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Guidance

Ordinance on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland

As of: 20 December 2018

This guidance will be updated and supplemented, as needed. The current version is available at: www.sif.admin.ch/ordinance

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1 Introduction

This document provides additional information as well as guidance on the «Ordinance on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland» of the Federal Council dated 30 November 2018 (SR 958.2; hereinafter «Ordinance»).

Section 2 discusses selected issues raised by interested and affected market participants in connection with this Ordinance. Section 3 provides guidance on specific provisions of the Ordinance.

The Federal Department of Finance (FDF) will update and supplement this guidance as required.

The Ordinance is available online in the three official languages at www.admin.ch > Federal Law. An English language translation was also published for information purposes (as part of the German, French and Italian versions). Legally binding are only the publications in the official languages:

Ordinance – German	https://www.admin.ch/opc/de/classified-compilation/20183325/index.html <i>Additional Information:</i> www.sif.admin.ch/verordnung
Ordinance – French	https://www.admin.ch/opc/fr/classified-compilation/20183325/index.html <i>Additional Information:</i> www.sif.admin.ch/ordonnance
Ordinance – Italian	https://www.admin.ch/opc/it/classified-compilation/20183325/index.html <i>Additional Information:</i> www.sif.admin.ch/ordinanza
Ordinance – English	https://www.admin.ch/opc/en/classified-compilation/20183325/index.html <i>Additional Information:</i> https://www.sif.admin.ch/ordinance

2 Important Questions and Answers

2.1 What is the aim of the Ordinance?

The Ordinance aims at the protection and safeguarding of a functioning Swiss stock exchange infrastructure as an essential element of the Swiss financial system.

For instance, the Ordinance seeks to limit the negative impact for Switzerland as a location for stock exchanges as well as a financial and business center in case the European Commission were not to extend the stock exchange equivalence it had granted to Switzerland until year-end 2018 (cf. Section 2.4 below). The Ordinance, *inter alia*, establishes a basis that investment firms located in the European Union could continue trading Swiss shares on Swiss stock exchanges also as from 2019, even absent the stock exchange equivalence. The Federal Council continues to be committed to ensuring an unlimited extension of the stock exchange equivalence as the clearly preferred and best solution for all parties. The adoption of the present Ordinance does not change this fact. Accordingly, the Ordinance is designed such, that in case of an extension of the stock exchange equivalence, in practice, the Ordinance would have *no* effect on market participants.

2.2 Why does the Federal Council enact the Ordinance on 30 November 2018?

At the present time it cannot be excluded that a specific case of application for the protective effect envisaged by the Ordinance arises as from 1 January 2019 in the context of the EU stock exchange equivalence. For this reason, the Ordinance had to be enacted. However, this does not mean that such case of application will arise necessarily. Rather, the Federal Council continues to seek an unlimited extension of the stock exchange equivalence. The Federal Council remains committed to this objective. The Swiss regulatory and supervisory framework continues to fulfil all requirements to be recognized as equivalent by the European Commission.

The Ordinance had to be adopted already prior to year-end 2018 solely because affected market participants require clarity and a minimal lead time to adapt to the Ordinance. Should, despite all efforts, the EU stock exchange equivalence lapse by year-end 2018, the new duty to obtain recognition pursuant to the Ordinance must apply as from 1 January 2019 in order to achieve the intended protective effect.

2.3 Who is addressed by the Ordinance?

The Ordinance is addressed to trading venues with registered office abroad. This includes namely stock exchanges (referred to in the EU as «regulated markets») and multilateral trading facilities (cf. guidance on Article 1 of the Ordinance).

2.4 How should the intended protective effect be achieved?

Equity securities (e.g. shares) issued by companies with registered office in Switzerland are traded not only on trading venues in Switzerland, but also – more than shares issued by companies located in many other jurisdictions – on trading venues located abroad. Therefore, foreign financial market regulation can also affect Swiss financial market infrastructures. Generally, such cross-border effects of foreign financial market regulation do not have specific negative consequences on the Swiss stock exchange infrastructure. In particular cases, however, foreign financial market regulation may have adverse effects or even impair the functioning of the Swiss stock exchange infrastructure.

