



BANK OF ENGLAND
PRUDENTIAL REGULATION
AUTHORITY



Consultation Paper | PRA CP6/21 | FCA CP21/7

Margin requirements for non-centrally cleared derivatives: Amendments to BTS 2016/2251

March 2021





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This is a joint consultation by the FCA and the PRA. Although the FCA and PRA have considered the proposals independently of one another and in accordance with their statutory objectives, we have decided to consult jointly to avoid unnecessary duplication. Responses will be shared between authorities where relevant.

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Responses are requested by Wednesday 19 May 2021.

In light of current measures to help prevent the spread of COVID-19, please address any comments or enquiries by email to: CP6_21@bankofengland.co.uk for PRA-regulated firms, or cp21-07@fca.org.uk for FCA firms. Other respondents should submit responses to both authorities.

Alternatively, please address any comments or enquiries to:

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1 Overview

1.1 This Consultation Paper (CP) sets out the Prudential Regulation Authority's (PRA) and Financial Conduct Authority's (FCA) proposals to establish or extend exemptions for some products subject to bilateral margining requirements, and to align implementation phases and thresholds to the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) standards.

1.2 The proposals in this CP would result in changes to the UK version of Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (hereafter Binding Technical Standards (BTS) 2016/2251), the Technical Standards under Article 11(15) of the European Market Infrastructure Regulation (EMIR).¹

1.3 This CP is relevant to PRA-authorized firms that are financial counterparties for the purposes of Article 2 of EMIR. In addition, this CP is relevant to all FCA solo-regulated entities and non-financial counterparties in scope of the margin requirements under UK EMIR (FCA firms).

Background

Objectives of bilateral margin requirements for uncleared derivatives

1.4 The financial crisis of 2008 exposed significant weaknesses in the resilience of banks and other market participants to financial and economic shocks. In the context of over-the-counter (OTC) derivatives, the crisis demonstrated the need for improved transparency in the OTC derivatives markets and further regulation of OTC derivatives and market participants. This was necessary to limit excessive and opaque risk-taking through OTC derivatives. It was also necessary to mitigate the systemic risk posed by OTC derivatives transactions, markets, and practices.

1.5 In response, the Group of Twenty (G20) initiated a reform programme in 2009 to reduce the systemic risk posed by OTC derivatives. One of the key requirements of the reform is for the mandatory clearing of all standardised OTC derivative transactions via a central counterparty (CCP). However, not all OTC derivatives can be centrally cleared. In 2011, to mitigate the risks associated with non-centrally cleared OTC derivatives, the G20 agreed to add margin requirements to the reform programme, and tasked BCBS and IOSCO to jointly develop standards.² The introduction of the bilateral margining requirements are a key aspect of the post-crisis reforms aimed at mitigating systemic risk and incentivising central clearing. These requirements are implemented in the UK by the onshored EMIR and BTS 2016/2251.³

1.6 In addition to the safety and soundness of individual firms, BCBS and IOSCO identified that margin requirements for non-centrally cleared derivatives have two main benefits:

- **reduction of systemic risk:** margin requirements for non-centrally cleared derivatives would be expected to reduce contagion and spillover effects by ensuring that collateral is available to offset losses caused by the default of a derivatives counterparty. Margin requirements can also have broader macroprudential benefits, by reducing the financial system's vulnerability to

¹ Unless stated otherwise, all references to regulations, technical standards and rules should be read as to the UK versions.

² Available at: <http://www.g20.utoronto.ca/2009/2009communiqué0925.html>.

³ The current EMIR text can be accessed at <https://www.legislation.gov.uk/eur/2012/648/contents>, the current BTS text can be accessed at <https://www.legislation.gov.uk/eur/2016/2251/contents>.

potentially destabilising procyclicality and limiting the build-up of uncollateralised exposures within the financial system.

- **promotion of central clearing:** margin requirements on non-centrally cleared derivatives will promote central clearing by reflecting the generally higher risk associated with uncleared trades.

1.7 In 2013, BCBS and IOSCO published 'Margin requirements for non-centrally cleared derivatives'.⁴ Among other things, it requires counterparties to exchange initial and variation margin on uncleared derivatives. Variation margin (VM) protects the transacting parties from the current exposure that has already been incurred by one of the parties from changes in the mark-to-market value of the contract after the transaction has been executed. Initial margin (IM) protects the transacting parties from the potential future exposure that could arise from future changes in the mark-to-market value of the contract during the time it takes to close out and replace the position in the event that one or more counterparties default.

1.8 The implementation of bilateral margining was initially scheduled to occur in phases between 2015 and 2019, but these dates were subsequently updated by BCBS and IOSCO.

1.9 The European Union (EU) BTS, which implements the substantive aspects of the BCBS and IOSCO framework in the EU, were published in the EU Official Journal on Thursday 15 December 2016.⁵ Implementation was scheduled to occur in phases, in line with the updated BCBS and IOSCO standard. The VM requirements came into effect for all in-scope firms in February and March 2017. Given the more complex requirements for IM (including the need for margin models to be in place and significant re-documentation of contracts), the IM requirements were implemented in phases depending on the size of firm and volume of derivatives activity. The first phase-in, for the most systemically important firms, took effect on 4 February 2017 with subsequent phase-ins occurring in September on an annual basis. In addition, several EU-specific transitional provisions and time-limited exemptions were also due to expire over the implementation period.

1.10 Since finalisation of the EU BTS in 2016, the European Supervisory Authorities (ESAs) have proposed several amendments to specific requirements to address emerging issues, including updated implementation schedules.⁶ However, formal adoption of the amendments has lagged, and remains outstanding. This delay in adoption has left a gap between the adopted regulation and practice. The ESAs have issued supervisory guidance to deprioritise supervisory action on those elements expected to change under pending amendments.⁷ The PRA, FCA, and industry have been operating in practice on the basis of the pending (but unadopted) amending BTS.

⁴ Subsequently updated, available at: <https://www.bis.org/bcbs/publ/d475.htm>.

⁵ Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R2251>.

