This power to appoint—or approve the appointment of—inferior officers carries with it the power to remove those individuals from office. As the Supreme Court has explained, ''the power of removal from office is incident to the power of appointment,'' and thus statutes vesting heads of department with appointment authority are presumed to carry with them removal authority, absent language to the contrary.[18] Here, the relevant statutes provide no such restrictions.[19] Accordingly, the Commission may require that it approve both the appointment and the removal from office of any PCAOB hearing officer before any such action may take effect.

II. Administrative Law Matters

The Commission finds, in accordance with the Administrative Procedure Act (''APA''),[20] that these revisions relate solely to agency organization, procedures, or practice and do not constitute a substantive rule. Accordingly, the APA's provisions regarding notice of rulemaking, opportunity for public comment, and advance publication of the amendments prior to their effective date are not applicable. These changes are therefore effective on April 3, 2019. For the same reason, and because these amendments do not affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act[21] are not applicable. Additionally, the provisions of the Regulatory Flexibility Act,[22] which apply only when notice and comment are required by the APA or other law, are not applicable. These amendments do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995.[23] Further, because the amendments impose no new burdens on private parties, the Commission does not believe that the amendments will have any impact on competition for purposes of Section 23(a)(2) of the Exchange Act.

[18] *See Keim* v. *United States,* 177 U.S. 290, 293–94 (1900); *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259–60 (1839); *Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Bollers,* 10 Op. Att'y Gen. 204, 207–09 (1862); *Tenure of Office of Inspectors of Customs,* 1 Op. Att'y Gen. 459, 459 (1821).

[19] *See* 5 U.S.C. 4802(b); 15 U.S.C. 78d(b); 15 U.S.C. 7217(a); 15 U.S.C. 7211(f), (g); *see also Free Enter. Fund,* 561 U.S. at 510 (Commission may remove members of the Board ''at will'').

[20] 5 U.S.C. 553(b)(3)(A).

[21] 5 U.S.C. 804(3)(C).

[22] 5 U.S.C. 601 *et seq.*

[23] *See* 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4.

III. Statutory Authority

This rule is adopted pursuant to statutory authority granted to the Commission, including 5 U.S.C. 4802(b), Sections 4(b) and 23(a) of the Exchange Act, 15 U.S.C. 78d(b), and Sections 101 and 107 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7211, 7217.

List of Subjects in 17 CFR Part 202

Administrative practice and procedure, Securities.

Text of Rule

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as *COM007*follows:

PART 202—INFORMAL AND OTHER PROCEDURES

■ 1. The authority citation for part 202 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 77t, 77sss, 77uuu, 78d–1, 78u, 78w, 78*ll*(d), 80a–37, 80a–41, 80b–9, 80b–11, 7201 *et seq.,* unless otherwise noted.

* * * * *

Subpart A—Public Company Accounting Oversight Board (Regulation P)

■ 2. Section 202.150 is added to read as follows:

§ 202.150 Commission approval of appointment or removal from office of Public Company Accounting Oversight Board hearing officers.

The Commission shall approve both the appointment and removal from office of any hearing officer employed by the Public Company Accounting Oversight Board. No action by the Board proposing to appoint or remove from office a hearing officer shall be final absent Commission approval.

By the Commission.

Dated: March 28, 2019.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2019–06427 Filed 4–2–19; 8:45 am]

BILLING CODE 8011–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Notification of determination.

SUMMARY: The following is the analysis and determination of the Commodity Futures Trading Commission (''Commission'') regarding a request by the Australian Prudential Regulation Authority (''APRA'') that the Commission determine that laws and regulations applicable in Australia provide a sufficient basis for an affirmative finding of comparability with respect to margin requirements for uncleared swaps applicable to certain swap dealers (''SDs'') and major swap participants (''MSPs'') registered with the Commission. As discussed in detail herein, the Commission has found the margin requirements for uncleared swaps under the laws and regulations of Australia comparable to those under the Commodity Exchange Act (''CEA'') and Commission regulations.

DATES: This determination was made and issued by the Commission on March 27, 2019.

FOR FURTHER INFORMATION CONTACT: Matthew Kulkin, Director, 202–418–5213, *mkulkin@cftc.gov;* Frank Fisanich, Deputy Director, 202–418–5949, *ffisanich@cftc.gov;* or Lauren Bennett, Special Counsel, 202–418–5290, *lbennett@cftc.gov,* Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to section 4s(e) of the CEA,[1] the Commission is required to promulgate margin requirements for uncleared swaps applicable to each SD and MSP for which there is no U.S. Prudential Regulator (collectively, ''Covered Swap Entities'' or ''CSEs'').[2] The Commission published final margin requirements for such CSEs in January 2016 (''CFTC Margin Rule'').[3]

[1] 7 U.S.C. 1 *et seq.*

[2] *See* 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a U.S. Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable U.S. Prudential Regulator. 7 U.S.C. 6s(e)(1)(A). *See also* 7 U.S.C. 1a(39) (defining the term ''Prudential Regulator'' to include: The Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The U.S. Prudential Regulators published final margin requirements in November 2015. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (''U.S. Prudential Regulators' Margin Rule'').

[3] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule,

Subsequently, on May 31, 2016, the Commission published in the **Federal Register** its final rule with respect to the cross-border application of the Commission's margin requirements for uncleared swaps applicable to CSEs (''CFTC Cross-Border Margin Rule'').[4] The CFTC Cross-Border Margin Rule sets out the circumstances under which a CSE is allowed to satisfy the requirements under the CFTC Margin Rule by complying with comparable foreign margin requirements (''substituted compliance''); offers certain CSEs a limited exclusion from the Commission's margin requirements; and outlines a framework for assessing whether a foreign jurisdiction's margin requirements are comparable to the CFTC Margin Rule (''comparability determinations''). The Commission promulgated the CFTC Cross-Border Margin Rule after close consultation with the U.S. Prudential Regulators and in light of comments from and discussions with market participants and foreign regulators.[5]

The Commission considered APRA's prudential standards and public consultation papers, in addition to supplemental materials provided by APRA, in making this determination. The Commission's analysis and comparability determination for Australia regarding the CFTC Margin Rule is detailed below.

II. CFTC Cross-Border Margin Rule

A. Regulatory Objective of Margin Requirements

The regulatory objective of the CFTC Margin Rule is to further the congressional mandate to ensure the safety and soundness of CSEs in order to offset the greater risk to CSEs and the financial system arising from the use of swaps that are not cleared.[6] The primary function of margin is to protect a CSE from counterparty default, allowing it to absorb losses and continue to meet its obligations using collateral provided by the defaulting counterparty. While the requirement to post margin protects the counterparty in the event of the CSE's default, it also functions as a risk management tool, limiting the amount of leverage a CSE can utilize by requiring that it have adequate eligible collateral to enter into an uncleared swap. In this way, margin serves as a first line of defense not only in protecting the CSE but in containing the amount of risk in the financial system as a whole, reducing the potential for contagion arising from uncleared swaps.[7]

However, the global nature of the swap market, coupled with the interconnectedness of market participants, also necessitate that the Commission recognize the supervisory interests of foreign regulatory authorities and consider the impact of its choices on market efficiency and competition, which the Commission believes are vital to a well-functioning global swap market.[8] Foreign jurisdictions are at various stages of implementing margin reforms. To the extent that other jurisdictions adopt requirements with different coverage or timelines, the Commission's margin requirements may lead to competitive burdens for U.S. entities and deter non-U.S. persons from transacting with U.S. CSEs and their affiliates overseas.

B. Substituted Compliance

To address these concerns, the CFTC Cross-Border Margin Rule provides that, subject to certain findings and conditions, a CSE is permitted to satisfy the requirements of the CFTC Margin Rule by instead complying with the margin requirements in the relevant foreign jurisdiction. This substituted compliance regime is intended to address the concerns discussed above without compromising the congressional mandate to protect the safety and soundness of CSEs and the stability of the U.S. financial system. Substituted compliance helps preserve the benefits of an integrated, global swap market by reducing the degree to which market participants will be subject to multiple sets of regulations. Further, substituted compliance builds on international efforts to develop a global margin framework.[9]

The CFTC Cross-Border Margin Rule requires that applicants for a comparability determination provide copies of the relevant foreign jurisdiction's margin requirements[10] and descriptions of their objectives,[11] how they differ from the BCBS/IOSCO Framework,[12] and how they address the elements of the Commission's margin requirements.[13] The applicant must

which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. *See* §§ 23.150 through 23.159, 23.161. The Commission's regulations are found in chapter I of title 17 of the Code of Federal Regulations, 17 CFR parts 1 through 199.

[4] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016). The CFTC Cross-Border Margin Rule, which became effective August 1, 2016, is codified in part 23 of the Commission's regulations. *See* § 23.160.

[5] In 2014, in conjunction with re-proposing its margin requirements, the Commission requested comment on three alternative approaches to the cross-border application of its margin requirements: (i) A transaction-level approach consistent with the Commission's guidance on the cross-border application of the CEA's swap provisions, *see* Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 FR 45292 (July 26, 2013) (the ''Guidance''); (ii) an approach consistent with the U.S. Prudential Regulators' proposed cross-border framework for margin, *see* Margin and Capital Requirements for Covered Swap Entities, 79 FR 57348 (Sept. 24, 2014); and (iii) an entity-level approach that would apply margin rules on a firm-wide basis (without any exclusion for swaps with non-U.S. counterparties). *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 79 FR 59898 (Oct. 3, 2014). Following a review of comments received in response to this request for comment, the Commission's Global Markets Advisory Committee (''GMAC'') hosted a public panel discussion on the cross-border application of margin requirements. *See* GMAC Meeting (May 14, 2015), transcript and webcast, available at: *http://www.cftc.gov/PressRoom/Events/opaevent_gmac051415.*

[6] *See* 7 U.S.C. 6s(e)(3)(A).

[7] *See* CFTC Margin Rule, 81 FR at 689.

[8] In determining the extent to which the Dodd-Frank swap provisions apply to activities overseas, the Commission strives to protect U.S. interests, as determined by Congress in Title VII, and minimize conflicts with the laws of other jurisdictions, consistent with principles of international comity. *See* Guidance, 78 FR at 45300–01 (referencing the Restatement (Third) of Foreign Relations Law of the United States).

[9] In October 2011, the Basel Committee on Banking Supervision (''BCBS'') and the International Organization of Securities Commissions (''IOSCO''), in consultation with the Committee on Payment and Settlement Systems and the Committee on Global Financial Systems, formed a Working Group on Margining Requirements to develop international standards for margin requirements for uncleared swaps. Representatives of 26 regulatory authorities participated, including the Commission. In September 2013, the Working Group on Margin Requirements published a final report articulating eight key principles for non-cleared derivatives margin rules. These principles represent the minimum standards approved by BCBS and IOSCO and their recommendations to the regulatory authorities in member jurisdictions. *See* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (updated March 2015) (''BCBS/IOSCO Framework''), available at *http://www.bis.org/bcbs/publ/d317.pdf.*

[10] *See* § 23.160(c)(2)(v).

[11] *See* § 23.160(c)(2)(i).

[12] *See* § 23.160(c)(2)(iii). *See also* § 23.160(a)(3) (defining ''international standards'' as based on the BCBS–ISOCO Framework).

[13] *See* § 23.160(c)(2)(ii) (identifying the elements as: (A) The products subject to the foreign jurisdiction's margin requirements; (B) the entities subject to the foreign jurisdiction's margin requirements; (C) the treatment of inter-affiliate transactions; (D) the methodologies for calculating the amounts of initial and variation margin; (E) the process and standards for approving models for calculating initial and variation margin models; (F) the timing and manner in which initial and variation margin must be collected and/or paid; (G) any threshold levels or amounts; (H) risk management controls for the calculation of initial and variation margin; (I) eligible collateral for initial and variation margin; (J) the requirements of custodial arrangements, including segregation of margin and rehypothecation; (K) margin documentation requirements; and (L) the cross-border application of the foreign jurisdiction's margin regime). Section 23.160(c)(2)(ii) largely tracks the elements of the BCBS/IOSCO Framework but breaks them down into their components as appropriate to ensure ease of application.

identify the specific legal and regulatory provisions of the foreign jurisdiction's margin requirements that correspond to each element and, if necessary, whether the relevant foreign jurisdiction's margin requirements do not address a particular element.[14]

C. Standard of Review for Comparability Determinations

The CFTC Cross-Border Margin Rule identifies certain key factors that the Commission will consider in making a comparability determination. Specifically, the Commission will consider the scope and objectives of the relevant foreign jurisdiction's margin requirements; [15] whether the relevant foreign jurisdiction's margin requirements achieve comparable outcomes to the Commission's corresponding margin requirements; [16] and the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's margin requirements.[17]

This process reflects an outcomes-based approach to assessing the comparability of a foreign jurisdiction's margin requirements. Instead of demanding strict uniformity with the Commission's margin requirements, the Commission evaluates the objectives and outcomes of the foreign margin requirements in light of foreign regulator(s)' supervisory and enforcement authority. Recognizing that jurisdictions may adopt different approaches to achieving the same outcome, the Commission will focus on whether the foreign jurisdiction's margin requirements are comparable to the Commission's in purpose and effect, not whether they are comparable in every aspect or contain identical elements.

In keeping with the Commission's commitment to international coordination on margin requirements for uncleared derivatives, the Commission believes that the standards it has established are fully consistent with the BCBS/IOSCO Framework.[18] Accordingly, where relevant to the Commission's comparability analysis, the BCBS/IOSCO Framework is discussed to explain certain internationally agreed upon concepts. In addition, considerations of comity are particularly relevant to the substituted compliance determination under this type of international framework.[19]

The CFTC Cross-Border Margin Rule provided a detailed discussion regarding the facts and circumstances under which substituted compliance for the requirements under the CFTC Margin Rule would be available and such discussion is not repeated here. CSEs seeking to rely on substituted compliance based on the comparability determinations contained herein are responsible for determining whether substituted compliance is available under the CFTC Cross-Border Margin Rule with respect to the CSE's particular status and circumstances.

D. Conditions to Comparability Determinations

The CFTC Cross-Border Margin Rule provides that the Commission may impose terms and conditions it deems appropriate in issuing a comparability determination.[20] Any specific terms and conditions with respect to margin requirements are discussed in the Commission's determinations detailed below.

As a general condition to all determinations, however, the Commission requires notification of any material changes to information submitted to the Commission by the applicant in support of a comparability finding, including, but not limited to, changes in the relevant foreign jurisdiction's supervisory or regulatory regime.[21] The Commission also expects that the relevant foreign regulator will enter into, or will have entered into, an appropriate memorandum of understanding or similar arrangement with the Commission in connection with a comparability determination.[22]

Finally, the Commission considers an application to be a representation by the applicant that the laws and regulations submitted are finalized,[23] that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of such laws and regulations encompasses the swaps activities [24] of CSEs [25] in the relevant jurisdictions.[26]

---

[14] *See id.*

[15] *See* § 23.160(c)(3)(i).

[16] *See* § 23.160(c)(3)(ii). As discussed above, the Commission's CFTC Margin Rule is based on the BCBS/IOSCO Framework; therefore, the Commission expects that the relevant foreign margin requirements would conform to such Framework at a minimum in order to be deemed comparable to the Commission's corresponding margin requirements.

[17] *See* § 23.160(c)(3)(iii). *See also* § 23.160(c)(3)(iv) (indicating the Commission would also consider any other relevant facts and circumstances).

