

Uncleared Margin Rules in EU and US

Summary and Comparison



Contents

Transactions in Scope	3
Parties in Scope	5
Thresholds and Exemptions	7
Intra-Group Exemption	9
Margin – Calculation and Collection	11
Margin – Policies, Procedures and Documentation	13
Legal Review	13
Segregation of IM	14
IM Calculation	15
Eligible Collateral	17
Collateral Valuation – Haircuts	20
IM Collateral Concentration Limits	21
Cross-Border Trades	22
Contacts	24

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Margin rules for uncleared derivatives have now been finalised in the EU and in the US (separately by bank regulators and the CFTC but not yet the SEC). While these are largely consistent with the BCBS/IOSCO framework, there are differences in the precise margin requirements between the two jurisdictions and compliance dates are not aligned. Moreover, issues with respect to the application of the rules in a cross-border context remain unresolved and, unless transitional relief is available, an approach that is based on the strictest version of all applicable rules is likely to prevail and procedures and documentation will have to be tailored accordingly.

The respective rules are summarised and compared in the attached table. Links to the relevant rules are here:

European Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016, coming into force 4 January 2017: [Click here](#).

Prudential Regulators (PR) Final Rules (30 November 2015): [Click here](#).

CFTC Final Rules (6 January 2016): [Click here](#).

Both the EU and US rules are summarised in this publication with some added commentary. The summary will be updated once the SEC rules are finalised. The US rules were summarised with the assistance of Kramer Levin.



Transactions in Scope

Uncleared OTC derivative contracts. (Art. 11(3) EMIR).

Listed derivatives executed on a third country exchange which is not deemed equivalent to an EU regulated market are considered OTC derivative contracts.

US designated contract markets (DCMs) considered equivalent to an EU regulated market are:

- Cantor Futures Exchange L.P.
- CBOE Futures Exchange, LLC
- Chicago Board of Trade (Board of Trade of the City of Chicago Inc.)
- Chicago Mercantile Exchange Inc.
- Commodity Exchange Inc.
- ELX Futures L.P.
- Eris Exchange, LLC
- ICE Futures U.S. Inc.
- Minneapolis Grain Exchange Inc.
- New York Mercantile Exchange Inc.
- Nodal Exchange, LLC
- North American Derivatives Exchange, Inc. OneChicago LLC
- TrueEX LLC
- Nasdaq Futures Inc.

PR rule: Uncleared swaps and uncleared security-based swaps (SBS). (PR rule at 12 CFR §§45, 237, 349, 624, 1221 and noted herein as §__.1 through §__.12).

CFTC rule: Uncleared swaps (but not uncleared SBS). (CFTC rule at 17 CFR §23.150 through §23.161).

An “uncleared swap” is a swap that is not cleared by a derivatives clearing organization (DCO) registered with the CFTC or by a clearing organization that the CFTC has exempted from registration by rule or order. (§__.2; §23.151) CFTC registered or exempted DCOs as of 27 July 2016 are:

- ASX Clear (Futures) Pty Limited
- Cantor Clearinghouse, L.P.
- Chicago Mercantile Exchange, Inc.
- Eurex Clearing AG
- ICE Clear Credit LLC
- ICE Clear Europe Limited
- ICE Clear US, Inc.
- Japan Securities Clearing Corporation
- Korea Exchange, Inc.
- LCH.Clearnet LLC
- LCH.Clearnet Ltd.
- LCH.Clearnet SA
- Minneapolis Grain Exchange, Inc.
- Natural Gas Exchange Inc.
- Nodal Clear, LLC
- North American Derivatives Exchange, Inc.
- Options Clearing Corporation
- OTC Clearing Hong Kong Limited
- Singapore Exchange Derivatives Clearing Limited

An “uncleared SBS” is an SBS that is not, directly or indirectly, submitted to and cleared by a clearing agency registered with the SEC or by a clearing agency that the SEC has exempted from registration by rule or order. (§__.2).

Exceptions:

No IM required for physically-settled FX forwards, FX swaps and currency swaps but VM still required (albeit on a deferred basis in the case of physically-settled FX forwards). (Arts. 27 and 37(2)).

Margin rules only apply to uncleared single stock equity options and index options from 4 January 2020. (Art. 38(1)).

Derogations exist in relation to OTC derivative contracts concluded in connection with covered bonds. (Art. 30).

Trades entered into pre-compliance date excluded. (Art. 35).

Exceptions:

No IM or VM required for physically-settled FX swaps and FX forwards and certain other derivatives not covered as swaps or SBS under Dodd-Frank. (77 FR 69694 (Nov. 20, 2012)).

Trades entered into pre-compliance date excluded. However, if transactions are entered into before and after the compliance date under the same master agreement, then the pre-compliance date transactions will be excluded only where the parties elect to margin the pre-compliance date swaps under a separate netting portfolio from the post-compliance date swaps (e.g. under separate credit support annexes). While the parties may designate separate netting sets under the same master agreement, if one set includes post-compliance date swaps, then all of the swaps in that set will be subject to the margin rules. (§__.5(a)(3); §23.153(d)(2)).

Comments:

- IM is required under EU and US rules for FX options, non-deliverable forwards and other cash-settled FX forwards/swaps.
 - EU rules impose VM requirements on physically-settled FX forwards/swaps whereas these are exempt from all IM/VM requirements under US rules.
 - Under EU rules, in relation to physically-settled FX forwards, VM is currently expected to apply from 3 Jan 2018.
 - Spot FX are not OTC derivative contracts for the purposes of the EU rules by virtue of the fact they are not financial instruments under MiFID II, as clarified by the MiFID II Delegated Regulation ([click here](#)). This means that Spot FX is out of scope of the IM and VM requirements under the EU rules. Spot FX transactions are a contract for the exchange of one currency against another, where delivery is to be made within the longer of: (a) 2 trading days in respect of any pair of major currencies; (b) where at least one is not a major currency, the longer of 2 trading days or the period generally accepted in the market as the standard delivery period for that currency pair; or (c) where the main purpose is the sale or purchase of a transferable security or a unit in a collective investment undertaking, the period generally accepted as standard delivery period or 5 trading days if shorter.
 - 3 year exemption for equity options under EU rules reflects the uncertainty as to whether these will be subject to margin requirements in other jurisdictions which may otherwise give rise to regulatory arbitrage to the detriment of EU firms.
 - Under US rules, uncleared SBS executed by entities not subject to supervisions by a PR will be subject to SEC rules (yet to be finalised).
 - US rules will apply to pre-compliance date trades if those trades are included in a netting set that includes post-compliance date trades (these separate netting portfolios are commonly covered by separate credit support annexes to a netting agreement). Potential need to have multiple CSAs, each covering a distinct netting set; one for legacy transactions and one for new transactions. Amendments, modifications, novations and/or compression exercises affecting a pre-compliance trade would result in the trade no longer being excluded from the US rules. The position is less clear under the RTS but it is likely that amendments aimed at avoiding the rules would attract adverse regulatory scrutiny.
 - Contracts that CCPs enter into during a default management process are excluded from the margining rules.
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Parties in Scope

Margin rules apply (Art. 24) where:

- A. Both parties are either FCs or NFC+s; or
- B. One party is an FC or NFC+ and the other party is a third country entity that would be an FC or NFC+ if it was established in the EU.

