



US vs EU MARGIN RULES

LATHAM & WATKINS^{LLP}

Comparative Summary

US vs EU MARGIN RULES

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* Last updated May 13, 2019

As regulators and market practice clarify the scope and application of the rules in the coming months, we will update this Reference Guide to reflect the most current understanding. Please bookmark <https://www.lw.com/thoughtLeadership/US-EU-margin-rules-reference-guide> to ensure access to the most recent version of this Reference Guide.

US vs EU MARGIN RULES

Comparative Summary

	US Margin Rules ¹		EU Margin Rules ²
	PR Margin Rules	CFTC Margin Rules	
I. SCOPE			
Covered Entities	Swap Entities and SBS Entities ³ that are prudentially regulated ⁴ (PR Swap Entities)	Swap Entities that are not prudentially regulated (CFTC Swap Entities)	(i) Financial Counterparties (FC) ⁵ (ii) Non-Financial Counterparties above clearing thresholds (NFC+) ⁶ (iii) Third Country Entities (TCE) that would be FC or NFC+ if established in the EU (TCE (FC/NFC+)) ⁷
Covered Products	Uncleared swaps and security-based swaps (SBS) entered into on or after the relevant compliance date (other than FX Products)	Uncleared swaps entered into on or after the relevant compliance date (other than FX Products)	Non-centrally cleared over-the-counter (OTC) derivatives (uncleared OTC derivatives) entered into on or after the relevant compliance date (other than Exempted Products) ⁸
Exempted Products	FX Products ⁹ are not subject to IM/VM requirements under US Margin Rules		<u>Permanent Exemptions</u> <ul style="list-style-type: none">FX Products (exempt from IM requirements only)¹⁰Hedging swaps related to regulated covered bonds (Covered Bond Swaps)
			<u>Temporary Exemptions</u> (<i>i.e., delayed implementation</i>) <ul style="list-style-type: none">Single-stock equity options and options on equity indices¹¹
			<u>Proposed Exemptions</u> <ul style="list-style-type: none">Physically-settled FX forwards (proposed exemption from VM requirements, except for transactions between credit institutions and investment firms)¹²
Covered Counterparties	(i) PR Swap Entities (ii) CFTC Swap Entities (iii) Financial End-Users		(i) FCs (ii) NFC+ (iii) TCE (FC/NFC+)
Exempted Counterparties	Exempted End-Users ¹³		(i) Non-Financial Counterparties below clearing thresholds (NFC-) (ii) TCEs that would be NFC- if established in the EU (TCE (NFC-)) (iii) TCEs trading with each other if there is no “direct, substantial and foreseeable effect” within the EU (iv) Certain covered bond issuers or covered pools (subject to certain conditions) (v) Central counterparties (CCPs) that are (a) also authorised as credit institutions in accordance with Directive 2013/36/EU and (b) entering into uncleared OTC derivative contracts during a default management process ¹⁴

		US Margin Rules ¹	EU Margin Rules ²
		PR Margin Rules	
II. INITIAL MARGIN			
Rule	(i) Swap Entity Counterparty: Swap Entity must post/collect IM (ii) Financial End-User Counterparty with Material Swaps Exposure: Swap Entity must post/collect IM (iii) Financial End-User Counterparty without Material Swaps Exposure: No IM requirement under US Margin Rules		(i) FC/NFC+ Counterparty with Material Swaps Exposure: Covered Entity must collect IM ¹⁵ (ii) FC/NFC+ Counterparty without Material Swaps Exposure: No IM requirement under EU Margin Rules
IM Collection Frequency/Timing	Daily, beginning on or before the business day following execution and ending upon termination/expiration of the relevant transaction		Must be recalculated and collected within one business day following the occurrence of certain events (e.g., change in the portfolio between the parties such as execution/expiration/non-margin related payment or delivery, underlying risk measurement approach has changed, minimum recalculation period if no calculation performed in the preceding 10 business days) <ul style="list-style-type: none">IM collection shall be performed without offsetting the IM amounts due as between the two counterparties
Material Swaps Exposure	> US\$8 billion ¹⁶		> €8 billion ¹⁷
Minimum Transfer Amount	US\$500,000 per counterparty	US\$500,000 per counterparty <ul style="list-style-type: none">Maximum US\$50,000 alternative minimum transfer amount (MTA) for certain Separately Managed Accounts¹⁸	€500,000 (or equivalent in another currency) per counterparty
IM Threshold Amount	US\$50 million ¹⁹		€50 million ²⁰
IM Calculation	Standardized IM Schedule (i.e., the ISDA Standardized Initial Margin Model (SIMM)) Calculated as a percentage of notional exposure, with adjustment for net-to-gross replacement cost ratio		Standardized IM Schedule ²¹ (i.e., SIMM or the Standardized Approach) <ul style="list-style-type: none">Uses risk sensitivities as inputRisk divided into six asset classes (interest rate, FX, credit qualifying, credit non-qualifying, equities and commodities) (risk classes); risk factors are prescribed per risk classCalibration of risk weights on an periodic basisParties using SIMM to calculate IM will need a license from the International Swaps and Derivatives Association, Inc. (ISDA)
	Approved Proprietary Margin Models ²² <ul style="list-style-type: none">Potential future exposure is an estimate of 99% confidence interval over a holding period equal to the shorter of either:<ul style="list-style-type: none">(i) 10 business days(ii) The maturity of the swap or netting portfolioHistorical observation period requirements:<ul style="list-style-type: none">(i) Equally weighted data from a period of 1-5 years(ii) Must include period of significant financial stress		Approved Proprietary Margin Models (IM Models) <ul style="list-style-type: none">Potential future exposure is an estimate of 99% confidence interval over margin period of risk of at least 10 daysHistorical observation period requirements:<ul style="list-style-type: none">(i) Equally weighted data from a period of 3-5 years(ii) At least 25% of data must be representative of period of significant financial stress