[18] The CFTC Margin Rule was modified substantially from its proposed form to further align the Commission's margin requirements with the BCBS/IOSCO Framework and, as a result, the potential for conflict with foreign margin requirements should be reduced. For example, the CFTC Margin Rule raised the material swaps exposure level from $3 billion to the BCBS/IOSCO standard of $8 billion, which reduces the number of entities that must collect and post initial margin. *See* CFTC Margin Rule, 81 FR at 644. In addition, the definition of uncleared swap was amended to not include swaps cleared by derivatives clearing organizations that are not registered with the Commission but pursuant to Commission orders are permitted to clear for U.S. persons. *See id.* at 638. The Commission notes, however, that the BCBS/IOSCO Framework leaves certain elements open to interpretation (*e.g.,* the definition of ''derivative'') and expressly invites regulators to build on certain principles as appropriate. *See, e.g.,* Element 4 (eligible collateral) (national regulators should ''develop their own list of eligible collateral assets based on the key principle, taking into account the conditions of their own markets''); Element 5 (initial margin) (the degree to which margin should be protected would be affected by ''the local bankruptcy regime, and would vary across jurisdictions''); Element 6 (transactions with affiliates) (''Transactions between a firm and its affiliates should be subject to appropriate regulation in a manner consistent with each jurisdiction's legal and regulatory framework.'').

[19] It is noted that APRA has provided reciprocal recognition of the CFTC Margin Rule.

[20] *See* § 23.160(c)(5).

[21] *See* CFTC Cross-Border Margin Rule, 81 FR at 34839.

[22] Under Commission regulations 23.203 and 23.606, CSEs must maintain all records required by the CEA and the Commission's regulations in accordance with Commission regulation 1.31 and keep them open for inspection by representatives of the Commission, the U.S. Department of Justice, or any applicable U.S. Prudential Regulator. *See* §§ 23.203 and 23.606. A CSE that is eligible to avail itself of substituted compliance pursuant to the Commission's Comparability Determination for Australia: Certain Entity-Level Requirements must comply with the Commission's requirements to: (i) Make records required by § 23.201 open to inspection by any representative of the Commission, the United States Department of Justice, or any applicable U.S. Prudential Regulator in accordance with § 23.203(b)(2); and (ii) produce information to Commission staff and the staff of an applicable U.S. Prudential Regulator in accordance with § 23.606(a)(2).

[23] The Commission notes that finalized rules of the foreign jurisdiction must be in full force and effect before a CSE may rely on this comparability determination for purposes of substituted compliance.

[24] ''Swaps activities'' is defined in Commission regulation 23.600(a)(7) to mean, with respect to a registrant, such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives. The Commission's regulations under 17 CFR part 23 are limited in scope to the swaps activities of CSEs.

[25] No CSE that is not legally required to comply with a law or regulation determined to be comparable may voluntarily comply with such law or regulation in lieu of compliance with the CEA and the relevant Commission regulation. Each CSE that seeks to rely on a comparability determination is responsible for determining whether it is subject to the laws and regulations found comparable.

[26] The Commission has provided APRA with opportunities to review and comment on the Commission's description of APRA's laws and regulations on which this comparability determination is based. The Commission relies on the accuracy and completeness of such review and any corrections received in making its comparability determinations. A comparability determination based on an inaccurate description of foreign laws and regulations may not be valid.

III. Margin Requirements for Swaps Activities in Australia

As represented to the Commission by the applicant, margin requirements for swap activities in Australia are governed by APRA's *Prudential Standard CPS 226: Margining and risk mitigation for non-centrally cleared derivatives* (including the Explanatory Statement and Regulation Impact Statement) (''CPS 226''), covering: (i) Authorized deposit-taking institutions (''ADIs,'' including foreign ADIs and authorized banking non-operating holding companies); (ii) general insurers (including foreign general insurers operating as foreign branches in Australia, authorized insurance non-operating holding companies and parent entities of Level 2 [27] insurance groups); (iii) life companies (including friendly societies, eligible foreign life insurance companies, and registered life non-operating holding companies); and (iv) registrable superannuation entities (collectively, ''APRA covered entities'').[28]

IV. Comparability Analysis

The following section describes the regulatory objective of the Commission's requirements with respect to margin for uncleared swaps imposed by the CEA and the CFTC Margin Rule and a description of such requirements. Immediately following a description of the requirement(s) of the CFTC Margin Rule for which a comparability determination was requested by the applicant, the Commission provides a description of the foreign jurisdiction's comparable laws, regulations, or rules. The Commission then provides a discussion of the comparability of, or differences between, the CFTC Margin Rule and the foreign jurisdiction's laws, regulations, or rules.

A. Objectives of Margin Requirements

1. Commission Statement of Regulatory Objectives

The regulatory objective of the CFTC Margin Rule is to ensure the safety and soundness of CSEs in order to offset the greater risk to CSEs and the financial system arising from the use of swaps that are not cleared. The primary function of margin is to protect a CSE from counterparty default, allowing it to absorb losses and continue to meet its obligations using collateral provided by the defaulting counterparty. While the requirement to post margin protects the counterparty in the event of the CSE's default, it also functions as a risk management tool, limiting the amount of leverage a CSE can utilize by requiring that it have adequate eligible collateral to enter into an uncleared swap. In this way, margin serves as a first line of defense not only in protecting the CSE but in containing the amount of risk in the financial system as a whole, reducing the potential for contagion arising from uncleared swaps.[29]

2. APRA Statement of Regulatory Objectives

The regulatory objectives of CPS 226 are to improve prudential safety, reduce systemic risk, and promote central clearing.[30] Further, APRA's margin regime incorporates additional risk mitigation requirements in relation to non-centrally cleared derivatives that are intended to increase the transparency of bilateral positions between counterparties, promote legal certainty over the terms of non-centrally cleared derivative transactions, and facilitate the timely resolution of disputes.[31] To ensure that these objectives are achieved, the laws and regulations of Australia prescribe that financial institutions shall establish an appropriate framework for margin requirements, in line with the BCBS/IOSCO Framework.

B. Products Subject to Margin Requirements

The Commission's CFTC Margin Rule applies only to uncleared swaps. Swaps are defined in section 1a(47) of the CEA [32] and Commission regulations.[33] ''Uncleared swap'' is defined for purposes of the CFTC Margin Rule in § 23.151 as a swap that is not cleared by a registered derivatives clearing organization, or by a clearing organization that the Commission has exempted from registration by rule or order pursuant to section 5b(h) of the Act.[34]

In Australia, APRA's margin rules apply to ''non-centrally cleared derivatives,'' which are defined as derivatives [35] that are not cleared by a central counterparty.[36] APRA's margin rules do not apply to physically-settled foreign exchange forwards and swaps.[37] While it is beyond the scope of this comparability determination to definitively map any differences between the definitions of ''swap'' and ''uncleared swap'' under the CEA and Commission regulations and APRA's definitions of ''derivative,'' and ''non-centrally cleared derivative,'' the Commission believes that such definitions largely cover the same products and instruments.

However, because the definitions are not identical, the Commission recognizes the possibility that a CSE may enter into a transaction that is an uncleared swap as defined in the CEA and Commission regulations, but that is not a non-centrally cleared derivative as defined under the laws of Australia. In such cases, the CFTC Margin Rule would apply to the transaction but APRA's margin rules would not apply and thus, substituted compliance would not be available. The CSE could not choose to comply with APRA's margin rules in place of the CFTC Margin Rule.

[27] APRA has represented that a Level 2 group is APRA's broadest regulatory consolidation for capital adequacy purposes for banking and general insurance entities, and includes all subsidiaries of the head of the group, including those incorporated outside Australia, except for non-consolidated subsidiaries.

[28] *See* CPS 226, Paragraphs 2 and 3. An APRA covered entity that is a parent of a Level 2 group must ensure that certain affiliates comply with the requirements of APRA's margin rules as if those affiliates were themselves APRA covered entities. *See* CPS 226, Paragraph 4.

[29] *See* CFTC Cross-Border Margin Rule, 81 FR at 34819.

[30] *See* CPS 226 Explanatory Statement, Page 4.

[31] *See* APRA Discussion Paper, Margining and risk mitigation for non-centrally cleared derivatives (''APRA Discussion Paper''), Page 8, available at *https://www.apra.gov.au/margining-and-risk-mitigation-non-centrally-cleared-derivatives.*

[32] 7 U.S.C. 1a(47).

[33] *See, e.g.,* § 1.3, Swap.

[34] Section 23.151.

[35] For the purposes of CPS 226, a ''derivative'' is defined as (i) a derivative within the meaning of Chapter 7 of the Corporations Act of 2001; or (ii) an arrangement that is a forward, swap, or option, or any combination of those things, in relation to one or more commodities. *See* CPS 226, Paragraph 9(g).

[36] *See* CPS 226, Paragraph 9(r). Non-centrally cleared derivatives do not include exchange traded derivatives, securities financing transactions, or indirectly cleared derivatives that are intermediated through a clearing member on behalf of a non-member client where the client is subject to the margin requirements of the central counterparty, or where the client provides margin consistent with the central counterparty's margin requirements. *Id.*

[37] *See* CPS 226, Paragraphs 12 and 18. Pursuant to a determination by the Secretary of the Treasury, foreign exchange swaps and foreign exchange forwards are exempt from the definition of the term ''swap'' under the CEA. *See* Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012). Accordingly, such transactions are not subject to the CFTC Margin Rule. *See* 81 FR at 638. Notwithstanding that foreign exchange swaps and foreign exchange forwards are exempt from the definition of swap, CSEs remain subject to the Commission's requirements for swap transaction reporting and business conduct standards with respect to such transactions.

Likewise, if a transaction is a non-centrally cleared derivative as defined under the laws of Australia but not an uncleared swap subject to the CFTC Margin Rule, a CSE could not choose to comply with the CFTC Margin Rule pursuant to this determination. CSEs are solely responsible for determining whether a particular transaction is both an uncleared swap and a non-centrally cleared derivative before relying on substituted compliance under the comparability determinations set forth below.

C. Entities Subject to Margin Requirements

The CFTC Margin Rule and CFTC Cross-Border Margin Rule apply only to CSEs, *i.e.,* SDs and MSPs registered with the Commission for which there is not a U.S. Prudential Regulator.[38] Thus, only such CSEs may rely on the determinations herein for substituted compliance, while SDs and MSPs for which there is a U.S. Prudential Regulator must look to the determinations of the U.S. Prudential Regulators. The Commission has consulted with the U.S. Prudential Regulators in making these determinations.

CSEs are not required to collect and/or post margin with every uncleared swap counterparty. The initial margin obligations of CSEs under the CFTC Margin Rule apply only to uncleared swaps with counterparties that meet the definition of ''covered counterparty'' in § 23.151.[39] Such definition provides that a ''covered counterparty'' is a counterparty to a swap with a CSE that is either a financial end user[40] that exceeds a certain threshold of swap activity (''material swaps exposure'')[41] or another SD or MSP.[42] On the other hand, the variation margin obligations of CSEs under the CFTC Margin Rule apply more broadly. Such obligations apply to CSEs transacting with SDs, MSPs, and all financial end users, not just those with material swaps exposure.[43] Thus, importantly for comparison with the non-centrally cleared derivative margin requirements of Australia, under the CFTC Margin Rule CSEs must exchange variation margin with any counterparty that falls within the definition of ''financial end user'' without regard to the size of such counterparty's involvement in the swap market or the risk it may present to the CSE.

All APRA covered entities are subject to the margin requirements in CPS 226. Similar to the CFTC Margin Rule's exclusion of non-CSE counterparties that do not meet the definition of ''financial end user,'' APRA's margin rules state that APRA covered entities are only required to exchange margin with certain types of financial institutions[44] (collectively, ''APRA covered counterparties''). Also similar to the CFTC Margin Rule's material swaps exposure threshold for application of initial margin requirements, APRA's margin rules require initial margin to be exchanged only when an APRA covered entity and its APRA covered counterparty each belong to a margining group[45] whose aggregate month-end average notional amount of non-centrally cleared derivatives for a pre-defined three-month reference period exceeds a ''qualifying level'' of AUD 12 billion, subject to a phase-in period (''APRA Initial Margin Threshold'').[46] The implementation timetable for APRA's initial margin requirements is as follows:[47]

Reference period	Qualifying level	Margining period
March, April and May 2016	AUD 4.5 trillion	1 March 2017 to 31 August 2017.
March, April and May 2017	AUD 3.375 trillion	1 September 2017 to 31 August 2018.
March, April and May 2018	AUD 2.25 trillion	1 September 2018 to 31 August 2019.
March, April and May 2019	AUD 1.125 trillion	1 September 2019 to 31 August 2020.
From March 2020, March, April and May of each subsequent calendar year.	AUD 12 billion	1 September of the year referred to in the first column of this row to 31 August of the next calendar year.

But, dissimilar to the CFTC Margin Rule's requirement that CSEs exchange variation margin with all swap entity and ''financial end user'' counterparties regardless of the level of activity in uncleared swaps, APRA's margin rules require variation margin to be exchanged only when an APRA covered entity and its APRA covered counterparty each belong to a margining group whose aggregate month-end average notional amount of non-

[38] *See* description of the U.S. Prudential Regulators in *supra* note 2.

[39] *See* § 23.152.

[40] *See* definition of ''Financial end user'' in § 23.150. In general, the definition covers entities involved in regulated financial activity, including banks, brokers, intermediaries, advisers, asset managers, collective investment vehicles, and insurers.

[41] *See* § 23.150, which defines the initial margin threshold for financial end-users as ''material swaps exposure.'' Material swaps exposure for a financial end-user means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July and August of the previous calendar year that exceeds $8 billion, where such amount is calculated only for business days. An entity shall count the average daily aggregate notional amount of an uncleared swap, an uncleared security-based swap, a foreign exchange forward, or a foreign exchange swap between the entity and a margin affiliate only one time. For purposes of this calculation, an entity shall not count a swap that is exempt pursuant to § 23.150(b) or a security-based swap that qualifies for an exemption under section 3C(g)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations or that satisfies the criteria in section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78–c3(g)(4)) and implementing regulations.

[42] *See* definition of ''swap entity'' in § 23.150.

[43] *See* § 23.153.

[44] A ''financial institution'' includes, but is not limited to any institution engaged substantively in one or more of the following activities: Banking; leasing; issuing credit cards; portfolio management; management of securitization schemes; equity and/or debt securities, futures and commodity trading and broking; custodial and safekeeping services; insurance and similar activities that are ancillary to the conduct of these activities. *See* CPS 226, Paragraph 9(i). Further, an APRA covered counterparty excludes: (i) Sovereigns, central banks, multilateral development banks, public sector entities and the Bank for International Settlements; (ii) a covered bond special purpose vehicle that enters into derivative transactions for the sole purpose of hedging; and (iii) a securitization special purpose vehicle in a traditional securitization that enters into derivative transactions for the sole purpose of hedging. *See* CPS 226, Paragraph 9(f).

[45] A ''margining group'' is comprised of one or more entities within the meaning of Australian Accounting Standard AASB 10 *Consolidated Financial Statements* (''AASB 10''). AASB 10 establishes principles for the presentation and preparation of consolidated financial statements when an entity controls one or more other entities, and defines a group as a parent and its subsidiaries, where a subsidiary is an entity that is controlled by another entity. *See* CPS 226, Paragraph 9(n); Australian Accounting Standard AASB 10 *Consolidated Financial Statements,* Appendix A. An APRA covered entity may elect to apply equivalent foreign accounting standards that apply to the consolidated financial statements of the APRA covered entity or APRA covered counterparty, as relevant. *See* CPS 226, Paragraph 9(n).