The Ordinance achieves its protective effect by allowing trading with equity securities of companies with registered office in Switzerland on foreign trading venues only if the relevant foreign financial market regulation does not contain restrictive provisions that significantly negatively affect the trading of such equity securities on Swiss trading venues.

A specific case of application of this protective effect would arise if the European Commission were not to extend beyond 2018 the stock exchange equivalence currently granted to Switzerland with a time-limit until year-end 2018. EU investment firms are subject to EU share trading obligations (cf. Article 23 MiFIR¹). Pursuant to these share trading obligations, EU investment firms may trade shares on Swiss stock exchanges only if the European Commission recognizes as equivalent Switzerland's legal and supervisory framework applicable to stock exchanges (so-called stock exchange equivalence). The EU share trading obligations apply to shares that are (also) admitted to trading on an EU regulated market or are traded on an EU trading venue. Hence, today, the EU share trading obligations apply also to numerous shares issued by Swiss companies. Absent the stock exchange equivalence, EU investment firms would, in principle, be disallowed from continuing trading shares in such companies with registered office in Switzerland on Swiss trading venues. The loss of these trading volumes would, however, have significant adverse effects on the trading with shares of companies with registered office in Switzerland on Swiss trading venues, and thereby on the entire Swiss stock exchange infrastructure as an essential element of the Swiss financial system.

The intended effect of the protective measure is as follows: If shares issued by companies with registered office in Switzerland are neither admitted to trading on an EU regulated market nor traded on an EU trading venue, the EU share trading obligations pursuant to Article 23 para. 1 MiFIR do not apply to these shares. Accordingly, a stock exchange equivalence would not be necessary in such case. The same would apply pursuant to Article 23 para. 1 let. a MiFIR even if a certain trading volume with Swiss shares remains on EU trading venues, but such share trading occurs non-systemically, ad hoc, irregularly and infrequently. Accordingly, the protective measure aims at ensuring that in case of a lapsing stock exchange equivalence, as from January 2019, no trading with equity securities issued by companies with registered office in Switzerland occurs in the EU that would trigger corresponding share trading obligations. For that reason, trading with Swiss equity securities (namely shares) on foreign trading venues is subjected to a duty to obtain recognition. Granting such recognition to EU trading venues depends on whether EU financial market regulation does not have a significant adverse effect on the trading of equity securities issued by companies with registered office in Switzerland on Swiss trading venues.

Therefore, the protective measure constitutes a basis that EU investment firms could continue trading Swiss shares on Swiss trading venues as from 2019, potentially also absent an EU stock exchange equivalence, without breaching then no longer applicable EU share trading obligations (however, shares issued by European issuers could no longer be traded by EU investment firms on Swiss trading venues despite the protective measure).

It should be emphasized that today's situation, in which share trading is restricted neither in Switzerland, nor in the EU (given the stock exchange equivalence in force until year-end 2018) or elsewhere is clearly preferable for all market participants in Switzerland and abroad. Therefore, the Federal Council's primary objective remains to obtain an unlimited extension of the EU stock exchange equivalence.

EU authorities are also aware of the cross-border aspects of EU share trading obligations. For instance, ESMA highlighted in November 2017 that the lack of equivalence decisions can cause issues in trading non-EU shares.² Against this background – according to ESMA – the

¹ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. Text with EEA relevance.

² «ESMA is aware that the scope of the trading obligation in Article 23, and the absence of the relevant equivalence decisions, might cause issues for investment firms that wish to undertake trades in non-EEA shares in the primary listing venues of such shares. ESMA and the European Commission are working closely together to resolve those issues.» (cf. ESMA FAQ dated 13 November 2017, available at: <https://www.esma.europa.eu/press-news/esma-news/esma-clarifies-trading-obligation-shares-under-mifid-ii>; status: 29.11.2018).