⁶ 2017 proposed FX amendments: [https://esas-joint-committee.europa.eu/Publications/Technical%20Standards/Joint%20Draft%20RTS%20on%20margin%20requirements%20for%20non-centrally%20cleared%20OTC%20derivatives%20\(JC-2017-79\).pdf](https://esas-joint-committee.europa.eu/Publications/Technical%20Standards/Joint%20Draft%20RTS%20on%20margin%20requirements%20for%20non-centrally%20cleared%20OTC%20derivatives%20(JC-2017-79).pdf);
December 2019 amendments: https://eba.europa.eu/sites/default/documents/files/document_library//ESAs%202019%20%20-%20Final%20Report%20-%20Bilateral%20margin%20amendments.pdf;

May 2020

Amendments: https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Draft%20Technical%20Standards/2020/RTS/883267/Joint%20RTS%20on%20amendments%20to%20the%20bilateral%20margin%20requirements%20under%20EMIR%20in%20response%20to%20the%20COVID-19%20outbreak.pdf;

November 2020 Amendments: https://www.esma.europa.eu/sites/default/files/library/esas_2020_20_-_final_report_-_bilateral_margin_amendments_intragroup_equity_options_and_novations.pdf.

⁷ See references in note 6.

1.11 In light of the UK's withdrawal from the EU and end of the transition period, the BTS as they stood at 11:00pm on Thursday 31 December 2020 were retained in UK law by the European Union (Withdrawal) Act 2018, and amended to make them operable in a UK context by EU Exit Instruments made by the PRA.^{8, 9} Provisions that were not applicable before the end of the transition period, including the pending amendments noted above, did not form part of retained EU law.

1.12 Policy Statement (PS) 27/20 'The Bank of England's amendments under the European Union (Withdrawal) Act 2018: Changes before the end of the transition period' noted an intention to consult in Q1 2021 on the implementation of the final phases envisaged in the updated BCBS and IOSCO standard. It also noted that the consultation would consider whether other pending amendments should be adopted into the UK framework.¹⁰

Summary of proposals

1.13 This CP proposes to amend the UK bilateral margining requirements in the onshored BTS 2016/2251 by:

- changing the implementation dates and thresholds for the phase-in of IM requirements;
- requiring the exchange of VM for physically settled foreign exchange (FX) forwards and swaps to specified counterparties only; and
- extending the temporary exemption for single-stock equity options and index options until 4 January 2024.

1.14 This CP should be read alongside the FCA's transitional regime for intragroup exemptions from margin, as well as the BCBS and IOSCO statement on documentation requirements for counterparties below the €50 million initial margin threshold.^{11, 12}

Implementation

1.15 The PRA and FCA are proposing to amend BTS 2016/2251 using the making and amendment powers under Article 11(15) of EMIR and under Section 138P of the Financial Services and Markets Act 2000 (FSMA). These proposed changes would be effective on publication of the final technical standards instrument, which is planned for Thursday 1 July 2021. Consistent with the respective mandates under EMIR, the PRA is proposing amendments with respect to PRA-regulated firms, and the FCA is proposing amendments to all other firms covered by the requirements. For this consultation, the proposals are identical.

Co-ordination with other UK bodies

1.16 This is a joint PRA and FCA consultation. The PRA and FCA have also consulted with the Bank of England and HM Treasury as part of the development of these proposals.¹³

⁸ December 2020: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/uk-withdrawal-from-the-eu-changes-before-the-end-of-the-transition-period>.

⁹ PRA EMIR (EU Exit) No.3 as amended by PRA EMIR (EU Exit) No.5.

¹⁰ December 2020: <https://www.bankofengland.co.uk/prudential-regulation/publication/2020/uk-withdrawal-from-the-eu-changes-before-the-end-of-the-transition-period>.

¹¹ The Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019 (Part 5) <https://www.legislation.gov.uk/uksi/2019/335/contents/made>.

¹² Available at: <https://www.bis.org/press/p190305a.htm>.

¹³ In line with Section 138P(5)(c) of FSMA.

Responses and next steps

1.17 This consultation closes on Wednesday 19 May 2021. The PRA and FCA invite feedback on the proposals set out in this consultation. PRA-regulated firms should address any comments or enquiries to: CP6_21@bankofengland.co.uk. FCA solo-regulated firms should address any comments or enquiries to cp21-07@fca.org.uk. Other respondents should submit responses to both authorities.

1.18 Following consideration of any responses, the PRA and FCA will submit the updated BTS 2016/2251 to HM Treasury for approval, in accordance with section 138R of FSMA. Assuming HM Treasury provides approval, the PRA and FCA will make and publish the amendments to the technical standards for their respective firms.

1.19 The proposals set out in this CP have been designed in the context of the UK having now left the European Union and the transition period having come to an end. Unless otherwise stated, any references to EU or EU-derived legislation refer to the version of that legislation which forms part of retained EU law. The PRA will keep the policy under review to assess whether any changes would be required due to changes in the UK regulatory framework.

2 Proposals

Initial margin phase-in deadlines and thresholds

2.1 The PRA and FCA propose to implement amendments to the initial margin phase-in deadlines and thresholds by:

- removing the Tuesday 1 September 2020 phase, thereby providing firms with operational relief to assist with mitigating the effects of Covid-19 disruption;
- introducing a Wednesday 1 September 2021 phase to capture those firms with over €50 billion in aggregate average notional amount of non-centrally cleared derivatives; and
- introducing a Thursday 1 September 2022 phase to capture those firms with over €8 billion aggregate average notional amount of non-centrally cleared derivatives.

2.2 These proposals are consistent with the revised BCBS and IOSCO timeline and response to Covid-19. The PRA and FCA consider that the proposed amendments enhance the safety and soundness of UK firms by providing operational relief to enable a smooth implementation, without unduly delaying the prudential benefits of the standard. Alignment to the international standards provides firms with cross-border activities with a unified basis to meet obligations across jurisdictions.

Physically settled FX forwards and swaps

2.3 The PRA and FCA propose to amend the application of the VM requirements for physically settled FX forwards and swaps. The requirement to exchange VM would only apply to firms that are 'institutions' as defined in Article 4(1)(3) of Capital Requirements Regulation (CRR) (or for third-country firms, would meet the definition of 'institution' if established in the UK).

