

If you have questions or would like additional information on the material covered in this Alert, please contact one of the authors:

**Chris Borg**

Partner, London  
+44 (0)20 3116 3650  
cborg@reedsmith.com

**Brett Hillis**

Partner, London  
+44 (0)20 3116 2992  
bhillis@reedsmith.com

**Joanna T. Williams**

Counsel, London  
+44 (0)20 3116 3661  
jtwilliams@reedsmith.com

**Melissa Peters**

Associate, London  
+44 (0)20 3116 3664  
mpeters@reedsmith.com

...or the Reed Smith lawyer with whom you regularly work.

## EMIR: Intra-group Exemptions from Uncleared Margin Requirements – FCA Opens Application Process

### At a Glance...

On 4 January 2017, the FCA opened its application process for the intra-group transaction (“**IGT**”) exemption to the EU’s new requirements to exchange margin for uncleared OTC derivative contracts (as set out in Commission Delegated Regulation 2016/2251, the “**Margin RTS**”). Firms must submit an application form attaching supporting documents.

This will require granular information on the relevant transaction types. It includes estimates of the anticipated size and type of trades, and requires various supporting documents (including historical trade data). All of this must be collated before an application is considered “complete”: the FCA then has three months to consider it.

The variation margin (“**VM**”) “big-bang” application date of 1 March 2017, may be on everyone’s minds, but 4 July 2017, should be a close second for any financial counterparty (“**FC**”) or non-financial counterparty above the EMIR clearing threshold (“**NFC+**”) which conducts OTC derivative contracts with other companies in its group<sup>1</sup>.

A link to the FCA’s webpage and copies of the intra-group exemption application forms and associated user guide are [available below](#).

We have also included a summary of the key requirements of the Margin RTS with tables showing phase-in of the relevant requirements, potential exemptions, and the applicable process for obtaining the intra-group exemption, depending on the EMIR<sup>2</sup> classification of group entities.

## Key Questions

### Is this relevant to me?

Yes, if you are an FC or NFC+ under EMIR and you enter into OTC derivative transactions with other companies in your group.

This could apply if, for example, you act as a group risk aggregator using derivatives to pass risk or benefit back to operating companies in your group.

What do I need to do now?

- Work out whether any of your group companies are FC or NFC+ under EMIR.
- If you have FC or NFC+ entities in your group, check whether they enter into intra-group OTC derivative contracts with group counterparties either inside or outside the EU.
- Map the pairs of in-scope entities trading in OTC derivative contracts with each other.
- Work out in which Member States you need to apply for intra-group exemptions.
- Work out whether the relevant pairs of entities satisfy the conditions to apply for the intra-group exemption, and collate the supporting documents.
- Apply for relevant intra-group exemptions by **4 April 2017**, to give relevant national competent authorities (“**NCA**s”) three months to consider applications before VM requirements apply to most intra-group transactions.

### How can we help you?

*We have included tables below showing the available intra-group transaction exemptions and how the application process differs depending on the status and home jurisdiction of the relevant entities within a group.*

*We can assist you in making an assessment whether the conditions for the intra-group transaction exemption are met (including verifying no legal impediments), reviewing or producing supporting documentation, and making required applications to relevant NCAs.*

*If initial margin (“**IM**”) or VM requirements apply to any of your OTC derivative contracts, we can assist you to put in place required risk-management procedures, put in place required EMIR-compliant documentation, or explore other alternatives.*

**Who?**

Anyone entering into OTC derivative contracts in the EU market needs to consider the Margin RTS. Margin requirements apply for financial counterparties under EMIR (“**FC**”), non-financial counterparties over the clearing threshold under EMIR (“**NFC+**”), and third-country entities which would be classified as FC or NFC+ if they were established in the EU (“**TCE+**”) when they trade in uncleared OTC derivative contracts with other such entities. In limited circumstances, it can apply to two TCE+ entities where they trade with each other<sup>3</sup>.

Even those who trade with FC or NFC+ entities, but are not themselves FC, NFC+ or TCE+, are likely to be approached by their counterparties, asking for confirmation of their EMIR status. The Margin RTS allows counterparties to provide in their risk management procedures (“**RMP**”) that no collateral is exchanged when dealing with a non-financial counterparty under EMIR that is below the clearing threshold (“**NFC-**”), or a third-country entity that would be classified as NFC- were it established in the EU (“**TCE-**”).