US Margin Rules ¹		EU Margin Rules ²
PR Margin Rules	CFTC Margin Rules	
II. INITIAL MARGIN <i>(continued)</i>		
Eligible Collateral	<ul style="list-style-type: none">Immediately available cash funds denominated in USD, another major currency or the agreed currency of settlement (US Cash Collateral)Securities issued or guaranteed by a US government agency, the European Central Bank (the ECB) or certain sovereign entitiesCertain debt securities and asset-backed securities issued by US government-sponsored enterprises (GSEs)Certain interests in pooled investment funds that invest in certain US government securities or securities issued by, or guaranteed by, the ECB or certain sovereign entities (Eligible Investment Fund Interests)Certain corporate debt securitiesSecurities issued or guaranteed by the Bank for International Settlements, the IMF or a multilateral development bankCertain listed equitiesGold	<ul style="list-style-type: none">Cash in the form of money credited to an account in any currency, or similar claims for the repayment of money (e.g., money market deposits accounts) (EU Cash Collateral)Gold in the form of allocated pure gold bullion of recognised good delivery (Gold)Certain debt securities issued by EU central governments, EU central banks, certain regional and local authorities of EU Member States and certain public sector entities of EU Member States, multilateral development banks or international organisationsCertain debt securities issued by third countries' governments, central banks and certain regional and local authoritiesCertain debt securities issued by credit institutions or investment firmsCorporate bondsMost senior tranche of a securitisation that is not a re-securitisation (securitisation positions)Certain convertible bonds provided that they can be converted only into equities which are included in a main indexCertain equities included in a main indexShares or units in UCITS, where specified conditions are satisfied (Eligible UCITS Units) <p>* Additional considerations required for credit quality risk²³, wrong-way risk and concentration risk²⁴</p>
III. VARIATION MARGIN		
Rule	Swap Entity must post/collect VM with any uncleared swap counterparties that are either (i) Swap Entities or (ii) Financial End-Users	FC/NFC+/TCE (FC/NFC+) must collect VM from any FC/NFC+/ TCE (FC/NFC+) counterparties
VM Collection Frequency/Timing	Daily, beginning on or before the business day following execution and ending upon termination/expiration of the relevant transaction	Must be calculated at least daily and collected same-day; permitted collection within two business days if certain conditions are met
Eligible Collateral	<p>(i) Swap Entity Counterparty: Swap Entity may only post/collect US Cash Collateral</p> <p>(ii) Financial End-User Counterparty: Swap Entity may post/collect the same forms of Eligible Collateral as for IM</p>	<p>Same Eligible Collateral as for IM</p> <ul style="list-style-type: none">No concentration limits for VM

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IV. COLLATERAL																																																																
Collateral Valuation	<p>The value of any Eligible Collateral collected/posted to satisfy the US Margin Rules is subject to the sum of the applicable Haircuts</p> <ul style="list-style-type: none">Haircuts may only be determined by using the standard methodology provided for under the US Margin Rules	<p>The value of any Eligible Collateral collected/posted to satisfy the EU Margin Rules is subject to the application of Haircuts to the market value of collected collateral</p> <ul style="list-style-type: none">Haircuts may be determined using either:<ul style="list-style-type: none">The standard methodology provided for under the EU Margin RulesAn FC/NFC+'s own estimates using internal models (volatility estimates) compliant with the EU Margin RulesHaircuts for debt securities and securitisation positions based on internal Credit Quality Steps corresponding with the probability of default (PD) associated with such posted securities: <table><thead><tr><th>Credit Quality Step</th><th>PD</th></tr></thead><tbody><tr><td>1.....</td><td>≤ 0.10%</td></tr><tr><td>2.....</td><td>≤ 0.25%</td></tr><tr><td>3.....</td><td>≤ 1.00%</td></tr><tr><td>4.....</td><td>≤ 7.50%</td></tr></tbody></table>	Credit Quality Step	PD	1.....	≤ 0.10%	2.....	≤ 0.25%	3.....	≤ 1.00%	4.....	≤ 7.50%																																																				
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<p><u>Eligible Investment Fund Interests</u></p> <p>The Haircut for any Eligible Investment Fund Interests under the PR Margin Rules is the weighted average Haircut on all assets within the relevant investment fund at the end of the prior month, with the weights applied in the weighted average calculated as a fraction of the fund's total market value that is invested in each asset with a given Haircut</p>	<p><u>Eligible Investment Fund Interests</u></p> <p>The CFTC Margin Rules do not specify any Haircut with respect to Eligible Investment Fund Interests posted/collected as collateral under the CFTC Margin Rules</p>	<p><u>Eligible UCITS Units</u></p> <p>The Haircut for any Eligible UCITS Unit(s) under the EU Margin Rules is the weighted average of the Haircuts that would apply to the assets in which the UCITS fund is invested</p>																																																																				
<p><u>Initial Margin</u></p> <ul style="list-style-type: none">IM collected pursuant to the US Margin Rules must be segregated at a third-party custodianNo rehypothecation, but third-party custodian may reinvest US Cash Collateral that is required to be segregated, in other Eligible CollateralTreatment of excess collateral:<ul style="list-style-type: none"><u>PR Margin Rules</u>: All IM posted by PR Swap Entities (even if not pursuant to the PR Margin Rules) must be held by a third-party custodian<u>CFTC Margin Rules</u>: Any excess collateral posted above IM amounts required under CFTC Margin Rules need not be segregated at a third-party custodian		<p><u>Initial Margin</u></p> <ul style="list-style-type: none">All IM collected must be segregated (can be held by collecting counterparty, third-party holder or custodian) to protect from the insolvency or default of the collecting counterpartyEU Cash Collateral collected as IM must be deposited with an independent third-party holder or independent custodian (in either case, where credit quality has been considered using a methodology that does not rely solely upon external assessments) or with a central bankIf collateral is held by the collecting party, collecting party must offer posting party right to individual segregation <p>(continued on next page)</p>																																																																				