2.4 The proposal would apply to both forwards and swaps to ensure consistent treatment of the similar risks, regardless of legal form.

2.5 The PRA and FCA consider that the proposal strikes a proportionate balance in meeting the objectives of the BCBS and IOSCO framework, prudential safety, and maintaining consistency of approaches across jurisdictions.

Single-stock equity options and index options

2.6 The PRA and FCA propose to extend the temporary exemption for single-stock equity and index options until 4 January 2024. The original temporary exemption was introduced to avoid market fragmentation, to ensure a level playing field across jurisdictions, and to avoid scope for regulatory arbitrage. Since the original temporary exemption was reintroduced, there has not been a material change to the international position. This proposal aligns the treatment of single-stock equity options and index options for UK firms with that of other jurisdictions, maintaining a level playing field. While there are good reasons for such contracts to be subject to margin, on balance, in light of the international position, at this stage the PRA and FCA consider that a further extension to the temporary exemption is warranted.

Other Considerations

2.7 Under Part 5 of the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2019, the FCA has implemented

a temporary regime for intragroup exemptions (TIGER), which provides a transitional period of up to three years from Friday 1 January 2021 for intragroup transactions between UK firms and their third-country group entities where no equivalence determination has been made.¹⁴

2.8 In March 2019, BCBS and IOSCO noted that the framework does not specify the application of documentation, custodial, or operational requirements if the IM amount does not exceed the framework's €50 million IM threshold.¹⁵ However, BCBS and IOSCO noted that it is expected that covered entities will act diligently when their exposures approach the threshold, to ensure that the relevant arrangements needed are in place if the threshold is exceeded. The PRA and FCA consider that the BCBS and IOSCO clarification is consistent with the obligations in the BTS.

2.9 The PRA and FCA note that earlier phases that identified the scope of counterparties captured, as well as minimum transfer amounts and margin thresholds, have been set in line with the BCBS and IOSCO standard, in Euros. Reflecting the international nature of uncleared OTC derivatives markets, and to avoid adding frictions into the market at this stage, the PRA and FCA do not propose to change the currency denomination of the BTS. The PRA is proposing that the final phases will be implemented with Euro thresholds.

¹⁴ [The Over the Counter Derivatives, Central Counterparties and Trade Repositories \(Amendment, etc., and Transitional Provision\) \(EU Exit\) Regulations 2019](https://www.legislation.gov.uk/uksi/2019/335/made), <https://www.legislation.gov.uk/uksi/2019/335/made>.

¹⁵ Available at: <https://www.bis.org/press/p190305a.htm>.

3 The PRA's statutory obligations

3.1 In carrying out its policy making functions, the PRA is required to comply with several legal obligations. The PRA may make a standards instrument only if it has been approved by HM Treasury. Before submitting a standards instrument to HM Treasury for approval, the Financial Services and Markets Act 2000 (FSMA) requires the PRA to publish a draft of the proposed technical standards accompanied by:¹⁶

- a cost benefit analysis;
- an explanation of the PRA's reasons for believing that making the proposed technical standards is compatible with the PRA's duty to act in a way that advances its general objective,¹⁷ insurance objective (if applicable),¹⁸ and secondary competition objective;¹⁹
- an explanation of the PRA's reasons for believing that making the proposed technical standards is compatible with its duty to have regard to the regulatory principles;²⁰ and
- a statement as to whether the impact of the proposed technical standards will be significantly different to mutuals than to other persons.²¹

3.2 The Prudential Regulation Committee (PRC) should have regard to aspects of the Government's economic policy as recommended by HM Treasury.²²

3.3 The PRA is also required by the Equality Act 2010 to have due regard to the need to eliminate discrimination and to promote equality of opportunity in carrying out its policies, services and functions.²³

Cost benefit analysis

3.4 This section sets out an analysis of the costs and benefits of introducing the changes proposed in this CP. The PRA has not included quantitative estimates for the proposals in this analysis, as it does not anticipate that the costs to firms would be material. The PRA considers that data collection to support quantitative analysis would not be proportionate, as the proposals either maintain the current practice, or extend implementation dates. The extensions to the implementation date are anticipated in international standards but had not been reflected in EU law, and therefore did not form part of UK law at the end of the transition period (11:00pm on Thursday 31 December 2020).

3.5 The technical standards for risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty implement, in the UK, reforms agreed at an international level following the 2008 financial crisis. The costs and benefits of the proposals need to be considered in this context. The majority of the proposals would not reflect a change in approach, but rather:

- (i) would introduce amendments that had been proposed by the ESAs but not been adopted by the EU Commission by the end of the transition period, which meant that they did not form part of UK law; or

¹⁶ Section 138S of FSMA.

¹⁷ Section 2B of FSMA.

¹⁸ Section 2C of FSMA.

¹⁹ Section 2H(1) of FSMA.

²⁰ Sections 2H(2) and 3B of FSMA.

²¹ Section 138K of FSMA.

²² Section 30B of the Bank of England Act 1998.

²³ Section 149.

- (ii) would update the final two initial margin implementation phases, with updated thresholds and application dates (reflecting BCBS and IOSCO agreement to postpone application due to Covid-19).

3.6 For items under (i), industry and regulators have been operating on the basis of the proposed amendments. The proposals provide the legal basis for maintaining the current practice. Items under (ii) both remove the obligations existing from Tuesday 1 September 2020, and introduce two new implementation phases. The scope of firms envisaged to be covered would not be amended by these proposals.

Affected firms and markets

3.7 The proposals in this CP apply to all PRA-authorized firms that are financial counterparties for the purposes of Article 2 of EMIR. Not all the proposals in this CP would be relevant for all firms.

3.8 The markets that are most relevant to the proposals in this CP are non-centrally cleared OTC derivatives. With respect to the legal obligations, the proposals would delay or remove the current requirements on some equity option and FX products. As comparable products may be centrally cleared, it is possible that the proposals in this CP could also decrease an incentive to centrally clear such products. However, as the proposals aim to maintain the practical current state and are likely to have a minor impact on the operational costs of affected firms, the PRA does not anticipate that they would have a material adverse impact on these markets.

