenman LLP

Chambers

Global Practice Guides

Derivatives

Contributing Editor

Carl Kennedy

Katten Muchin Rosenman LLP

2025

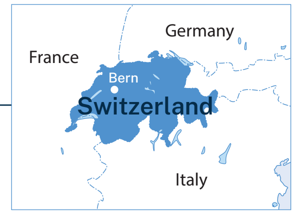
Chambers Global Practice Guides

For more than 20 years, Chambers Global Guides have ranked lawyers and law firms across the world. Chambers now offer clients a new series of Global Practice Guides, which contain practical guidance on doing legal business in key jurisdictions. We use our knowledge of the world's best lawyers to select leading law firms in each jurisdiction to write the 'Law & Practice' sections. In addition, the 'Trends & Developments' sections analyse trends and developments in local legal markets.

Content Management Director Claire Oxborrow
Content Manager Jonathan Mendelowitz
Senior Content Reviewers Sally McGonigal, Ethne Withers, Deborah Sinclair and Stephen Dinkeldein
Content Reviewers Vivienne Button, Lawrence Garrett, Sean Marshall, Marianne Page, Heather Palomino and Adrian Ciechacki
Content Coordination Manager Nancy Laidler
Senior Content Coordinators Carla Cagnina and Delicia Tasinda
Content Coordinator Hannah Leinmüller
Head of Production Jasper John
Production Coordinator Genevieve Sibayan

Published by
Chambers and Partners
165 Fleet Street
London
EC4A 2AE
Tel +44 20 7606 8844
Fax +44 20 7831 5662
Web www.chambers.com

SWITZERLAND



Law and Practice

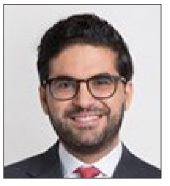
Contributed by:
Olivier Favre and Tarek Houdrouge
Schellenberg Wittmer Ltd

Contents

Schellenberg Wittmer Ltd is one of the leading Swiss business law firms with over 150 specialised lawyers in Zurich, Geneva and Singapore. The capital markets group consists of a core team of more than 15 lawyers with in-depth knowledge of debt and equity capital markets, along with the practical and technical expertise to advise on derivatives and structured finance transactions of any type (including OTC derivatives transactions documented under ISDA terms or under Swiss law, exchange-traded derivatives transactions (ETDs) and the issuance of structured products) and to answer any regulatory questions that arise in connection thereto. The team has significant experience in shaping the legal and regulatory environment in the Swiss derivatives and structured finance sector and also takes part in initiatives with trade associations (such as ISDA and the Swiss Bankers Association).

Authors

Olivier Favre is a partner in Schellenberg Wittmer's banking and finance group in Zurich, a key partner in the capital markets group of the firm and co-heads the blockchain technologies and fintech practice. Olivier focuses on capital markets, derivatives and structured finance transactions, and advises clients on financial services, securities, commodities, fund, insurance and reinsurance regulation. He advises clients on financing transactions and on fintech solutions and their legal implementation. His clients include financial institutions, buy-side firms, issuers, fintech and virtual assets services providers, insurance companies and industry associations such as the International Swaps and Derivatives Association, Inc (ISDA) and the Swiss Bankers Association.



Tarek Houdrouge is co-head of Schellenberg Wittmer's banking and finance practice in Geneva and the key contact for capital markets. Tarek's main areas are banking and finance, transactions and capital markets. He combines banking and finance expertise with his M&A practice. Tarek's recent experience in capital markets includes: advising an undisclosed anchor investor in its participations in the CHF4 billion private placement (PIPE) and rights offering of Credit Suisse Group AG; advising clients on regulatory and requirement aspects under SIX regulations to perform share buy-backs on behalf of Swiss companies via a second trading line; and other market-leading transactions involving Swissport International Ltd and Credit Agricole Corporate Investment Banking.

Schellenberg Wittmer Ltd

Löwenstrasse 19
8021 Zurich
15bis, rue des Alpes
1211 Geneva 1
Switzerland

Tel: +41 44 215 5252
Fax: +41 44 215 5200
Email: zurich@swlegal.ch
Web: www.swlegal.com/en/

Schellenberg Wittmer

1. General

1.1 Overview of Derivatives Markets

Segments of the Swiss Derivatives Market

The Swiss derivatives market can be divided into the following segments:

- OTC derivatives – the OTC derivatives market consists of Swiss derivatives dealers trading OTC derivatives with other Swiss or international dealers in the inter-dealer market as well as transactions entered into between a Swiss dealer and end-users. The end-users may be corporations using derivatives for their hedging, investment or treasury management purposes or investors using derivatives for hedging or investment purposes. OTC derivatives may be cleared or uncleared products. However, there is no Swiss clearing house providing clearing services for OTC derivatives.
- Exchange-traded derivatives (ETDs) – the Swiss ETD market involves Swiss banks acting as clearing brokers or clients of clearing brokers providing Swiss end-users with access to the clearing services of a central counterparty (CCP) of the relevant exchange where the ETDs are traded. There is no Swiss ETD exchange or Swiss CCP for ETDs. For this reason, the Swiss parties involved in the clearing chains always access the clearing services provided by foreign CCPs.
- Structured products – these are usually issued under a programme for such products. To the extent that the products may be sold to retail investors, they must be issued or guaranteed by a regulated issuer (ie, a bank, a securities house or an insurer) or the products must be fully collateralised. The products have an international securities identification number (ISIN) and are issued as securities. The pay-out of the products references an underlying asset and such products therefore have the economics of a derivative, but they are issued in securitised form. Such structured products may be listed on a Swiss regulated exchange (eg, SIX Swiss Exchange). Structured products may be used, for instance, to have exposure to a new asset class of underlyings such as digital assets, but in the form of traditional securities (eg, through exchange-traded products (ETPs), which are products listed on a Swiss regulated exchange that are secured by liquid assets or through tracker certificates on such underlyings that may or may not be secured by collateral).