European Commission would prepare equivalence decisions for those non-EU jurisdictions, whose shares are traded in the EU systematically and frequently.³ In contrast, where the European Commission would not adopt an equivalence decision for specific trading venues in non-EU jurisdictions, it could be assumed that trading in shares admitted to a stock exchange in such third country cannot be considered to be systematic, regular and frequent in the EU.⁴ Also the European Commission has stated that EU share trading obligations apply under the condition that share trading in the EU constitutes a significant percentage of a share's global share trading volume.⁵

2.5 Would the Ordinance *de facto* have an effect if the EU were to extend the stock exchange equivalence prior year-end 2018 only for an *unlimited time*?

No.

In this case – which the Federal Council continues to aim for – the Ordinance would remain in effect, however, it would have *no effect* in practice. Specifically, the FDF would promptly amend the list of jurisdictions pursuant to Article 2 paragraph 1 letter b of the Ordinance (cf. Article 3 paragraph 3 Ordinance), so that the list would be empty as per 1 January 2019. Thereby, also all trading venues located in the EU would fulfil the requirements for the new recognition and would obtain such recognition without request as per 1 January 2019.

Moreover, the Ordinance is time-limited until year-end 2021 and can, if needed, also be repealed by the Federal Council before then.

2.6 Would the Ordinance *de facto* have an effect, if the EU were to extend the stock exchange equivalence prior year-end 2018 for a *limited time period*?

In the interim, no.

The Federal Council has repeatedly stated that Switzerland fulfils all requirements for an unlimited extension of the stock exchange equivalence by the European Commission.⁶ In case of a time-limited extension before year-end 2018, the Ordinance would remain in effect. However, the Ordinance would in practice have *no effect* in the interim – i.e. for the duration of the time-limited extension of the stock exchange equivalence. Specifically, the FDF would promptly amend the list of jurisdictions pursuant to Article 2 paragraph 1 letter b of the Ordinance, so that the list would be empty as per 1 January. Thereby, also all trading venues located in the EU would – in the interim – fulfil the requirements for the new recognition and would obtain such recognition without request as per 1 January 2019. In case of a time-limited extension, the situation would have to be re-assessed towards the expiration date of the prolonged stock exchange equivalence.

³ «While the Commission is preparing equivalence decisions for the non-EU jurisdictions whose shares are traded systematically and frequently in the EU, the absence of an equivalence decision taken with respect to a particular third country's trading venues indicates that the Commission has currently no evidence that the EU trading in shares admitted to trading in that third country's regulated markets can be considered as systematic, regular and frequent.» (cf. ESMA FAQ dated 13 November 2017, cited in footnote 2)

⁴ Cf. ESMA FAQ dated 13 November 2017 (cf. footnote. 2).

⁵ «The EU trading obligation applies to shares listed on both exchanges in the recognised countries and in the EU ("dual listings"), on condition that trading in the EU constitutes a significant percentage of the share's global trading volume» (cf. European Commission Press Release dated 13 December 2017, available at: <http://europa.eu/rapid/midday-express-13-12-2017.htm?locale=en#18>; status: 29.11.2018).

⁶ Also the European Commission has stated in its implementing decision (EU) 2017/2441 of 21 December 2017 that Switzerland fulfils all four conditions required for the stock exchange equivalence. Cf. Implementing Decision (EU) 2017/2441 of the Commission of 21 December 2017 on the equivalence of the legal and supervisory framework applicable to stock exchange in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council, Recitals no. 25 as well as in particular, no. 14, no. 18, no. 21, and no. 24.

2.7 How do affected trading venues obtain recognition?

The Swiss Financial Market Supervisory Authority FINMA (www.finma.ch) is competent for granting recognition. FINMA will grant recognition to foreign trading venues on request or – more relevant in practice – without request. For specific questions concerning the recognition process cf. Section 2.15 below.

2.8 What is the effect of the protective measure on trading venues in the EU?

Should the European Commission extend the stock exchange equivalence before year-end 2018, the protective measure has in practice no effect on trading venues in the EU. However, if the stock exchange equivalence were not extended, EU trading venues cannot obtain recognition pursuant to the Ordinance, because in this case the EU restricts its market participants in trading equity securities of companies with registered office in Switzerland on Swiss trading venues and this significantly adversely affects the trading in such equity securities on Swiss trading venues. In this case, trading venues in the EU would, from 1 January 2019 onwards, be disallowed from offering or facilitating trading in certain equity securities of companies with registered office in Switzerland (cf. Article 1 of the Ordinance).