[46] *See* CPS 226, Paragraph 17.

[47] *See* CPS 226, Paragraph 18.

centrally cleared derivatives for a pre-defined three-month reference period exceeds a ''qualifying level'' of AUD 3 billion (''APRA Variation Margin Threshold'').[48] The implementation timetable for APRA's variation margin requirements is as follows:[49]

Reference period	Qualifying level	Margining period
March, April and May 2016	AUD 3 billion	1 March 2017 to 31 August 2017.
March, April and May 2017	AUD 3 billion	1 September 2017 to 31 August 2018.
March, April and May of each subsequent calendar year.	AUD 3 billion	1 September of the year referred to in the first column of this row to 31 August of the next calendar year.

Accordingly, (i) when either the APRA covered entity or its APRA covered counterparty belong to a margining group whose non-centrally cleared derivatives activities fall below the APRA Initial Margin Threshold, an APRA covered entity is not required to comply with the initial margin requirements of CPS 226; (ii) when either the APRA covered entity or its APRA covered counterparty belong to a margining group whose non-centrally cleared derivatives activities fall below the APRA Variation Margin Threshold, an APRA covered entity is not required to comply with the variation margin requirements of CPS 226; and (iii) when the APRA covered entity transacts with a non-APRA covered counterparty, the APRA covered entity is not required to comply with either the initial or variation margin requirements of CPS 226 (transactions described in (ii) and (iii) are hereinafter referred to as ''Supervised Transactions'').

Notwithstanding APRA's margin thresholds, entities that are subject to both the CFTC Margin Rule and CPS 226 would also be required to comply with APRA's risk management framework, which requires such entities to have systems in place for identifying, measuring, evaluating, monitoring, reporting, and controlling or mitigating material risks (''CPS 220'').[50] Such risks include: (i) Credit risk, (ii) market and investment risk; (iii) liquidity risk; (iv) insurance risk; (v) operational risk; (vi) risk arising from strategic objectives and business plans; and (vii) any other risk that, singly or in combination with different risks, may have a material impact on the institution.[51]

APRA represented that, given the highly concentrated nature of Australia's non-centrally cleared derivatives market, the exclusion of small market participants from APRA's margin requirements would have a minimal impact on the reduction of systemic risk.[52] APRA further stated that the APRA Variation Margin Threshold was intended to limit the competitive disadvantage to small firms faced with the considerable costs associated with compliance of the full extent of the margin requirements in CPS 226, and to avoid the creation of a disincentive for the use of non-centrally cleared derivatives for hedging purposes.[53]

Despite the definitional differences and differences in activity thresholds with respect to the scope of application of the CFTC Margin Rule and APRA's margin requirements, the Commission notes that in transactions between counterparties with the highest levels of activity in uncleared swaps (and thus presumably present the most risk), both the CFTC Margin Rule and APRA's margin requirements require both initial and variation margin. CSEs that exceed the APRA Initial Margin Threshold transacting with APRA covered counterparties that also exceed the APRA Initial Margin Threshold would be required to collect and post initial margin and variation margin in amounts and with frequencies that are comparable to the same requirements under the CFTC Margin Rule (as discussed elsewhere in this determination). Although the ''material swaps exposure'' threshold under the CFTC Margin Rule (denominated in USD) is currently lower than the APRA Initial Margin Threshold (denominated in AUD), the Commission recognizes that they are of approximately the same magnitude and further differences are largely attributable to fluctuating AUD/USD exchange rates. Given that the initial margin thresholds serve the same purpose and are of approximately the same magnitude, the Commission has concluded that the application of the APRA Initial Margin Threshold is comparable in purpose and effect to the CFTC ''material swaps exposure'' threshold. The Commission also notes that if a CSE/APRA covered entity enters into an uncleared swap with a CSE that is a U.S. person, then it will be required to exchange variation margin and post initial margin in accordance with the CFTC Margin Rule, because substituted compliance for variation margin and the collection of initial margin is not available.[54] This requirement significantly limits the extent to which differences between the APRA Initial Margin Threshold and the CFTC ''material swaps exposure'' threshold could negatively impact systemic risk in the United States.[55]

With respect to Supervised Transactions that would be subject to the CFTC Margin Rule but not subject to certain requirements of CPS 226, the Commission recognizes that APRA has determined that such transactions generally involve small counterparties that do not present risk that warrants the considerable costs associated with compliance with the full scope of APRA's margin rules. The Commission also recognizes that Supervised Transactions will remain subject to APRA's risk management requirements under CPS 220.

The Commission also notes that application of the CFTC Margin Rule to CSEs otherwise eligible for substituted compliance that are seeking to enter Supervised Transactions in Australia that are subject to APRA's risk management requirements under CPS 220 would place those CSEs at a competitive disadvantage relative to other firms subject only to the risk management requirements under CPS 220.

[48] *See* CPS 226, Paragraph 11.

[49] *See* CPS 226, Paragraph 12.

[50] *See* APRA Prudential Standard CPS 220—Risk Management (''CPS 220''), available at *https://www.apra.gov.au/sites/default/files/Prudential-Standard-CPS-220-Risk-Management-%28July-2017%29.pdf.*

[51] *See* CPS 220, Paragraph 26.

[52] *See* APRA Response to Submissions, Margining and risk mitigation for non-centrally cleared derivatives (''APRA Response to Submissions''), Page 22, available at *https://www.apra.gov.au/margining-and-risk-mitigation-non-centrally-cleared-derivatives.* Further, APRA estimated that although the APRA Variation Margin Threshold would exclude approximately half of all market participants from the requirement to exchange variation margin, over 80% of all transactions in the market would nonetheless be subject to variation margin requirements. *See* APRA Regulation Impact Statement, Page 13.

[53] *See* APRA Discussion Paper, Page 19.

[54] *See* Cross-Border Margin Rule, 81 FR at 34829.

[55] This requirement also mitigates anti-evasion concerns.

Accordingly, the Commission finds that the scope of entities subject to the non-centrally cleared derivatives requirements under the laws of Australia is comparable in purpose and outcome to the scope of entities subject to the CFTC Margin Rule for purposes of § 23.160. A CSE that is an APRA covered entity and eligible for substituted compliance under § 23.160 may therefore classify its counterparties in accordance with CPS 226 with respect to determining whether initial or variation margin must be exchanged. For Supervised Transactions, where certain margin requirements would apply under the CFTC Margin Rule, but not under CPS 226 (*e.g.,* the requirement to exchange variation margin), a CSE that is an APRA covered entity and eligible for substituted compliance under § 23.160 may comply with the relevant aspects of the CFTC Margin Rule by complying with the risk management requirements of CPS 220.

D. Treatment of Inter-Affiliate Derivative Transactions

The BCBS/IOSCO Framework recognizes that the treatment of inter-affiliate derivative transactions will vary between jurisdictions. Thus, the BCBS/IOSCO Framework does not set standards with respect to the treatment of inter-affiliate transactions. Rather, it recommends that regulators in each jurisdiction review their own legal frameworks and market conditions and put in place margin requirements applicable to inter-affiliate transactions as appropriate.[56]

1. Commission Requirements for Inter-Affiliate Transactions

The Commission determined through its CFTC Margin Rule to provide rules for swaps between ''margin affiliates.'' The definition of ''margin affiliates'' provides that a company is a margin affiliate of another company if: (i) Either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards; (ii) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (iii) for a company that is not subject to such principles or standards, if consolidation as described in (i) or (ii) above would have occurred if such principles or standards had applied.[57]

With respect to swaps between margin affiliates, the CFTC Margin Rule, with one exception explained below, provides that a CSE is not required to collect initial margin [58] from a margin affiliate provided that the CSE meets the following conditions: (i) The swaps are subject to a centralized risk management program that is reasonably designed to monitor and to manage the risks associated with the inter-affiliate swaps; and (ii) the CSE exchanges variation margin with the margin affiliate.[59]

In an exception to the foregoing general rule, the CFTC Margin Rule does require CSEs to collect initial margin from non-U.S. affiliates that are financial end users that are not subject to comparable initial margin collection requirements on their own outward-facing swaps with financial end users.[60] This provision is an anti-evasion measure that is designed to prevent the potential use of affiliates to avoid collecting initial margin from third parties. For example, suppose an unregistered non-U.S. affiliate of a CSE enters into a swap with a financial end user and does not collect initial margin equivalent to that which would have been required if such affiliate were subject to the CFTC Margin Rule. Suppose further that the affiliate then enters into a swap with the CSE. Effectively, the risk of the swap with the third party would have been passed to the CSE without any initial margin. The rule would require this affiliate to post initial margin with the CSE. The rule would further require that the CSE collect initial margin even if the affiliate routed the trade through one or more other affiliates.[61]

The Commission stated in the CFTC Margin Rule that its inter-affiliate initial margin requirement is consistent with its goal of harmonizing its margin rules as much as possible with the BCBS/IOSCO Framework.[62] Such Framework, for example, states that although the exchange of initial and variation margin by affiliated parties vary, such exchange ''is not customary'' and that initial margin in particular ''would likely create additional liquidity demands.'' [63] Accordingly, the Framework states that ''[s]uch transactions may not necessarily be suited to harmonization.'' [64] With an understanding that many authorities, such as those in Europe and Japan, were not expected to require initial margin for inter-affiliate swaps, the Commission recognized that requiring the posting and collection of initial margin for inter-affiliate swaps generally would be likely to put CSEs at a competitive disadvantage to firms in those other jurisdictions where such margin was not required.[65]

Unlike the general rule for initial margin, however, the CFTC Margin Rule does require CSEs to exchange variation margin with margin affiliates that are SDs, MSPs, or financial end users (as is also required under the U.S. Prudential Regulators' rules).[66] The Commission believes that marking open positions to market each day and requiring the posting or collection of variation margin reduces the risks of inter-affiliate swaps.

2. Requirements for Inter-Affiliate Derivatives Under the Laws of Australia

Pursuant to APRA's margin rules, an APRA covered entity is not required to exchange initial margin with an APRA covered counterparty that is also a member of the APRA covered entity's margining group.[67] APRA's definition of ''margining group'' is similar to the Commission's definition of ''margin affiliates'' for purposes of the CFTC Margin Rule.[68] Further, an APRA covered entity that is a foreign ADI, a foreign general insurer operating as a foreign branch in Australia, or an eligible foreign life insurance company is not required to exchange variation margin with an APRA covered counterparty that is a member of its margining group.[69] An APRA covered entity is also not required to exchange variation margin with an APRA covered counterparty that is a member of its Level 2 group.[70]

In addition, APRA has the discretionary authority to impose initial and/or variation margin requirements between an APRA covered entity and

[56] *See* BCBS/IOSCO Framework, Element 6: Treatment of transactions with affiliates.

[57] *See* § 23.151.

[58] ''Initial margin'' is margin exchanged to protect against a potential future exposure and is defined in § 23.151 to mean ''the collateral, as calculated in accordance with § 23.154 that is collected or posted in connection with one or more uncleared swaps.''

[59] *See* § 23.159(a).

[60] *See* § 23.159(c).

[61] *See id.*

[62] *See* CFTC Margin Rule, 81 FR at 674.

[63] *See* BCBS/IOSCO Framework, Element 6: Treatment of transactions with affiliates.

[64] *Id.*

[65] *See* CFTC Margin Rule, 81 FR at 674.

[66] *See* § 23.159(b), U.S. Prudential Regulators' Margin Rule, 80 FR at 74909.

[67] *See* CPS 226, Paragraph 57.

[68] *See* definition of ''margin affiliate'' in § 23.150.

[69] *See* CPS 226, Paragraph 58.

[70] *See* CPS 226, Paragraph 59. A Level 2 group is APRA's broadest regulatory consolidation for capital adequacy purposes for banking and general insurance entities, and includes all subsidiaries of the head of the group, including those incorporated outside Australia, except for non-consolidated subsidiaries. APRA has represented that, with respect to banking groups, the following types of affiliates would be *excluded* from Level 2 consolidation: Insurance; funds management; certain securitization special purpose vehicles; and non-financial subsidiaries.

any of its affiliates where APRA deems appropriate to do so, in light of regulatory arbitrage and contagion risks.[71] APRA stated that it would consider ''the impact on prudential safety, financial stability, procyclicality, competition, and other factors'' in exercising this discretionary authority.[72]

APRA has observed that entities often perform risk management decisions on a consolidated group basis, and frequently use inter-affiliate derivatives for hedging purposes.[73] Further, APRA stated that the application of consolidated capital requirements to Level 2 groups allows APRA to maintain oversight and confidence that the Level 2 capital required adequately reflects the risk undertaken by entities within the same Level 2 group.[74] Accordingly, APRA limited its inter-affiliate variation margin requirements to those affiliates that are not part of the same Level 2 capital consolidation group. APRA stated that its application of inter-affiliate variation margin requirements is intended to minimize liquidity and operational burdens while also reducing the risk of contagion to an APRA-regulated institution.[75]

3. Commission Determination

Having compared the outcomes of APRA's margin requirements applicable to inter-affiliate non-centrally cleared derivatives to the outcomes of the Commission's corresponding margin requirements applicable to inter-affiliate uncleared swaps, and considered those outcomes in the broader context of APRA's prudential oversight of risk management and capital requirements, the Commission finds that the treatment of inter-affiliate transactions under the CFTC Margin Rule and the treatment of those transactions under APRA's margin requirements are comparable in outcome.

The CFTC and APRA both generally exclude inter-affiliate transactions from their respective initial margin requirements.[76] However, the scope of application of APRA's variation margin requirements for inter-affiliate transactions is narrower than that under the CFTC Margin Rule. Specifically, the CFTC Margin Rule requires the exchange of variation margin between all margin affiliates, while APRA only requires the exchange of variation margin between affiliates that are not part of the same Level 2 capital consolidation group.

An uncleared swap with an affiliate presents credit risk to a CSE. The Commission has determined that this credit risk must be managed by marking open positions to market each day and requiring the posting or collection of variation margin. If the affiliate were to default, the margin provided by the affiliate would allow a CSE to continue to meet its obligations. APRA, on the other hand, has determined that this credit risk can be adequately managed for Level 2 affiliates with specific capital requirements and the more general risk management standards that require APRA covered entities to establish and implement policies and procedures for risk mitigation standards for non-centrally cleared derivatives transactions with all of their counterparties.[77] In 2013, the Commission found the risk management requirements for APRA covered entities comparable to the Commission's risk management requirements for SDs and MSPs under subpart J of part 23 of the Commission's regulations.[78] In addition, uncollateralized credit risk from inter-affiliate swaps would be subject to capital requirements under the Commission's proposed capital rules.[79]

The Commission notes that if a CSE/APRA covered entity enters into an uncleared swap with a margin affiliate that is itself a CSE and a U.S. person, then it will be required to exchange variation margin in accordance with the CFTC Margin Rule, because the U.S. CSE is required to do so and substituted compliance for the inter-affiliate variation margin requirement is not available to U.S. CSEs.[80] In addition, the Commission is aware of the historic volume and aggregate size of inter-affiliate uncleared swaps of CSEs that may currently be eligible for substituted compliance pursuant to this determination. Given the inability to transfer risk to U.S. margin affiliates that are CSEs without variation margin, the historic level of relevant inter-affiliate activity, and the capital and risk management requirements of both APRA and the Commission, the Commission has concluded that the outcome resulting from compliance with APRA's capital and risk management requirements is comparable in outcome to compliance with the CFTC Margin Rule with respect to uncleared swaps with Level 2 affiliates. Accordingly, the Commission finds that the requirements under the laws of Australia with respect to inter-affiliate margin for non-centrally cleared derivatives are comparable in outcome to the requirements of the CFTC Margin Rule for purposes of § 23.160. The Commission intends to monitor the volume and aggregate size of inter-affiliate swaps of CSEs that may be eligible for substituted compliance pursuant to this determination and, to the extent it deems prudent, may consult with APRA regarding the capital and risk management treatment of the attendant risk of such swaps.