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PR Margin Rules	CFTC Margin Rules	
IV. COLLATERAL (continued)		
Holding of Collateral (continued)		<u>Initial Margin</u> (continued) <ul style="list-style-type: none"> The segregation arrangements shall ensure that collateral posted as IM is available to the posting counterparty in a timely manner, in case the collecting counterparty defaults No rehypothecation, but third-party holder/custodian or central bank may reinvest EU Cash Collateral that is required to be segregated, in other Eligible Collateral Diversification requirements for EU Cash Collateral posted as IM where parties are global systemically important institutions (G-SIIs) or other systemically important institutions (O-SIIs) dealing among themselves, including, <i>inter alia</i>: <ul style="list-style-type: none"> <u>Custodian Diversification</u>. No more than 20% of such IM may be held in EU Cash Collateral by a single third-party custodian <u>Jurisdictional Diversification</u>. Country diversification requirements if IM collected in excess of €1 billion from a single counterparty for certain transactions <ul style="list-style-type: none"> Also reflects the risk exposure to a third-party holder or custodian holding EU Cash Collateral posted as IM
	<u>Variation Margin</u> No segregation requirements	<u>Variation Margin</u> No segregation requirements
V. INTER-AFFILIATE TRANSACTIONS		
Rule	<u>Initial Margin</u> <ul style="list-style-type: none"> Affiliate Is Also a PR Swap Entity: PR Swap Entity must post and collect IM with respect to inter-affiliate uncleared swaps/SBS Affiliate Is Not a PR Swap Entity: PR Swap Entity need only post IM with respect to inter-affiliate uncleared swaps/SBS 	<u>Initial Margin</u> <ul style="list-style-type: none"> FCs/NFCs+ must collect IM from affiliates in accordance with the EU Margin Rules, unless they qualify for the intra-group exemption²⁶ Parties can qualify for an exemption from EU Margin Rules for intra-group transactions if there are both: <ul style="list-style-type: none"> (i) Adequate risk management procedures in place²⁷ (ii) No actual or foreseeable practical²⁸ or legal²⁹ impediments to the prompt transfer of parties' own funds or repayment of liabilities existing between the parties Affiliates Established in the Same EU Member State: <ul style="list-style-type: none"> (i) No positive decision of the national competent authority (NCA) is required (ii) The exemption applies automatically, <i>provided that</i> there is no current or foreseen practical or legal impediment to the prompt transfer of funds or repayment of liabilities between the affiliates <p>(continued on next page)</p>
	<u>Initial Margin</u> <ul style="list-style-type: none"> (i) Collecting IM: <ul style="list-style-type: none"> CFTC Swap Entities must collect IM from foreign affiliates that are both: <ul style="list-style-type: none"> (a) Financial End-Users (b) Not subject to comparable IM collection requirements on their own outward-facing swaps with Financial End-Users Otherwise, CFTC Swap Entity need not collect IM from an affiliate if the following conditions are satisfied: <ul style="list-style-type: none"> (a) Inter-affiliate swap is subject to a centralized risk-management program meeting certain conditions (b) VM is exchanged with respect to the inter-affiliate swap (ii) Posting IM: CFTC Swap Entities need only post IM to its affiliates that are PR Swap Entities 	

US Margin Rules ¹		EU Margin Rules ²	
PR Margin Rules	CFTC Margin Rules		
V. INTER-AFFILIATE TRANSACTIONS (continued)			
Rule (continued)		<p>Initial Margin (continued)</p> <ul style="list-style-type: none">Affiliates Established in Different EU Member States:<ul style="list-style-type: none">(i) Both Affiliates Are FC: A positive decision of both relevant NCAs is required for a total or partial exemption(ii) Both Affiliates Are NFC+: Counterparties must notify their respective NCAs of their intention to apply the exemption<ul style="list-style-type: none">Exemption shall be valid, unless either NCA does not agree within three months of such notification(iii) One FC Affiliate Facing an NFC+ Affiliate: A positive decision of the FC's NCA is required for a total or partial exemptionTransitional Exemptions for EU/Non-EU Intra-Group Transactions<ul style="list-style-type: none">Transitional exemption from IM collection requirements, pending equivalence determinations with a long-stop of three years from entry into force of the EU Margin Rules (i.e., January 4, 2020)Following an equivalence decision, transitional exemption from intra-group IM posting requirements until the later of:<ul style="list-style-type: none">(i) Four months after the date of entry into force of such equivalence decision(ii) The relevant IM compliance date (see below)<p>Upon the entry into force of such equivalence decision, parties to intra-group transactions must make another application to the relevant NCAs in order to benefit from any transitional exemption.</p>	
	<p>Variation Margin</p> <p>PR Swap Entities must post and collect VM for inter-affiliate uncleared swaps/SBS</p>	<p>Variation Margin</p> <p>CFTC Swap Entities must post and collect VM for inter-affiliate uncleared swaps</p>	<p>Variation Margin</p> <p>Same as for IM (except that the reference to “IM compliance date” above should be read as “VM compliance date”)³⁰</p>
IM Threshold Amount (if applicable)	<p>US\$20 million</p> <p>(resulting from all uncleared swaps/SBS with such affiliate)</p>	<p>US\$50 million</p> <p>(i.e., no special treatment for inter-affiliate swaps)</p>	<p>€10 million</p> <p>(resulting from all uncleared OTC derivatives with such affiliate)</p>

US Margin Rules ¹		EU Margin Rules ²
PR Margin Rules	CFTC Margin Rules	
V. INTER-AFFILIATE TRANSACTIONS <i>(continued)</i>		
IM Calculation (if applicable)	<p>(i) Approved Proprietary IM Model:</p> <ul style="list-style-type: none">Holding period equal to the shorter of:<ul style="list-style-type: none">(a) Five business days(b) The maturity of such inter-affiliate uncleared swap/SBS or the applicable netting portfolioIf holding period for netting portfolio calculated in this way, such netting portfolio must be identified and separated from any other netting portfolio for purposes of calculating and complying with the IM requirements under the PR Margin Rules <p>(ii) Other Internal IM Model: To the extent that a PR Swap Entity uses an internal IM model that does not conform with the PR Margin Rules requirements, such PR Swap Entity must calculate (on a daily basis) the IM amount to be collected with respect to its uncleared swaps/SBS with a given affiliate, by using the standardized IM schedule and multiplying the gross IM by 0.7</p>	<p>No special treatment of inter-affiliate swaps in calculating IM</p> <p>No special treatment of intra-group uncleared OTC derivatives in calculating IM (except insofar as the lower IM Threshold Amount applies)</p>
Segregation (if applicable)	Custodian for non-cash Eligible Collateral collected from the PR Swap Entity's affiliate to satisfy the IM requirements may be such PR Swap Entity or an affiliate thereof	<p>Custodian for Eligible Collateral collected by a CFTC Swap Entity from its affiliate to satisfy the IM requirements may be such CFTC Swap Entity or an affiliate thereof</p> <p>No special treatment of intra-group uncleared OTC derivatives with respect to the segregation of Eligible Collateral collected from affiliates as IM under the EU Margin Rules</p>
VI. NETTING		
IM Calculation	<p><u>Standardized IM Schedule</u></p> <p>60% benefit of cross-asset netting</p>	<p><u>Standardized IM Schedule</u></p> <p>60% benefit of cross-asset netting</p>
	<p><u>Approved Proprietary IM Model</u></p> <p>Swap Entity can net all uncleared swaps with a counterparty under an EMNA within, but not across, the following broad risk categories</p> <ul style="list-style-type: none">CommodityCreditEquityFX and interest rates	<p><u>Approved Proprietary IM Model</u></p> <p>Counterparties can net all uncleared swaps under an EMNA within, but not across, the following asset classes:</p> <ul style="list-style-type: none">Interest rates, currency and inflationEquityCreditCommodities and GoldOther