The new duty to obtain recognition is a purely protective measure. Most trading venues in the EU and the EU as a whole are economically only marginally affected by the duty to obtain recognition, due to their marginal share of equity securities of companies with registered office in Switzerland compared to the total share trading volume. The measure solely aims at the protection of Switzerland as a functioning location for stock exchanges. It creates a basis for EU investment firms to continue trading shares of companies with registered office in Switzerland on Swiss trading venues also from 2019, even without an extension of the stock exchange equivalence (cf. Section 2.4).

2.9 What is the effect of the protective measure on trading venues in the United Kingdom?

From January until the end of March 2019, trading venues in the United Kingdom (UK) are affected by the protective measure in the same way as are trading venues in the EU, as during this period the UK continues to have the status of an EU member state (cf. Section 2.8). Whether trading venues in the UK obtain recognition pursuant to the Ordinance in this period therefore depends on whether the European Commission extends the stock exchange equivalence granted to Switzerland before year-end 2018.

After the UK's exit from the EU, the situation will have to be reevaluated. In case financial regulation applicable in the UK does not restrict UK market participants in trading equity securities of companies with registered office in Switzerland on Swiss trading venues and the trading in such equity securities on Swiss trading venues is not significantly adversely affected, all trading venues in the UK can and will quickly obtain recognition pursuant to the Ordinance (or, in case they already previously obtained such recognition, be able to keep this recognition without interruption).

2.10 What is the effect of the protective measure on trading venues in the USA and other countries outside of the EU?

Equity securities of companies with registered office in Switzerland are traded also on trading venues in the USA – for example on national securities exchanges or on so-called alternative trading systems (ATS) – as well as on various trading venues in other countries outside the EU. To the knowledge of the FDF, currently neither the USA nor other countries outside the EU have regulations in place restricting market participants in trading equity securities of companies with registered office in Switzerland on Swiss trading venues and thereby significantly adversely affecting the trading in Swiss equity securities on Swiss trading venues.

Accordingly, all relevant trading venues, for example those located in the USA (including ATS),

can and will obtain from FINMA a recognition in time for 1 January 2019, without having to file a request.

Therefore, the Ordinance in practice has *no effect* on these trading venues. All of these trading venues are permitted to offer or facilitate the trading in equity securities of companies with registered office in Switzerland – as currently and without impairment or interruption – also after 1 January 2019.

The same also applies to all further foreign trading venues on which equity securities of companies with registered office in Switzerland are being traded, which are not located in a jurisdiction designated pursuant to Article 2 paragraph 1 letter b of the Ordinance, and which are subject to appropriate regulation and supervision. Generally, all relevant foreign trading venues should fulfil the latter requirement. In particular, the requirement of appropriate regulation and supervision is fulfilled by all trading venues from jurisdictions, from which a trading venue already has been granted recognition according to Article 41 of the Financial Market Infrastructure Act of 19 June 2015 (FMIA, SR 958.1) by FINMA (cf. www.finma.ch > *Authorisation* > *Licensed institutions and persons* > *List of authorised and recognised financial market infrastructures (including trading venues) and foreign participants*). In case a trading venue should be missing on FINMA's list of trading venues recognized pursuant to the Ordinance, the trading venue concerned or other market participants may notify FINMA at the below contact details (see Section 2.15). FINMA will update the list as required.

Moreover, in practice, the Ordinance will generally have no effect on off-venue (OTC) trading in Swiss equity securities. An exception to this principle is when a trading venue located in jurisdiction pursuant to Article 3 paragraph 3 Ordinance is involved in the transaction (e.g. by facilitating the transaction).

2.11 How are equity securities treated that are listed at a stock exchange in Switzerland as well as at a foreign stock exchange (dual listing)?