E. Methodologies for Calculating the Amounts of Initial and Variation Margin

As an overview, the methodologies for calculating initial and variation margin as agreed under the BCBS/IOSCO Framework state that the margin collected from a counterparty should (i) be consistent across entities covered by the requirements and reflect the potential future exposure (initial margin) and current exposure (variation margin) associated with the particular portfolio of non-centrally cleared derivatives, and (ii) ensure that all

[71] *See* CPS 226, Paragraph 61; *see also* APRA Response to Submissions, Page 14.

[72] *See* APRA Response to Submissions, Page 14.

[73] *See* APRA Discussion Paper, Page 15.

[74] *See id.*

[75] *See id.*

[76] The CFTC Margin Rule only requires CSEs to collect initial margin from non-U.S. affiliates that are not subject to comparable initial margin collection requirements on their own outward facing swaps with third parties.

[77] *See* CPS 226, Paragraph 71. In this regard, APRA's position is similar to a 2016 statement of then-CFTC Commissioner Christopher Giancarlo regarding inter-affiliate swaps, ''[I]nter-affiliate swaps provide an important risk management role within corporate groups. They enable use of a single conduit on behalf of multiple affiliates to net affiliates' trades, which reduces the overall risk of the corporate group and the number of outward-facing swaps into which the affiliates might otherwise enter. This, in turn, reduces operational, market, counterparty credit and settlement risk. Rather than increasing risk, inter-affiliate swaps allow entities within a corporate group to transfer risk to the group entity best positioned to manage it.'' *See* CFTC Margin Rule, 81 FR at 707.

[78] *See* Notice of Comparability Determination for Certain Requirements under Australian Regulation, 78 FR 78864, 78870 (Dec. 27, 2013). In that determination, the Commission noted that CPS 220, which was in draft form at the time, would impose additional compliance requirements on ADIs.

[79] *See* Capital Requirements for Swap Dealers and Major Swap Participants, 81 FR 91252, 91258 (Dec. 16, 2016). Further, many CSEs are part of bank holding companies that are subject to consolidated oversight by the U.S. Prudential Regulators.

[80] *See* Cross-Border Margin Rule, 81 FR at 34829. The Commission notes that, subject to certain conditions, a CSE is generally not required to collect initial margin from a margin affiliate. *See* § 23.159(a)(1). However, a CSE would be required to collect initial margin from a margin affiliate that is a financial end user where the margin affiliate is located in a jurisdiction that the Commission has not found to be eligible for substituted compliance with regard to the CFTC Margin Rule, and the margin affiliate does not collect initial margin on its swaps with unaffiliated third parties for which initial margin would be required if the swap were subject to the CFTC Margin Rule. *See* § 23.159(c)(2)(ii). With this Determination, the Commission has found Australia to be eligible for substituted compliance with regard to all aspects of the CFTC Margin Rule, and thus, a CSE would generally not be required to collect initial margin from a margin affiliate in Australia that is a financial end user. *See* § 23.159(c)(2)(iii).

counterparty risk exposures are covered fully with a high degree of confidence.

With respect to the calculation of initial margin, as a minimum the BCBS/IOSCO Framework generally provides that:

• Initial margin requirements will not apply to counterparties that have less than EUR 8 billion of gross notional in outstanding derivatives.

• Initial margin may be subject to a EUR 50 million threshold applicable to a consolidated group of affiliated counterparties.

• All margin transfers between parties may be subject to a de-minimis minimum transfer amount not to exceed EUR 500,000.

• The potential future exposure of a non-centrally cleared derivative should reflect an extreme but plausible estimate of an increase in the value of the instrument that is consistent with a one-tailed 99% confidence interval over a 10-day horizon, based on historical data that incorporates a period of significant financial stress.

• The required amount of initial margin may be calculated by reference to either (i) a quantitative portfolio margin model or (ii) a standardized margin schedule.

• When initial margin is calculated by reference to an initial margin model, the period of financial stress used for calibration should be identified and applied separately for each broad asset class for which portfolio margining is allowed.

• Models may be either internally developed or sourced from the counterparties or third-party vendors but in all such cases, models must be approved by the appropriate supervisory authority.

• Quantitative initial margin models must be subject to an internal governance process that continuously assesses the value of the model's risk assessments, tests the model's assessments against realized data and experience, and validates the applicability of the model to the derivatives for which it is being used.

• An initial margin model may consider all of the derivatives that are approved for model use that are subject to a single legally enforceable netting agreement.

• Initial margin models may account for diversification, hedging, and risk offsets within well-defined asset classes such as currency/rates, equity, credit, or commodities, but not across such asset classes and provided these instruments are covered by the same legally enforceable netting agreement and are approved by the relevant supervisory authority.

• The total initial margin requirement for a portfolio consisting of multiple asset classes would be the sum of the initial margin amounts calculated for each asset class separately.

• Derivatives for which a firm faces zero counterparty risk require no initial margin to be collected and may be excluded from the initial margin calculation.

• Where a standardized initial margin schedule is appropriate, it should be computed by multiplying the gross notional size of a derivative by the standardized margin rates provided under the BCBS/IOSCO Framework [81] and adjusting such amount by the ratio of the net current replacement cost to gross current replacement cost (NGR) pertaining to all derivatives in a legally enforceable netting set. The BCBS/IOSCO Framework provides the following standardized margin rates:

Asset class	Initial margin requirement (% of notional exposure)
Credit: 0–2 year duration	2
Credit: 2–5 year duration	5
Credit: 5+ year duration	10
Commodity	15
Equity	15
Foreign exchange	6
Interest rate: 0–2 year duration	1
Interest rate: 2–5 year duration	2
Interest rate: 5+ year duration	4
Other	15

• For a regulated entity that is already using a schedule-based margin to satisfy requirements under its required capital regime, the appropriate supervisory authority may permit the use of the same schedule for initial margin purposes, provided that it is at least as conservative.

• The choice between model- and schedule-based initial margin calculations should be made consistently over time for all transactions within the same well defined asset class.

• Initial margin should be collected at the outset of a transaction, and collected thereafter on a routine and consistent basis upon changes in measured potential future exposure, such as when trades are added to or subtracted from the portfolio.

• In the event that a margin dispute arises, both parties should make all necessary and appropriate efforts, including timely initiation of dispute resolution protocols, to resolve the dispute and exchange the required amount of initial margin in a timely fashion.

With respect to the calculation of variation margin, as a minimum the BCBS/IOSCO Framework generally provides that:

• The full amount necessary to fully collateralize the mark-to-market exposure of the non-centrally cleared derivatives must be exchanged.

• Variation margin should be calculated and exchanged for derivatives subject to a single, legally enforceable netting agreement with sufficient frequency (*e.g.,* daily).

• In the event that a margin dispute arises, both parties should make all necessary and appropriate efforts, including timely initiation of dispute resolution protocols, to resolve the

[81] The BCBS/IOSCO Framework provides standardized margin rates, as set out in the table accompanying the text.

dispute and exchange the required amount of variation margin in a timely fashion.

1. Commission Requirement for Calculation of Initial Margin

In keeping with the BCBS/IOSCO Framework described above, with respect to the calculation of initial margin, the Commission's CFTC Margin Rule generally provides that:

- Initial margin is intended to address potential future exposure, *i.e.,* in the event of a counterparty default, initial margin protects the non-defaulting party from the loss that may result from a swap or portfolio of swaps, during the period of time needed to close out the swap(s).[82]
- Potential future exposure is to be an estimate of the one-tailed 99% confidence interval for an increase in the value of the uncleared swap or netting portfolio of uncleared swaps due to an instantaneous price shock that is equivalent to a movement in all material underlying risk factors, including prices, rates, and spreads, over a holding period equal to the shorter of 10 business days or the maturity of the swap or netting portfolio.[83]
- The required amount of initial margin may be calculated by reference to either (i) a risk-based margin model or (ii) a table-based method.[84]
- All data used to calibrate the initial margin model shall incorporate a period of significant financial stress for each broad asset class that is appropriate to the uncleared swaps to which the initial margin model is applied.[85]
- CSEs shall obtain the written approval of the Commission or a registered futures association to use a model to calculate the initial margin required.[86]
- An initial margin model may calculate initial margin for a netting portfolio of uncleared swaps covered by the same eligible master netting agreement.[87]
- An initial margin model may reflect offsetting exposures, diversification, and other hedging benefits for uncleared swaps that are governed by the same eligible master netting agreement by incorporating empirical correlations within the following broad risk categories, provided the CSE validates and demonstrates the reasonableness of its process for modeling and measuring hedging benefits: Commodity, credit, equity, and foreign exchange or interest rate.[88]
- Empirical correlations under an eligible master netting agreement may be recognized by the model within each broad risk category, but not across broad risk categories.[89]
- If the initial margin model does not explicitly reflect offsetting exposures, diversification, and hedging benefits between subsets of uncleared swaps within a broad risk category, the CSE shall calculate an amount of initial margin separately for each subset of uncleared swaps for which such relationships are explicitly recognized by the model and the sum of the initial margin amounts calculated for each subset of uncleared swaps within a broad risk category will be used to determine the aggregate initial margin due from the counterparty for the portfolio of uncleared swaps within the broad risk category.[90]
- Where a risk-based model is not used, initial margin must be computed by multiplying the gross notional size of a derivative by the standardized margin rates provided under § 23.154(c)(1)[91] and adjusting such amount by the ratio of the net current replacement cost to gross current replacement cost (NGR) pertaining to all derivatives under the same eligible master netting agreement.[92]
- A CSE shall not be deemed to have violated its obligation to collect or post initial margin if, *inter alia,* it makes timely initiation of dispute resolution mechanisms, including pursuant to § 23.504(b)(4).[93]

2. Commission Requirements for Calculation of Variation Margin

In keeping with the BCBS/IOSCO Framework described above, with respect to the calculation of variation margin, the Commission's CFTC Margin Rule generally provides that:

- Each business day, a CSE must calculate variation margin amounts for itself and for each counterparty that is an SD, MSP, or financial end user. Such variation margin amounts must be equal to the cumulative mark-to-market change in value to the CSE of each uncleared swap, adjusted for any variation margin previously collected or posted with respect to that uncleared swap.[94]
- Variation margin must be calculated using methods, procedures, rules, and inputs that to the maximum extent practicable rely on recently-executed transactions, valuations provided by independent third parties, or other objective criteria.[95]
- CSEs may comply with variation margin requirements on an aggregate basis with respect to uncleared swaps that are governed by the same eligible master netting agreement.[96]
- A CSE shall not be deemed to have violated its obligation to collect or post variation margin if, *inter alia,* it makes timely initiation of dispute resolution mechanisms, including pursuant to § 23.504(b)(4).[97]

3. APRA Requirements for Calculation of Initial Margin

In keeping with the BCBS/IOSCO Framework described above, with respect to the calculation of initial margin, APRA's margin rule generally provides that:

- APRA covered entities must post and collect initial margin with an APRA covered counterparty to cover the potential future exposure that could arise from future changes in the market value of a non-centrally cleared derivative over the close-out period in the event of a counterparty default.[98]
- The required amount of initial margin posted and collected must be calculated by either a model approach approved by APRA or the standardized schedule set out in APRA's margin rules.[99]
- APRA may, upon the request of an APRA covered entity, approve the entity to calculate initial margin using a schedule already in use for regulatory capital purposes prior to the application of APRA's margin rules, provided that such a schedule is at least as conservative as outlined in APRA's margin rules.[100]
- When using the standardized schedule for initial margin, APRA covered entities must calculate the sum of the net standardized initial margin

[82] *See* CFTC Margin Rule, 81 FR at 683.

[83] *See* § 23.154(b)(2)(i).

[84] *See* § 23.154(a)(1)(i) and (ii).

[85] *See* § 23.154(b)(2)(ii).

[86] *See* § 23.154(b)(1)(i).

[87] *See* § 23.154(b)(2)(v).

[88] *See id.*

[89] *See id.*

[90] *See* § 23.154(b)(2)(vi).

[91] The standardized margin rates provided in § 23.154(c)(1) are, in all material respects, the same as those provided under the BCBS/IOSCO Framework. *See supra* note 81.

[92] *See* § 23.154(c).

[93] *See* § 23.152(d)(2)(i).

[94] *See* § 23.155(a).

[95] *See id.*

[96] *See* § 23.153(d)(1).

[97] *See* § 23.153(e)(2)(i).

[98] *See* CPS 226, Paragraphs 17 and 9(k). The standardized margin rates provided in CPS 226 are, in all material respects, the same as those provided under the BCBS/IOSCO Framework. *See supra* note 81.

[99] *See* CPS 226, Paragraph 30.

[100] *See* CPS 226, Attachment A, Paragraph 2.

amount separately for each netting agreement.[101]

- APRA covered entities are not required to collect initial margin for non-centrally cleared derivatives for which there is no counterparty risk; accordingly, such derivatives may be excluded from the initial margin calculation under both a model approach and the standardized schedule.[102]
- The calculation of initial margin for cross-currency swaps differs depending on whether a model approach or the standardized schedule is adopted:[103]
  - If a model approach is adopted, then the model does not need to incorporate the risk associated with the fixed physically-settled FX transactions associated with the exchange of principal. All other risks of the cross-currency swap must be considered in the calculation.
  - If the standardized schedule is adopted, then the initial margin only needs to be calculated with reference to the relevant row in the interest rates section of APRA's standardized schedule.
- The initial margin calculated by the model approach must be sufficiently conservative even during periods of low market volatility. Calculation of the initial margin amount must be consistent with at least a one-tailed 99% confidence interval over a 10-day time horizon, based on historical data that includes a period of significant financial stress and does not exceed an historical period of five years. The historical data must be equally weighted for calibration purposes.[104]
- The period of financial stress used for calibration must be identified and applied separately for each asset class.[105]
- Transactions that are not subject to the same legally enforceable netting agreement must not be considered in the same initial margin model calculation.[106]
- A model may allow for diversification, hedging and risk offsets within an asset class provided these transactions are covered by the same legally enforceable netting agreement. Any such allowance requires approval by APRA as part of an initial margin model approval.[107]
- Initial margin calculations by a model for derivatives in distinct asset classes must be performed without regard to derivatives in other asset classes. That is, initial margin amounts calculated for each asset class must not account for diversification benefits across asset class and must be summed to calculate the initial margin amount for a netting agreement.[108]

4. APRA Requirements for Calculation of Variation Margin

In keeping with the BCBS/IOSCO Framework described above, with respect to the calculation of variation margin, APRA's margin rule generally provides that:

- APRA covered entities must exchange variation margin with APRA covered counterparties to reflect the current mark-to-market exposure resulting from changes in the market value of a non-centrally cleared derivative.[109]
- Transactions that are not subject to the same legally enforceable netting agreement must not be considered in the same variation margin calculation.[110]

5. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that the amounts of initial and variation margin calculated under the methodologies required under APRA's margin rules would be similar to those calculated under the methodologies required under the CFTC Margin Rule. Specifically, under the CFTC Margin Rule and APRA's margin rules:

- The definitions of initial and variation margin are similar, including the description of potential future exposure agreed under the BCBS/IOSCO Framework;
- Margin models and/or a standardized margin schedule may be used to calculate initial margin;
- Criteria for historical data to be used in initial margin models are similar;
- Initial margin models must be approved by a regulator;
- Eligibility for netting is similar;
- Correlations may be recognized within broad risk categories, but not across such risk categories;
- The required method of calculating initial margin using standardized margin rates is essentially identical; and
- The prescribed standardized margin rates are essentially identical.