Margin rules do not apply where: one party is an NFC-, including a third country entity that would be a NFC- if established in the EU.

Financial Counterparty (FC): Entity regulated in the EEA as (1) MiFID firm (2) credit institution (deposit-taker)(excluding CCPs that may be regulated as banking institutions), general or life insurer, reinsurer, occupational pension scheme, UCITs and/or their management companies, AIF managed by an authorised or registered AIFM.

Non-Financial Counterparty (NFC): Entity that is not an FC.

NFC+: an NFC exceeding the EMIR clearing thresholds, ie.in gross notional value, for all non-hedging transactions, €1 billion for credit and equity derivatives and €3 billion for interest rate swaps, FX, commodity and other OTC derivatives.

NFC-: an NFC below clearing thresholds.

Margin rules apply (§§__3 and __4; §§23.150(a), 23.152, and 23.153) to swaps between Covered Swap Entities (CSEs) and:

- A. other Swap Entities;
- B. a Financial End User with Material Swaps Exposure;
- C. a Financial End User without Material Swaps Exposure;
 - VM: CSE required to collect/post; and
 - IM: CFTC rule – CSE not required to collect/post IM; PR rule – CSE only needs to collect/post IM as CSE determines appropriate given credit risk of CSE's exposure to the c/p; and
- D. other c/ps including sovereigns, multilateral development banks (MDBs) and the Bank for International Settlements (BIS): CSE only needs to collect and post IM/VM as CSE determines appropriate given credit risk of CSE's exposure to the c/p.

Exempted Swaps: Note that both the PRs and CFTC exempt from the margin rules certain uncleared swaps entered into with c/ps that qualify for exceptions/exemptions from mandatory clearing requirements, including financial institutions with total assets of less than USD 10 Bn, captive finance companies, co operative entities and Treasury affiliates acting as agent. (§__1(d); §23.150(b)).

AANA: average daily aggregate notional amount of uncleared swaps, SBS, and physically settled FX swaps and forwards (but excluding exempted swaps as described above) for an entity and its affiliates. (§__2; §23.151).

Affiliate (PR rule)/ Margin Affiliate (CFTC rule): in each case defined based on accounting standards. (§__2; §23.151).

Covered Swap Entity (CSE): PR rule: Swap Entity that is regulated by a PR (including federally insured depository institutions, bank holding companies, certain foreign banks and certain subsidiaries of bank holding companies and foreign banks). CFTC rule: Swap Entity not regulated by a PR including a non-bank subsidiary of a bank holding company. (§__2; §23.151).

Financial End User: an entity that is not a Swap Entity and is one of the following: US or foreign bank, bank holding company and its affiliates, intermediate holding company, investment fund, state-licensed lender, market intermediary e.g. commodity pool, commodity pool operator, commodity trading advisor, floor broker, floor trader, introducing broker, futures commission merchant), insurance company, securitization vehicle or a foreign entity that would be a Financial End User if established in the US. Excludes sovereigns, MDBs and BIS. (CFTC rule: Financial End User also includes a SBS dealer and a major SBS participant.) (§__2; §23.151).

Material Swaps Exposure: AANA for June, July and August of preceding year (calculated only for business days (BD) and counting trades with affiliates only once) and determined on 1 Jan each year, exceeds USD8Bn. (§__2; §23.151).

PR: Federal Reserve, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Farm Credit Administration and Federal Housing Finance Agency. (§__2; §23.151).

Swap Entity: entity registered as, PR rule: swap dealer, SBS dealer, major swap participant (MSP) or major SBS participant; CFTC rule: swap dealer or MSP. (§__2; §23.151).

Status Change: If a CSE's c/p changes status so as to be subject to stricter margin rules (e.g. by acquiring Material Swaps Exposure), CSE to comply with stricter rules for those swaps entered into after change in status. If a CSE's c/p changes its status so as to be subject to less strict margin rules, then CSE may comply with the less strict rules both for new and existing outstanding swaps entered into after the compliance date. (§§__.1(f) and (g); §23.161(c)).

Comments:

- Under US rules, certain financial c/ps (i.e. Financial End Users without a Material Swaps Exposure) would be subject to VM requirements. Trades between EU FCs and such Financial End Users will be subject to both IM/VM requirements under EU rules.
 - "Financial Counterparties" under EU rules do not capture all regulated entities; for example, payment service providers will be regarded as NFCs.
 - NFCs that could potentially switch between NFC+ and NFC- status (thereby becoming in-scope parties for some years, but not for others) may have to over-comply, or reach agreements with their c/ps to switch compliant CSAs on and off.
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Thresholds and Exemptions

Gross Notional Threshold:

IM only required to be collected if gross notional amount of uncleared OTC derivatives above €8Bn (i.e. aggregate average month end notional amount (AANA) of €8Bn for March, April, May of preceding year) either for c/p or c/p's group. (Art. 28(1)). VM applies in all cases. (Art. 10).

Intra-group OTC derivatives counted only once, i.e. only one affiliate needs to count it. (Art. 28(2)).

Funds treated as distinct entities for purposes of threshold only where fund assets are segregated and not collateralised, guaranteed or supported by other funds or fund manager. (Art. 28(3)).

Phase-in of IM and VM based on AANA, calculated as per Arts. 36 and 39.

IM (Art. 36(1)):

- 4 February 2017 €3Tn
- 1 September 2017 €2.25Tn
- 1 September 2018 €1.5Tn
- 1 September 2019 €0.75Tn
- 1 September 2020 €8Bn

(calculated in current, not preceding, year)

VM (Art. 37(1)):

- 4 February 2017 - €3Tn
- 1 March 2017 - no threshold, VM applies to all in-scope parties.

IM threshold (Art. 29(1)):

No IM required from c/p where IM due does not exceed €50Mn.

If parties within different groups, no IM required if IM due from all entities within group does not exceed €50Mn.

If parties within same group, no IM required if IM amount due from affiliate does not exceed €10Mn.

Note: the IM thresholds specified are the maximum amounts permitted. Parties may agree to a lower, or zero, IM threshold.

Note: the IM thresholds specified are the maximum amounts permitted. Parties may agree to a lower, or zero, IM threshold.

Minimum Transfer Amount (MTA) (Art. 25):

If sum of IM, VM and excess collateral due is below €500,000 (or a lower agreed threshold), no collection of collateral required. Parties may agree apportionment of MTA threshold between separate IM and VM amounts provided aggregate does not exceed overall MTA.

If above MTA threshold, no deduction of MTA permitted for amount of collateral exchange.