Applicable Regulatory Requirements

OTC derivatives

OTC derivatives are subject to the Swiss regulation of derivatives under the Swiss Financial Market Infrastructure Act of 19 June 2015 ("FinMIA"). These regulatory requirements are the Swiss equivalent of the European Market Infrastructure Regulation (EMIR) and include:

- a reporting obligation for all such derivatives transactions other than transactions entered into between small non-financial counterparties;
- a clearing obligation for certain types of OTC derivatives (including some interest-rate derivatives and credit derivatives on indices as underlyings), except if they are entered into with a small financial or a small non-financial counterparty; and
- risk mitigation obligations for uncleared derivatives – including:
  - (a) variation margin requirements for any transactions other than those entered into with a small non-financial counterparty;
  - (b) initial margin requirements for financial counterparties and large non-financial counterparties crossing a threshold of CHF8 billion in aggregated average notional amounts;
  - (c) the obligation to agree to portfolio reconciliation and dispute resolution (PRDR) processes and, to the extent the transaction is entered into with a counterparty other than a small non-financial counterparty, perform portfolio reconciliations;
  - (d) the obligation to perform portfolio compressions in trading relationships that include more than 500 transactions; and
  - (e) the obligation for any counterparty other than a small financial or small non-financial counterparty to value transactions.

Under the rules of the FinMIA, financial counterparties are regulated banks, securities firms, insurance and reinsurance companies, holding companies of financial or insurance groups, managers of collective investment schemes, fund management companies, collective investment schemes and pension funds. All other counterparties are deemed to be non-financial counterparties.

Similar to EMIR, small non-financial counterparties are distinguished from large non-financial counterparties by reference to the nominal amounts of the outstanding OTC derivatives (average gross positions, calculated over 30 working days). A non-financial counterparty is deemed to be large if it exceeds at least one of the following threshold values with all of its trading activity with any counterparties:

- credit derivatives – CHF1.1 billion;
- equity derivatives – CHF1.1 billion;
- interest rate derivatives – CHF3.3 billion;
- FX derivatives – CHF3.3 billion; and
- commodity derivatives and other derivatives – CHF3.3 billion.

The calculation is done by aggregating the positions of all group companies that are non-financial counterparties (worldwide), without counting the positions of financial counterparties (of the same group). Hedging transactions and physically settled FX forwards and swaps are not counted for the calculation.

The Swiss calculation includes cleared and uncleared OTC derivatives transactions and, in this respect, will differ from the determination as it is made under EMIR when the rules of EMIR 3.0 come into force, as for the purposes of EMIR 3.0, only uncleared OTC derivatives will be counted (but with lower thresholds).

The FinMIA distinguishes small and large financial counterparties by reference to a threshold of CHF8 billion, including the entire derivatives portfolio (counting also hedging transactions and including cleared and uncleared OTC derivatives transaction, but without counting ETDs) except for physically settled FX forwards and swaps. Except for funds, collective investment schemes and fund managers, the calculation is made by aggregating the positions of all group companies that are financial counterparties (worldwide), without counting the positions of non-financial counterparties (of the same group). As regards funds, collective investment schemes and fund/asset managers, there is no aggregation of their positions. The calculation is made in respect of each fund and collective investment scheme separately (even if the assets are managed by the same manager).

As opposed to the rules of EMIR 3.0 as they are intended to be implemented, the FinMIA does not require a separate calculation for cleared and uncleared OTC derivatives.

Under the current framework of the FinMIA, the determination of a party qualifying as a small or large financial or non-financial counterparty is an ongoing calculation. To the extent that a small financial or non-financial counterparty becomes a large one, it must notify the counterparty and it has four months to comply with the further obligations resulting from the change to its status (eg, compliance with the clearing obligation).

To the extent that the transactions are entered into on a cross-border basis, these regulatory requirements may also be complied with by applying the rules of a jurisdiction recognised by the Swiss Financial Market Supervisory Authority ("FINMA") as being equivalent to the rules of the FinMIA by applying such foreign rules on a substituted compliance basis. This is at present possible for EMIR, UK EMIR and the US rules of the Commodity Futures Trading Commission (CFTC).

ETDs

ETDs are also subject to some regulatory obligations under the FinMIA, including a reporting obligation for all such derivatives transactions. However, the other regulatory obligations of the FinMIA do not apply to ETDs.

Structured products

Structured products are not subject to the regulatory obligations of the FinMIA. However, if they are issued to any retail investors, they must either be issued or guaranteed by a regulated firm or, as an alternative, they must be fully collateralised. In addition, they must be issued under a programme or prospectus that complies with the disclosure requirements of the Swiss Financial Services Act of 15 June 2018 ("FinSA") and any products that are offered to retail investors other than in the context of a discretionary asset management mandate or an advisory mandate entered into with a bank or securities firm must be documented with a key information document (KID) that complies with the requirements of the FinSA or those of the EU packaged retail and insurance-based investment products (PRIIPs).