US Margin Rules ¹		EU Margin Rules ²																																										
PR Margin Rules	CFTC Margin Rules																																											
VI. NETTING (continued)																																												
Portfolio Margining	<p>For purposes of portfolio margining, counterparties may enter into EMNAs that separately account for pre- and post-compliance date positions</p> <ul style="list-style-type: none">No exemption for new swaps/SBS arising from post-compliance date amendments to and novations or compressions of uncleared swaps/SBS that were entered into prior to the applicable compliance date(s)³¹	<p>For purposes of portfolio margining, counterparties may enter into EMNAs that separately account for pre- and post-compliance date positions</p> <ul style="list-style-type: none">The position related to post-compliance date amendments to and novations or compressions of legacy uncleared OTC derivatives is not clear under the EU Margin RulesSuch trades may either:<ul style="list-style-type: none">Remain legacy trades that are not subject to margin requirementsCome under regulatory scrutiny if amendments are questionable, appear to be efforts to avoid application of the EU Margin Rules and/or result in a significantly larger credit risk to a counterparty (i.e., substantial increases to the legacy trade's notional amount)																																										
VII. COMPLIANCE SCHEDULE																																												
Phased-in Compliance Dates	<table><tr><th>Notional Amount</th><th>VM Compliance Date</th><th>IM Compliance Date</th></tr><tr><td>> US\$3 trillion</td><td>September 1, 2016</td><td>September 1, 2016³²</td></tr><tr><td>> US\$2.25 trillion</td><td>March 1, 2017</td><td>September 1, 2017</td></tr><tr><td>> US\$1.5 trillion</td><td>March 1, 2017</td><td>September 1, 2018</td></tr><tr><td>> US\$750 billion</td><td>March 1, 2017</td><td>September 1, 2019</td></tr><tr><td>> US\$8 billion</td><td>March 1, 2017</td><td>September 1, 2020</td></tr><tr><td>≤ US\$8 billion</td><td>March 1, 2017</td><td>N/A</td></tr></table>	Notional Amount	VM Compliance Date	IM Compliance Date	> US\$3 trillion	September 1, 2016	September 1, 2016 ³²	> US\$2.25 trillion	March 1, 2017	September 1, 2017	> US\$1.5 trillion	March 1, 2017	September 1, 2018	> US\$750 billion	March 1, 2017	September 1, 2019	> US\$8 billion	March 1, 2017	September 1, 2020	≤ US\$8 billion	March 1, 2017	N/A	<table><tr><th>Notional Amount</th><th>VM Compliance Date</th><th>IM Compliance Date</th></tr><tr><td>> €3 trillion</td><td>February 4, 2017</td><td>February 4, 2017</td></tr><tr><td>> €2.25 trillion</td><td>March 1, 2017</td><td>September 1, 2017</td></tr><tr><td>> €1.5 trillion</td><td>March 1, 2017</td><td>September 1, 2018</td></tr><tr><td>> €750 billion</td><td>March 1, 2017</td><td>September 1, 2019</td></tr><tr><td>> €8 billion</td><td>March 1, 2017</td><td>September 1, 2020</td></tr><tr><td>≤ €8 billion</td><td>March 1, 2017</td><td>N/A</td></tr></table>	Notional Amount	VM Compliance Date	IM Compliance Date	> €3 trillion	February 4, 2017	February 4, 2017	> €2.25 trillion	March 1, 2017	September 1, 2017	> €1.5 trillion	March 1, 2017	September 1, 2018	> €750 billion	March 1, 2017	September 1, 2019	> €8 billion	March 1, 2017	September 1, 2020	≤ €8 billion	March 1, 2017	N/A
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	<p>Notional Amount Calculation</p> <p>Average daily notional amount of uncleared swaps, uncleared SBS, FX forwards and FX swaps (computed for business days only) for each counterparty (aggregated with its respective affiliates), calculated for the previous March, April and May</p> <ul style="list-style-type: none">Inter-affiliate transactions need only be counted onceUncleared swaps/SBS entered into with Exempted End-Users would not be included in calculationSBS that either (i) are exempt pursuant to the SEC clearing exemption for affiliates of end-users or (ii) satisfy the criteria for the SEC's end-user exception for clearing would not be included in the calculation	<p>Notional Amount Calculation</p> <p>Aggregate Average Notional Amount (AANA) for each counterparty (aggregated with its respective worldwide corporate group³³), calculated as of the last business day of the previous March, April and May</p> <ul style="list-style-type: none">Intra-group transactions (regardless of whether qualifying for exemption under the EU Margin Rules) need only be counted onceCalculation would include transactions that are permanently/temporarily exempt from IM/VM requirements under the EU Margin Rules (i.e., physically-settled FX swaps and forwards, Currency Swaps³⁴, Covered Bond Swaps, derivatives with exempted counterparties, exempted intra-group transactions, hedging trades, etc.)The following would not be considered OTC derivatives and would therefore not be included in AANA calculation:<ul style="list-style-type: none">Exchange-traded derivatives on a non-EU equivalent marketExchange-traded derivatives trades on an EU regulated market <p>(continued on next page)</p>																																										