Accordingly, the Commission finds that the methodologies for calculating the amounts of initial and variation margin for non-centrally cleared derivatives under the laws of Australia are comparable in outcome to those of the CFTC Margin Rule for purposes of § 23.160.

F. Process and Standards for Approving Margin Models

Pursuant to the BCBS/IOSCO Framework, initial margin models may be either internally developed or sourced from counterparties or third-party vendors but in all such cases, models must be approved by the appropriate supervisory authority.[111]

1. Commission Requirement for Margin Model Approval

In keeping with the BCBS/IOSCO Framework, the CFTC Margin Rule generally requires:

- CSEs shall obtain the written approval of the Commission or a registered futures association to use a model to calculate the initial margin required.[112]
- The Commission or a registered futures association will approve models that demonstrate satisfaction of all of the requirements for an initial margin model set forth above in Section IV(E)(1), in addition to the requirements for annual review;[113] control, oversight, and validation mechanisms;[114] documentation;[115] and escalation procedures.[116]
- CSEs must notify the Commission and the registered futures association in writing 60 days prior to, extending the use of an initial margin model to an additional product type; making any change to the model that would result in a material change in the CSE's assessment of initial margin requirements; or making any material change to modeling assumptions.
- The Commission or the registered futures association may rescind its approval, or may impose additional conditions or requirements if the Commission or the registered futures association determines, in its discretion, that a model no longer complies with the requirements for an initial margin

[101] *See* CPS 226, Attachment A, Paragraph 1. For each netting agreement, the net standardized initial margin amount = 0.4 × gross standardized initial margin amount + 0.6 × net-to-gross ratio of the net current credit exposure of all transactions included in a netting agreement to the gross current credit exposure of the same transactions. *See* CPS 226, Attachment A, Paragraph 3(a).

[102] *See* CPS 226, Paragraph 31.

[103] *See* CPS 226, Paragraph 32.

[104] *See* CPS 226, Paragraph 34.

[105] *See* CPS 226, Paragraph 35.

[106] *See* CPS 226, Paragraph 36.

[107] *See* CPS 226, Paragraph 37.

[108] *See* CPS 226, Paragraph 38.

[109] *See* CPS 226, Paragraphs 9(ab), 11. The exchange of variation margin is executed pursuant to the implementation table referenced in section IV(C) *supra.*

[110] *See* CPS 226, Paragraph 16.

[111] *See* BCBS/IOSCO Framework Requirement 3.3.

[112] *See* § 23.154(b)(1)(i).

[113] *See* § 23.154(b)(4), discussed further *infra.*

[114] *See* § 23.154(b)(5), discussed further *infra.*

[115] *See* § 23.154(b)(6), discussed further *infra.*

[116] *See* § 23.154(b)(7), discussed further *infra.*

model summarized in section IV(E)(1) *supra.*

2. APRA Requirements for Approval of Margin Models

In keeping with the BCBS/IOSCO Framework, APRA's margin rules generally require:

• An APRA covered entity may apply to APRA for approval to use a model for the calculation of initial margin for some or all of its portfolio.[117] APRA has further represented that it must approve all margin models prior to their implementation.

• Once an APRA covered entity has obtained approval to use a model for the calculation of initial margin for an asset class, it must continue to employ that model for that asset class on an ongoing basis unless, or except to the extent that, the model approval is varied, revoked, or suspended by APRA.[118]

• APRA may, at any time, vary, revoke, or suspend a model approval for the calculation of initial margin, or impose additional conditions on a model approval.[119]

• Prior notification to APRA is required for any material changes to an initial margin model or risk measurement system. APRA's prior written approval is required for any material changes to an initial margin model which are not consistent with global industry standards for initial margin models.[120]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that the requirements for submission of margin models to APRA are comparable to the regulatory approval requirements of the CFTC Margin Rule. Specifically, APRA covered entities must submit their models to APRA for approval prior to their implementation and notify APRA of material changes to the model. APRA also retains the right to vary, suspend or revoke its approval at any time. Accordingly, the Commission finds that such requirements under the laws of Australia are comparable in outcome to those of the CFTC Margin Rule for purposes of § 23.160.

[117] *See* CPS 226, Paragraph 33.

[118] *See* CPS 226, Paragraph 41.

[119] *See* CPS 226, Paragraph 42.

[120] *See* CPS 226, Paragraph 44.

G. Timing and Manner for Collection or Payment of Initial and Variation Margin

1. Commission Requirement for Timing and Manner for Collection or Payment of Initial and Variation Margin

With respect to the timing and manner for collection or posting of initial margin, the CFTC Margin Rule generally provides that:

• Where a CSE is required to collect initial margin, it must be collected on or before the business day after execution of an uncleared swap, and thereafter the CSE must continue to hold initial margin in an amount equal to or greater than the required initial margin amount as re-calculated each business day until such uncleared swap is terminated or expires.

• Where a CSE is required to post initial margin, it must be posted on or before the business day after execution of an uncleared swap, and thereafter the CSE must continue to post initial margin in an amount equal to or greater than the required initial margin amount as re-calculated each business day until such uncleared swap is terminated or expires.

• Required initial margin amounts must be posted and collected by CSEs on a gross basis (*i.e.,* amounts to be posted may not be set-off against amounts to be collected from the same counterparty).

With respect to the timing and manner for collection or posting of variation margin, the CFTC Margin Rule generally provides that:

• Where a CSE is required to collect variation margin, it must be collected on or before the business day after execution of an uncleared swap, and thereafter the CSE must continue to collect the required variation margin amount, if any, each business day as re-calculated each business day until such uncleared swap is terminated or expires.[121]

• Where a CSE is required to post variation margin, it must be posted on or before the business day after execution of an uncleared swap, and thereafter the CSE must continue to post the required variation margin amount, if any, each business day as re-calculated each business day until such uncleared swap is terminated or expires.[122]

With respect to both initial and variation margin, a CSE shall not be deemed to have violated its obligation to collect or post margin if, *inter alia,* it makes timely initiation of dispute resolution mechanisms, including pursuant to § 23.504(b)(4).[123]

[121] *See* § 23.153(a).

[122] *See* § 23.153(b).

2. APRA Requirements for Timing and Manner for Collection of Initial and Variation Margin

With respect to the timing and manner for collection or posting of initial margin, APRA's margin rules generally provide that:

• Initial margin must be calculated and called both at the outset of a transaction and on a regular and consistent basis upon changes in the measured potential future exposure. Settlement of initial margin amounts must be conducted promptly.[124]

• Initial margin must be posted and collected on a gross basis.[125]

With respect to the timing and manner for collection or posting of variation margin, APRA's margin rules generally provide that variation margin must be calculated and called on a daily basis, and settlement of variation margin amounts must be conducted promptly.[126] In the discussion paper that accompanied CPS 226, APRA stated that settlement of variation margin should occur on a T+1 basis; however, such a settlement timeframe may not be feasible in all circumstances due to, for example, time zone and cross-border considerations, and therefore has adopted a principles-based approach for the prompt settlement of variation margin.[127]

3. Commission Determination

Having compared APRA's margin requirements applicable to the timing and manner of collection and payment of initial and variation margin to the Commission's corresponding margin requirements, the Commission finds that APRA's margin requirements are comparable in outcome for purposes of § 23.160.

Under the CFTC Margin Rule, where initial margin is required, a CSE must calculate the amount of initial margin each business day. Although APRA's margin rules only require that initial margin be calculated on a ''regular and consistent basis,'' APRA represented

[123] *See* § 23.153(e)(2)(i).

[124] *See* CPS 226, Paragraph 21. APRA represented that its initial margin requirements were intended to provide flexibility for less significant financial counterparties that may find the daily calculation and exchange of initial margin to be operationally difficult. Given that changes to a portfolio would trigger a requirement for the re-calculation and call of initial margin, APRA represented that, in practice, the inter-bank/dealer market would nonetheless calculate and exchange initial margin on a daily basis.

[125] *See* CPS 226, Paragraph 20.

[126] *See* CPS 226, Paragraph 14.

[127] *See* APRA Discussion Paper, Page 19.

that larger Australian banks and dealers whose portfolios change on a daily basis will nonetheless calculate initial margin on a daily basis, given that APRA's rules require that initial margin must be re-calculated upon changes in potential future exposure. Both jurisdictions require counterparties to calculate and call variation margin on a daily basis.

With respect to the timing of the collection and posting of margin, the CFTC Margin Rule requires CSEs to collect or post any required margin amount (whether initial or variation) within one business day of calculation. APRA's margin rules specify only that margin be collected or posted "promptly," which presumably could be longer than one business day. APRA stated that, absent extenuating circumstances, the settlement of variation margin should occur within one business day of calculation. With respect to the settlement of initial margin, APRA stated that its flexible approach is appropriate for "less significant financial counterparties" and would not significantly impact systemic risk.[128] Specifically, the daily calculation and exchange of initial margin would have a limited impact on risk for inactive traders, as a counterparty's potential future exposure would be unlikely to change significantly and variation margin would nonetheless be exchanged daily. APRA has represented that the large internationally active banks that are operating in Australia would generally calculate and exchange margin on a daily basis, consistent with the CFTC Margin Rule, due to daily changes to their portfolios.

Given APRA's statements regarding the practical implementation of its margin rules, the Commission finds that the requirements of APRA's rules with respect to the timing and manner for collection or payment of initial and variation margin are comparable in outcome for purposes of § 23.160.

H. Margin Threshold Levels or Amounts

The BCBS/IOSCO Framework provides that initial margin could be subject to a threshold not to exceed EUR 50 million. The threshold is applied at the level of the consolidated group to which the threshold is being extended and is based on all non-centrally cleared derivatives between the two consolidated groups.

Similarly, to alleviate operational burdens associated with the transfer of small amounts of margin, the BCBS/IOSCO Framework provides that all margin transfers between parties may be subject to a de-minimis minimum transfer amount not to exceed EUR 500,000.

1. Commission Requirement for Margin Threshold Levels or Amounts

In keeping with the BCBS/IOSCO Framework, with respect to margin threshold levels or amounts the CFTC Margin Rule generally provides that:

• CSEs may agree with their counterparties that initial margin may be subject to a threshold of no more than $50 million applicable to a consolidated group of affiliated counterparties.[129]

• CSEs are not required to collect or to post initial or variation margin with a counterparty until the combined amount of initial margin and variation margin to be collected or posted is greater than $500,000 (*i.e.,* a minimum transfer amount).[130]

2. APRA Requirements for Margin Threshold Levels or Amounts

Also in keeping with the BCBS/IOSCO Framework, with respect to margin threshold levels or amounts, APRA's margin requirements generally provide that:

• The threshold applicable to the initial margin for each margining group must not be greater than AUD 75 million. The threshold is applied bilaterally at the aggregate level of the margining group and is based on all non-centrally cleared derivative transactions between the two margining groups.[131]

• The combined variation margin and initial margin required to be posted or collected pursuant to APRA's margin rules must be subject to a de-minimis minimum transfer amount that must not exceed AUD 750,000 (*i.e.,* a minimum transfer amount).[132]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that APRA's requirements for margin threshold levels or amounts, in the case of APRA covered entities, are comparable in outcome to those required by the CFTC Margin Rule for purposes of § 23.160.

The Commission notes that at current exchange rates, AUD 75 million is approximately $53 million, while AUD 750,000 is approximately $530,000. Although these amounts are greater than those permitted by the CFTC Margin Rule, the Commission recognizes that exchange rates will fluctuate over time and thus the Commission finds that such requirements under the laws of Australia are comparable in outcome to those of the CFTC Margin Rule for purposes of § 23.160.

I. Risk Management Controls for the Calculation of Initial and Variation Margin

1. Commission Requirement for Risk Management Controls for the Calculation of Initial and Variation Margin

With respect to risk management controls for the calculation of initial margin, the CFTC Margin Rule generally provides that:

• CSEs are required to have a risk management unit pursuant to § 23.600(c)(4). Such risk management unit must include a risk control unit tasked with validation of a CSE's initial margin model prior to implementation and on an ongoing basis, including an evaluation of the conceptual soundness of the initial margin model, an ongoing monitoring process that includes verification of processes and benchmarking by comparing the CSE's initial margin model outputs (estimation of initial margin) with relevant alternative internal and external data sources or estimation techniques, and an outcomes analysis process that includes back testing the model.[133]

• In accordance with § 23.600(e)(2), CSEs must have an internal audit function independent of the business trading unit and the risk management unit that at least annually assesses the effectiveness of the controls supporting the initial margin model measurement systems, including the activities of the business trading units and risk control unit, compliance with policies and procedures, and calculation of the CSE's initial margin requirements under this part.[134]

• At least annually, such internal audit function shall report its findings to the CSE's governing body, senior management, and chief compliance officer.[135]

[128] As discussed above, the CFTC Margin Rule applies only to SDs and MSPs for which there is no U.S. Prudential Regulator. SDs and MSPs are registered by virtue of their substantial swaps activity. By comparison, APRA's margin rules apply to a broader range of entities, including depository institutions, insurance companies, and superannuation firms. Thus, APRA's margin rules have incorporated a greater flexibility with respect to the timing of margin collection and posting in order to address the range in the size and sophistication of the entities that are subject to its margin requirements.

[129] *See* § 23.154(a)(3) and definition of "initial margin threshold" in § 23.151.

[130] *See* § 23.152(b)(3).

[131] *See* CPS 226, Paragraph 22.

[132] *See* CPS 226, Paragraph 28.

[133] *See* § 23.154(b)(5).

[134] *See* § 23.154(b)(5)(iv).

[135] *See* § 23.154(b)(5)(iv).

With respect to risk management controls for the calculation of variation margin, the CFTC Margin Rule generally provides that:

• CSEs must maintain documentation setting forth the variation margin methodology with sufficient specificity to allow a counterparty, the Commission, a registered futures association, and any applicable U.S. Prudential Regulator to calculate a reasonable approximation of the margin requirement independently.

• CSEs must evaluate the reliability of its data sources at least annually, and make adjustments, as appropriate.

• CSEs, upon request of the Commission or a registered futures association, must provide further data or analysis concerning the variation margin methodology or a data source, including: The manner in which the methodology meets the requirements of the CFTC Margin Rule; a description of the mechanics of the methodology; the conceptual basis of the methodology; the empirical support for the methodology; and the empirical support for the assessment of the data sources.