Benefits

3.9 In the absence of the PRA's proposed amendments, there would remain legal uncertainty about the obligations of firms within the UK. If these amendments were not adopted, firms would face increased operational costs to align current practice with the regulations that have not been updated. The extensions to IM phase-in thresholds and timelines would provide additional operational capacity for firms to comply with the requirements. The PRA considers that the following measures would generate additional benefits, in addition to helping realise the net benefits anticipated to result from all measures promoting financial stability:

- the proposed amendments to the treatment of physically settled FX forwards and swaps provides an appropriate mitigation to relevant risks by ensuring that major firms exchange margin on these contracts; and
- the proposed amendments to the treatment of single-stock and index equity options provides some medium-term consistency on the treatment of these products across major jurisdictions.

Costs

3.10 It is not anticipated that the proposals would have material costs for firms. In all cases, the proposals align the regulations with current practice in firms, or provide legal certainty regarding implementation of future phases. The proposals do however delay the prudential benefits of margin envisaged (set out in 1.6 above) for the short term, which will have a negative impact on achieving the objectives of the reform temporarily for the period of the delay. Capital requirements will continue to apply.

Compatibility with the PRA's objectives

3.11 The PRA considers that the proposals in this CP advance its general objectives of promoting the safety and soundness of PRA-authorized firms and to ensure that policyholders are appropriately

protected. In particular, the PRA's proposals intend to ensure that the risks associated with non-cleared derivatives are adequately collateralised.

3.12 The PRA has a secondary objective to facilitate effective competition in the markets for services provided by PRA-authorized persons in carrying out regulated activities. Because the proposals maintain the current practice, the PRA has not identified any impacts on firms that are likely to:

- materially affect the operating costs of any cohort of affected firms that compete in the relevant markets; or
- materially change the behaviour of any particular firms.

3.13 Consequently, the PRA considers that these proposals are consistent with the PRA's secondary competition objective.

Regulatory principles

3.14 In developing the proposals in this CP, the PRA has had regard to the regulatory principles. Two principles are of particular significance for these proposals.

3.15 The principle that the PRA's resources are used in the most efficient and economical way. The proposals would support the PRA in supervising firms in an efficient and effective way by publishing clear expectations of firms in the UK following the end of the transition period.

3.16 The principle that a burden imposed on a PRA-authorized person should be proportionate to the benefits expected to result from that burden. The PRA considers that the proposals outlined in this CP are proportionate to the cost for firms in implementing and meeting the requirements on an ongoing basis, and will be proportionate to firms' size and complexity.

Impact on mutuals

3.17 The PRA considers that the impact of the proposed rule changes on mutuals is expected to be no different from the impact on other firms.

HM Treasury recommendation letter

3.18 HM Treasury has made recommendations to the PRC about aspects of the Government's economic policy to which the PRC should have regard when considering how to advance the PRA's objectives and apply the regulatory principles.²⁴

3.19 The PRA has considered these aspects in relation to the proposals and considers competition and competitiveness to be of particular relevance.

3.20 The PRA has considered competition in its proposals. In particular, many of the proposals relate to specific products or activities. This ensures that similar risks are captured, regardless of firm structure.

3.21 The PRA considers that the UK's competitiveness will be supported by the proposals. The scope of entities covered by the FX contracts is consistent with those of other major jurisdictions. Similarly, the time-limited extension to the exemption for some equity option products will ensure that the

24 Information about the PRC and the recommendations from HM Treasury are available on the Bank's website at <https://www.bankofengland.co.uk/about/people/prudential-regulation-committee>.

requirements in the UK are consistent with those in other major jurisdictions. The prudential measures (namely the final IM phases) addressing financial stability would help maintain a robust and resilient UK financial system, supporting London's position as a leading international financial centre and the UK's attractiveness to internationally active financial institutions.

Equality and diversity

3.22 The PRA considers that the proposals do not give rise to equality and diversity implications.

4 FCA cost benefit analysis

Introduction

4.1 FSMA, as amended by the Financial Services Act 2012, generally requires the FCA to publish a cost benefit analysis (CBA) of proposed rules. Specifically, section 138I requires the FCA to publish a CBA of proposed rules, defined as ‘an analysis of the costs, together with an analysis of the benefits that will arise if the proposed rules are made’.

4.2 The FCA’s CBA is set out below. The FCA are conducting a separate CBA to the PRA given the different supervisory remits. The FCA are consulting in relation to all FCA solo-regulated entities and non-financial counterparties in scope of the margin requirements. As such, this CBA considers the costs and benefits only related to those entities. Where, in the FCA’s opinion, the costs or benefits cannot be reasonably estimated or it is not reasonably practicable to produce an estimate, the FCA has not attempted to do so. In these cases, there is a statement of the FCA’s opinion and an explanation of it. The FCA has not quantified costs that are of minimal significance.

Background to this CBA

4.3 The original margin requirements for non-centrally cleared derivatives are global standards set internationally by BCBS and IOSCO in 2013 that were implemented in response to the global financial crisis of 2008.²⁵ They formed part of the global reform of the derivatives market, specifically to mitigate the financial stability risks inherent with OTC derivative transactions that are not centrally cleared. These margin requirements were implemented in the EU by way of Commission Delegated Regulation (EU) 2016/2251 of Thursday 4 October 2016.²⁶ Most of these requirements were then onshored into the UK regime, applicable to UK firms from 11:00pm on Thursday 31 December 2020.

4.4 The proposals in this consultation paper were anticipated in international standards but had not been reflected in EU law at the end of the Transition Period. As such, the FCA are consulting on these proposals for the purposes of providing clarity to UK firms as to their status under the UK regime. The costs and benefits of these proposals should be considered in that context. This CBA will only focus on the costs and benefits relating to the proposals as described in this consultation.