For the trading of equity securities of companies with registered office in Switzerland that are listed both at a stock exchange in Switzerland as well as at a foreign stock exchange before 30 November 2018, there is an exception. Foreign stock exchanges are not required to obtain recognition for the trading of these equity securities, but are nonetheless required to obtain recognition for the trading of other equity securities of companies with registered office in Switzerland (cf. Article 1 paragraph 2 Ordinance). This exception is available only to foreign stock exchanges, but not to other trading venues. The issuer of the equity securities must have expressly consented to the listing at the foreign stock exchange. Listing and express consent must have occurred prior to 30 November 2018.

Insofar as a foreign stock exchange has received recognition pursuant to the Ordinance – e.g. stock exchanges in the USA and in other jurisdictions outside the EU – also new dual listings of equity securities issued by companies with registered office in Switzerland at such stock exchanges continue to be possible. The Ordinance does not restrict such new dual listings. Correspondingly, the mentioned exception is currently mainly relevant for Swiss issuers with securities that have been listed at an EU domiciled stock exchange prior to 30 November 2018.

2.12 Are sanctions possible in case of violations of the Ordinance?

The Ordinance is deemed to be a financial market act pursuant to the Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA, SR 956.1). Willful as well as negligent exercise of an activity that requires a license, recognition, admission or registration without corresponding license, recognition, admission or registration will lead to criminal law sanctions (Article 44 FINMASA). Corresponding criminal law sanctions can target foreign trading venues as well as their responsible bodies (e.g. management, board of directors). Sanctions include, in case of willful conduct, imprisonment of up to three years or a monetary penalty, and a fine in case of negligent conduct.

2.13 What is the Ordinance's legal basis?

The Ordinance is based on Article 184 paragraph 3 of the Federal Constitution (SR 101). Pursuant to Article 184 paragraph 1 of the Federal Constitution, the Federal Council is responsible for foreign relations. Safeguarding foreign affairs interests may require also the adoption of national legal acts. Accordingly, Article 184 paragraph 3 of the Federal Constitution vests the power to adopt ordinances and rulings in the Federal Council where safeguarding the interests of the Switzerland so requires. The Federal Council may only adopt ordinances based directly on Article 184 paragraph 3 of the Federal Constitution if the objective of the ordinance cannot be achieved through the normal legislative process. These requirements are satisfied with the present Ordinance, as it aims at limiting significant negative effects for Switzerland as a location for stock exchanges as well as a financial and business center, already as from January 2019. Therefore, there is a high urgency, both in timing and substance, with regard to the protective measure implemented by the Ordinance.

2.14 Were market participants included in the preparation of the Ordinance?

As the Ordinance is based directly on the Federal Constitution (cf. Section 2.13), there has been no formal consultation. However, an informal exchange between the FDF and representatives of affected Swiss market participants (stock exchanges, industry associations as well as banks, issuers, etc.) has taken place. Market concerns have been addressed where possible without undermining the protective effect of the measure.

2.15 To whom can trading venues address questions?

Affected trading venues may address questions at any time to:

General inquiries on the protective measure	By E-Mail to: ordinance-info@sif.admin.ch
Inquiries regarding the granting of recognitions	By E-Mail to: exchangesupervision@finma.ch

3 Guidance regarding the Ordinance

Article 1

This clause contains the new duty to obtain recognition for trading venues (i.e. namely stock exchanges; referred to in the EU as «regulated markets», and multilateral trading systems) with registered office abroad.

The duty to obtain recognition pursuant the Ordinance complements the existing duty to obtain recognition pursuant Article 41 of the Financial Market Infrastructure Act of 19 June 2015 (FMIA). Both duties to obtain recognition are independent of each other. A trading venue with registered office abroad might therefore require two recognitions: On the one hand a recognition pursuant to Article 41 FMIA, if the foreign trading venue grants direct access to FINMA supervised Swiss participants. On the other hand, as from 1 January 2019, a new recognition pursuant to Article 1 of the Ordinance, if certain equity securities of companies with registered office in Switzerland are traded on the foreign trading venue or if the foreign trading venue facilitates such trading.