US Margin Rules ¹		EU Margin Rules ²
PR Margin Rules	CFTC Margin Rules	
VII. COMPLIANCE SCHEDULE <i>(continued)</i>		
Phased-in Compliance Dates <i>(continued)</i>		<p>Notional Amount Calculation <i>(continued)</i></p> <ul style="list-style-type: none">• Centrally Cleared OTC Derivatives: OTC derivatives that are centrally cleared (<i>i.e.</i>, when it is cleared by an authorised EU CCP or a recognised third-country CCP) would not qualify as non-centrally cleared OTC derivatives and therefore would not be included in AANA calculation<ul style="list-style-type: none">– If an OTC derivative is cleared outside of the EU by a non-recognised non-EU CCP, it may still be “non-centrally cleared” for the purposes of EMIR and may need to be taken into account in the AANA calculation³⁵• There are separate AANA calculations for IM and VM; both entities must be above the relevant AANA threshold for the EU Margin Rules to apply
VIII. CROSS-BORDER APPLICATION		
Exemption/Exclusion	<p>Uncleared swaps/SBS for which neither the counterparty nor the Foreign Covered Swap Entity,³⁶ nor any party providing a guarantee of either party's relevant uncleared swap obligations, falls under the following categories:</p> <ul style="list-style-type: none">• A US entity (including a US branch, agency or subsidiary of a foreign bank)• A natural person who is a US resident• A branch or office of a US entity• A Swap/SBS Entity that is a subsidiary of a US entity <p>Uncleared swap of a CFTC Swap Entity that is not a US person (a Non-US CFTC Swap Entity), where the following conditions are met:</p> <ul style="list-style-type: none">• Neither counterparty is a US person• Neither counterparty's relevant uncleared swap obligations are guaranteed by a US person• Neither counterparty is either:<ul style="list-style-type: none">(i) A Foreign Consolidated Subsidiary (an FCS)³⁷(ii) A US branch of a Non-US CFTC Swap Entity <p>* Exclusion not available for certain inter-affiliate uncleared swaps</p>	<ul style="list-style-type: none">• Uncleared derivatives entered into between two TCEs (regardless of whether they are TCE (FC/NFC+)) if both:<ul style="list-style-type: none">(i) The contract does not have a direct, substantial or foreseeable effect within the EU³⁸(ii) The application of margin-related obligations is not necessary or appropriate to prevent evasion of EMIR• Uncleared derivatives entered into between an EU counterparty and a TCE in a jurisdiction where each of the following conditions are met:<ul style="list-style-type: none">(i) Legal reviews confirm that either (a) the exchange of collateral agreements cannot be enforceable at all times with certainty or (b) segregation compliant with the EU Margin Rules is not possible(ii) The collection of collateral in accordance with the EU Margin Rules (<i>i.e.</i>, on a gross basis) is not possible(iii) Group aggregate notional where no margin collected, divided by group aggregate notional (excluding intra-group transactions) < 2.5%<ul style="list-style-type: none">▪ The EU counterparty's trades with a TCE in a non-netting jurisdiction may not exceed this 2.5% ratio• An EU counterparty is not required to post IM/VM to (but must collect IM/VM on a gross basis from) a TCE counterparty in a jurisdiction where legal reviews confirm that either:<ul style="list-style-type: none">(i) The exchange of collateral agreements cannot be enforceable at all times with certainty(ii) Segregation compliant with the EU Margin Rules is not possible

US Margin Rules ¹		EU Margin Rules ²
PR Margin Rules	CFTC Margin Rules	
VIII. CROSS-BORDER APPLICATION (continued)		
Availability of Substituted Compliance	<p>Initial Margin</p> <p>If an uncleared swap/SBS is not eligible for the exclusion, substituted compliance may be available with respect to the collection (but not posting) of IM by a PR Swap Entity for uncleared swaps/SBS meeting the following conditions:</p> <ul style="list-style-type: none">PR Swap Entity is either:<ul style="list-style-type: none">(i) A Foreign Covered Swap Entity(ii) A US branch or agency of a foreign bank(iii) An entity that is not organized under US law and is a subsidiary of a depository institution, Edge corporation or agreement corporationNeither party's relevant uncleared swap/SBS obligations are guaranteed by any of the following:<ul style="list-style-type: none">(i) An entity organized under US law (excluding a US branch or agency of a foreign bank)(ii) A natural person who is a US resident(iii) A branch or office of an entity organized under US law	<p>Initial Margin</p> <p>If an uncleared swap is not eligible for the exclusion, substituted compliance may be available with respect to both the posting and collection of IM for uncleared swaps meeting the following conditions:</p> <ul style="list-style-type: none">CFTC Swap Entity is a Non-US person (including a US branch thereof or an FCS)The Non-US CFTC Swap Entity's relevant uncleared swap obligations are not guaranteed by a US personCounterparty is neither:<ul style="list-style-type: none">(i) A CFTC Swap Entity that is a US person (a US CFTC Swap Entity)(ii) A Non-US CFTC Swap Entity (including a US branch thereof or an FCS) whose relevant swap obligations are guaranteed by a US person <p>Substituted compliance may be available with respect to the posting (but not collection) of IM by a CFTC Swap Entity for the following uncleared swap transactions:</p> <ul style="list-style-type: none">(i) A US CFTC Swap Entity facing (ii) a Non-US person counterparty (including a Non-US CFTC Swap Entity, a US branch thereof or an FCS) whose relevant uncleared swap obligations are not guaranteed by a US person(i) A Non-US CFTC Swap Entity (including a US branch thereof or an FCS) whose relevant swap obligations are guaranteed by a US person facing (ii) a Non-US person counterparty (including a Non-US CFTC Swap Entity, a US branch thereof or an FCS) whose relevant uncleared swap obligations are not guaranteed by a US person <p>(continued on next page)</p>
		<p>Initial Margin</p> <p>If a cross-border uncleared OTC derivative is subject to the EU Margin Rules, substituted compliance may be available when the EU adopts explicit decisions on the equivalence of third-country regimes (e.g., the United States) in accordance with Article 13 of EMIR</p> <ul style="list-style-type: none">If a TCE (FC/NFC+) is guaranteed by an EU entity, substituted compliance is not available