AANA threshold for Financial End Users:

For Financial End Users (but not Swap Entities), IM only required if Financial End User has Material Swaps Exposure. (§__3(a); §23.152(a)).

Material Swaps Exposure evaluated for fund entities by applying accounting consolidation rules but counting trades with affiliates only once. (§__2; §23.151).

For phase-in described below, AANA based on March, April, and May of current (not preceding year) (§__1(e); §23.161), whereas for all other purposes of the margin rules Material Swaps Exposure calculated based on AANA for June, July, and August of preceding year. (§__2; §23.151).

Phase-in of IM and VM based on AANA for March, April and May of current (not preceding) year:

IM (§__1(e); §23.161):

- 1 September 2016 USD3Tn
- 1 September 2017 USD2.25Tn
- 1 September 2018 USD1.5Tn
- 1 September 2019 USD0.75Tn
- 1 September 2020 No threshold

VM (§__1(e); §23.161):

- 1 September 2016 - USD 3Tn
- 1 March 2017 - no threshold, VM applies to all in-scope parties.

IM threshold:

No IM required to be collected/posted between:

- CSE (and its affiliates) and a c/p that is a Swap Entity or Financial End User with Material Swaps Exposure (and its affiliates) where IM does not exceed USD50Mn (determined on a consolidated basis for both CSE and c/p) (§§__1 and __3(a)(2)); and
- PR CSE and its affiliates where IM does not exceed USD 20Mn (determined on a per affiliate basis). (§__11(b)(2)).

Note that no IM required to be collected/posted between CFTC affiliates if swaps subject to a centralized risk management program (subject to qualifications described in section "Intra-Group Exemption" below). (§23.159(a)).

Note: the IM thresholds specified are the maximum amounts permitted. Parties may agree to a lower, or zero, IM threshold.

Minimum Transfer Amount (MTA):

If sum of IM and VM that must be collected or posted by a CSE with respect to its c/p is not greater than USD500,000, no collection of collateral required. (§__5(b); §23.152(b)(3) and 23.153(c)).

Netting arrangements:

Where CSE cannot conclude that netting agreement is an EMNA, PR rule: CSE must treat swaps on gross basis for margin collection, but can net swaps for margin posting (§__5(a)(4)); CFTC rule: CSE must collect and post on a gross basis. (§§23.152(c) and 23.153(d)).

Eligible Master Netting Agreement (EMNA): an agreement which (i) provides for a single obligation upon default; (ii) is only subject to limited stays in insolvency; and (iii) does not contain any walkaway clauses. CSE must have well-founded legal basis to conclude agreement meets requirements (while PRs note that a legal opinion is not required, CFTC notes legal opinion will be required as a practical matter but that an in-house counsel analysis may be sufficient). (§__.2; §23.151).

Third country counterparty in collateral-unfriendly jurisdiction (Art. 31):

Where no legal comfort that:

- A. netting agreement and, where used, exchange of collateral agreement is enforceable in third country; or
- B. IM posted can be effectively segregated from c/p's insolvency, then:
 - (i) no need to post IM/VM (but must collect gross);
 - (ii) no need to collect or post IM/VM where, in addition to issues on enforceability and IM segregation, legal review concludes that collateral cannot be collected in a manner compliant with the RTS (even on a gross basis), AND the notional of affected contracts (i.e. those for which no collateral is collected) amounts to less than 2.5% of the notional of a c/p's group-wide OTC derivatives, excluding intra-group trades.

Third country counterparty in non-netting jurisdiction (§__.9(f); §23.160(e)):

No posting or segregation of IM to a foreign c/p is required if:

- CSE is a foreign branch of a US bank or foreign subsidiary of a US bank (or Edge or agreement corporation);
- there are certain legal or operational limitations in the foreign jurisdiction;
- the foreign jurisdiction requires CSE to transact in the foreign jurisdiction and does not accommodate collateral posting outside the jurisdiction;
- the foreign c/p is not guaranteed by a US person (and, under CFTC rule, is not a CSE);
- CSE collects cash IM and collects and posts cash VM;
- under PR rule, the PRs give prior written approval; and
- under CFTC rule, (a) for each broad risk category, the total outstanding notional in that category to which this exclusion applies is less than 5% of CSE's total outstanding notional for that category, (b) CSE has policies and procedures ensuring it is in compliance, and (c) CSE maintains proper books and records.

Comments:

- Gross notional thresholds are broadly similar under EU and US rules albeit there are differences on account of the €/USD exchange rate.
- Under both the EU and US rules, gross notional amount of uncleared OTC derivatives (i.e. aggregate average month end notional amount (AANA) is calculated without regard to the exemptions provided for certain categories of OTC derivatives (i.e. the notional amount of outstanding physically-settled FX forwards, FX swaps and currency swaps will be taken into account).
- Under the EU rules (but not the US rules), there is effectively an exemption from margin requirements when in-scope entities trade with c/ps in collateral-unfriendly jurisdictions, subject to those trades being less than 2.5% of overall group-wide OTC notional exposure (which could be lower than the AANA threshold amount as intra-group trades are ignored, albeit it is unclear whether cleared OTC trades will need to be included). This would facilitate trading with certain Asian c/ps, for example in China, where netting and/or collateral exchange agreements may not be fully enforceable.
- Unless an exemption applies (see over), intra-group trades (where at least one c/p is in the EU) shall be margined on the later of the phase-in dates and 6 months after entry into force of the RTS. (Art. 38(2)).
- There appears to be choice as to how to allocate the MTA across entities within a group.
- There is added complexity where a fund has allocated pools of assets to multiple investment managers. The fund will need to coordinate and aggregate notional values of trades entered into on its behalf by each of its investment managers in order to determine its AANA. ISDA has produced an advisory note highlighting that a fund will, under the US rules, be an "affiliate" of a company if it is consolidated on the financial statements prepared by that company.



Intra-Group Exemption

If c/ps within same group, no IM required if IM amount due from either affiliate does not exceed €10Mn. (Art. 29(1)(c)).

Otherwise (per Arts. 32-34 and Arts. 3 and 11 EMIR):

- A. Exemption applies where affiliate established in same Member State.
- B. If affiliate established in a different Member State, exemption applies as follows:
 - (i) For an FC trading with an affiliate that is: either an FC, FHC, financial institution or ancillary services undertaking but either both within a consolidation group and subject to centralised risk procedures OR subject to the same institutional protection scheme OR both are credit institutions.

Approval of regulators of both affiliates required and conditioned on adequate risk management of both c/ps and no impediment to transfer of own funds and repayment of liabilities. ESMA to mediate if no agreement between regulators.