The addition «or (...) facilitate the trading of such equity securities» clarifies that the duty to obtain recognition also covers circumstances, in which the equity securities are not directly traded on the foreign trading venue, but in which the foreign trading venue makes arrangements to facilitate such trading, e.g. with a view to circumvent the duty to obtain recognition pursuant to this Ordinance.

Shares, participation certificates, profit-sharing certificates, or other participation rights are all regarded as equity securities (cf. Article 2 letter i FMIA). The Ordinance does not cover convertible bonds as such (at least until conversion has been notified), US-law governed American Depository Receipts and Exchange Traded Funds (ETFs). The duty to obtain recognition pursuant the Ordinance requires that the equity security is listed at a stock exchange in Switzerland or is traded on a trading venue (cf. Article 26 FMIA) in Switzerland. If, in contrast, an equity security of a company with registered office in Switzerland is not listed on a Swiss stock exchange and there is no trading of that equity security on Swiss trading venues, there is no connection to the Swiss capital market. In this case, the foreign trading venue is not subject to the duty to obtain recognition pursuant to the Ordinance for this specific equity security.

Paragraph 2 contains exceptions to the duty to obtain recognition, specifically for the trading in certain equity securities of companies with registered office in Switzerland. The exception is available only to stock exchanges and therefore is narrower than the duty to obtain recognition pursuant to paragraph 1. The main focus are equity securities that are admitted to trading on, or are listed at, a stock exchange in Switzerland as well as at a foreign stock exchange, in each case with an explicit consent of the issuer of these equity securities, who also assumes the duties associated with the admission to trading or the listing at such stock exchanges. In Switzerland, this is referred to as a “Doppelkotierung” (also referred to as a “dual listing”). The act of listing (admission with explicit consent of the issuer) on the foreign stock exchange must have occurred prior to 30 November 2018, so that the exception operates specifically as a right of continuance for listings that have existed prior to the adoption of the Ordinance, but cannot be used as an avoidance option. In addition, the exception applies only for the specific foreign stock exchange on which the equity securities in question are admitted to trading, or listed, with the explicit consent of the issuer. Other stock exchanges and trading venues (even if located in the same jurisdiction) cannot benefit from the exception.

Article 2

The recognition of a foreign trading venue is granted by FINMA on request or – in practice probably the usual case – without request, if the requirements are met. The recognition requirements are twofold: On the one hand, the foreign trading venue must be subject to appropriate regulation and supervision. This requirement follows Article 41 paragraph 2 FMIA and is generally already fulfilled by the relevant foreign trading venues. On the other hand, the foreign trading venue cannot have its registered office in a jurisdiction that restricts its market participants in trading equity securities of companies with registered office in Switzerland on Swiss trading venues and thereby significantly adversely affect the trading in such equity securities on Swiss trading venues.

Article 3

FINMA publishes a list of all recognised foreign trading venues. This list is available at FINMA's website (cf. www.finma.ch) and is continuously updated.

The FDF publishes a list of jurisdictions pursuant to Article 2 paragraph 1 letter b of the Ordinance. This list is promptly updated by the FDF, as needed. Jurisdictions on this list restrict their market participants in trading equity securities of companies with registered office in Switzerland on Swiss trading venues, with significant adverse effects for the trading in such equity securities on Swiss trading venues. This would be the case, for example, if the European Commission would not extend the stock exchange equivalence for Switzerland before year-end 2018. In this case this list would, with effect as from 1 January 2019, contain the European Union including all of its member states. Accordingly, trading venues with registered office in the European Union could not obtain recognition pursuant to the Ordinance.

Article 4

Foreign participants at Swiss trading venues today require an authorisation by FINMA (cf. Article 40 FMIA) and have certain duties (cf. Articles 38 and 39 FMIA). To resolve possible short-term operational challenges when the Ordinance enters into force, FINMA can, pursuant to Article 4, grant authorisation pursuant to Article 40 FMIA also temporarily and newly authorised foreign participants can fulfil certain duties also retrospectively.

Article 5

The Ordinance is deemed to be a financial market act pursuant to the Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA, SR 956.1). Accordingly, also the criminal provisions set out in the FINMASA apply in case of an activity without recognition (cf. Article 44 et seq. FINMASA).