**When?**

Phased implementation will start 4 February 2017 (one month after the entry into force of the Margin RTS) for the biggest market participants. Entities above the initial margin threshold will all have become subject to initial margin (“**IM**”) by 1 September 2020. Most in-scope entities (including those below the IM threshold) will become subject to variation margin (“**VM**”) requirements from 1 March 2017.

**Phase-in Timeline for IM and VM**

Type of Margin	Phase-in by AANA <sup>4</sup>					
	> €3 000 billion	> €2 250 billion	> €1 500 billion	> €750 billion	> €8 billion	≤ €8 billion
<b>IM</b>	4 Feb 2017	1 Sept 2017	1 Sept 2018	1 Sept 2019	1 Sept 2020	N/A
<b>VM</b>	4 Feb 2017	1 March 2017				

By the time they are fully implemented, the Margin RTS will apply to a much wider range of trades than they will at the outset. The scope of what an OTC derivative contract is will likely expand further into the forward FX and physical commodities markets on the implementation of MiFID II in January 2018. Temporary exemptions from VM applicable to certain types of FX transactions will also expire during the course of 2018.

Exemption	Margin RTS Ref	Expires	IM	VM	Automatic
All IGTs (whether with another EU counterparty or a TCE)	Article 38(2)	4 July 2017 (for VM) and later of 4 July 2017, and date IM would otherwise apply (for IM)	Y  Longer transitional exemption applies with TCE+	Y	Y
IGTs with TCE+ in non-equivalent jurisdiction	Article 36(2)(a)	3 years from in-force date of RTS (4 Jan 2020)	Y	N	N  See IGT exemption table
IGTs with TCE+ in equivalent jurisdiction	Article 36(2)(b)  See IGT exemption table	4 months from positive equivalence ruling (for VM), and later of 4 months from positive equivalence ruling and date IM would otherwise apply (for IM)	Y	N	N  See IGT exemption table
Physically settled FX forwards	Article 37(2)	Earlier of entry into application of entry into force of delegated regulation to harmonise treatment across EU (earliest 3 January 2018) and 31 December 2018	Permanent exemption applies (subject to conditions)	Y	Y
Single stock equity options or index options	Article 38(1)	3 years from in-force date of RTS (4 Jan 2020)	Y	Y	Y

Other exemptions (including intra-group exemptions, where applicable) are available on an ongoing basis.

Exemption	Margin RTS Ref	Expires	IM	VM	Application Required
Transactions with NFC-/TCE-	Article 24	Provide in RMPs <sup>5</sup>	IM	VM	N
All IGTs with FC or NFC+	Exemption in Article 11(6), (7) or (10) of EMIR	See IGT exemption table below	Y	Y	Y See IGT exemption table below
IGTs with TCE+ in equivalent jurisdiction	Exemption in Article 11(8) or (9) of EMIR	See IGT exemption table below	Y	Y	Y See IGT exemption table below
Physically settled FX forwards, physically settled FX and swaps and currency swaps	Article 27	Provide in RMPs	Y	N	N
Covered bonds for hedging purposes	Article 30	Provide in RMPs Relevant OTC derivative contracts satisfy conditions in Article 30(2)	Y	Y Not posted by covered bond issuer but collected from counter-party	Y

**Intra-group Transaction Exemption Requirements**

**Intra-group exemption:** Availability of the exemption is subject to certain conditions<sup>6</sup>. The Margin RTS clarifies which centralised risk management procedures must be met and what would amount to “legal and practical impediments” on transferability of own funds and repayment of liabilities.

‘Legal’ impediments<sup>7</sup> include actual or foreseen:

- currency and exchange controls
- regulatory restrictions
- restrictions stemming from insolvency or resolution regimes
- the existence of minority interests that limit decision-making power within entities that form the group.

- the nature of the legal structure of the counterparty

‘Practical’ impediments<sup>8</sup> include:

- where sufficient assets are not or may not be freely available to satisfy transfers or repayments when due
- where there are operational obstacles that effectively delay or prevent transfers or repayments when due.