1.2 Historical Trends and Looking Forwards

As regards the offer of products available in the Swiss market, a key driver is the demand for products requested by the buy-side in the asset management and private banking sectors. In the past 12 months, on the supply side, the disappearance of Credit Suisse has left a gap that was filled on the sell-side by other derivatives dealers.

As regards the regulatory environment, Switzerland has, so far, been closely aligned with the regulation of derivatives as it applies in the EU by following the rules of EMIR. The rules of the FinMIA were put in place after those of EMIR and, in some respects, the Swiss rules are more liberal than those of EMIR. This has allowed Swiss derivatives regulation to remain aligned with EMIR after the EMIR Refit. However, in the context of the adoption of EMIR 3.0, the EU rules will diverge from those of the FinMIA in some material respects, particularly as regards the determination of status as a small or large financial or non-financial counterparty.

The Swiss Federal Department of Finances (FDF), in consultation with the financial industry, recently prepared a reform package for the FinMIA that was adopted by the Swiss Federal Council and released as a consultation report (the "FinMIA Refit Report"), together with a proposed draft of the revised FinMIA, on 19 June 2024. The consultation ran until 11 October 2024. Under such revised rules, the Swiss derivatives regulation for OTC derivatives has been liberalised further, with the key proposals being the following:

- The determination of the status of a counterparty as a small or large financial or non-financial counterparty will become an annual determination.
- To the extent that a jurisdiction is eligible to be applied instead of the FinMIA, on a substituted compliance basis, this will also allow the application of such rules to determine counterparty status (ie, the question of the counterparty classification will not remain subject to a Swiss law analysis).
- The new rules will provide that small non-financial counterparties will not come into the scope of the reporting obligation at any point in time.
- As regards the content of the reporting fields, the financial data feed (FDF) further proposes to amend the content of reports to the trade repository by harmonising such content with international standards on ordinance level (eg, with regard to the legal entity identifier (LEI), unique transaction identifier (UTI) and other critical data points). In this way, the quality of the reported data will be improved, which should make it possible to determine financial stability risks more easily.

As regards substituted compliance, note that Switzerland signed the Berne Financial Services Agreement (BFSA) with the UK on 21 December 2023 as a bilateral treaty regarding the mutual recognition of certain areas of financial services and insurance regulation. As regards the regulation of OTC derivatives, the BFSA also covers the risk mitigation obligations for uncleared OTC derivatives (eg, margin rules, portfolio reconciliation and dispute resolution processes, timely exchange of confirmations, valuation of transactions, and portfolio compression). As a result, between Switzerland and the UK, applying the rules of the other jurisdiction by way of substituted compliance will also become possible on the basis of the BFSA when it goes live. However, as regards the application of the rules of the UK EMIR on a substituted compliance basis under Swiss law, this is already possible on the basis of domestic Swiss law.

2. Types of Derivatives

2.1 Futures and Options

Futures are traded as ETDs. Options may be traded either as ETDs or as OTC derivatives.

As regards the market for ETDs, Switzerland does not have a trading venue for such products. Therefore, the products traded are those available in markets outside Switzerland. In terms of the demand for ETDs, Swiss investors have recently requested ETDs on cryptocurrencies as underlyings. These products may also be sold in Switzerland to retail investors. However, as such ETDs are qualified as "securities" for the purposes of Swiss regulation, any firm offering such products from Switzerland or using a Swiss intermediary to access the Swiss market, may become subject to licensing requirements as a securities firm or may have to obtain the authorisation of a Swiss branch or Swiss representative office of a foreign securities firm.

As regards options traded as OTC derivatives, the authors see innovative products used in the Swiss market, for instance, in the context of equity financing transactions. An example of such products are collar transactions, which may be used for the purpose of hedging a long position in an equity investment with a put option by protecting the shareholder against a decline in the share price below a put strike price, while at the same time giving away the upside in the event of a development of the share price above the call strike price.

At present, options on single names or baskets of equities as underlyings and equity index options benefit from a temporary exemption from the variation and initial margin requirements that is currently in place until 1 January 2026. In the context of the FinMIA Refit, the temporary exemption is intended to become a permanent one.

2.2 Swaps and Security-Based Swaps

Swaps are typically traded as OTC derivatives with the involvement of a swap dealer using an International Swaps and Derivatives Association (ISDA) Master Agreement or a Swiss Master Agreement (SMA) as the relevant documentation. Under Swiss law, no distinction is made between security-based swaps and other swaps.

Exemptions from the derivatives regulation apply in respect of physically settled FX swaps (in addition to physically settled FX forwards) and in respect of physically settled OTC derivatives (including swaps) with commodities as underlyings. The exempted FX swaps are only subject to a reporting obligation, but not the other regulatory requirements resulting from the FinMIA. Exempted swaps with commodities as underlyings are not subject to the derivatives regulation under the FinMIA at all.

Certain interest-rate swap transactions, as well as certain index-credit default swaps, are subject to a mandatory clearing obligation, except if they are traded with a small financial counterparty or a small non-financial counterparty. Other swap transactions may be subject to a voluntary clearing. Any such clearing occurs with a central counterparty outside Switzerland. To the extent that the clearing occurs through Swiss clearing brokers as direct participants of such CCPs, the CCPs must be authorised by FINMA to provide such clearing services in Switzerland (CCPs such as Eurex Clearing, ICE Clear, LCH, LME Clear and Cboe Clear have such authorisation).