US Margin Rules ¹		EU Margin Rules ²
PR Margin Rules	CFTC Margin Rules	
VIII. CROSS-BORDER APPLICATION <i>(continued)</i>		
Availability of Substituted Compliance <i>(continued)</i>		<p>Initial Margin <i>(continued)</i></p> <p>Substituted compliance may be available with respect to the collection (but not posting) of IM by an FCS or a US branch of a Non-US CFTC Swap Entity with respect to an uncleared swap satisfying the following conditions:</p> <ul style="list-style-type: none">• The relevant uncleared swap obligations of the FCS or US branch of a Non-US CFTC Swap Entity are not guaranteed by a US person• Counterparty is either:<ul style="list-style-type: none">(i) A US CFTC Swap Entity <p>A Non-US CFTC Swap Entity (including a US branch thereof or an FCS) whose relevant uncleared swap obligations are guaranteed by a US person</p>
	<p>Variation Margin</p> <p>No substituted compliance with respect to VM posting/collection requirements under PR Margin Rules</p>	<p>Variation Margin</p> <p>Substituted compliance may be available with respect to both the posting and collection of VM for uncleared swaps meeting the following conditions:</p> <ul style="list-style-type: none">• CFTC Swap Entity is a Non-US person (including an FCS or a US branch of a Non-US CFTC Swap Entity)• The Non-US CFTC Swap Entity's relevant uncleared swap obligations are not guaranteed by a US person• Counterparty is neither:<ul style="list-style-type: none">(i) A US CFTC Swap Entity(ii) A Non-US CFTC Swap Entity (including a US branch thereof or an FCS) whose relevant swap obligations are guaranteed by a US person
Substituted Compliance Determinations to Date	None	<ul style="list-style-type: none">• Japan³⁹• EU⁴⁰• Australia⁴¹ <p>US (CFTC Margin Rules only)⁴²</p>

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Endnotes

¹ **US Margin Rules** refers, collectively, to the PR Margin Rules and the CFTC Margin Rules, where: (i) **PR Margin Rules** means the margin requirements for uncleared swaps/SBS finalized jointly by the **Prudential Regulators** (i.e., the Board of Governors of the Federal Reserve System (the **FRB**), the Office of the Comptroller of the Currency (the **OCC**), the Federal Deposit Insurance Corporation (the **FDIC**), the Farm Credit Administration (the **FCA**) and the Federal Housing Finance Agency (the **FHFA**)); and (ii) **CFTC Margin Rules** means the margin requirements for uncleared swaps finalized by the US Commodity Futures Trading Commission (the **CFTC**).

² **EU Margin Rules** refers to the delegated regulation that specifies margin requirements for uncleared OTC derivatives adopted by the European Commission (**EC**) on October 4, 2016 and published in the Official Journal of the European Union (**EU Journal**) on December 15, 2016. The EU Margin Rules entered into force on January 4, 2017 (i.e., 20 days after their publication in the EU Journal).

³ **Swap Entities** refers to CFTC-registered swap dealers and major swap participants; and **SBS Entities** refers to SEC-registered security-based swap dealers and major security-based swap participants.

⁴ A Swap/SBS Entity is **prudentially regulated** if it is subject to regulatory oversight by (i) the FRB, (ii) the OCC, (iii) the FDIC, (iv) the FCA or (v) the FHFA. See FN4 of the PR Margin Rules adopting release for a detailed discussion on how to determine whether a Swap/SBS Entity is subject to prudential regulatory oversight.

⁵ **Financial Counterparties** refers to investment firms, credit institutions, insurance undertakings, assurance undertakings, reinsurance undertakings, undertakings for collective investments in transferrable securities (**UCITS**) and their managers, institutions for occupational retirement provision and alternative investment funds (**AIFs**) managed by alternative investment fund managers (**AIFMs**) (in each case, authorised pursuant to relevant EU directives). On May 4, 2017, the EC published a legislative proposal to amend *Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories* (referred to as the **European Market Infrastructure Regulation** or **EMIR**) (the **EMIR Review Proposal**), which included a proposal to broaden the scope of the FC category to capture additional entities, the activities of which are “financial” in nature – these would include (i) third-country AIFs that are currently considered NFCs under EMIR, (ii) central securities depositories and securitisation special purpose entities. Although the EMIR Review Proposal provides for exempting small financial counterparties from the clearing obligation if their derivative volumes are below clearing thresholds, it appears that such small financial counterparties would nonetheless remain subject to the EMIR Margin Rules by virtue of being FCs. Note that the market does not expect any amending regulation to be enacted prior to the end of 2018.

⁶ **Non-Financial Counterparty** or **NFC** refers to an undertaking established in the EU other than an FC or a central counterparty. NFCs are divided into the categories of NFC+ and NFC-, depending on whether they are above or below the clearing threshold. The **clearing threshold** is €1 billion for each of credit and equity derivatives and €3 billion for each of interest rate, FX, commodity and other derivatives. Contracts objectively measurable as reducing risks relating to commercial and treasury financing activity are **excluded** from these clearing threshold calculations. The EMIR Review Proposal included a proposed amendment which providing that NFCs (i) would only be subject to mandatory clearing under EMIR for those categories of OTC derivatives for which (a) a clearing mandate exists and (b) the NFC exceeds the clearing threshold, but (ii) would not be subject to mandatory clearing under EMIR for other classes of derivatives which are subject to mandatory clearing, but for which the NFC is below the clearing threshold. Notwithstanding this proposed amendment to EMIR, it appears that an NFC that exceeds the clearing threshold for any class of OTC derivatives would nonetheless remain subject to the EU Margin Rules as an NFC+ (as opposed to being subject to the EU Margin Rules for only those classes of OTC derivatives which are subject to the clearing mandate and for which the NFC has exceeded the clearing threshold).

⁷ Trades between two TCEs (FC/NFC+) are in scope if either (i) there is a “direct, substantial and foreseeable effect” within the EU or (ii) the application of margin-related obligations is necessary to prevent evasion of EMIR.

⁸ For uncleared OTC derivatives contracts that involve the payment of an upfront premium to guarantee the performance of the contract, the counterparty receiving the payment of the premium (i.e., the **option seller**) **does not** have a current or potential future exposure to the counterparty paying the premium (i.e., the **option buyer**). Therefore, the option seller should be able to choose not to collect IM or VM as long as the option seller is not exposed to any credit risk. The option buyer should, however, collect both IM and VM.