AND where affiliate is in third country (whether equivalent or not), FC's regulator must also be satisfied that both FC and affiliate have adequate risk procedures, and no impediment to transfer of own funds or repayment of liabilities; and
 - (ii) For an NFC (established in EU or equivalent third country) trading with an affiliate (whether FC or NFC) that is within the same consolidation group, and:
 - (a) If NFC trading with another NFC, notification by both NFCs required to respective designated authorities demonstrating adequate risk procedures and no impediment to transfer of own funds or repayment of liabilities.
 - (b) If NFC trading with an FC, approval of FC's regulator required conditioned on adequate risk controls of both c/ps and no impediment to transfer of own funds and repayment of liabilities. FC's regulator to notify NFC's designated authority and ESMA to mediate if disagreement between them.
 - (c) If NFC trading with an affiliate established in third country (whether equivalent or not), NFC must notify its designated authority and demonstrate that both NFC and affiliate have adequate risk procedures, and no impediment to transfer of own funds or repayment of liabilities.

VM:

CSE required to collect and post VM to and from affiliates. (§__11(c); §23.159(b)).

IM (PR rule):

- **Posting:** CSE not required to post IM to affiliate but CSE must calculate IM amounts and inform affiliate on a daily basis. (§__11(b)).
- **Collection:** CSE must collect IM from affiliate but only required to collect if above IM threshold of USD20Mn per affiliate. (§§__3(a) and __11(b)(2)).
- PRs note in adopting release that a parent holding company can supply non-cash IM to an affiliate to satisfy its collection obligation re an affiliate.
- **Schedule discount:** If the Standardised Approach used to calculate IM, a 30% discount applies. (§__11(f)).
- **Reduced holding period:** margin holding period of risk (MPOR) of 10 BD can be reduced to 5 BD for swap that is exempt from the clearing obligation under CFTC rules (e.g. the inter-affiliate exemption) or SEC rules, or exemption for finance affiliates or agent affiliates. (§__11(e)(1)).
- **Custody:** For IM collected by CSE from affiliate, the custodian may be CSE or affiliate for non-cash IM only. Restrictions on rehypothecation still apply. (§__11(d)).

IM (CFTC rule) (§23.159(a)):

- **Posting:** CSE not required to post IM to margin affiliate unless the margin affiliate is a CSE regulated by a PR that is required to collect IM.
- **Collection:** CSE not required to collect IM from a margin affiliate if swaps subject to a centralized risk management program and CSE exchanges VM with a margin affiliate that is a Swap Entity or Financial End User, provided that IM shall be collected if margin affiliate:
 - (a) is a Financial End User;
 - (b) the margin affiliate enters into swaps with third parties directly or with another margin affiliate that enter into swaps with third parties; and
 - (c) the margin affiliate is located in a jurisdiction that CFTC has not found eligible for substituted compliance and the margin affiliate does not collect IM in a manner compliant with CFTC rule.
- **Custody:** any IM collected from a margin affiliate can be custodied by CSE or another margin affiliate.

Comments:

- Under the EU rules, regulators have a degree of discretion as to whether to exempt inter-affiliate trades. If no exemption is granted and, by contrast, an exemption is available under the US rules, this may impact the assessment of substituted compliance rulings by US regulators in respect of the EU rules.

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- Note that consolidation grouping is satisfied where it meets consolidation requirements under either the Capital Requirements Regulation (Regulation EU No 575/2013) (CRR) or under the Accounting Directive (2013/34/EU) (or if affiliate is in a third country, where the third country consolidation rules are IFRS equivalent).
 - A legal impediment to prompt transfer of own funds or repayment of liabilities between c/ps can include currency/exchange controls, c/ps in resolution, factors relating to purpose or legal structure of c/p and other legal, administrative or contractual restriction. A practical impediment can include lack of unencumbered or liquid assets, and other operational obstacles.
 - Public disclosure and notification to ESMA of exemption required.

Exemption required where both c/ps established in a third country and would be subject to margin rules if established in the EU provided trade has direct, substantial and foreseeable effect within EU or necessary to prevent evasion ([see Commission Delegated Regulation \(EU\) No 285/2014](#)).

- Where intra-group trade is between EU c/p and third country c/p and where:
 - a. third country c/p is FC and EU c/p is either an FC, NFC, FHC or ancillary services undertaking subject to regulatory capital requirements; or
 - b. third country c/p is an NFC and EU c/p is an FC or NFC; and
 - c. both affiliates are within same consolidation group, have centralised risk procedures and otherwise satisfy conditions for the intra-group exemption,

then VM/IM requirements only apply from:

- (i) 3 years after RTS enters into force (where no third country equivalence decision issued); or
- (ii) four months after the third country equivalence decision issued or, if later, the date when VM/IM requirements start applying to the trade.

Comments:

- Availability of intra-group exemption under EU rules generally requires regulatory approval but extends to both IM and VM. The extension of the exemption to cover VM where one of the two c/ps is domiciled in a third country was confirmed in a correction to the RTS issued on 20 January 2017: [Click here](#). Prior to that correction, only IM was covered. US exemption does not require regulatory approval but only extends to IM.
 - IM thresholds between affiliates are higher in the US (USD20Mn) than in the EU (€10Mn).
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Margin – Calculation and Collection

Timing of calculation:

IM: within 1 BD of time when a trade is added or removed from a netting set (or expired) or a payment or delivery obligation is triggered or when no calculation performed within preceding 10 BD, or when IM calculated under Standardised Approach and a trade is reclassified under different asset category because of reduced time to maturity (Art. 9(2)).

VM: daily. May be netted across netting sets (Arts. 9(1) and 10).

Time zone difference: calculation based on snapshot of trades in netting set entered into before 16:00 on previous BD of the time zone where it is first 16:00 (Art. 9(3)(b)).

Timing of calculation:

IM: CSE must comply with IM requirements on a daily basis beginning on or before BD following day of execution and until termination/expiry. (§§__8(a) and (b); §23.154(a)).

Day of execution: day of the trade, adjusted for the later of applicable time zones, with a 4:00 p.m. cut-off in the location of a party. (§__2; §23.151).

VM: CSE must comply with VM requirements on a daily basis beginning on or before BD following day of execution and until termination/expiry. (§__4(b); §23.155(a)).

Timing of providing margin:

IM: within same BD of date of calculation (Art. 13(2)).

VM: within same BD of date of calculation or within 2 BD if VM previously collected relates to trade that is:

- (1) not subject to IM requirements (for example, physically settled FX transactions) and where posting c/p has provided an advance amount of eligible collateral calculated using IM methodology with margin period of risk (MPOR) at least equal to the number of days in between and including the calculation date and collection date (i.e. including an IA component) and VM amounts may be offset if no segregation between c/ps; or
- (2) subject to IM requirements and (a) where IM calculation is based on IM model and MPOR increased by period between calculation and collection date or (b) where IM calculated using Standardised Approach, it is adjusted to take into account period between calculation and collection date (Arts. 12(1) and (2)).

Timing of collection:

IM: within 1 BD of day of execution. (§__3(c); §§23.152(a) and (b)).