2.3 Forwards

Forwards are traded as OTC derivatives. Forwards may be traded in respect of any asset classes as underlyings. From a Swiss perspective, a derivative is defined as a financial contract: (i) with a value depending on one or more underlying; and (ii) that is not a spot transaction.

As long as a forward contract references the value of an underlying asset and it is not settled as a spot transaction (see **2.6 Exemptions, Non-Derivative Products and Spot Transactions**), it will fall within the definition of a derivative for the purposes of Swiss law. This would also include, for instance, FX forward transactions.

Exemptions from the derivatives regulation apply in respect of physically settled FX forwards (in addition to physically settled FX swaps) and in respect of physically settled OTC derivatives (including forwards) with commodities as underlyings. The exempted FX forwards are only subject to a reporting obligation, but not the other regulatory requirements resulting from the FinMIA. The exempted forwards with commodities as underlyings are not subject to the derivatives regulation under the FinMIA at all.

2.4 Listed v Over-the-Counter

Listed Derivatives/ETDs

At present, there are no Swiss exchanges where derivatives in the form of exchange-traded derivatives (ETDs) are listed. Any such ETDs are traded on foreign exchanges. Swiss investors are able to access such foreign exchanges through a clearing chain, involving a clearing broker providing clearing services and, possibly, a client of such clearing broker providing indirect clearing services. For investors other than small non-financial counterparties in the sense of the FinMIA and for Swiss parties involved in the clearing chain, ETDs are subject to a reporting requirement from the perspective of Swiss derivatives regulation under the FinMIA, but not to other regulatory requirements.

For Swiss banks or securities firms providing clearing services in the clearing chain for clients, the positions resulting from ETDs are not subject to regulatory capital requirements, except where they indemnify the client for any losses incurred due to changes in the value of the transaction in the event of default by the qualifying CCP, or they guarantee to the clients that the qualifying CCPs or clearing services provider perform their obligations. However, to the extent that banks or securities firms hold ETDs for their own account, or in the event that they were to guarantee the exposures resulting from the ETDs to their clients, the banks or securities firms must take into account the positions resulting from the ETDs for the purposes of their own regulatory capital analysis.

For the purposes of such analysis, a risk weight of 2% applies, to the extent that the ETDs are cleared with a qualifying CCP and legal opinions of the relevant jurisdictions involved confirm the following:

- the ETD transactions are identified as "client transactions";
- margin assets held through the clearing chain with the qualifying CCP will be segregated for the benefit of indirect clients, that is, the indirect clients will not incur any losses in the event of:
  - (a) the insolvency of the clearing services provider through whom the bank or securities firm acts;
  - (b) an insolvency of other indirect clients of such clearing services provider; or
  - (c) an insolvency of the clearing services provider and other indirect clients; and
- in the event of an insolvency of the clearing services provider through whom the bank or securities firm acts as direct client of a clearing broker, the applicable laws and regulations lead to the conclusion that the positions and margin would either be upheld directly with the qualifying CCP or they could be transferred at the market value to another clearing broker (porting) or, upon request of the client, they could be closed out.

OTC Derivatives

OTC derivatives are traded as bilateral contracts between two parties under the market standard documentation for such transactions. This is typically an ISDA Master Agreement, together with the relevant supporting documents, or an SMA for OTC derivatives transactions, as published by the Swiss Bankers Association.

Such OTC derivatives are subject to the regulatory requirements of the FinMIA, which are closely aligned with EMIR (see **1.1 Overview of Derivatives Markets**).

As regards their regulatory capital analysis, derivatives dealers trading OTC derivatives may account for OTC derivatives traded under netting set on a net basis if the following requirements, as implemented in Switzerland on the basis of the Basel rules, are met:

- A master agreement customarily used in the OTC derivatives market (a "Master Agreement"), including a close-out netting arrangement, is in place that provides for a single lump sum termination amount including all the relevant derivatives transactions, provided that the Master Agreement includes termination events for the possible default or insolvency of the counterparty.
- Reasoned legal opinions confirm that the contractual provisions of the Master Agreement (as described above) are legally binding and enforceable:
  - (a) according to the place of incorporation of the counterparty, including in the event of a default or insolvency of the relevant counterparty;
  - (b) according to the law governing the individual transactions forming part of the netting arrangement; and
  - (c) according to the agreement governing the netting arrangement.
- The bank has processes in place to monitor ongoing changes to the applicable laws that are relevant for the enforceability of the netting arrangement.

2.5 Asset Classes

Swiss law does not restrict any particular asset class as an underlying of a derivatives transaction.

However, certain exemptions from regulatory requirements apply with respect to some types of asset classes (see **2.6 Exemptions, Non-Derivative Products and Spot Transactions**).

To the extent that derivatives transactions are not traded as transactions in the inter-dealer market, but are traded with a client as a financial service like any other financial instrument, the relevant point-of-sale obligations resulting from the FinSA must be complied with.

As regards such point-of-sale obligations, FINMA introduced additional risk disclosure requirements in connection with complex products offered to retail clients such as contracts for differences (CFDs). When disclosing the risks associated with financial instruments, the provider must inform its clients of:

- the proportion of clients who lose money in connection with CFDs;
- the potential obligation to make additional payments and the risk of unlimited losses; and
- leverage and margin rules, as well as counterparty and market risk.