4.5 As detailed in the consultation paper, the PRA and FCA are consulting on three key areas relating to the margin requirements for non-centrally cleared derivatives. The proposals are to:

- a) reinstate and extend the temporary exemption from the bilateral margin requirements for single stock equity and index options. This expired on 4 January 2020 but firms have continued to benefit from the exemption by way of supervisory forbearance following a statement from ESMA (supported by the FCA).²⁷
- b) embody in UK law the supervisory policy that bilateral variation margin requirements for physically-settled foreign exchange (FX) forwards and swaps should only apply to contracts

²⁵ <https://www.bis.org/bcbs/publ/d499.pdf>

²⁶ Commission Delegated Regulation (EU) 2016/2251 of 4 October 2016 supplementing the European Market Infrastructure Regulation with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=GA>

²⁷ Statement from ESMA (November 2019): <https://www.esma.europa.eu/press-news/esma-news/emir-rtm-various-amendments-bilateral-margin-requirements-and-joint-statement>

between financial institutions. Firms have been operating on this basis by way of supervisory forbearance since January 2018 following a joint statement from the European Supervisory Authorities (supported by the FCA).²⁸

- c) implement the amended thresholds and delayed initial margin phase-in dates for the final two categories of firms to align with global standards set by BCBS and IOSCO. The thresholds and phase-in dates were originally amended by BCBS and IOSCO in July 2019.²⁹ The phase-in dates were further amended by BCBS and IOSCO in April 2020 to take into account the response to the Covid-19 pandemic. Firms have been aware of the amended thresholds and timelines following a statement issued by BCBS and IOSCO.³⁰

4.6 Given that the proposals in a. and b. above reflect current market practice and maintain the current status for in-scope firms, the FCA do not anticipate that the costs to firms would be material to implement these proposals. As such, the FCA has not performed a cost benefit analysis relating to these proposals.

4.7 For the purposes of this consultation, the FCA has only considered a cost benefit analysis in relation to proposal c. given that we are proposing to amend the last two phase-in dates of the initial margin requirements. The European Supervisory Authorities (ESAs) have produced the relevant impact assessments relating to the original proposals for implementing the initial margin requirements.³¹ For the purposes of this consultation paper, the FCA are only considering the cost benefit analysis relating to the proposed delay of the original timetable for firms in scope of the last two implementation phase-ins.

The FCA's Intervention: Delayed Implementation of the last two phase-ins of the initial margin requirements

4.8 The initial margin requirements, and phase-in timetable, are global standards set internationally by BCBS and IOSCO. Given the more complex requirements needed to implement the initial margin requirements (including the need for margin models to be in place and significant re-documentation of contracts), BCBS and IOSCO set implementation phase-in dates that determined when the initial margin requirement would apply to specific firms.

4.9 The original BCBS and IOSCO standards prescribed five implementation phase-in dates based on the size of firm and volume of their derivatives activity.³² The first phase in for the largest firms (with an average aggregate notional amount (AANA) over EUR 3 trillion) occurred in February 2017. The final phase in for the smallest firms (with an AANA over EUR 8 billion) was expected to take place in September 2020. To allow a smoother implementation of the final phase-ins, BCBS and IOSCO amended the implementation timetable in 2019 to extend the final phase-in by one year and inserted a new implementation threshold and phase-in as follows:³³

²⁸ Statement by European Supervisory Authorities (November 2017): <https://esas-joint-committee.europa.eu/Pages/News/Variation-margin-exchange-for-physically-settled-FX-forwards-under-EMIR.aspx>.

²⁹ Statement by BCBS-IOSCO (July 2019): <https://www.bis.org/press/p190723.htm>.

³⁰ Statement by BCBS-IOSCO (April 2020): <https://www.iosco.org/news/pdf/IOSCONEWS560.pdf>.

³¹ Original ESMA impact assessment on implementation of the initial margin requirements: https://www.esma.europa.eu/sites/default/files/library/2015/11/jc_cp_2014_03_cp_on_risk_mitigation_for_otc_derivatives.pdf and https://esas-joint-committee.europa.eu/Publications/Consultations/20150610_JC_CP_2015_002_2nd_Joint_CP_on_Risk_Mitigation_for_EMIR_OTC_derivatives.pdf.

³² BCBS-IOSCO "Margin requirements for non-centrally cleared derivatives" (requirement 8) (dated 2013): <https://www.bis.org/publ/bcbs261.pdf>.

³³ BCBS-IOSCO statement (July 2019): <https://www.bis.org/press/p190723.htm>.

- 1 September 2020 (for firms with an AANA over EUR 50 billion)
- 1 September 2021 (for firms with an AANA over EUR 8 billion).

4.10 Given the significant challenges posed by COVID-19, including the displacement of staff and the need for firms to focus resources on managing risks associated with market volatility at the time, BCBS and IOSCO subsequently proposed a one-year delay (respectively) to the last two phase-ins. The delayed phase-ins are as follows:

- 1 September 2021 (for firms with an AANA over EUR 50 billion)
- 1 September 2022 (for firms with an AANA over EUR 8 billion).

4.11 This consultation paper proposes to embody in UK law these last two implementation phase-ins. This will provide legal clarity to UK firms and aligns the UK with other major jurisdictions in relation to the implementation of the international standards.

Baseline

4.12 At present, UK firms are operating based on the delayed phase-ins of the initial margin requirements by way of supervisory approach, following statements issued by ESMA and supported by the FCA. This was intended to allow the EU time to make the necessary amendments to formalise the updated implementation dates in legislation. At the end of the transition period, the finalisation of the EU amendments was still pending. As a result, UK firms have continued to operate under the same supervisory approach, working towards the delayed implementation dates, until such time as we are able to make the necessary amendments to the relevant UK Technical Standards.

4.13 The costs and benefits of the delayed phase-in are considered against those of the baseline of implementation according to the previous timetable. Given the proposal is to delay the implementation as mandated by BCBS and IOSCO, the FCA are considering the relevant costs and benefits of doing so.

