

COVID-19 NEWS OF INTEREST

Federal Agencies Adopt a Final Rule and an Interim Final Rule Delaying Compliance Dates of Initial Margin Requirements for Non-Cleared Swaps

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The Board of Governors of the Federal Reserve System, Farm Credit Administration, Federal Deposit Insurance Corporation, Federal Housing Finance Agency and Office of the Comptroller of the Currency (collectively, the “Agencies”) recently adopted a final rule (the “Final Rule”) and an interim final rule (the “Interim Final Rule”) that amend the Agencies’ regulations requiring swap dealers, security-based swap dealers, major swap participants and major security-based swap participants (such covered swap entities collectively, the “CSEs”) under the Agencies’ respective jurisdictions to exchange margin with their counterparties for swaps that are not centrally cleared (the “Swap Margin Rule”). The Final Rule, among other things, creates a sixth compliance phase with a compliance date of September 1, 2022, for CSEs posting and collecting initial margin from and to counterparties with material swaps exposure (“Covered Counterparties”) meeting the Phase 6 Threshold described below. The Interim Final Rule delays the compliance date from September 1, 2020, to September 1, 2021, for CSEs posting and collecting initial margin from and to Covered Counterparties meeting the Phase 5 Threshold described below. The Agencies are promulgating the Final Rule and the Interim Final Rule to provide CSEs with additional time to comply with their initial margin requirements under the Swap Margin Rule so as not to hinder any efforts to address exigent circumstances caused by the coronavirus disease 2019 (the “COVID-19”) pandemic.

The Final Rule was published on July 1, 2020, and becomes effective on August 31, 2020. The Interim Final Rule was published on July 1, 2020, and becomes effective on September 1, 2020, and the public comment period will remain open until August 31, 2020.

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Background

In November 2015, the Agencies adopted a final rule requiring CSEs to collect and post initial margin and variation margin for non-cleared swaps. The implementation of both initial margin and variation margin requirements began on September 1, 2016. Variation margin requirements for all CSEs and counterparties were entirely phased in by March 1, 2017. The initial margin requirements were implemented in five phases from September 1, 2016 through September 1, 2020, with each phase based on the size of the CSE's portfolio of non-cleared swaps and the counterparty's portfolio of non-cleared swaps. When adopted by the Agencies in 2015, the Agencies' initial margin implementation schedule was consistent with the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions (together, the "BCBS/IOSCO") international framework for margin requirements for non-centrally cleared derivatives. In July 2019, the BCBS/IOSCO amended its framework to delay the final compliance date of the implementation schedule to September 1, 2021. On April 3, 2020, to address operational challenges encountered by certain entities due to the COVID-19 pandemic, the BCBS/IOSCO further revised the implementation schedule to delay the initial margin compliance date to September 1, 2021, for swaps between CSEs and Covered Counterparties with an average daily aggregate notional amount ("AANA") of non-centrally cleared derivatives between €50 billion and €750 billion. In addition, the initial margin compliance date was revised to September 1, 2022, for swaps between CSEs and Covered Counterparties with an AANA of non-centrally cleared derivatives between €8 billion and €50 billion.

In response to the BCBS/IOSCO framework revisions, the Agencies recently adopted the Final Rule and the Interim Final Rule to amend the implementation schedule for initial margin requirements under the Swap Margin Rule to be consistent with the current BCBS/IOSCO framework. The Final Rule separates the last compliance phase, which covers swaps between CSEs and Covered Counterparties with an AANA of non-centrally cleared derivatives between \$8 billion and \$750 billion into two compliance phases. Under the Interim Final Rule, CSEs and Covered Counterparties with an AANA between \$50 billion and \$750 billion ("Phase 5 Threshold") must post and collect initial margin starting on September 1, 2021. Under the Final Rule, other remaining CSEs and Covered Counterparties with an AANA between \$8 billion and \$50 billion ("Phase 6 Threshold") must post and collect initial margin starting on September 1, 2022.

The Agencies note in the Interim Final Rule that CSEs and Covered Counterparties may voluntarily begin collecting and posting initial margin under the Swap Margin Rule before the new mandatory compliance dates pursuant to the Agencies' original implementation schedule or other mutually agreed upon date.

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Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Swap Margin Rule and the regulatory regime. We would be pleased to assist on your matters.

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