New types of asset classes that are emerging in Switzerland include derivatives on cryptocurrencies and other digital assets as underlyings, derivatives on verified carbon credits (VCCs) and equity derivatives used in the context of complex equity financing transactions (eg, in the context of an accelerated share buy-back).

2.6 Exemptions, Non-Derivative Products and Spot Transactions

Non-Derivative Products and Spot Transactions

From a Swiss perspective, a derivative is defined as a financial contract (i) with a value depending on one or more underlying; and (ii) that is not a spot transaction.

With regards to (i) having a value depending on an underlying:

Swiss law does not provide for an exhaustive list of underlying assets or values of a derivative. While the Ordinance to the FinMIA (the "FinMIO") mentions shares, bonds, commodities and bullion as underlying assets as well as currencies, and interest rates and indices as underlying values, these are only examples. A contract referencing other assets or values that will be used to determine the value of the contract (eg, economic statistics, inflation rates or climatic variables) is also considered a derivative for the purposes of the FinMIA.

For the purposes of classifying a contract as a derivative under the FinMIA, it is a requirement that the value of the contract directly or indirectly depends on the price of the underlying asset. Therefore, the reference to the value of the underlying must result from the terms and conditions of the financial contract. It is not sufficient that the value is derived from an asset pool. As a result, asset-backed securities or collateralised loan obligations do not qualify as derivatives for the purposes of the FinMIA. In addition, shares in an investment company investing in underlying assets are also not classified as derivatives for the purposes of the FinMIA.

Any instrument issued in the form of a certified or uncertified security would not be classified as a derivative in the sense of the FinMIA, even if its value is directly or indirectly dependent on the price of an underlying asset. For instance, any structured products issued in securitised form would not be viewed as a derivative.

Moreover, the definition of derivatives for the purposes of Swiss law does not include instruments, where a derivative is only an embedded element, but the primary purpose of the contract is different (eg, stock options forming part of a stock option plan paid as compensation under an employment agreement or put/call options embedded in a shareholders' agreement). To be classified as a derivative for the purposes of the FinMIA, the main contractual obligations of the parties must depend on the value of the underlying assets or values.

With regards to (ii) not being a spot transaction:

A spot transaction is a transaction that is settled within two trading days (T+2) of the trade date or within the longer settlement period that is customary for such transaction. A transaction does not qualify as a spot transaction where the parties provide for a postponement of the delivery of the underlying asset that is longer than two days or, if longer, the customary settlement period for the assets concerned (one settlement cycle). However, if there is no customary settlement period for a specific product, the question may arise how to distinguish a spot transaction from a forward contract. In the event that the parties determine a settlement date that is not the shortest possible settlement date, the transaction is likely not to be qualified as a spot transaction but as a forward transaction (ie, a derivative for the purposes of the FinMIA).

A transaction for the sale and purchase of securities in any currency that settles within one settlement cycle of the securities transaction (securities conversion transaction) is also viewed as a spot transaction. This raises the questions: (i) whether this also applies to foreign exchange transactions entered into separately from the securities transaction and, if so; (ii) whether there is a maximum time limit for the settlement cycle that would have to be complied with to fall into the scope of this exemption.

On the basis that securities conversion transactions qualify as spot transactions in the sense of Article 10 (2)(c) MiFID II Delegated Regulation (ie, they are settled within the customary settlement cycle for the underlying securities transactions, which is not longer than T+5), the Swiss analysis should be that such transactions should also be classified as spot transactions for the purposes of the FinMIA. Regarding the cap of five trading days, while this is not addressed in the Swiss rules, the authors believe it is advisable to stay within the limit set by the EU regulation as a "safe harbour" in order for the transactions not to be classified as derivatives for the purposes of the FinMIA.

Rolling spot transactions are permitted in Switzerland and qualify, depending on their structure, either as spot transactions or as derivatives for the purposes of the FinMIA. To the extent spot transactions do not include an enforceable obligation to extend the transaction (ie, if the parties can decide freely whether or not they wish to roll over the economic terms of a spot transaction) and provided further that such extension of the spot transaction is not the normal market practice between the parties, such transaction would be treated as a spot transaction. However, if the parties are obliged to roll a spot transaction or if such extension of a spot transaction is the normal market practice, such transaction would be qualified as a derivative for the purposes of the FinMIA.

Exempted Transactions

Under the Swiss rules, the following types of transactions are exempt from the derivatives regulation:

- physically settled commodity derivatives, except if they are traded on a regulated exchange, on a multilateral trading facility or on an organised trading facility;
- physically settled commodity derivatives on power or natural gas as underlyings traded on an organised trading facility; and
- derivatives regarding freight, inflation rates, climatic variables or official economic statistics that are cash-settled only upon default or termination.

Other transactions are only exempt from certain obligations, as follows:

- ETDs are only subject to a reporting obligation, but not to other obligations of the derivatives regulation resulting from the FinMIA.
- Physically settled FX forwards and swaps, where the confirmation specifies that the transactions will be physically settled (however, the calculation should include cash-settled FX forwards (ie, NDFs) and swaps, FX options and currency swaps), are only subject to a reporting obligation, but not to other obligations of the derivatives regulation resulting from the FinMIA.
- Currency swaps, which combine a swap of currencies and an interest rate derivative, are not subject to the initial margin requirement for the FX component.
- Options on single names or baskets of equities as underlyings and equity index options benefit from a temporary exemption from the variation and initial margin requirements that is currently in place until

1 January 2026. In the context of the FinMIA Refit, the temporary exemption is intended to become a permanent one.

3. Regulation of Derivatives

3.1 National

3.1.1 National Regulators

FINMA is the Swiss regulatory authority in charge of applying the rules of the Swiss derivatives regulation. Such rules are specified in the FinMIA and the FinMIO and the FINMA Ordinance on Financial Market Infrastructures and Derivatives Trading of 3 December 2015 (the "FinMIO-FINMA").