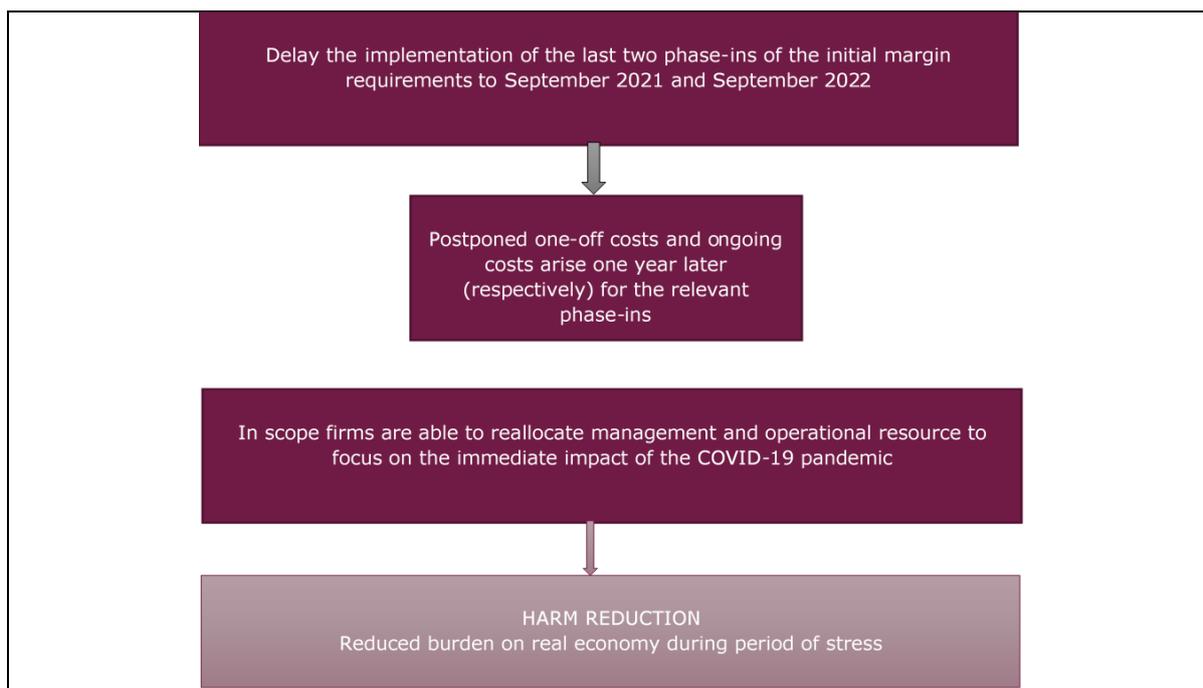
The FCA intervention

4.14 As outlined in the CP, the FCA and PRA propose to delay the implementation of the initial margin requirements for non-centrally cleared derivatives for the last two categories of firms as follows:

- 1 September 2021 for firms with over €50 billion in aggregate average notional amount of non-centrally cleared derivatives; and
- 1 September 2022 for firms with over €8 billion aggregate average notional amount of non-centrally cleared derivatives.

The figure below illustrates how we expect this intervention to reduce the risk of harmful side effects on the UK economy.

Figure 4.1: How the delayed implementation of the last two phase-ins of the initial margin requirements address risks to market integrity



Costs and benefits of delaying implementation

4.15 The delayed implementation of the last two phase-ins will predominantly impact FCA solo-regulated firms and non-financial counterparties in scope of the margin requirements. The FCA has set out the expected costs and benefits in relation to those firms. Given the analysis of the costs and benefits as below, and given that the proposal is in line with standards set at international level, of which firms are already aware, the conclusion is that the benefits of the delayed implementation of the last two phase-ins of the initial margin requirements by one year (respectively) will outweigh its costs.

Costs

Additional Familiarisation Costs for In-Scope Firms

4.16 Familiarisation costs would be required by in scope market participants to familiarise themselves with this proposal. The FCA estimate the familiarisation costs of this proposal using our Standardised Cost Model, assuming a document length of 25 pages and approximately 7,840 words, a reading speed of 100 words per minute, and an hourly compliance staff salary (including overheads) of £63. As UK firms are already familiar with the delayed implementation timetable, the FCA are assuming 1 compliance staff member is required to read the document, this corresponds to familiarisation costs of £83 per firm.

Costs and Lost Benefits of the Delay

4.17 As set out in the original BCBS and IOSCO standards, the exchange of initial margin is to be used in the event of a counterparty default to cover any losses from the last exchange of variation margin to the time taken to hedge or close the position with the defaulting counterparty. The FCA consider the cost of the delayed implementation dates to be the loss of this benefit for the one-year period (respectively), in which in scope transactions would not be collateralised and be open to the counterparty credit risks the original margin requirements are looking to mitigate. In line with the approach taken by the ESAs in relation to the EU proposals, we consider the cost of this lost benefit to be not reasonably quantifiable.

Benefits

4.18 Delaying implementation of the IM requirements for in-scope firms will result in a one year delay (respectively) to the accrual of one-off and on-going costs to implement the initial margin requirements. Firms in scope of these last two phase-ins are predominantly smaller firms who require adequate time to prepare for implementation of these requirements. This delay will provide operational relief to those firms which, in turn, will allow for smoother implementation of the requirements under the amended timelines. The delayed implementation dates were proposed to allow firms to focus resources on more urgent priorities in response to the COVID-19 pandemic. This is particularly relevant for smaller firms in scope of the last two phase-ins as their capacity to address large scale operational changes is more limited than for larger firms.

4.19 In addition, the proposal to implement the delayed last two phase-ins of the initial margin requirements will give legal clarity to in scope UK firms of the margin requirements under the UK regime and aligns the UK with other major jurisdictions in relation to the implementation of the international standards.

4.20 The FCA has not sought to quantify these benefits as it does not consider it reasonably practicable to do so.

5 FCA Compatibility statement

Compliance with legal requirements

5.1 This Chapter records the FCA's compliance with a number of legal requirements applicable to the proposals in this consultation, including an explanation of the FCA's reasons for concluding that its proposals in this consultation are compatible with certain requirements under the Financial Services and Markets Act 2000 (FSMA).