2. APRA Requirements for Risk Management Controls for the Calculation of Initial and Variation Margin

With respect to risk management controls for the calculation of initial margin, APRA's margin requirements generally provide that:

• Where APRA covered entities use a quantitative calculation model to calculate initial margin, the models must be subject to an independent internal governance process that: (i) Continuously monitors and assesses the value of the model's risk assessments; (ii) tests the model against realized data and experience; (iii) validates the applicability of the model to the derivatives for which it is used; (iv) regularly reviews the model in line with developments in global industry standards for initial margin models; and (v) accounts for the complexity of the products covered.[136]

• APRA covered entities must ensure that an independent review of the initial margin model and risk measurements system is carried out initially and then regularly as part of the internal audit process. This review must be conducted by functionally independent, appropriately trained, and competent personnel, and must take place at least once every three years or when a material change is made to the model or the risk measurement system.[137]

With respect to risk management controls for the calculation of variation margin, APRA's margin requirements generally provide that:

• An APRA covered entity must agree with its APRA covered counterparties and clearly document the process for determining the value of each non-centrally cleared derivative transaction at any time from the execution of the transaction to the termination, maturity, or expiration thereof.[138]

• Documentation must include an alternative process or approach by which counterparties will determine the value of the non-centrally cleared derivative transaction in the event of the unavailability or other failure of any inputs required to value the transaction.[139]

• An APRA covered entity must perform periodic reviews of the agreed upon valuation process to take into account changes in market conditions.[140]

3. Commission Determination

Based on the foregoing, the Commission has determined that APRA's requirements applicable to APRA covered entities pertaining to risk management controls for the calculation of initial and variation margin are comparable to the corresponding requirements under the CFTC Margin Rule. Specifically, the Commission finds that under both APRA's requirements and the CFTC Margin Rule, a CSE is required to establish a unit independent of the trading desk that is tasked with comprehensively managing the entity's use of an initial margin model, including establishing controls and testing procedures. Further, APRA's margin requirements and the CFTC Margin Rule both require ongoing reviews of firms' valuation methodologies. Although APRA's margin rules only require an internal review of the margin model and risk measurement system to be carried out once every three years, as compared to the CFTC Margin Rule's requirement for an annual review, APRA's margin rules also require a review to be conducted when a material change is made to the model or risk management system. In addition, margin model risk is further mitigated by APRA's requirement that models must be subject to an internal governance process that, among other things, continuously monitors and tests the models against realized experience and developments in industry standards. Accordingly, the Commission finds that, for purposes of § 23.160, APRA's requirements pertaining to risk management controls are comparable in outcome to the controls required by the CFTC Margin Rule.

J. Eligible Collateral for Initial and Variation Margin

As explained in the BCBS/IOSCO Framework, to ensure that counterparties can liquidate assets held as initial and variation margin in a reasonable amount of time to generate proceeds that could sufficiently protect collecting entities from losses on non-centrally cleared derivatives in the event of a counterparty default, assets collected as collateral for initial and variation margin purposes should be highly liquid and should, after accounting for an appropriate haircut, be able to hold their value in a time of financial stress. Such a set of eligible collateral should take into account that assets which are liquid in normal market conditions may rapidly become illiquid in times of financial stress. In addition to having good liquidity, eligible collateral should not be exposed to excessive credit, market and FX risk (including through differences between the currency of the collateral asset and the currency of settlement). To the extent that the value of the collateral is exposed to these risks, appropriately risk-sensitive haircuts should be applied. More importantly, the value of the collateral should not exhibit a significant correlation with the creditworthiness of the counterparty or the value of the underlying non-centrally cleared derivatives portfolio in such a way that would undermine the effectiveness of the protection offered by the margin collected. Accordingly, securities issued by the counterparty or its related entities should not be accepted as collateral. Accepted collateral should also be reasonably diversified.

1. Commission Requirement for Eligible Collateral for Initial and Variation Margin

With respect to eligible collateral that may be collected or posted to satisfy an initial margin obligation, the CFTC Margin Rule generally provides that CSEs may collect or post: [141]

• Cash denominated in a major currency, being United States Dollar (USD); Canadian Dollar (CAD); Euro (EUR); United Kingdom Pound (GBP); Japanese Yen (JPY); Swiss Franc (CHF); New Zealand Dollar (NZD); Australian Dollar (AUD); Swedish Kronor (SEK); Danish Kroner (DKK); Norwegian Krone

[136] *See* CPS 226, Paragraph 39.

[137] *See* CPS 226, Paragraph 40.

[138] *See* CPS 226, Paragraph 86.

[139] *See* CPS 226, Paragraph 88.

[140] *See* CPS 226, Paragraph 89.

[141] *See* § 23.156(a)(1).

(NOK); any other currency designated by the Commission; or any currency of settlement for a particular uncleared swap.

- A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of Treasury.
- A security that is issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, a U.S. government agency (other than the U.S. Department of Treasury) whose obligations are fully guaranteed by the full faith and credit of the U.S. government.
- A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20 percent risk weight under the capital rules applicable to SDs subject to regulation by a U.S. Prudential Regulator.
- A publicly-traded debt security issued by, or an asset-backed security fully guaranteed as to the timely payment of principal and interest by, a U.S. Government-sponsored enterprise that is operating with capital support or another form of direct financial assistance received from the U.S. government that enables the repayments of the U.S. Government-sponsored enterprise's eligible securities.
- A security that is issued by, or fully guaranteed as to the payment of principal and interest by, the Bank for International Settlements, the International Monetary Fund, or a multilateral development bank as defined in § 23.151.
- Other publicly-traded debt that has been deemed acceptable as initial margin by a U.S. Prudential Regulator as defined in § 23.151.
- A publicly-traded common equity security that is included in the Standard & Poor's Composite 1500 Index (or any other similar index of liquid and readily marketable equity securities as determined by the Commission), or an index that a CSE's supervisor in a foreign jurisdiction recognizes for purposes of including publicly traded common equity as initial margin under applicable regulatory policy, if held in that foreign jurisdiction.
- Securities in the form of redeemable securities in a pooled investment fund representing the security-holder's proportional interest in the fund's net assets and that are issued and redeemed only on the basis of the market value of the fund's net assets prepared each business day after the security-holder makes its investment commitment or redemption request to the fund, if the fund's investments are limited to securities that are issued by, or unconditionally guaranteed as to the timely payment of principal and interest by, the U.S. Department of the Treasury, and immediately-available cash funds denominated in U.S. dollars; or securities denominated in a common currency and issued by, or fully guaranteed as to the payment of principal and interest by, the European Central Bank or a sovereign entity that is assigned no higher than a 20% risk weight under the capital rules applicable to SDs subject to regulation by a U.S. Prudential Regulator, and immediately-available cash funds denominated in the same currency; and assets of the fund may not be transferred through securities lending, securities borrowing, repurchase agreements, reverse repurchase agreements, or other means that involve the fund having rights to acquire the same or similar assets from the transferee.
- Gold.
- A CSE may not collect or post as initial margin any asset that is a security issued by: The CSE or a margin affiliate of the CSE (in the case of posting) or the counterparty or any margin affiliate of the counterparty (in the case of collection); a bank holding company, a savings and loan holding company, a U.S. intermediate holding company established or designated for purposes of compliance with 12 CFR 252.153, a foreign bank, a depository institution, a market intermediary, a company that would be any of the foregoing if it were organized under the laws of the United States or any State, or a margin affiliate of any of the foregoing institutions; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323).[142]
- The value of any eligible collateral collected or posted to satisfy initial margin requirements must be reduced by the following haircuts: An 8% discount for initial margin collateral denominated in a currency that is not the currency of settlement for the uncleared swap, except for eligible types of collateral denominated in a single termination currency designated as payable to the non-posting counterparty as part of an eligible master netting agreement; and the discounts set forth in the following table:[143]

STANDARDIZED HAIRCUT SCHEDULE

Cash in same currency as swap obligation	0.0
Eligible government and related debt (*e.g.,* central bank, multilateral development bank, GSE securities identified in 17 CFR 23.156(a)(1)(v)): Residual maturity less than one-year	0.5
Eligible government and related debt (*e.g.,* central bank, multilateral development bank, GSE securities identified in 17 CFR 23.156(a)(1)(v)): Residual maturity between one and five years	2.0
Eligible government and related debt (*e.g.,* central bank, multilateral development bank, GSE securities identified in 17 CFR 23.156(a)(1)(v)): Residual maturity greater than five years	4.0
Eligible corporate debt (including eligible GSE debt securities not identified in 17 CFR 23.156(a)(1)(v)): Residual maturity less than one-year	1.0
Eligible corporate debt (including eligible GSE debt securities not identified in 17 CFR 23.156(a)(1)(v)): Residual maturity between one and five years	4.0
Eligible corporate debt (including eligible GSE debt securities not identified in 17 CFR 23.156(a)(1)(v)): Residual maturity greater than five years	8.0
Equities included in S&P 500 or related index	15.0
Equities included in S&P 1500 Composite or related index but not S&P 500 or related index	25.0
Gold	15.0

With respect to eligible collateral that may be collected or posted to satisfy a variation margin obligation, the CFTC Margin Rule generally provides that CSEs may collect or post:[144]

[142] *See* § 23.156(a)(2).

[143] *See* § 23.156(a)(3).

[144] *See* § 23.156(b)(1).

• With respect to uncleared swaps with an SD or MSP, only immediately available cash funds that are denominated in: U.S. dollars, another major currency (as defined in § 23.151), or the currency of settlement of the uncleared swap.

• With respect to any other uncleared swaps for which a CSE is required to collect or post variation margin, any asset that is eligible to be posted or collected as initial margin, as described above.

• The value of any eligible collateral collected or posted to satisfy variation margin requirements must be reduced by the same haircuts applicable to initial margin described above.[145]

Finally, CSEs must monitor the value and eligibility of collateral collected and posted: [146]

• CSEs must monitor the market value and eligibility of all collateral collected and posted, and, to the extent that the market value of such collateral has declined, the CSE must promptly collect or post such additional eligible collateral as is necessary to maintain compliance with the margin requirements of §§ 23.150 through 23.161.

• To the extent that collateral is no longer eligible, CSEs must promptly collect or post sufficient eligible replacement collateral to comply with the margin requirements of §§ 23.150 through 23.161.

2. APRA Requirements for Eligible Collateral for Initial and Variation Margin

With respect to eligible collateral that may be collected or posted to satisfy an initial or variation margin obligation, APRA's margin requirements generally provide that APRA covered entities may collect or post: [147]

• Cash.[148]

• Debt securities issued by Commonwealth, State and Territory governments in Australia, central, state, and regional governments in other countries, the Reserve Bank of Australia, central banks in other countries, and the international banking agencies and multilateral development banks (each with an External Credit Assessment Institution (''ECAI'') rating of 3 or better).[149]

• Debt securities issued by ADIs, overseas banks, Australian and international local governments and corporates (each with an ECAI rating of 3 or better).[150]

• Unrated debt securities that are issued by an ADI or overseas bank as senior debt and are listed on a recognized exchange. All externally rated issues of the same seniority by the same issuer must have a long-term or short-term ECAI rating of 3 or better, and the entity holding the unrated security must have no information suggesting that the unrated security justifies an ECAI rating of less than 3.[151]

• Covered bonds with an ECAI rating of 3 or better.[152]

• Senior securitization exposures with an ECAI rating of 1.[153]

• Equities included in a major stock index.[154]

• Gold bullion.[155]

• Resecuritization exposures (irrespective of credit ratings) are not eligible collateral.[156]

• Securities issued by a counterparty to the transaction (or by any person or entity related or associated with the counterparty) is considered to have a material positive correlation with the credit quality of the counterparty and thus are not eligible collateral.[157]

• An APRA covered entity must have appropriate controls in place to ensure that the collateral collected does not exhibit significant wrong-way risk or significant concentration risk. The controls must consider concentrations in terms of an individual issuer, issuer type, and asset type.[158]

Risk-sensitive haircuts appropriately reflecting the credit, market, and FX risk must be applied to the collateral.[159] The haircuts must be calculated using either a model approach approved by APRA or the following standardized schedule: [160]

Cash	0%
Debt securities under paragraph 45(b):	
residual maturity ≤1 year	0.5%
residual maturity >1 year, ≤5 years	2%
residual maturity >5 years	4%
Debt securities under paragraphs 45(c), 45(d), 45(e),45(f):	
residual maturity ≤1 year	1%
residual maturity >1 year, ≤5 years	4%
residual maturity >5 years	8%
Equities included in a major stock index	15%
Gold	15%

With respect to initial margin, an additional FX haircut of eight per cent of market value applies to all cash and non-cash collateral in which the currency of the collateral asset differs from the termination currency.[161] Similarly, for purposes of variation margin, an additional FX haircut of 8% of market value applies to all non-cash collateral in which the currency of the collateral asset differs from the agreed upon currency of an individual derivative contract, the relevant master netting agreement, or the relevant credit support annex.[162]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission observes that APRA's

[145] *See* § 23.156(b)(2).

[146] *See* § 23.156(c).

[147] *See* CPS 226, Paragraph 45.

[148] *See* CPS 226, Paragraph 45(a).

[149] *See* CPS 226, Paragraph 45(b).

[150] *See* CPS 226, Paragraph 45(c).

[151] *See* CPS 226, Paragraph 45(d).

[152] *See* CPS 226, Paragraph 45(e).

[153] *See* CPS 226, Paragraph 45(f).

[154] *See* CPS 226, Paragraph 45(g).

[155] *See* CPS 226, Paragraph 45(h).

[156] *See* CPS 226, Paragraph 46.

[157] *See* CPS 226, Paragraph 47.

[158] *See* CPS 226, Paragraph 48.

[159] *See* CPS 226, Paragraph 50.

[160] *See* CPS 226, Paragraph 50 and Attachment B. The risk-sensitive haircut for an APRA covered entity may also be calculated using a schedule already in use for regulatory capital purposes prior to the application of CPS 226, provided that such a schedule is at least as conservative as the CPS 226 schedule. The use of such an alternative schedule for the risk-sensitive haircut must be approved by APRA. *Id.*

[161] *See* CPS 226, Attachment B, Paragraph 4.

[162] *See* CPS 226, Attachment B, Paragraph 3.

requirements pertaining to assets eligible for posting or collecting by APRA covered entities as collateral for non-centrally cleared derivatives are comparable to the requirements of the CFTC Margin Rule.

The Commission notes that there are some areas in which APRA's requirements for eligible collateral are less strict than those in the CFTC Margin Rule. For example, APRA allows for a broader range of forms of eligible collateral, including debt securities issued by banks and senior securitizations. This difference is mitigated, however, by APRA's requirement that such debt securities either: (i) have certain minimum credit ratings; or (ii) if unrated, are senior debt listed on a recognized exchange and issued by entities whose comparable securities have certain minimum credit ratings. Further, APRA's margin rules apply a 15% haircut for all equities included on a major stock index, whereas the CFTC Margin Rule permits a 15% haircut for equities included in the S&P 500 or related index, and a 25% haircut for equities included in the S&P 1500 or related index. In addition, unlike the CFTC Margin Rule, APRA's margin rules do not delineate specific currencies which may be used as collateral.

With respect to variation margin, the CFTC Margin Rule states that CSEs are only permitted to exchange immediately available cash funds that are denominated in U.S. dollars, another major currency (as defined in § 23.151), or the currency of settlement of the uncleared swap when transacting with other swap entities. CSEs may post and collect any form of eligible collateral as variation margin when transacting with financial end users. By comparison, APRA's requirements would permit any form of eligible collateral (as described above) for transactions with all counterparties.