**Intra-group Transaction (IGT) Exemptions**

Applicant	Counter-party	Same Member State (MS)	Conditions	EMIR Ref	Application
NFC+	NFC+	Y	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(1)</p> <p>Exemption: Article 11(5)</p>	None required
NFC+	FC	Y	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(1)</p> <p>Exemption: Article 11(5)</p>	None required

Applicant	Counter-party	Same Member State (MS)	Conditions	EMIR Ref	Application
NFC+	NFC+	N	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(1)</p> <p>Exemption: Article 11(7)</p>	To NCAs of both NFC+ (subject to non-objection of both NCAs within 3 months <sup>9</sup> )
NFC+	FC	N	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(1)</p> <p>Exemption: Article 11(10)</p>	<p>Required by FC in its MS (subject to positive decision of NCA of FC)</p> <p>NCA of FC will notify NCA of NFC+ within 2 months and parties within 3 months</p>
NFC+	TCE+	N/A	<p>Positive equivalence ruling for TCE+ jurisdiction under Article 13(2) EMIR<sup>10</sup></p> <p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(1)</p> <p>Exemption: Article 11(9)</p>	To NCA of NFC+ (subject to non-objection within 3 months)

Applicant	Counter-party	Same Member State (MS)	Conditions	EMIR Ref	Application
FC	NFC+	Y	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(2)(d)</p> <p>Exemption: Article 11(5)</p>	None required
FC	NFC+	N	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(2)(d)</p> <p>Exemption: Article 11(10)</p>	<p>To NCA of FC (subject to positive decision of NCA of FC)</p> <p>NCA of FC will notify NCA of NFC+ within 2 months and parties within 3 months</p>
FC	FC	Y	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(2)(a), (b) or (c)</p> <p>Exemption: Article 11(5)</p>	None required



Applicant	Counter-party	Same Member State (MS)	Conditions	EMIR Ref	Application
FC	FC	N	<p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(2) (a), (b) or (c)</p> <p>Exemption: Article 11(6)</p>	To NCAs of both FCs (subject to positive decision of NCAs of both FCs)
FC	TCE+	N/A	<p>Positive equivalence ruling for TCE+ jurisdiction under Article 13(2) EMIR<sup>11</sup></p> <p>Same consolidation on full basis</p> <p>Centralised risk evaluation, measurement and control procedures</p> <p>No current/foreseen practical or legal impediment to prompt transfer of own funds or repayment of liabilities</p>	<p>IGT type: Article 3(2) (a)(i)</p> <p>Exemption: Article 11(8)</p>	To NCA of FC (subject to positive decision of NCA within 3 months)

**Variation Margin**

*Frequency of calculation and collection:* VM must be calculated at least on a daily basis and provided within the same business day or within two business days where certain conditions are met.

**Initial Margin**

*Segregation:* IM must be segregated so that it will be protected from the insolvency of the collecting party. There are specific requirements on the holding of cash and non-cash collateral and concentration limits for systemically important in-scope entities required to collect more than €1 billion in IM.

*Phase-in:* This is based on threshold tests. The IM threshold-based, phase-in timeline is set out in the table above.

*Disapplication:* IM need not be collected for all new contracts entered into within a calendar year, where one of the counterparties has an “aggregated month-end average notional amount” below the €8 billion threshold (this AANA is averaged across March, April and May of the preceding year and includes all non-centrally cleared OTC derivative contracts of all entities in the counterparty’s group, and any intra-group, non-centrally cleared OTC derivative contracts<sup>12</sup>). There are conditions attached to this, including a requirement relating to risk-management procedures.

*Recalculation:* IM must be recalculated and called at least every 10 business days and within one business day of the occurrence of certain events.

*Calculation method:* IM can either be calculated under the standardised approach set out in the Margin RTS (the standardised method) or according to an IM model. The Margin RTS set out conditions for these models and a requirement that they be recalibrated at least annually.

*Group IM threshold:* Where certain conditions apply, IM can be subject to a threshold of:

- up to €50 million at group-to-group level (where the counterparties belong to different groups)
- up to €10 million where counterparties belong to the same group.

**Other Key Requirements (not already covered in exemptions tables)**

*Eligible collateral:* This must be of a type which can be liquidated in a timely manner by the holder (and for which the holder has market access) on default of the posting counterparty. It must also fall within one of the asset classes set out in the Margin RTS and may be subject to a prescribed valuation haircut. These include:

- cash credited to an account or similar claims for the repayment of money

- high-quality securities (including high-quality government, corporate and covered bonds, the most senior tranche of some securitisations, but not re securitisations)
- equities included in a main index
- gold (in the form of allocated bullion of recognised good delivery)
- certain shares or units in UCITS that meet eligibility criteria.