VM: at least once per BD, for a period beginning on or before the BD following day of execution. (§__4(b); §§23.153 and (b)).

Calculation of IM:

Calculated per Standardised Approach or IM Model (or both) (Art. 11(1)). IM may not be off-set. (Art. 11 (2)).

C/ps may use different approaches. If at least one uses an IM Model, both required to agree on model characteristics and data relevant to calibration pursuant to Section 4 of RTS (Arts. 11(5) and (6)).

Calculation of IM:

Calculated per Standardised Approach or IM Model (or both) but CSEs cannot "cherry pick" method that results in the lowest margin amount. Choice should be based on fundamental considerations apart from that which produces the most favourable result. The PRs and CFTC do not expect there to be a need for a CSE to switch between methods for a particular c/p and CSE may need to provide rationale for a change of methodology. (§§__8(a) and (b); §23.154).

Calculation of VM:

Calculated as aggregate MTM minus VM previously collected minus day-zero MTM of individual contracts plus VM previously posted. (Art. 10).

Comments:

- Same BD timing of IM collection is potentially challenging for c/ps in different time zones that need to post margin to c/ps in the US or EU. C/ps in Asia, for example, may need to either post excess collateral to meet the deadline, post cash which may still be challenging if margin call arrives after the close of business, or post collateral available on the same day e.g. US Treasuries. Latter option could be subject to a 8% haircut for FX mismatch, thereby increasing cost of collateral. Automated collateral allocation services to ensure same day posting could be another solution, assuming there are enough of such service providers to prevent concentration of collateral among a few providers.
 - For the EU rules, the market consensus is that “same-day” provision of margin requires that the providing party initiates the relevant transfer on the date of calculation, even if, for cash, the settlement occurs the following day.
 - Under EU rules, the dispensation to post VM within 2 BDs of calculation date involves a higher amount of VM (noting that VM need not be segregated) or higher IM amount (if IM applies). RTS does not provide that VM collection within 2 BDs can be subject to an offset between c/ps.
 - Margin rules in some Asian jurisdictions likely to enable posting over a longer timeframe compared to EU or US rules.
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EU	US
Margin – Policies, Procedures and Documentation	
<p>Policies, procedures required to address collateral levels, eligibility and type, to be reviewed and updated as necessary and at least annually and process for addressing exceptions with c/p. (Art. 2)</p> <p>Trading documentation (including netting and exchange of collateral agreement) to be in place before entry into of contracts. (Art. 3).</p> <p>Exchange of collateral agreement with c/p to cover the OTC derivatives within scope of margin rules, collateral levels/type/valuation, segregation, margin calculation and margin calls, EODS and TEs and governing law. (Art. 3)</p>	<p>CSE must enter into documentation with a Financial End User or Swap Entity providing CSE and c/p with the right to collect and post margin. (§__10; §23.158).</p> <p>Documentation must provide (§§__10(b) and (c); §§23.155(b) and 23.158):</p> <ol style="list-style-type: none"> Methods, procedures, rules and inputs (CFTC rule only: and data sources) for determining the value of swaps for VM; Dispute resolution procedures for the value of swaps or the value of collateral posted as IM or VM; and Methods, procedures, rules and inputs (CFTC rule only: and data sources) used to calculate IM.

EU	US
Legal Review	
<p>Segregation: Compliance with segregation arrangements by external counsel or internal independent unit and continuously assessed. (Arts. 19 (5) and (6)).</p> <p>Netting and Collateral: Enforceability of netting and exchange of collateral agreement by external counsel or independent internal unit and continuously assessed. Art. 296 CRR compliant legal opinions will satisfy the legal review requirement. (Art. 2).</p>	<p>Segregation: Custody agreement must be enforceable including in bankruptcy in all relevant jurisdictions. (§__7(c)(2); §23.157(c)(2)).</p> <p>Netting: CSE must have well-founded legal basis to conclude agreement meets requirements and enforceable under local law (while PRs note in adopting release that an unqualified legal opinion is not required, CFTC notes in adopting release legal opinion will be required as a practical matter but that an in-house counsel analysis may be sufficient). (§__5(a)(4); §23.151).</p>

Comments:

- Greater use of third party custodians will prompt need for fresh legal opinions on custody/segregation.



Segregation of IM

IM to be protected from collecting c/p default or insolvency. IM held by collateral provider must be held in insolvency-remote custody accounts. (Art. 19(1)).

Segregation from other assets of custodian/third party holder and from (i) other assets of the collecting c/p if collateral is a proprietary asset of collecting c/p (e.g. under a title transfer arrangement) or (ii) other assets of posting c/p if collateral is not a proprietary asset of collecting c/p (e.g. under a security arrangement). (Art. 19(4)).

Cash IM to be held with central bank or with custodian bank that is not affiliated with either c/p. Credit quality of such custodian/third party holder must not be based solely on external credit rating. Custodian in CRR equivalent non-EU jurisdiction may be used. (Arts. 19(1)(e) and (8)).

Collecting c/p to provide option for individual segregation, i.e. segregation from other collateral collected from other c/ps. (Art. 19(5)).

On default of collecting c/p, collateral to be available to posting c/p in timely manner. (Art. 19(1)(g)).

Substitution: permitted. (Art. 19(2)).

Rehypothecation: not permitted. Cash IM can be reinvested in securities by custodian/third party holder. (Art. 20).

IM collected by CSE (excluding excess IM) must be held by third party custodian not affiliated with either party, unless IM (PR rule: non-cash IM only) collected by CSE from an affiliate in which case can be custodied by CSE or another affiliate. (§§ __.7(b) and __.11(d); §23.157(b)).

IM posted by CSE (including excess IM if CSE is a bank) must be held by third party custodian not affiliated with either party. (§ __.7(a); §23.157(a)).

Cash IM may be held by custodian but must be used to purchase eligible non-cash IM within a time period "reasonably necessary" to make that purchase after the cash collateral is posted as IM. (§ __.7(d); §23.157(c)(3)).

Rehypothecation: generally not permitted. Custody agreement may permit posting c/p to substitute collateral or to direct reinvestment of collateral held by a custodian into other eligible collateral, subject to restrictions and haircuts. (§ __.7(c)(1); §23.157(c)(1)).

Comments:

- Under US rules, any reinvestment of cash collateral into non-cash collateral will be subject to collateral haircuts and eligibility criteria. Under EU rules, reinvestment of cash IM is permitted. (Art. 20(2)).