While not identical, the Commission finds that the forms of eligible collateral for initial and variation margin under the laws of Australia provide comparable protections to the forms of eligible collateral mandated by the CFTC Margin Rule. Specifically, although APRA's margin regime allows for a broader range of eligible collateral with corresponding haircuts, such collateral must satisfy credit rating restrictions that seek to ensure that it is liquid and able to hold its value in a time of financial stress. APRA covered entities must also continuously monitor the concentration risk of collateral. The Commission recognizes that the list of eligible collateral under APRA's margin regime was compiled by APRA in accordance with the standard set forth in the BCBS/IOSCO Framework requiring that the assets held as collateral are highly liquid and, after accounting for appropriate haircuts, able to hold their value in a time of financial stress.[163] Thus, the Commission finds APRA's margin regime with respect to the forms of eligible collateral for initial and variation margin for uncleared swaps is comparable in outcome to the CFTC Margin Rule for purposes of § 23.160.

K. Requirements for Custodial Arrangements, Segregation, and Rehypothecation

As explained in the BCBS/IOSCO Framework, the exchange of initial margin on a net basis may be insufficient to protect two market participants with large gross derivatives exposures to each other in the case of one firm's failure. Thus, the gross initial margin between such firms should be exchanged.[164]

Further, initial margin collected should be held in such a way as to ensure that (i) the margin collected is immediately available to the collecting party in the event of the counterparty's default, and (ii) the collected margin must be subject to arrangements that protect the posting party to the extent possible under applicable law in the event that the collecting party enters bankruptcy.[165] The BCBS–IOSCO Framework acknowledges that ''there are many different ways to protect provided margin,'' and that in some cases, ''access to assets held by third-party custodians has been limited or practically difficult.'' [166]

1. Commission Requirement for Custodial Arrangements, Segregation, and Rehypothecation

In keeping with the principles set forth in the BCBS/IOSCO Framework, with respect to custodial arrangements, segregation, and rehypothecation, the CFTC Margin Rule generally requires that:

- All assets posted by or collected by CSEs as initial margin must be held by one or more custodians that are not the CSE, the counterparty, or margin affiliates of the CSE or the counterparty.[167]
- CSEs must enter into an agreement with each custodian holding initial margin collateral that:
  - Prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian;
  - May permit the custodian to hold cash collateral in a general deposit account with the custodian if the funds in the account are used to purchase an asset that qualifies as eligible collateral (other than equities, investment vehicle securities, or gold), such asset is held in compliance with this section, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and
  - Is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions including in the event of bankruptcy, insolvency, or a similar proceeding.[168]
- A posting party may substitute any form of eligible collateral for posted collateral held as initial margin.[169]
- A posting party may direct reinvestment of posted collateral held as initial margin in any form of eligible collateral.[170]
- Collateral that is collected or posted as variation margin is not required to be held by a third-party custodian and is not subject to restrictions on rehypothecation, repledging, or reuse.[171]

2. APRA Requirements for Custodial Arrangements, Segregation, and Rehypothecation

With respect to custodial arrangements, segregation, and rehypothecation, APRA's margin rules generally require that:

- Initial margin must be held so as to ensure that: (i) The margin collected is promptly available to the collecting party in the event of the posting party's default;[172] and (ii) the collected margin must be subject to arrangements that protect the posting party to the extent possible under applicable law in the event that the collecting party enters insolvency or bankruptcy.[173]

[163] *See* APRA Discussion Paper, Page 24.

[164] *See* BCBS/IOSCO Framework, Key principle 5.

[165] *See id.*

[166] *See* BCBS/IOSCO Framework, Commentary 5(i).

[167] *See* § 23.157(a) and (b).

[168] *See* § 23.157(c)(1) and (2).

[169] *See* § 23.157(c)(3).

[170] *See id.*

[171] *See* CFTC Margin Rule, 81 FR at 672.

[172] APRA considers the requirement that initial margin be promptly available to the collecting party in the event of the posting party's default consistent in policy intent with a requirement that initial margin be immediately available; *i.e.*, that initial margin must be available as soon as legally and operationally possible.

[173] *See* CPS 226, Paragraph 25. APRA further represented that although it implemented a principles-based approach, in practice it believes

• Initial margin must not be re-hypothecated, re-pledged or re-used, but cash initial margin may be held in a demand deposit account with a third-party custodian in the name of the posting counterparty. The third-party custodian must not be affiliated with either counterparty. APRA has represented that cash held in a custody account may be reinvested in other forms of eligible collateral. Contractual arrangements providing for the posting and collection of initial margin must provide for initial margin to be held in a manner that satisfies this requirement.[174]

• Initial margin collected must be segregated from the collector's proprietary assets. The initial margin collector must also segregate initial margin provided in respect of one or more counterparties from the assets of other parties if requested by the relevant counterparty or counterparties.[175]

• Eligible collateral that was originally posted or collected may be substituted provided that: (i) both parties agree to the substitution; (ii) the substitution is made on the terms applicable to their agreement; and (iii) the substituted eligible collateral meets all of the requirements of APRA's margin rules and the value of the substituted eligible collateral, after the application of risk-sensitive haircuts, is sufficient to meet the margin requirement.[176]

• Collateral exchanged for variation margin is not subject to custodial safekeeping requirements.

3. Commission Determination

The Commission notes that APRA's margin requirements with respect to custodial arrangements are less stringent than those of the CFTC Margin Rule in one respect. Under the CFTC Margin Rule, all assets posted by or collected by CSEs as initial margin must be held by one or more custodians that are not the CSE, the counterparty, or margin affiliates of the CSE or the counterparty.[177] APRA's margin rules permit, but do not require, cash initial margin to be held with a third-party custodian. If a third-party custodian is used, it may not be affiliated with either counterparty. Importantly, however, APRA's margin rules do not prohibit an APRA covered entity itself (or an affiliated entity for other than cash initial margin) from acting as custodian to hold initial margin collected from counterparties, so long as the margin is segregated from the collector's proprietary assets. Further, where a third-party custodian is not used, APRA's margin rules require collateral to be segregated from other counterparties' collateral only at the request of the posting counterparty.

As discussed above, the BCBS–IOSCO Framework contemplates multiple methodologies for protecting initial margin. APRA has stated that its margin safekeeping requirements were intended to allow flexible approaches that would mitigate compliance costs without compromising the protections available to counterparties.[178] If a third-party custodian is not used, APRA further represented that mere segregation of assets, in the absence of a trust arrangement, would not be sufficient to meet the requirements of CPS 226. APRA stated that Australian insolvency law protects the posting party's right to recover initial margin upon insolvency of the collecting party so long as it is held by the collecting party on trust for the posting party.[179] Accordingly, the Commission finds that APRA's margin requirements with respect to custodial arrangements are comparable in outcome to the CFTC Margin Rule for purposes of § 23.160.

L. Requirements for Margin Documentation

1. Commission Requirement for Margin Documentation

With respect to requirements for documentation of margin arrangements, the CFTC Margin Rule generally provides that:

• CSEs must execute documentation with each counterparty that provides the CSE with the contractual right and obligation to exchange initial margin and variation margin in such amounts, in such form, and under such circumstances as are required by the CFTC Margin Rule.[180]

• The margin documentation must specify the methods, procedures, rules, inputs, and data sources to be used for determining the value of uncleared swaps for purposes of calculating variation margin; describe the methods, procedures, rules, inputs, and data sources to be used to calculate initial margin for uncleared swaps entered into between the CSE and the counterparty; and specify the procedures by which any disputes concerning the valuation of uncleared swaps, or the valuation of assets collected or posted as initial margin or variation margin may be resolved.[181]

2. APRA Requirements for Margin Documentation

With respect to requirements for documentation of margin arrangements, APRA's margin rules generally provide that:

• An APRA covered entity must establish and implement policies and procedures to execute written trading relationship documentation with an APRA covered counterparty prior to or contemporaneously with executing a non-centrally cleared derivative transaction.[182]

• The trading relationship documentation must: (i) Promote legal certainty for non-centrally cleared derivative transactions; (ii) include all material rights and obligations of the counterparties concerning the non-centrally cleared derivative trading relationship, including margin arrangements in accordance with applicable law, that have been agreed between them; and (iii) be executed in writing or through equivalent non-rewritable, non-erasable electronic means.[183]

• An APRA covered entity must agree with its counterparties and clearly document the process for determining the value of each non-centrally cleared derivative transaction for the purpose of exchanging margin.[184]

• All agreements on valuation process must be documented in the trading relationship documentation or trade confirmation.[185]

• An APRA covered entity must have rigorous and robust dispute resolution procedures in place with its counterparties prior to or contemporaneously with executing a non-centrally cleared derivative transaction.[186]

• An APRA covered entity must have policies and procedures to maintain trading relationship documentation for a reasonable period of time after the maturity of any outstanding transactions with an APRA covered counterparty.[187]

that most of the major Australian banks intend to use third-party custodians to meet with requirements of CPS 226.

[174] *See* CPS 226, Paragraph 26.

[175] *See* CPS 226, Paragraph 27.

[176] *See* CPS 226, Paragraph 49.

[177] *See* § 23.157(a) and (b).

[178] *See* APRA Discussion Paper, Page 22. APRA further represented that many large banks will nonetheless use third-party custodians.

[179] APRA stated that in the event of a bankruptcy, trust assets are not considered property of the collecting party, and would be dealt with under the terms of the trust arrangement. *See Stansfield DIY Wealth Pty Ltd (in liq)* [2014] NSWSC 1484.

[180] *See* § 23.158(a).

[181] *See* § 23.158(b).

[182] *See* CPS 226, Paragraph 74.

[183] *See* CPS 226, Paragraph 75.

[184] *See* CPS 226, Paragraph 86.

[185] *See* CPS 226, Paragraph 87.

[186] *See* CPS 226, Paragraph 90.

[187] *See* CPS 226, Paragraph 76.

3. Commission Determination

Based on the foregoing, the Commission has determined that APRA's margin requirements applicable to margin documentation are substantially the same as the margin documentation requirements under the CFTC Margin Rule. Specifically, the Commission finds that under both APRA's requirements and the CFTC Margin Rule, a CSE/APRA covered entity is required to enter into documentation with each counterparty that sets forth the rights and obligations of the counterparties, including margin arrangements in accordance with applicable law, as well as the methodologies used for determining valuations. Accordingly, the Commission finds that APRA's requirements pertaining to margin documentation are comparable in outcome to those required by the CFTC Margin Rule for purposes of § 23.160.

M. Cross-Border Application of the Margin Regime

1. Cross-Border Application of the CFTC Margin Rule

The general cross-border application of the CFTC Margin Rule, as set forth in the CFTC Cross-Border Margin Rule, is discussed in detail in section II *supra.* However, § 23.160(d) and (e) of the CFTC Cross-Border Margin Rule also provide certain alternative requirements for uncleared swaps subject to the laws of a jurisdiction that does not reliably recognize close-out netting under a master netting agreement governing a swap trading relationship, or that has inherent limitations on the ability of a CSE to post initial margin in compliance with the custodial arrangement requirements [188] of the CFTC Margin Rule.[189]

Section 23.160(d) generally provides that where a jurisdiction does not reliably recognize close-out netting, the CSE must treat the uncleared swaps covered by a master netting agreement on a gross basis with respect to collecting initial and variation margin, but may treat such swaps on a net basis with respect to posting initial and variation margin.[190]

Section 23.160(e) generally provides that where certain CSEs are required to transact with certain counterparties in uncleared swaps through an establishment in a jurisdiction where, due to inherent limitations in legal or operational infrastructure, it is impracticable to require posted initial margin to be held by an independent custodian pursuant to § 23.157, the CSE is required to collect initial margin in cash (as described in § 23.156(a)(1)(i)) and post and collect variation margin in cash, but is not required to post initial margin. In addition, the CSE is not required to hold the initial margin collected with an unaffiliated custodian.[191] Finally, the CSE may only enter into such affected transactions up to 5% of its total uncleared swap notional outstanding for each broad category of swaps described in § 23.154(b)(2)(v).

2. Cross-Border Application of APRA's Margin Regime

With respect to cross-border transactions, APRA's margin requirements state that APRA may approve substituted compliance in relation to the margin requirements of a foreign jurisdiction where those requirements are comparable in outcome with the BCBS/IOSCO framework and APRA's margin rules.[192] Where APRA grants substituted compliance, an APRA covered entity will be deemed in compliance with APRA's margin rules for transactions in which it complies with the relevant foreign margin requirements in their entirety.[193] APRA may limit the scope or impose conditions on its substituted compliance determinations.[194] An APRA covered entity may only avail itself of substituted compliance with respect to a foreign jurisdiction when a transaction is subject to the margin requirements of that jurisdiction.[195]

Where an APRA covered entity is a foreign ADI, a foreign general insurer operating as a foreign branch in Australia, or an eligible foreign life insurance company and is directly subject to margin requirements that are substantially similar to the BCBS/IOSCO Framework by its home jurisdiction, it may comply with its home jurisdiction's requirements in their entirety in lieu of complying with APRA's margin rules, subject to certain conditions.[196] Specifically, the APRA covered entity must complete an internal assessment that positively demonstrates: (i) How it is directly subject to the requirements of the foreign jurisdiction; (ii) how the requirements of the foreign jurisdiction are substantially similar to the BCBS/IOSCO Framework; and (iii) how it complies with those requirements.[197]

Similarly, where a member of an APRA covered entity's Level 2 group that is incorporated outside of Australia is directly subject to margin requirements of a foreign jurisdiction that are substantially similar to the

[188] *See* § 23.157 and section IV(K) *supra.*

[189] *See* § 23.160(d) and (e). With respect to non-netting jurisdictions, the CFTC margin rule generally provides that if a CSE cannot conclude after sufficient legal review with a well-founded basis that the netting agreement described in § 23.152(c) meets the definition of ''eligible master netting agreement'' set forth in § 23.151, the CSE must treat the uncleared swaps covered by the agreement on a gross basis for the purposes of calculating and complying with the requirements of §§ 23.152(a) and 23.153(a) to collect margin, but the CSE may net those uncleared swaps in accordance with §§ 23.152(c) and 23.153(d) for the purposes of calculating and complying with the requirements of this part to post margin. A CSE that relies on this provision must have policies and procedures ensuring that it is in compliance with the requirements of this paragraph, and maintain books and records properly documenting that all of the requirements of the provision are satisfied.

With respect to jurisdictions where compliance with custodial arrangements is unavailable, §§ 23.152(b), 23.157(b), and 23.160(d) do not apply to an uncleared swap entered into by a Foreign Consolidated Subsidiary or a foreign branch of a U.S. CSE if (i) inherent limitations in the legal or operational infrastructure in the applicable foreign jurisdiction make it impracticable for the CSE and its counterparty to post any form of eligible initial margin collateral recognized pursuant to § 23.156 in compliance with the custodial arrangement requirements of § 23.157; (ii) the CSE is subject to foreign regulatory restrictions that require the CSE to transact in uncleared swaps with the counterparty through an establishment within the foreign jurisdiction and do not accommodate the posting of collateral for the uncleared swap in compliance with the custodial arrangements of § 23.157 in the United States or a jurisdiction for which the Commission has issued a comparability determination under § 23.160(c) with respect to § 23.157; (iii) the counterparty to the uncleared swap is a non-U.S. person that is not a CSE, and the counterparty's obligations under the uncleared swap are not guaranteed by a U.S. person; (iv) the CSE collects initial margin for the uncleared swap in accordance with § 23.152(a) in the form of cash pursuant to § 23.156(a)(1)(i), and posts and collects variation margin in accordance with § 23.153(a) in the form of cash pursuant to § 23.156(a)(1)(i); (v) for each broad risk category, as set out in § 23.154(b)(2)(v), the total outstanding notional value of all uncleared swaps in that broad risk category, as to which the CSE is relying on § 23.160(e), may not exceed 5% of the CSE's total outstanding notional value for all uncleared swaps in the same broad risk category; (vi) the CSE has policies and procedures ensuring that it is in compliance with the requirements of § 23.160(e); and (vii) the CSE maintains books and records properly documenting that all of the requirements of § 23.160(e) are satisfied.