5.2 When consulting on new rules and technical standards, the FCA is required by section 138I(2)(d) FSMA to include an explanation of why it believes making the proposed rules and technical standards is (a) compatible with its general duty, under s. 1B(1) FSMA, so far as reasonably possible, to act in a way which is compatible with its strategic objective and advances one or more of its operational objectives, and (b) its general duty under s. 1B(5)(a) FSMA to have regard to the regulatory principles in s. 3B FSMA. The FCA is also required by s. 138K(2) FSMA to state its opinion on whether the proposed rules and technical standards will have a significantly different impact on mutual societies as opposed to other authorised persons.

5.3 This Chapter also sets out the FCA's view of how the proposed rules and technical standards are compatible with the duty on the FCA to discharge its general functions (which include rule-making) in a way which promotes effective competition in the interests of consumers (s. 1B(4)). This duty applies in so far as promoting competition is compatible with advancing the FCA's consumer protection and/or integrity objectives.

5.4 In addition, this Chapter explains how the FCA has considered the recommendations made by HM Treasury under s. 1JA FSMA about aspects of the economic policy of Her Majesty's Government to which it should have regard in connection with its general duties.

5.5 This Chapter includes the FCA's assessment of the equality and diversity implications of these proposals.

5.6 Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of its regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general guidance (but not when exercising other legislative functions like making rules). This Chapter sets out how the FCA has complied with requirements under the LRRRA.

The FCA's objectives and regulatory principles: Compatibility statement

5.7 The proposals set out in this consultation are primarily intended to advance the FCA's operational objective of market integrity. The margin requirements are global standards that look to address the financial stability risks inherent with OTC derivatives transactions that are unable to be centrally cleared. Implementation of the requirements as per the proposals in this consultation will further promote a sound, robust, and resilient derivatives market in the UK.

5.8 The FCA considers these proposals are compatible with its strategic objective of ensuring that the relevant markets function well. In the case of the last two phase-ins on the IM requirements, the proposal would ensure that OTC derivatives entered into by UK firms in scope of these phase-ins will be adequately collateralised, mitigating the financial stability risks inherent with OTC derivatives transactions. In relation to the exemption for equity and index options and the treatment of FX forwards and swaps, the proposals look to align UK firms with the treatment of these transactions in other major jurisdictions. This would ensure markets operate efficiently and well. For the purposes

of the FCA's strategic objective, 'relevant markets' are defined by s. 1F FSMA to mean the financial markets.

5.9 In preparing the proposals set out in this consultation, the FCA has had regard to the regulatory principles set out in s. 3B FSMA.

The need to use resources in the most efficient and economic way

5.10 The proposals would allow for a better implementation of the initial margin requirements by promoting a smooth implementation of the initial margin requirements, whilst allowing firms to focus resource in immediate response to the impact of the COVID-19 pandemic.

5.11 The proposals would support the FCA in supervising firms in an efficient and effective way by providing clear expectations for firms in the UK, following the transition from the EU to UK regime.

The principle that a burden or restriction should be proportionate to the benefits

5.12 The FCA considers that the proposals are proportionate to the cost for firms in implementing and meeting the margin requirements on a one-off and an ongoing basis, and will be proportionate to firms' size and complexity.

The desirability of sustainable growth in the economy of the United Kingdom in the medium or long term

5.13 The proposals are consistent with this principle.

The general principle that consumers should take responsibility for their decisions

5.14 The proposals are consistent with this principle.

The responsibilities of senior management

5.15 The FCA considers that the proposals do not undermine this principle.

The desirability of recognising differences in the nature of, and objectives of, businesses carried on by different persons including mutual societies and other kinds of business organisation

5.16 The FCA considers that the proposals do not undermine this principle.

The desirability of publishing information relating to persons subject to requirements imposed under FSMA, or requiring them to publish information

5.17 This principle is not relevant to these proposals.

The principle that we should exercise of our functions as transparently as possible

5.18 The proposals are consistent with this principle.

5.19 In formulating these proposals, the FCA has had regard to the importance of taking action intended to minimise the extent to which it is possible for a business carried on (i) by an authorised person or a recognised investment exchange; or (ii) in contravention of the general prohibition, to be used for a purpose connected with financial crime (as required by s. 1B(5)(b) FSMA). The FCA considers that this is not relevant in relation to the proposals in this paper.

Expected effect on mutual societies

5.20 The FCA does not expect the proposals in this paper to have a significantly different impact on mutual societies.

Treasury recommendations about economic policy

5.21 The FCA has also considered the most recent recommendations from the Treasury on aspects of the economic policy of the Government, which it should have regard to when acting to advance its objectives and meet its duties (s. 1JA FSMA).

5.22 The FCA consider that the proposals are consistent with these recommendations and particularly relevant to its objectives to promote effective competition and ensure market integrity.

5.23 The scope of FCA-supervised entities covered by the proposal in this CP relating to FX forwards and swaps is consistent with those of other major jurisdictions. In addition, the time-limited extension to the exemption for certain equity and index options will ensure that the requirements in the UK are also consistent with those in other major jurisdictions.

5.24 The proposal to implement the last two phase-in dates of the IM requirements will further promote economic growth by helping to maintain a robust and resilient UK financial system, maintaining the UK's position as a leading international financial centre.

Equality and diversity

5.25 The FCA is required under the Equality Act 2010 in exercising its functions to 'have due regard' to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Act, advance equality of opportunity between persons who share a relevant protected characteristic and those who do not, and to foster good relations between people who share a protected characteristic and those who do not.

5.26 As part of this, the FCA ensures the equality and diversity implications of any new policy proposals are considered.