The European Supervisory Authorities (**ESAs**) have published a consultation paper proposing to clarify application of the EU margin rules in the context of simple, transparent and standardised securitisations meeting enumerated requirements.

⁹ **FX Products** refers to physically-settled FX forwards and FX swaps and the fixed, physically-settled exchange of principal in cross-currency swaps.

¹⁰ Only the exchange of principal in Currency Swaps is exempt from the IM requirements; the interest rate component of Currency Swaps are subject to the IM requirements.

¹¹ EU Margin Rules contemplate delayed implementation of IM/VM requirements for equity options and options on equity indices for up to three years after the entry into force of the EU Margin Rules (i.e., up to January 4, 2020).

¹² Until the proposed amendments take effect, the ESAs expect NCAs to approach their enforcement of VM requirements under the EU Margin Rules “in a proportionate manner.”

¹³ **Exempted End-Users** means: (i) commercial end-users, including treasury affiliates (that qualify for the end-user exception to mandatory clearing) acting as agent; (ii) financial institutions (i.e., small banks, savings associations, Farm Credit System institutions, credit unions) with total assets of US\$10 billion or less; (iii) certain financial cooperatives hedging the risks associated with originating loans for their members; and (iv) certain captive finance companies.

¹⁴ Note that EMIR does not apply to the entities listed in Article 1(4) of EMIR and, with the exception of the reporting obligations under Article 9, EMIR also does not apply to the entities listed in Article 1(5) of EMIR.

¹⁵ The EMIR Review Proposal introduced a procedure for the prior supervisory approval and ongoing supervision of risk management procedures relating to the level and type of collateral and segregation arrangements, including IM models.

¹⁶ **Material Swaps Exposure Calculation Under US Margin Rules:** A Financial End-User with Material Swaps Exposure is an entity that has an average daily aggregate notional amount of uncleared swaps, uncleared SBS, FX forwards and FX swaps with all counterparties for June, July and August of the previous calendar year (calculated only for business days), aggregated with the Financial End-User's affiliates, that exceeds US\$8 billion.

¹⁷ **Material Swaps Exposure Calculation Under EU Margin Rules:** An FC/NFC+ Counterparty with Material Swaps Exposure is an entity that has an AANA recorded in the last business day of March, April and May of the previous calendar year exceeding €8 billion (dynamic assessment every year), aggregated with all uncleared OTC derivatives of such FC/NFC+ Counterparty's worldwide corporate group. For purposes of determining whether an FC/NFC+ Counterparty has Material Swaps Exposure, AANA includes all intra-group uncleared OTC derivative transactions, which are counted only once.

¹⁸ **Separately Managed Account** means each account managed by an asset manager and governed by an investment management agreement that grants the asset manager authority with respect to a specified amount of assets under management. On February 13, 2017, the CFTC's Division of Swap Dealer and Intermediary Oversight (**DSIO**) issued a letter providing no-action relief, stating that it would not recommend an enforcement action by the CFTC against a CFTC Swap Entity that does not comply with the MTA requirements under the CFTC Margin Rules, with respect to one or more swaps with any legal entity that is the owner of more than one Separately Managed Account, subject to the following conditions: (i) any such swaps were entered into with the CFTC Swap Entity by an asset manager on behalf of a Separately Managed Account owned by the legal entity pursuant to authority granted under an investment management agreement; (ii) the Separately Managed Account's swaps are subject to an EMNA that does not permit netting of IM/VM obligations across Separately Managed Accounts of the legal entity that has swaps outstanding with the CFTC Swap Entity; and (iii) the CFTC Swap Entity applies an alternative MTA no greater than US\$50,000 to the Separately Managed Account's IM and VM collection/posting obligations under the CFTC Margin Rules.

¹⁹ **IM Threshold Amount Under US Margin Rules:** Aggregate credit exposure resulting from all uncleared swaps and uncleared SBS between (i) a Swap Entity or any of its affiliates and (ii) a counterparty or any of its affiliates, **excluding** any uncleared swaps or uncleared SBS entered into with Exempted End-Users. Note that calculation of IM Threshold Amount under the US Margin Rules **excludes** physically-settled FX forwards and swaps.

²⁰ **IM Threshold Amount Under EU Margin Rules:** AANA resulting from all uncleared derivatives between (i) an FC/NFC+ or any of its affiliates and (ii) a counterparty or any of its affiliates, excluding any uncleared derivatives entered into with NFC- or TCE (NFC-), but **including** physically-settled FX forwards and swaps, Currency Swaps, Covered Bond Swaps and derivatives with exempted counterparties.

²¹ A counterparty may calculate the amount of IM to be collected using either (i) the Standardized Approach, (ii) an IM Model or (iii) both.

²² Note that, under both the US Margin Rules and the EU Margin Rules, approved proprietary IM models may be either developed by the counterparty or provided by a third party.

²³ The use of internal or external credit assessment process remains subject to a minimum level of credit quality. Credit institutions authorised under *Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on Prudential Requirements for Credit Institutions and Investment Firms (CRR)* are allowed to use internal-ratings-based (**IRB**) approaches using **Credit Quality Steps** and agree these with their counterparties. If there is no approved IRB approach for the collateral or if the two counterparties do not agree on the use of the IRB approach developed by one counterparty, the two counterparties can define a list of eligible collateral relying on the external credit assessments of recognized external credit assessment institutions.

²⁴ Concentration limits for sovereign debt securities **only** apply to trades between systemically important counterparties (including, but not limited to, systemically important banks) and **do not** apply to trades between them and smaller counterparties.

²⁵ Where the relevant agreement **does not** identify a termination currency, the Haircut shall apply to the market value of all the assets posted as IM.

²⁶ Note that parties were completely exempt from the EU Margin Rules for intra-group transactions until July 4, 2017.

²⁷ The risk management procedures shall be adequately sound, robust and consistent with the level of complexity of the derivative transaction and shall ensure the regular monitoring of exposures arising under intra-group transactions and the timely settlement of obligations resulting from such intra-group uncleared OTC derivatives.