As regards financial counterparties, the internal and external auditors of a regulated firm are, in the context of the annual regulatory audit process, in charge of confirming compliance with such rules. As regards non-financial counterparties, financial auditors are mandated to confirm whether, and how, the firm complies with such rules.

3.1.2 Clearing

The clearing obligation applies under the rules of the FinMIA to certain interest rate derivatives and certain credit default swaps on indices, except if they are entered into with a small financial or a small non-financial counterparty.

These clearing requirements apply to some of the derivatives that are currently subject to a clearing obligation under EMIR.

The following interest rate products are subject to the clearing obligation:

- basis swaps and fixed-to-floating rate swaps on the euro interbank offered rate (Euribor) as underlying, EUR as settlement currency and a maturity between 28 days and 50 years;
- forward rate agreements (FRAs) on Euribor as underlying, EUR as settlement currency and a maturity between three days and three years;
- overnight index swaps (OIS) on the secured overnight financing rate (SOFR) as underlying, USD as settlement currency and a maturity between seven days and three years;
- OIS with federal funds (FedFunds) as underlying, USD as settlement currency and a maturity between seven days and three years;
- OIS with the euro short-term rate (EuroSTR) as underlying, EUR as settlement currency and a maturity between seven days and three years;
- OIS with the sterling overnight indexed average rate (SONIA) as underlying, GBP as settlement currency and a maturity between seven days and 50 years; and
- OIS with the Tokyo overnight average rate (TONA) as underlying, JPY as settlement currency and a maturity between seven days and 30 years.

The following credit default swaps are subject to the clearing obligation:

- credit default swaps (index, not tranched) on iTraxx Europe Main as the underlying, EUR as settlement currency and a maturity of five years; and
- credit default swaps (index, not tranched) on iTraxx Europe Crossover as the underlying, EUR as settlement currency and a maturity of five years.

No other derivatives transactions (eg, FX derivatives, commodity derivatives or equity derivatives) are subject to a clearing obligation.

3.1.3 Mandatory Trading

FINMA has the competence to resolve that certain derivatives will become subject to a mandatory trading obligation. However, FINMA has not exercised such competence to date.

The mandatory trading obligation would be subject to the following:

- FINMA must take into account the degree of standardisation of the relevant derivatives transactions both from a legal and operational perspective, the liquidity of the relevant products, the traded volumes, the availability of information for determining market prices, and the counterparty risks involved with the relevant products;

- FINMA must apply the trading obligation in line with international standards and international developments;
- the trading obligation will not be applicable to transactions that are not available for trading on a trading venue; and
- physically settled FX forwards and swaps may not be subject to a trading obligation.

To the extent that FINMA will declare such trading obligation to be applicable, it is unlikely that this would, in any event, go beyond the obligations applicable under EMIR.

3.1.4 Position Limits

The rules of the FinMIA provide for the competence of the Swiss Federal Council to put in place obligations on position limits for commodity derivatives. However, the Swiss Federal Council has not made use of such competence and there are no indications that such competence will be exercised in the near future.

3.1.5 Reporting

Reporting of OTC Derivatives and ETDs

The Swiss regulatory requirements of the FinMIA provide for reporting obligations regarding OTC derivatives and ETDs. Note that it is currently not possible to satisfy such reporting obligations under foreign rules that have been recognised as equivalent by FINMA (eg, those of EMIR), because no foreign trade repositories are recognised by FINMA for the purposes of reporting under a jurisdiction other than the FinMIA.

For OTC derivatives

The reporting obligation depends on the status of the counterparties involved. In any event, a small non-financial counterparty never has a reporting obligation.

The Swiss rules provide for a one-sided reporting regime that imposes a reporting obligation under the rules of the FinMIA on one of the parties to a transaction, as follows:

In transactions between two Swiss counterparties –

- where one is a financial counterparty and the other is a non-financial counterparty, the financial counterparty reports;
- where one is a large and the other is a small financial counterparty, the large financial counterparty reports;
- where one is a large and the other is a small non-financial counterparty, the large non-financial counterparty reports;
- where both are large financial counterparties or both are small financial counterparties or both are large non-financial counterparties, the seller reports (if there is a seller) or, if not, the party as determined by the ISDA tie-breaker rules reports; and
- where both are small non-financial counterparties, no party reports.

Further to the above rules, note that there is no intragroup exemption. Therefore, unless the transaction is entered into between two small non-financial counterparties, it is subject to a reporting obligation.

In transactions between a Swiss and a foreign counterparty –

- the Swiss party reports, unless it is a small non-financial counterparty; and
- if the Swiss party is a small non-financial counterparty, there is currently an exemption in place until 1 January 2028, however, with the proposed FinMIA Refit, such obligation will generally be waived for small non-financial counterparties.

For ETDs

The reporting obligation falls on the Swiss party in the clearing chain that is closer to the foreign CCP.

To the extent that it is a clearing arrangement between a Swiss and a foreign clearing services provider, the obligation falls on the Swiss party. If the Swiss party at the end of the clearing chain is a small non-financial counterparty, there is currently an exemption in place until 1 January 2028, however, with the proposed FinMIA Refit, such obligation will generally be waived for small non-financial counterparties.