EU	US
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IM Calculation

Standardised Approach: Net IM = (0.4 x Gross IM) + (0.6 x Net-to-Gross Ratio (NGR) x Gross IM)

Gross IM = Notional Value x Multiplier

Standardized Approach* (§__8 and Table A to PR rule; §23.154(c)): IM Amount = (0.4 x Gross IM) + (0.6 x Net-to-Gross Ratio (NGR) x Gross IM)

Gross IM = Notional Value x Multiplier

Asset Class	Multiplier (%)	Asset Class	Multiplier (%)
Credit: 0-2 years (to maturity)	2	Credit: 0-2 years (to maturity)	2
Credit: 2-5 years	5	Credit: 2-5 years	5
Credit: 5+ years	10	Credit: 5+ years	10
Commodity	15	Commodity	15
Equity	15	Equity	15
FX	6	FX	6
Interest Rate and Inflation: 0-2 years	1	Cross-currency swap: 0-2 years	1
Interest Rate and Inflation: 2-5 years	2	Cross-currency swap: 2-5 years	2
Interest Rate and Inflation: 5+ years	4	Cross-currency swap: 5+ years	4
Other	15	Interest Rate: 0-2 years	1
		Interest Rate: 2-5 years	2
		Interest Rate: 5+ years	4
		Other	15

NGR = Net current replacement cost/Gross current replacement cost (i.e. cost of replacing only those swaps with +ve value in netting set).

Notional values can be netted down with identical swaps of opposite direction. Where swap falls within more than one asset class, assigned asset class should be one with highest multiplier.

See Annex IV of RTS.

* Calculated as percent of notional, with adjustment related to net-to-gross ratio.

NGR = Net current replacement cost / Gross current replacement cost (i.e. cost of replacing only those swaps under EMNA that have +ve value).

Netting permitted if swaps covered by an EMNA. (§__5(a); §23.152(c) and 23.153(d)).

Schedule discount (PR rule): If the Standardised Approach used to calculate IM for intra-group trade, a 30% discount applies. (§__11(f)).

IM Model:

Can be developed by third party agent as well as any c/p (cf. Standard Initial Margin Model (SIMM) being developed by ISDA) (Art. 14(1)). Model must capture all significant risks and other risk factors relating to currency, interest rates, movements between different yield curves and between different maturity buckets, liquidity, maturity mismatches among others. (Art. 14(2)).

IM model must reflect parameter uncertainty, correlation, basis risk and data quality in a prudent manner. (Art. 14(8)).

Variations in contract value in the netting set assume MPOR of at least 10 days at 99% confidence level. MPOR shall include period that may elapse between last exchange of VM to default of counterparty and estimated period to replace contract. (Art. 15).

IM Model (§§__8(c) and (d); §23.154(b)):

CSE must obtain approval for model from applicable PR (in the case of the PR rule) or from CFTC or a registered futures association such as the NFA (in the case of the CFTC rule). Model can be developed by third party (cf. SIMM being developed by ISDA).

Changes to model require 60 day prior notice to regulator.

Based on one-tailed 99% confidence interval over shorter of 10 BD horizon and the maturity of the swap or netting portfolio and a historical observation period of 1 – 5 years.

Further relief (PR Rule only §__11(e)(1)): MPOR of 5 BD can be used in model instead of 10 BD for a swap that would be subject to clearing requirement but for an exemption under CFTC rules (e.g. the inter-affiliate exemption) or SEC rules, or exemption for finance affiliates or agent affiliates.



Historical data referenced to be a period of last 3 years and no more than 5 years and at least 25% from stressed period (and if necessary data from older stressed period to be included if insufficient stressed period within previous 3-5 years). (Art. 16).

Changing market conditions: c/ps required to have policies for adjusting margins. Policies may require additional IM to be collected from recalibration of the model over a period between 1-30 BDs. (Art. 16(8)).

Proxies only permitted where it leads to similar IM levels or where data does not reflect true volatility of a contract(s). (Art. 16(10)).

IM models may only include uncleared OTC derivatives in the same netting set. Diversification, hedging and risk offsets only permitted within following asset classes: (1) Interest rates, currency, inflation (2) equity (3) credit (4) commodities and gold (5) other. (Art. 17).

Obligation to back-test model every 3 months including comparison of model values against realized market value of derivatives. (Art. 14(3)).

Initial validation to be carried out by independent third party; follow up validation at least once/year or earlier if significant change to model is made. (Art. 18(1)).

Regular audit of model to assess data sources, volatility and correlation assumptions. (Art. 18(1)).

Model recalibrated at least annually/periodically review in light of financial market developments and modelling technologies.

Model must include all material risks arising from nonlinear price characteristics of option positions and the sensitivity of the market value of the option positions to changes in the volatility of the underlying rates, prices, or other material risk factors.

Model may reflect offsetting exposures, diversifications, and other hedging benefits for swaps under same EMNA by incorporating empirical correlations within 4 broad risk categories (commodity, credit, equity, and FX or interest rate) provided CSE validates and demonstrates the reasonableness of its process for modelling and measuring hedging benefits. Empirical correlations may be recognized within each broad risk category but not across broad risk categories.

For cross-currency swaps, model need not recognize risks or risk factors associated with the exchange of principal. Model must recognize risks associated with other cash flows.

Comments:

- Industry is placing faith in SIMM to be widely used, averting reconciliation issues and disputes. The SIMM is expected to yield a significantly lower margin required amount than the Standardised Approach. Reconciliation issues are likely to be outsourced to third party vendors.
- If the SIMM is not finalised and approved prior to a compliance date, the Standardised Approach will have to be used. As the latter is based on applying percentage multipliers to notionals, it presupposes consistency in the way trades are booked, which is not always the case.
- Under US rules, use of margin model required to be approved by the relevant regulator or registered futures association, as applicable. Under EU rules, use of a margin model is not required to be approved by regulators albeit many dealers may nonetheless seek approval from their regulator. An industry-developed model such as the SIMM would streamline any regulatory approval processes initiated by in-scope parties.



EU	US
Eligible Collateral	

For both IM and VM (Art. 4):

Cash (incl. money market deposits or similar).

VM between CSE and a Swap Entity (§__6(a)(1); §23.156(b)(1)):

Cash (must be USD or other major currency or currency of settlement).

IM and VM between CSE and a Financial End User (§§__6(a) and (b); §§23.156(a)(1) and (b)(1)):

Cash (must be USD or other major currency or currency of settlement).