²⁸ Practical impediments include insufficient unencumbered/liquid assets to the counterparty when due and operational impediments which delay or prevent transfers or repayments when due.

²⁹ Legal impediments include: (i) currency/exchange controls; (ii) regulatory/administrative/legal/contractual frameworks that prevent mutual financial support or significantly affect transfer of funds intra-group; (iii) any condition for early intervention, recovery and resolution is met which results in supervisor foreseeing an impediment to prompt transfer of own funds or repayment of liabilities; (iv) minority interests that limit decision-making power; and (v) the purpose or the legal structure of the counterparty, as defined in its statutes, instruments of incorporation and internal rules.

³⁰ On January 20, 2017, the EC published an amendment in the EU Journal to the EU Margin Rules, which applies retroactively from January 4, 2017, correcting the transitional exemption from the posting of VM in EU/non-EU intra-group transactions to mirror that which had been included for the posting of IM in EU/non-EU intra-group transactions under the EU Margin Rules.

³¹ The Prudential Regulators and the CFTC have adopted rules clarifying that an amendment to a legacy swap solely for the purpose of complying with rulemakings promulgated in respect of "qualified financial contracts" by the FRB, the OCC and the FDIC.

³² On September 1, 2016, DSIO issued a time-limited no-action letter stating that it would not recommend an enforcement action by the CFTC against a CFTC Swap Entity subject to the September 1, 2016 compliance date for the CFTC Margin Rules, for failing to fully comply with the CFTC's custodial arrangement requirements during the initial 30 days of implementation (i.e., through October 3, 2016), provided that the CFTC Swap Entity is otherwise (i) collecting and posting margin in accordance with the CFTC Margin Rules, (ii) working in good faith to complete custodial arrangements in satisfaction of the CFTC Margin Rules and (iii) meeting certain other requirements. Note that this no-action relief expired on October 3, 2016.

³³ UCITS and AIFs managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU shall be considered distinct entities and treated separately if the funds are distinct segregated pools of assets for the purposes of the fund's insolvency or bankruptcy and the segregated pools of assets are not collateralised, guaranteed or otherwise financially supported by other investment funds or their managers.

³⁴ **Currency Swaps** refers to uncleared OTC derivative contracts under which counterparties exchange solely the principal amount and any interest payments in one currency, for the principal amount and any interest payments in another currency, at specified points in time according to a specified formula.

³⁵ There are arguments that "non-centrally cleared" means "not cleared anywhere (irrespective of the non-EU CCP's status under EMIR)," but there is no clear guidance from the European Securities and Markets Authority (**ESMA**) on this. As a result, market participants sometimes run parallel AANA calculations.

³⁶ **Foreign Covered Swap Entity** means a PR Swap Entity that **is not** (i) a US entity (including a US branch, agency or subsidiary of a foreign bank), (ii) a branch or office of a US entity or (iii) an entity that is a subsidiary of a US entity.

³⁷ **Foreign Consolidated Subsidiary** means a Non-US CFTC Swap Entity in which an ultimate parent entity (*i.e.*, the parent entity in a consolidated group in which none of the other entities in the consolidated group has a controlling interest, in accordance with US GAAP) that is a US person has a controlling financial interest (in accordance with US GAAP), such that the US ultimate parent entity includes the Non-US CFTC Swap Entity's operating results, financial position and statement of cash flows in the US ultimate parent entity's consolidated financial statements (in accordance with US GAAP).

³⁸ An uncleared OTC derivative contract between two TCEs will be considered to have **direct, substantial or foreseeable effect within the EU** when (i) at least one of the TCE counterparties benefits from a guarantee from a EU FC for a notional amount of at least €8 billion and the contract would constitute at least 5% of current exposures in the uncleared OTC derivative contracts of the guarantor or (ii)(a) the two TCE counterparties enter into the uncleared OTC derivative contract through their EU branches and (b) would qualify as FCs if they were established in the EU (*i.e.*, are both TCEs (FC)).

³⁹ On September 8, 2016, the CFTC issued a comparability determination applicable to CFTC Swap Entities, in respect of the margin requirements for uncleared OTC derivatives promulgated by the Japan Financial Services Agency (**JFSA**) (**Japanese Margin Rules**). The CFTC issued an amended comparability determination in respect of the Japanese Margin Rules on March 26, 2019. As amended, the CFTC's comparability determination generally found the Japanese Margin Rules comparable to the CFTC Margin Rules for substituted compliance purposes, to the extent that the uncleared swap transactions in question are subject to IM and/or VM posting/collection requirements, as applicable, under both the Japanese Margin Rules and the CFTC Margin Rules.

⁴⁰ On October 13, 2017, the CFTC issued a comparability determination applicable to CFTC Swap Entities, in respect of the EU Margin Rules. The CFTC generally found the EU Margin Rules comparable to the CFTC Margin Rules for substituted compliance purposes, to the extent that the uncleared swap transactions in question are subject to IM and/or VM posting/collection requirements, as applicable, under both the EU Margin Rules and the CFTC Margin Rules. **Please refer to our *Client Alert on the CFTC's comparability determination for a more detailed discussion*: <https://www.lw.com/thoughtLeadership/CFTC-publishes-comparability-determination-EU-margin-rules>.**

⁴¹ On March 27, 2019, the CFTC issued a comparability determination applicable to CFTC Swap Entities, in respect of the margin requirements for uncleared swaps under the laws of Australia and the regulations of the Australian Prudential Regulation Authority (**ARPA**) (**Australian Margin Rules**). The CFTC generally found the Australian Margin Rules comparable in outcome to the CFTC Margin Rules for substituted compliance purposes.

⁴² On October 13, 2017, the EC published a decision recognizing equivalence of the CFTC Margin Rules with respect to the EU Margin Rules; please note, however, that the PR Margin Rules were outside the scope of the EC's equivalence decision. Accordingly, compliance by CFTC Swap Entities with the CFTC Margin Rules (but **not** by PR Swap Entities with the PR Margin Rules), in respect of uncleared OTC derivative transactions **that are subject to margin requirements under both the EU Margin Rules and the CFTC Margin Rules**, and to which at least one of the counterparties is established in the United States, shall constitute compliance with the EU Margin Rules, effective November 3, 2017.