Commodity Traders – Impact of the New Financial Market Regulation

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- **Regulation of commodity trading limited in Switzerland**
- **Commodity derivatives subject to FinfraG**
- **Exemptions may apply to commodity derivatives, emission allowances and related derivatives**

1. Current Regulatory Regime

Commodity Trading activities are hardly regulated in Switzerland (apart from certain exemptions derived from the Stock Exchange Act (SESTA)). Commodity trading consists of physical commodity trading (delivery of commodities to the buyer) and commodity derivatives (with physical or cash settlement). Both trading activities can be done over-the-counter (OTC) or through an exchange. OTC commodity trading is far more dominant than trading through an exchange.

Commodity traders only fall under SESTA if their business activity is qualified as an activity of a securities dealer. Securities are defined as standardized certificates that are suitable for mass trading, rights not represented by a certificate with similar functions (bookentry securities) and derivatives.

Thus, physical commodities by themselves are not securities and traders that only trade in physical commodities are excluded from the scope of SESTA. Additional regulation (apart from the money laundering regulation of financial intermediaries) does not exist.

Commodity derivatives, however, are classified as securities if they are suitable for mass trading. Thus, even if a commodity trader trades commodity derivatives on a foreign exchange, it can be subject to SESTA.

Individualized commodity derivatives (tailored to the specific needs of a party) are, however, excluded from the scope of SESTA.

2. Overview of the New Financial Market Regulation

The Swiss regulatory regime also affects Commodity Traders and currently mainly affects their derivatives business. Commodity derivatives are subject to rules introduced by the Financial Market Infrastructure Act (FinfraG). Clearing obligations (across asset classes), risk mitigation duties and transparency / reporting rules will apply. The details of the covered OTC derivative trades / products for mandatory clearing are still to be defined (by delegation in FinfraG to Swiss Financial Market Supervisory Authority (FINMA) (in form of regulations).

3. Selected Key Points for Commodity Traders

Other than under Swiss law, commodity derivatives, emission allowances and related derivatives are subject to certain exemptions from the wide scope of MiFID II.

Market participants who deal on their own account in these products or persons who provide instrument services in these products to the customers or suppliers of their main business or traders who provide investment services in these instruments to their customers or suppliers of their main business, are exempt from MiFID II.

Similar provisions are expected for the FINMA regulations (once the complete set of delegated law has been enacted).

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