Non-cash:

- gold
- debt of sovereign/central bank, regional authority, PSE (if in EU Member State), international MDBs and organisations listed in Arts 117 and 118 CRR
- debt securities of credit institutions, investment firms
- debt of sovereign/central bank or regional authority in a non-EU Member State (subject in certain cases to market access and timely liquidation criteria)
- corporate bonds
- most senior tranche of securitisation (excluding re-securitisation)
- convertible bonds, convertible into equity listed on main index
- equities included in main index

Non-cash:

- gold
- US Treasuries or US agency issuances guaranteed by the US government
- publicly traded debt securities issued or guaranteed by US government sponsored enterprises (GSEs)
- securities issued by or fully guaranteed by ECB or sovereign with a risk weighting of 20% or less
- securities of or guaranteed by BIS, the International Monetary Fund or MDBs
- certain publicly traded debt (not being ABS and subject to PR approval in certain instances) that CSE determines is "investment grade"
- publicly traded equity listed in certain indexes (S&P 1500 or similar as determined by relevant PR; other non-US indices if CSE's non-US supervisor recognises the index for IM purposes)
- securities issued by certain investment funds

Main Indices:

- Asia/Pacific: STOXX Asia/Pacific 600
- Australia: ASX100
- Austria: ATX Prime (Includes ATX)
- Belgium: BEL20
- Brazil: IBOVESPA
- Canada: TSX60
- Central Europe: CETOP20 Index
- China: Hang Seng Mainland 100 Index (China), NYSE ARCA China Index and Shanghai Shenzhen CSI 300
- Czech Republic: PX Prague
- Denmark: OMX Copenhagen 20
- Emerging Markets: FTSE RAFI Emerging Markets and MSCI Emerging Markets 50
- Europe: FTSE Europe Index and STOXX Europe 600
- Europe and Middle East: MSCI AC Europe & Middle East
- Finland: OMXH25
- France: SBF120 (Includes CAC40, CAC Next 20, and CAC Mid Cap) and S&P BMI France
- Germany: HDAX (Includes DAX and MDAX)
- Global: FTSE All World Index and MSCI ACWI
- Greece: FT ASE Large Cap
- Hong Kong: Hang Seng and Hang Seng Composite Index



India: CNX 100 Index and S&P BSE 100 Index
Ireland: ISEQ 20
Italy: FTSE MIB
Japan: Nikkei 300 and TOPIX mid 400
Latin America: S&P Latin America 40
Malaysia: FTSE Bursa Malaysia KLCI Index
Mexico: Mexico Bolsa Index
Netherlands: AEX
New Zealand: S&P NZX 15 Index
Norway: OBX
Poland: WIG20
Portugal: PSI 20
Russia: MSCI Russia Index and Russian Traded Index
Singapore: FTSE Straits Times Index
South Africa: FTSE JSE Top 40 and INDI 25 Index
South Korea: KOSPI 100
Spain: IBEX35
Sweden: OMXS60 and OMXSB
Switzerland: SMI Expanded Index
Taiwan: TSEC Taiwan 50
UAE: FTSE Nasdaq Dubai UAE 20 Index
UK: FTSE 350 (Includes FTSE 100)
USA: NASDAQ100, Russell 3000 Index and S&P 500

- UCITS (subject to additional criteria under Art. 5)

Wrong way risk (Art. 4(2)):

Collateral shall not be issued by posting c/p or its affiliate; or significantly positively correlated with c/p credit risk or with general market risk factors.

The above applies to:

- non-sovereign backed EU local authority and PSE debt
- third country local authority debt (whether or not backed by sovereign)
- debt securities issued by banks or investment firms, and corporate bonds
- securitisation exposures
- main index convertible bonds and equities
- eligible UCITS
- exposures to third party holders or custodians holding cash IM.

Wrong way risk (§__6(d); §23.156(a)(2)):

Collateral shall not include securities issued by c/p or its affiliates, by a banking entity or affiliate, or by a non-bank SIFI.

Credit Quality (Arts. 6 and 7):

Non-cash collateral collected by a c/p is required to be of a minimum credit quality. Credit quality based on (i) external credit rating; or (ii) the c/p's internal rating using PD figures prescribed in Annex 1 RTS; or (iii) the internal rating of the posting c/p (established in the EU or prudentially equivalent third country).



Minimum Rating:

Member state debt securities (incl. sovereign-backed debt securities of local authorities and PSEs) if denominated in non-local currency: Prescribed PD of 7.5% or lower, or corresponding mapped external rating.

Other debt securities: Prescribed PD of 1% or lower (or corresponding mapped external rating).

No specific requirements for debt securities issued by member states (or sovereign backed local authorities and PSEs) or by MDBs and organisations listed in Arts 117, 118 CRR.

Procedures required to cover credit quality assessment when accepting collateral, replacing collateral whose credit quality has deteriorated or increasing the haircut.

Comments:

- Eligible collateral types do not fully mirror eligible collateral permissible for cleared trades, e.g. bank guarantees are ineligible under margin rules but permissible for cleared trades.
- Haircuts on collateral are based on the credit quality of that collateral and are determined according to the credit quality step assigned thereto. Mappings of external ratings to credit quality steps for the purposes of and pursuant to the EU Capital Requirements Regulation (CRR) - applied to determine haircut levels for margin provided in the form of non-cash collateral under the EU rules - were published in the Official Journal of the EU on 12 October 2016. [See Commission Implementing Regulations \(EU\) 2016/1801 and 2016/1799 here.](#)
- Eligibility of UCITS mirrors provisions in Art. 197(5) of the CRR which addresses eligibility of UCITS as collateral for purposes of mitigating credit exposures.



Collateral Valuation - Haircuts

Apply standardised haircuts or own estimates.

Standard haircuts (Annexes II and III RTS):

Applied based on external credit ratings (range: AAA to BB- (Fitch and S&P); Aaa to Ba3 (Moody's)), maturity (range: <1yr; 1-5yrs; and >5yrs) and asset class.

- Government debt, MDBs and International Organisations: 0.5% to 15% depending on rating and maturity.
- Non-sovereign backed local authority debt and corporate bonds: 1% to 12% depending on rating and maturity.
- senior securitisation tranche: 2% to 24% depending on rating and maturity.
- 15% haircut to equities, convertibles, gold.
- FX mismatch: 8% haircut (apart from cash VM).

For VM, base currency is that agreed in individual derivative contract, master netting agreement or CSA.

For IM, base currency is termination currency, i.e. currency of termination payment agreed in single derivative contract, master netting agreement or CSA.

Own volatility estimates permitted, subject to:

- calculation to at least a 99% confidence level, 10 BD liquidation period or longer if assets illiquid or historical data understates volatility.
- at least 1 year historical observation period.
- enhanced haircut for daily revaluation.
- cash VM attracts 0% haircut.

Schedule of haircuts (§§__6(c) and Table B to PR rule; §§23.156(a) (3) and (b)(2)):

- No haircut for cash VM or IM except 8% FX mismatch.
- Government debt: 0.5% (if maturity < 1yr), 2% (if maturity 1-5 yrs), 4% (if maturity > 5yrs).
- Eligible GSE debt and eligible publicly traded debt: 1% (if maturity < 1yr), 4% (if maturity 1-5 yrs), 8% (if maturity 5yrs).
- Equities: 15% (if in S&P 500), 25% (if in S&P 1500 Composite or related index).
- Gold: 15%.
- FX Mismatch: 8% additive haircut applies for IM: to collateral not in the currency of settlement, except for collateral in a single termination currency; and for VM: to collateral not in the currency of settlement, except for cash in USD or other major currency.