**Currency differential haircuts:** An 8% haircut applies to all cash and non-cash collateral posted as IM in a currency other than the termination currency specified. If no termination currency is specified, the haircut applies to the market value of all the assets posted as collateral. An 8% haircut applies to all non-cash VM posted in a currency other than an agreed currency.

**No frontloading:** FC and NFC+ can continue to apply the risk management procedures they have in place at the date of application of the Margin RTS for uncleared OTC derivative contracts entered into between 16 August 2012 and the relevant date of application of the Margin RTS.

**Independent legal review:** A firm must perform an independent legal review of the enforceability of any netting or collateral agreement that it enters into, and also whether the segregation arrangements for IM meet the requirements in the Margin RTS.

**Minimum transfer amount:** Counterparties may agree that an exchange of collateral is only necessary if the change in IM and VM requirements on recalculation is more than a minimum transfer amount (**MTA**). This can be set at up to a maximum of €500,000. Once exposure increases beyond this amount, the full amount (including the MTA) must be transferred. Parties can agree separate IM and VM MTAs, but they should not exceed €500,000 together.

**Rehypothecation/ Right of re-use:** The Margin RTS prohibit the re-hypothecation, re-pledge or re-use of collateral collected as IM. There is a limited exception which allows a “*third party holder...to use initial margin received in cash for reinvestment purposes*”.

**Disputes:** In case of a disputed margin call (IM or VM), the undisputed amount should be collected.

**Documentation:** Parties must ensure that they have entered into all necessary agreements (including a netting agreement and, if IM applies, an exchange of collateral agreement) when they conclude a non-centrally cleared OTC derivative contract. The Margin RTS set out the terms that these agreements must cover (including details of payment obligations, payment netting, events of default and termination events, calculation methods, close-out netting arrangements and governing law).

**Useful links:**

FCA website: <https://www.fca.org.uk/markets/european-market-infrastructure-regulation-emir/notifications-exemptions#intragroup-derivatives>

Single pair application form: <https://www.fca.org.uk/sites/default/files/publications/forms/emir-margin-intragroup-exemptions-application-form.xlsx>

Multiple pairs application form: <https://www.fca.org.uk/sites/default/files/publications/forms/emir-margin-intragroup-exemptions-application-form-multiple-pairs.xlsx>

FCA's user guide: <https://www.fca.org.uk/publication/forms/margin-igt-user-guide.pdf>

EMIR: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:201:0001:0059:EN:PDF>

Margin RTS: [EU Commission Delegated Regulation](#)

1. There is a longer delay to the application of the IM requirement to intra-group trades where one party is established outside of the EU to give time for equivalence decisions to be made; but as drafted, this does not extend to the VM requirements. The delay is three years from 4 January 2017, where no equivalence decision has been adopted. Where an equivalence decision has been adopted, it is the later of four months after the date of entry into force of that decision and the date on which the requirements would apply to other in-scope entities in any event under the Margin RTS.
2. Regulation (EU) No 648/2012
3. i.e., where there is a direct substantial and foreseeable effect within the EU or for anti-avoidance purposes.
4. Average month-end aggregate notional amount, measured in March, April and May of each year (or of March, April and May in 2016 in respect of the first phase-in date). Both counterparties must be over the relevant AANA threshold for the IM requirement to apply from the relevant phase-in date. After 1 September 2020, the threshold calculation is made each year to determine whether the IM requirements must be applied.
5. Risk management procedures in accordance with Article 2 of Margin RTS.
6. Set out in Article 3 and Article 11(6) to 11(10) of EMIR and Article 32 to 34 of the Margin RTS.
7. Article 33 of Margin RTS.
8. Article 34 of Margin RTS.
9. If one NCA considers conditions are not met, it must notify the other NCA within two months of receipt of notification.
10. Temporary exemption can be notified under Article 36 of Margin RTS.
11. Transitional exemption can be applied for under Article 36 of Margin RTS.
12. The gross notional value of only one leg of intra-group transaction need be counted towards the initial margin threshold.

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