Transaction Reporting

Separately from the above, trading of OTC derivatives on securities listed or admitted to trading on a Swiss regulated exchange as underlyings fall into the scope of the transaction reporting requirements under the Swiss rules, to the extent that the weight of such securities exceeds 25%. Also, ETDs fall into the scope of the transaction reporting obligation, to the extent that the underlyings are securities listed or admitted to trading on a Swiss regulated exchange.

Disclosure of Shareholdings

Exposures to equities listed on a Swiss regulated exchange resulting from derivatives transactions (including cash-settled derivatives) are counted towards the long and short positions in such equities for the purposes of the disclosure thresholds for significant shareholdings (the lowest threshold being at present 3%).

3.1.6 Business Conduct

Any firm that trades in derivatives is subject to the rules of the Swiss derivatives regulation of the FinMIA and the FinMIO and must have a policy in place that specifies how it complies with its regulatory obligations resulting from these rules (see **1.1 Overview of Derivatives Markets**).

To the extent that it is a firm subject to prudential supervision, compliance with such rules is reviewed by the regulatory auditors as part of the annual regulatory audit process. In addition to such process, there are no specific business conduct rules to be taken into account with respect to trading derivatives other than the following.

A party engaged in derivatives trading with a Swiss counterparty is subject to business conduct requirements, to the extent that it not only trades with a counterparty in the same way as in the inter-dealer market, but that it establishes a client relationship with the counterparty in the context of trading the derivatives. Derivatives transactions are classified as "financial instruments" under the rules of the FinSA.

Any of the following activities would be deemed to give rise to such a client relationship for the purposes of Swiss regulatory requirements and this would also give rise to an activity of providing a "financial service" to the counterparty:

- providing brokerage services regarding financial instruments (buying and selling "financial instruments") and/or receipt and transmission of orders regarding transactions in "financial instruments";
- marketing "financial instruments";
- providing advisory services regarding transactions in "financial instruments" (this would also include corporate finance services provided to a buy-side client);
- providing discretionary investment management services regarding a portfolio including "financial instruments"; and
- acting as a lender financing transactions in "financial instruments".

As a result of providing such a "financial service", the FinSA point-of-sale obligations would need to be taken into account, which include the following:

- an obligation to classify the counterparty into the categories of:
  (a) professional client;
  (b) institutional client; or
  (c) retail client;
- an obligation to provide information on the financial instruments (including general risk disclosures for trading financial instruments generally and specific disclosures for the products traded), provided that this obligation may be waived by professional clients;
- a best execution obligation;
- an obligation to register front office staff members with a client adviser registry, unless the financial services provider is already FINMA supervised or, if it is subject to prudential supervision by a foreign regulatory, the Swiss counterparties are only "per se professional clients"; and
- a record-keeping and accountability obligation, provided that this obligation may be waived by professional clients.

With respect to the obligation to provide information on CFDs, see the proposed new requirements by FINMA as stated in **2.5 Asset Classes**.

3.1.7 Commercial End Users

Commercial end-users may benefit from certain exemptions from regulatory requirements, to the extent that they are classified as small non-financial counterparties. In such capacity, they benefit from the following:

- neither they nor the counterparty are subject to the margin requirements for the transactions traded with the small non-financial counterparty (neither variation margin, nor initial margin requirements);
- they are not subject to a reporting obligation (to the extent that the proposed new rules will be adopted on the context of the pending FinMIA reform, not even after 1 January 2028);
- the transactions they trade do not fall into the scope of an obligation to clear derivatives; and
- the transactions entered into with such counterparties do not fall into the scope of an obligation to perform portfolio reconciliations.

3.2 Local

Switzerland does not have regulatory authorities on a local level (cantons or municipalities) that would be competent in this field.

3.3 Self-Regulatory Organisations, Independent Authorities, and Exchanges

For the derivatives market, there are no self-regulatory organisations or independent authorities that would be competent in this field.

However, Switzerland has trade associations such as the Swiss Bankers Association that are setting standards in respect of the documentation used (eg, by publishing the Swiss Master Agreement for OTC Derivatives Transactions or Other Master Agreements) and by being the most relevant forum for the discussion of the industry position to new rules and laws and developing best practices.

Given that the country does not have a Swiss exchange for derivatives and no Swiss CCP for clearing derivatives, Switzerland does not have such Swiss market participants.

However, as the Swiss securities custodian, SIX SIS offers a solution for the custody of securities for the purposes of using this with respect to initial margin assets under either SMAs for OTC Derivatives or ISDA documentations.

4. Documentation Issues

4.1 Trading Documentation

4.1.1 Industry Standards and Master Agreements

Documentation of OTC Derivatives Transactions

Use of ISDA terms

The industry standard documentation used in OTC derivatives transactions traded on a cross-border basis are ISDA Master Agreements and the definitions published by ISDA for the different asset classes, jointly with the relevant supporting documents published by ISDA (including credit support documents, such as VM credit support annexes (CSAs) for transactions subject to variation margin requirements, and IM collateral transfer agreements (CTAs) with the relevant security agreements for transactions subject to initial margin requirements).

For transactions traded in the domestic Swiss market, such ISDA documentation is also frequently used, to the extent that the transactions are entered into between financial counterparties or the transactions are subject to terms that mirror transactions traded internationally.