Annex 1: Draft UK Technical Standards instruments

PRA STANDARDS INSTRUMENT: THE TECHNICAL STANDARDS (BILATERAL MARGINING) INSTRUMENT 2021

Powers exercised

- A. The Prudential Regulation Authority (“the PRA”) makes this instrument in the exercise of powers under section 138P (Technical Standards) of the Act.
- B. For the purposes of section 138P of the Act, the power to make regulatory technical standards which the PRA relies on for the purposes of this instrument is conferred on the PRA by Article 11(15) of Regulation (EU) No 648/2012.
- C. Pursuant to section 138P(2)(b) of the Act, the power to make technical standards includes the power to modify, amend or revoke any EU tertiary legislation made by an EU entity under the original EU power which forms part of retained EU law. Commission Delegated Regulation (EU) No 2016/2251 constitutes EU tertiary legislation (as defined in section 20 of the EUWA) for the purposes of section 138P(2)(b) of the Act.
- D. The rule making powers referred to above are specified for the purpose of section 138Q(2) (Standards instruments) of the Act.

Pre-conditions to making

- E. The FCA has been consulted on the changes made by this instrument pursuant to section 138P(4) of the Act and consented to the PRA making this instrument, as required by section 138P(3) of the Act.
- F. In accordance with section 138J of the Act, the PRA published a draft of the proposed instrument and had regard to representations made. A draft of this instrument has been approved by the Treasury, as required by section 138R of the Act.

Interpretation

- G. In this instrument, any reference to any provision of direct EU legislation is a reference to it as it forms part of retained EU law.
- H. In this instrument:-
 - “EUWA” means the European Union (Withdrawal) Act 2018.
 - “PRA” means the Prudential Regulation Authority;
 - “retained EU law” has the meaning given it in section 6 of the EUWA; and
 - “the Act” means the Financial Services and Markets Act 2000.

Modifications

- I. The PRA makes the modifications in the Annex to Commission Delegated Regulation (EU) 2016/2251 insofar as it applies to financial counterparties that are PRA-authorised persons.

Commencement

- J. This instrument comes into force on [2020].

Citation

- K. This instrument may be cited as PRA Standards Instrument: The Technical Standards (Bilateral Margining) Instrument 2021.

By order of the Prudential Regulation Committee

[Date]

FCA STANDARDS INSTRUMENT: THE TECHNICAL STANDARDS (BILATERAL MARGINING) INSTRUMENT 2021

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) makes this instrument in the exercise of powers under section 138P (Technical Standards) of the Act.
- B. For the purposes of section 138P of the Act, the power to make regulatory technical standards which the FCA relies on for the purposes of this instrument is conferred on the FCA by Article 11(15) of Regulation (EU) No 648/2012.
- C. Pursuant to section 138P(2)(b) of the Act, the power to make technical standards includes the power to modify, amend or revoke any EU tertiary legislation made by an EU entity under the original EU power which forms part of retained EU law. Delegated Regulation (EU) No 2016/2251 constitutes EU tertiary legislation (as defined in section 20 of the EUWA) for the purposes of section 138P(2)(b) of the Act.
- D. The rule making powers referred to above are specified for the purpose of section 138Q(2) (Standards instruments) of the Act.

Pre-conditions to making

- E. The PRA has been consulted on the changes made by this instrument pursuant to section 138P(4) of the Act.
- F. A draft of this instrument has been approved by the Treasury, as required by section 138R of the Act.
- G. The FCA published a draft of the instrument in accordance with section 138I(1)(b) of the Act, accompanied by the information required by section 138I(2). The FCA had regard to representations made in response to the public consultation.

Interpretation

- H. All references to EU regulations in this instrument are to EU law as it forms part of retained EU law.
- I. In this instrument:-
 - “EUWA” means the European Union (Withdrawal) Act 2018.
 - “No. 3 Instrument” means the PRA’s Technical Standards (European Market Infrastructure) (EU Exit) (No. 3) Instrument 2019;
 - “No. 5 Instrument” means the PRA’s Technical Standards (European Market Infrastructure) (EU Exit) (No. 5) Instrument 2020;
 - “PRA” means the Prudential Regulation Authority;

“retained EU law” has the meaning given it in section 6 of the EUWA; and

“the Act” means the Financial Services and Markets Act 2000.

Modifications

J. The FCA makes the modifications in the Annex to Delegated Regulation (EU) 2016/2251.

Commencement

K. This instrument comes into force on [2020].

Citation

L. This instrument may be cited as FCA Standards Instrument: The Technical Standards (Bilateral Margining) Instrument 2021.

By order of the FCA Board

[Date]

ANNEX

MODIFICATIONS TO COMMISSION DELEGATED REGULATION (EU) 2016/2251

1. In this Annex, new text is underlined and deleted text is struck through.
 2. Commission Delegated Regulation (EU) 2016/2251 with regard to regulatory technical standards for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, as it forms part of retained EU law, is modified as follows:
-

...

Article 31a

Treatment of physically settled foreign exchange forwards and physically settled foreign exchange swaps

By way of derogation from Article 2(2), counterparties may provide in their risk management procedures that variation margins are not required to be posted or collected for physically settled foreign exchange forward contracts and physically settled foreign exchange swap contracts where:

- (i) one of the counterparties is not an institution as defined in point (3) of Article 4(1) of Regulation (EU) No 575/2013; or
- (ii) would not qualify as such an institution if it were established in the United Kingdom.

...

Article 36

Application of 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20

Article 9(2), Article 11, Articles 13 to 18, points (c), (d) and (f) of Article 19(1), Article 19(3) and Article 20 shall apply as follows:

- (a) from 1 month after 4 January 2017, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 3 000 billion;
- (b) from 1 September 2017, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 2 250 billion;
- (c) from 1 September 2018, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 1 500 billion;
- (d) from 1 September 2019, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 750 billion;

- (e) from 1 September ~~2021~~ 2020, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR ~~50~~ 8 billion;
- (f) from 1 September 2022, where both counterparties have, or belong to groups each of which has, an aggregate average notional amount of non-centrally cleared derivatives that is above EUR 8 billion.

Article 38

Dates of application for specific contracts

1. By way of derogation from Articles 36(1) and 37, in respect of all non-centrally OTC derivatives which are single-stock equity options or index options, the Articles referred to in paragraph Articles 36(1) and 37 shall not apply from ~~until~~ 3 ~~7~~ years after the date of entry into force of this Regulation ~~4 January 2017~~.