IM Collateral Concentration Limits

- A. Sum of collateral from single issuer or affiliated issuers of gold, debt issued by credit institutions and investment firms, corporate bonds, senior securitisation tranches, convertible bonds, equities, UCITS (incl. debt, not backed by sovereign credit, issued by regional authority or PSE in Member State or third country) (Art. 8(1)(a)):
Cap: greater of 15% of total collateral collected from c/p OR €10Mn (or equivalent).
- B. Sum of senior securitisation tranches, equities issued by credit institutions/investment firms, convertible bonds (converting into equity on main index issued by credit institutions/investment firms), (incl. UCITS primarily investing in such securities) (Art. 8(1)(b)):
Cap: greater of 40% of total collateral collected from c/p OR €10Mn (or equivalent).
- C. IM collected in excess of €1Bn from either a G-SII, O-SII, or a c/p (not being a pension scheme arrangement) who collects IM exceeding €1Bn from a single c/p (Arts. 8(2) to (6)):
Cap: sum of sovereign debt, debt issued by regional authority and PSE (in each case of EU Member State or third country, and re debt issued by regional authority and PSE, whether or not backed by sovereign credit), entities that are international MDBs and organisations listed in Arts 117 and 118 CRR shall not, if issued by a single issuer or issuers domiciled in a single country, exceed 50% of collateral collected from that c/p.

No concentration limits on IM.

Exception for pension schemes: where IM collected in excess of €1bn, collecting c/p shall establish procedures to manage concentration risk/diversification of collateral. Permitted to access concentration limits every three months (and not in every instance IM is (re) calculated) as long as IM collected from each such c/p was at all times below EUR 800 million during the quarter preceding the assessment.

NB: 50% cap also applies to exposures to third party holders or custodians holding cash IM.

Above concentration limits do not apply where collateral is in asset class that is same as underlying of derivative.

Where G-SII/O-SII collects cash IM from another G-SII/O-SII, collecting c/p shall ensure no more than 20% of total IM is held as cash by a single custodian.

G-SII/O-SII designations at Member State level. In the UK, the PRA has designated the following G-SIIs/O-SIIs:

G-SII: HSBC Holdings Plc, Barclays Plc, Royal Bank of Scotland Group Plc, Standard Chartered Plc.

O-SII: Barclays Plc, Citigroup Global Markets Limited, Credit Suisse International, Credit Suisse Investments (UK), Goldman Sachs Group UK Limited, HSBC Holdings Plc, J.P. Morgan Capital Holdings Limited, Lloyds Banking Group Plc, Merrill Lynch International, Morgan Stanley International Limited, Nationwide Building Society, Nomura Europe Holdings Plc, Royal Bank of Scotland Group Plc, Santander UK Plc, Standard Chartered Plc, UBS Limited.

Comments:

- Exemption from diversification requirements where collateral is the same as the underlying of the derivative is intended to capture cases, for example, in an equity derivative such as a call option, where the buyer of the call option mitigates his exposure to the c/p by collecting the underlying equity as collateral from the option seller.

Cross-Border Trades

FCs/NFC+s must exchange IM/VM with third country entity if such entity would be subject to margin rules if established in the EU. No IM/VM exchange required with third country entity that would be NFC- if established in the EU. (Art. 24).

If c/p in third country, margin may be calculated for all contracts that fall within RTS or are identified as uncleared (and subject to margining) in that third country, provided that the third country entity is subject to margining for those swaps considered as an "OTC Derivative" under the third country regime. (Art. 26).

Exclusion from margin rules (§§__9(a) and (b); §23.160(b)(2)(ii)):

Margin rules do not apply to a Foreign Swap of a Foreign CSE.

CFTC rule only: Exclusion for Foreign Swap of a Foreign CSE does not apply if there is an intra-group trade between Foreign CSE and US CSE (or with c/p that benefits from guarantee of US entity/person) and market-facing trade of Foreign CSE is not subject to comparable IM collection requirements. (§23.160(b)(2)(ii)(B)).

- Foreign Swap: uncleared swap (or, under PR rule, uncleared SBS) in which neither c/p nor any guarantor is: (a) an entity organized under US/State law (including a US branch, agency or subsidiary of a foreign bank) or a natural person that is US resident; (b) a branch or office of a US entity; or (c) a Swap Entity that is a subsidiary (or in the case of the CFTC rule, a foreign consolidated subsidiary) of a US entity.
- Foreign CSE: a CSE that is not: (a) an entity organized under US/State law, (including a US branch, agency or subsidiary of a foreign bank); (b) a branch or office of an entity organized under US/State law; or (c) an entity that is a subsidiary (or in the case of the CFTC rule, a foreign consolidated subsidiary) of a US entity.
- Subsidiary (PR rule) defined according to accounting consolidation standards under US GAAP, IFRS or similar, or, if a PR determines entity is a "subsidiary" of another entity because it is subject to significant support from, or materially subject to risks or losses of such other entity. (§__.2).
- Foreign consolidated subsidiary (CFTC rule) is a non-US CSE in which an ultimate parent entity that is a US person has a controlling financial interest under US GAAP such that the US ultimate parent entity must include the non-US CSE's operating results, financial position, and statement of cash flows in the US ultimate parent entity's consolidated financial statements under US GAAP. (§23.160).

Substituted compliance (§§__9(d)(1) through (3); §23.160(b)(2)(iii)):

CSE may rely on substituted compliance with the margin rules of another jurisdiction if:

- the PRs or CFTC, as applicable, determine the foreign margin regime satisfies the relevant margin rule requirements (comparability determination);
- if CSE's swaps are not guaranteed by a US entity/person and CSE is: (a) a Foreign CSE (see above); (b) a US branch or agency of a foreign bank; or (c) a foreign subsidiary of a US bank (or of an Edge or agreement corporation) (or in the case of the CFTC rule, a foreign consolidated subsidiary); and
- CFTC rule only: where the counterparty is not a US CSE or a non-US CSE (including a US branch of a non-US CSE or a foreign consolidated subsidiary) whose obligations under the relevant swap are guaranteed by a US person.

For CFTC rule only, where the counterparty is a US CSE or a non-US CSE (including a US branch of a non-US CSE or a foreign consolidated subsidiary) whose obligations under the relevant swap are guaranteed by a US person, the CSE may only collect under the foreign regime's requirements. (§23.160(b)(2)(iv)).

Limited substituted compliance for posting of margin (§___.9(d)(4); §23.160(b)(1)(ii):

A CSE may post IM to c/p under rules applying to c/p if:

- The c/p is not a US person and is subject to a foreign margin regime which the PRs or CFTC, as applicable, have made a comparability determination; and
- the c/p's obligations are not guaranteed by a US entity/person.

Comments:

- No comparability determinations within the US substituted compliance regime have been made as yet. Absent equivalence and comparability assessments between the EU and US (and similarly with respect to margin regimes of other jurisdictions), c/ps may have to conform to the standards that are the strictest across all applicable margin regimes.
 - Determinations of equivalence of margin rules in other non-EU jurisdictions are not addressed in the EU RTS as this is outside the scope of the issues to be mandated to be covered under the RTS.
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