Use of SMAs

For OTC derivatives traded with Swiss end-users or transactions traded between banks and their clients, an SMA for OTC derivatives transactions in the form published by the Swiss Bankers Association is often used. This agreement is subject to Swiss law as the governing law and is available not only in English, but also in German, French and Italian. The SMA was first published in 2003 and a revised version was published in 2013. The SMA of 2013 has a set of its own definitions that allow documentation with confirmations referring to such definitions. To the extent that the parties wish to use ISDA definitions under an SMA, the SMA of 2013 can be entered into in a version that includes the relevant bridge language, allowing the incorporation by reference of the most frequently used ISDA definitions into the relevant SMA.

The Swiss Bankers Association also published CSAs as the relevant supporting documents to be used for the purposes of exchanging collateral. This includes a CSA that may be used for the purposes of exchanging variation margins, to the extent that the parties are in scope for the exchange of variation margins.

Where an SMA is used to document derivatives transactions with private wealth management clients of a bank, such counterparties are not in scope of variation margin requirements and the banks usually do not enter into a bilateral margin documentation with such clients, but a one-sided general deed of pledge under which the client provides collateral to the bank for its exposure to the client.

Use of own documentation of the relevant banks

A Swiss bank may also have its own trade documentation for trading OTC derivatives, particularly to the extent that derivatives transactions are entered into with private wealth management clients. Such documentation is usually governed by Swiss law and the banks do not enter into a bilateral margin documentation with such clients, but a one-sided general deed of pledge under which the client provides collateral to the bank for its exposure to the client. Such master agreements may be limited to certain asset classes (eg, for the purposes of trading FX derivatives).

Documentation of ETDs

As regards ETDs, Swiss banks providing indirect clearing services to clients usually have their own trade documentation to use in ETDs with clients. However, the Swiss Bankers Association also published a standard Master Agreement for Exchange Traded Derivatives, which is sometimes used by certain banks.

In relations between a Swiss bank and international clearing services providers, the prevailing international documentation is used.

4.1.2 Margins

Under ISDA documentations, the exchange of variation margin is usually documented in the VM CSA published by ISDA or by amending a CSA to be in line with the variation margin requirements.

To the extent that an SMA is used, the exchange of variation margin is usually documented with the VM CSA published by the Swiss Bankers Association.

The Swiss rules for the exchange of initial margin are aligned with the rules of EMIR and apply to transactions with counterparties other than small non-financial counterparties, provided that both parties cross the threshold of CHF8 billion in aggregate average notional amounts (AANA) and the amount of initial margin to be exchanged reaches the threshold of CHF50 million.

Where parties are within the scope of the exchange of initial margin, they usually opt for the use of ISDA documentation as opposed to an SMA. However, Swiss parties may choose to appoint SIX SIS to act as the custodian of the initial margin. SIX SIS has the relevant documentation in place for a solution to document the exchange of initial margin both under ISDA terms and, as regards transactions with domestic counterparties, in the event that an SMA is used.

4.1.3 Other Agreements

In the repurchase agreement (Repo) market, where a Swiss counterparty is involved in a cross-border transaction, global master repurchase agreements (GMRAs) are widely used. In the domestic repo market, many firms participate in the repo trading platform operated by SIX SIS under the terms of the Swiss master repo agreement (SMRA), which is entered into by adhering to such SMRA on a multilateral basis. However, the trading occurs bilaterally between the relevant firms that both adhered to the SMRA.

In the securities lending market, where a Swiss counterparty is involved in a cross-border transaction, global master securities lending agreements (GMSLAs) are widely used. As regards domestic transactions, no standard master agreement prevails, but each firm has its own template documentation that is used.

4.2 Clearing Documentation

Clearing brokers and Swiss firms offering indirect clearing services usually use their own trade documentation to document the clearing terms. Such terms are usually the same for all asset classes.

The Swiss clearing brokers and indirect clearing services providers usually have a set of disclosure documentation that is prepared on the basis of the Futures

Industry Association (FIA) standards that are provided to the clients of the cleared derivatives.

4.3 Opinions and Other Documentation Issues

The Swiss regulatory capital requirements require netting and collateral enforceability opinions for the purposes of allowing Swiss banks to account for derivatives transactions on a net basis for regulatory capital purposes (see **2.4 Listed v Over-the-Counter**). Such opinions must cover the enforceability of the netting arrangement and the enforceability of the collateral in the insolvency of the counterparty and under the governing law of the agreement, as well as under the governing law of the transactions.

The Swiss margin rules require opinion coverage for the enforceability of the collateral provided by the counterparty (the "collateral provider opinion") and, as regards initial margin, for the availability of the collateral to the collateral provider in the insolvency of the collateral taker (the "collateral taker opinion").

With respect to ETDs, the Swiss regulatory capital requirements also require a legal opinion regarding the positions and margin assets held through the clearing chain with the CCP for the purposes of applying a risk weight of 2% for own account positions (see **2.4 Listed v Over-the-Counter**).

5. Enforcement Trends

5.1 Regulator Priorities and Enforcement Trends

FINMA has not published guidance on its priorities with respect to enforcement activities regarding derivatives. Given that the first level of enforcement activities lies with the auditors, any audit points tend to be addressed at that level.

For the future, increased scrutiny may be expected for any derivatives transactions entered into with retail clients, in particular, regarding compliance with any requirements to provide adequate disclosures under the point-of-sale information obligations of the FinSA (eg, for CFDs or similar retail products).