[190] *See id.*

[191] *See* §§ 23.160(e) and 23.157(b).

[192] *See* CPS 226, Paragraph 62.

[193] *See* CPS 226, Paragraph 63.

[194] *Id.*

[195] *See* CPS 226, Paragraph 64. An APRA covered entity may only substitute compliance in APRA's margin rules with those of a foreign jurisdiction where: (i) the APRA covered entity is transacting with an APRA covered counterparty that is subject to the margin requirements of a the relevant foreign jurisdiction; and/or (ii) the APRA covered entity is directly subject to the margin requirements of the relevant foreign jurisdiction. *Id.*

[196] *See* CPS 226, Paragraph 65.

[197] *See* CPS 226, Paragraph 65. The APRA covered entity's internal assessment, and any additional information, must be made available to APRA upon request. *Id.*

BCBS/IOSCO Framework, the APRA covered entity may apply for approval by APRA to comply, with respect to that member, with the foreign jurisdiction's requirements in lieu of complying with the relevant requirements of APRA's margin rules.[198]

Further, an APRA covered entity is not required to exchange variation margin or post or collect initial margin if there is any doubt as to the enforceability of: (i) The netting agreement upon insolvency or bankruptcy of the counterparty;[199] or (ii) the collateral agreement upon default of the counterparty.[200] APRA covered entities must monitor such exposures and set appropriate internal limits and controls to manage its exposure to such counterparties.[201] APRA has represented that it will review such thresholds, limits and controls though its supervisory processes and monitor both entity and industry levels of exposures to these jurisdictions.

Finally, where a counterparty to a transaction is incorporated, and operating, in a legal jurisdiction that does not permit it or its counterparty to satisfy the safekeeping requirements of Paragraph 25 of APRA's margin rules,[202] an APRA covered entity is not required to post or collect initial margin.[203] APRA represented that although there is no limit to such exposures, it intends to monitor the use of this exemption as part of its supervisory program.

3. Commission Determination

Although there are some differences in the cross-border application of APRA's margin rules as compared to the CFTC Cross-Border Margin Rule, the Commission finds that the cross-border application of APRA's margin regime is comparable in outcome to that of the CFTC Margin Rule as supplemented by the CFTC Cross-Border Margin Rule for purposes of § 23.160.

APRA implemented a final amendment to CPS 226 on September 1, 2017, which permits substituted compliance with respect to the margin requirements of fourteen foreign bodies, including the CFTC and the U.S. Prudential Regulators.[204] Accordingly, where a counterparty to a transaction is subject to the uncleared margin requirements of APRA and the CFTC, it may comply with the CFTC Margin Rule.

The Commission notes some differences in the cross-border treatment of netting and collateral agreements by APRA and the CFTC. Specifically, the CFTC Cross-Border Margin Rule provides that a CSE transacting in a jurisdiction that does not reliably recognize close-out netting and/or collateral arrangements must collect initial and variation margin on a gross basis, but may post on a net basis.[205] APRA's margin regime differs in this respect in that it does not require APRA covered entities to collect or post initial or variation margin at all where the enforceability of netting agreements and/or collateral arrangements are questionable. APRA stated that it implemented these exceptions in consideration of: (i) The potential liquidity burdens associated with exchanging margin on a gross basis; (ii) the additional counterparty credit risk associated with posting collateral to a jurisdiction where insolvency laws do not provide certainty that posted collateral will be returned in the event of the counterparty's insolvency; (iii) the higher regulatory capital requirements that would apply to banking institutions for their non-netting or uncollateralized exposures; and (iv) the commercial limitations to requiring margin on a collect-only basis, or on a collect-gross and post-net basis. However, pursuant to APRA's margin rules, APRA covered entities are required to monitor the resulting uncollateralized exposures and set appropriate internal limits and controls to manage such exposures to counterparties in these jurisdictions.[206] APRA represented that although it did not prescribe a quantitative limit for such exposures, it intends to review APRA covered entities' internal thresholds, limits, and controls through its supervisory process and monitor both entity and industry levels of exposures to these non-netting jurisdictions. The Commission notes that every CSE is required to have a risk management program pursuant to § 23.600, and thus the Commission also has the authority to inquire as to the adequacy of risk management covering uncleared swaps in non-netting jurisdictions. In light of the limited scope of the difference and APRA's heightened supervisory focus, the Commission finds for purposes of § 23.160 that APRA's margin rules are comparable in outcome to the Commission's margin rules with respect to the treatment of cross-border transactions with counterparties in non-netting jurisdictions.

Further, the CFTC Cross-Border Margin Rule states that when a CSE transacts in a jurisdiction where it cannot adhere to the CFTC Margin Rule's custodial safekeeping requirements, the CSE must collect initial margin in cash, and post and collect variation margin in cash, but is not required to post initial margin.[207] APRA's margin regime, however, does not require APRA covered entities to post or collect initial margin where either it or its counterparty cannot satisfy the safekeeping requirements of Paragraph 25 of APRA's margin rules.[208] APRA explained that this provision was intended to address APRA covered entities operating in New Zealand, where the country's legal framework prevents the giving or enforcing of rights with respect to margin provided by way of security interest. APRA further stated that it intends to monitor the use of this exemption and is engaged in ongoing dialogue with New Zealand authorities. Given this explanation, the Commission believes that the use of this exemption will be limited in scope and continuously monitored by APRA. Accordingly, although the Commission acknowledges that APRA's initial margin requirements in such scenarios are less stringent than those of the CFTC, the Commission finds that they

[198] *See* CPS 226, Paragraph 66.

[199] *See* CPS 226, Paragraph 68.

[200] *See* CPS 226, Paragraph 69.

[201] *See* CPS 226, Paragraphs 68 and 69.

[202] *See* CPS 226, Paragraph 25, which states that initial margin must be held so as to ensure that: (a) the margin collected is promptly available to the collecting party in the event of the posting party's default; and (b) the collected margin must be subject to arrangements that protect the posting party to the extent possible under applicable law in the event that the collecting party enters insolvency or bankruptcy.

[203] *See* CPS 226, Paragraph 67. APRA has represented that this exemption is intended to address legal impediments that currently exist in New Zealand because the four largest banks regulated by APRA have New Zealand subsidiaries that are subject to APRA's rules. According to APRA, entities subject to New Zealand law are not able to give, and enforce rights with respect to, margin provided by way of security interest. APRA continues to engage in ongoing dialogue with New Zealand regarding this use of this exemption.

[204] Where an APRA covered entity and its APRA covered counterparty are both members of the same margining group, APRA did not grant substituted compliance with respect the following jurisdictions: (i) Office of the Superintendent of Financial Institutions, Canada; (ii) European Commission; (iii) Hong Kong Monetary Authority; (iv) Financial Services Agency, Japan; (v) Ministry of Agriculture, Forestry and Fisheries, Japan; (vi) Monetary Authority of Singapore; and (vii) Swiss Financial Market Supervisory Authority.

[205] *See* § 23.160(d).

[206] *See* CPS 226, Paragraphs 68 and 69.

[207] *See* § 23.160(e).

[208] *See* CPS 226, Paragraph 25, which states that initial margin must be held so as to ensure that: (a) The margin collected is promptly available to the collecting party in the event of the posting party's default; and (b) the collected margin must be subject to arrangements that protect the posting party to the extent possible under applicable law in the event that the collecting party enters insolvency or bankruptcy.

are nonetheless comparable in outcome for purposes of § 23.160.

Having considered the similarities and differences described above, the Commission finds that the cross-border aspects of APRA's margin regime comparable in outcome to that of the Commission for purposes of § 23.160.

N. Supervision and Enforcement

The Commission has a long history of regulatory cooperation with APRA, including cooperation in the regulation of registrants of the Commission that are also APRA covered entities.[209] As part of APRA's ongoing prudential regulation and supervision of APRA covered entities, it will take all measures necessary to ensure that APRA's margin rules are implemented. Thus, the Commission finds that APRA has the necessary powers to supervise, investigate, and discipline entities for compliance with its margin requirements and recognizes APRA's ongoing efforts to detect and deter violations of, and ensure compliance with, the margin requirements applicable in Australia.

V. Conclusion

As detailed above, the Commission has noted several differences between the CFTC Margin Rule and APRA's margin rules. However, having considered the scope and objectives of the margin requirements for non-centrally cleared derivatives under the laws of Australia [210] the margin requirements in the broader context of APRA's prudential oversight of risk management and capital requirements, whether such margin requirements achieve comparable outcomes to the Commission's corresponding margin requirements,[211] the ability of APRA to supervise and enforce compliance with the margin requirements for non-centrally cleared derivatives under the laws of Australia,[212] and the reciprocal nature of comity in international regulation, the Commission has determined that APRA's margin rules are comparable in outcome, for purposes of § 23.160, to the CFTC Margin Rule.

Issued in Washington, DC, on March 27, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Appendices to Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman J. Christopher Giancarlo

Today I am pleased to announce that the Commission has issued a decision concluding that the Australian margin rules are comparable to the CFTC rules. As a result, Australian firms may rely on compliance with Australian margin rules to satisfy CFTC requirements.

In making this substituted compliance determination, Commission staff has conducted a principles-based, holistic analysis that focuses on regulatory outcomes rather than on a strict rule-by-rule comparison. This means that market participants can rely on one set of rules—in their totality—without fear that another jurisdiction will seek to selectively impose an additional layer of regulatory obligations.

This comparability determination is another example of how the Commission is committed to showing deference to foreign jurisdictions that have comparable regulatory and supervisory regimes. Such an approach is essential to ensuring strong and stable derivatives markets that support economic growth both within the United States and around the globe.

Appendix 3—Statement of Commissioner Brian D. Quintenz

I support the issuance of the Margin Comparability Determination for Australia (Determination). As I have noted previously, in order to avoid market fragmentation and an unworkable, complex patchwork of cross-border regulations, the Commission must apply a holistic, outcomes-based approach to substituted compliance. The Commission should assess comparability by determining if the totality of a legal regime's regulations, guidance, and supervisory approach achieve comparable outcomes to the CFTC's regime, instead of engaging in a rule-by-rule analysis for identical requirements.

I support today's Determination which applies such a holistic approach and respects the sovereignty of another jurisdiction to implement important G–20 reforms, such as margin, as it deems appropriate. Moreover, the Australian Prudential Regulation Authority (APRA) has already found CFTC margin regulations to be comparable to its own, so I am pleased that the determination adopted by the Commission today appropriately reciprocates that finding.

The outcomes-based approach of today's Determination appropriately accounts for modest regulatory differences between the CFTC and Australian margin regimes. For example, although CFTC rules require initial margin to be segregated at a third party custodian, the Australian framework allows initial margin to be segregated at a third party custodian or held in some other bankruptcy-remote manner, such as the use of a trust account. The end result of both custodial arrangements is the same, however, because in the event of bankruptcy, the posting party's assets are protected. The Determination today recognizes that other regimes can achieve the same overarching policy goals as the CFTC's regulations, although they do so by different means.

Like the recently amended Comparability Determination for Japan regarding margin for uncleared swaps, the Determination before us today also limits the flow of risk back to the United States. This is because under the Commission's Cross-Border Margin Rule, when a U.S. swap dealer enters into an uncleared swap with an Australian swap dealer or end-user, it is required to collect initial margin and variation margin must be exchanged. In the case of uncleared swaps between affiliated U.S. and non-U.S. swap dealers, variation margin is always required. In light of these safeguards, I do not believe that the Determination today will result in systemic risk being ''backdoored'' into the United States.

Since the Commission first began issuing comparability determinations in 2013, we have made substantial progress toward formalizing cooperative arrangements with our international counterparts through supervisory Memorandums of Understanding (''MOUs''). MOUs facilitate information sharing and cooperation between regulators with a shared interest in supervising cross-border firms. Importantly, we have an active MOU with APRA and I know we will continue to coordinate closely to ensure appropriate oversight over our respective regulated entities.[1] Through deference and engagement, the Commission can work alongside other regulators to ensure a well-regulated, liquid, global swaps market.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

I support today's Comparability Determination for Australia: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants (''Australia Determination'').

The Commission's regulations governing margin requirements for uncleared swaps (''CFTC Margin Rules'') help mitigate risks

[209] To facilitate this cooperation, the Commission has concluded memoranda of understanding with APRA with respect to the exchange of supervisory information. *See* the Commission's website at *http://www.cftc.gov/International/MemorandaofUnderstanding/index.htm*.

[210] *See* § 23.160(c)(3)(i).

[211] *See* § 23.160(c)(3)(ii). As discussed herein, the Commission's CFTC Margin Rule is based on the BCBS/IOSCO Framework; therefore, the Commission expects that the relevant foreign margin requirements would conform to such Framework at minimum in order to be deemed comparable to the Commission's corresponding margin requirements.

[212] *See* § 23.160(c)(3)(iii). *See also* § 23.160(c)(3)(iv) (indicating the Commission would also consider any other relevant facts and circumstances).

[1] Memorandum of Understanding, Cooperation and the Exchange of Information Related to the Supervision of Covered Firms (April 13, 2015), *https://www.cftc.gov/idc/groups/public/@internationalaffairs/documents/file/cftc-apra-supervisorymou041320.pdf*.

posed by uncleared swaps to swap dealers, major swap participants, and the overall U.S. financial system.[1] In this regard, the CFTC Margin Rules—and other rules around the world requiring margin for uncleared swaps—are a fundamental component of the regulatory reforms adopted in the wake of the 2008 financial crisis.

In 2016, the CFTC adopted its cross-border margin rule to permit swap dealers and major swap participants located in non-U.S. jurisdictions to comply with the CFTC's Margin Rules by meeting the similar rules of their home jurisdiction *if* the Commission has deemed those rules comparable.[2] This framework for ''substituted compliance'' supports the global nature of the swaps market and conforms to the directive in the Dodd-Frank Act for the Commission to consult and coordinate with international regulators to establish consistent international standards for the regulation of swaps entities and activities.[3] The substituted compliance framework helps reduce duplicative and overlapping regulatory requirements where effective comparable regulation exists, facilitates the ability of U.S. market participants to compete in foreign jurisdictions, and is consistent with the principle of international comity.

The CFTC's cross-border margin rule establishes an outcomes-based approach that considers a number of factors and does not require strict conformity with the CFTC Margin Rules. As I have said before, a comparability determination should not be based solely on the home country's written laws and regulations, but also consider the country's broader system of regulation, including oversight and enforcement. In addition, the nature of the other country's relevant markets may be taken into account. Finally, in considering these issues, the Commission should keep in mind the principle of comity: The reciprocal recognition of the legislative, executive, and judicial acts of another jurisdiction.[4]

The Australia Determination finds the margin requirements for uncleared swaps under Australian laws, regulations, standards, and other materials comparable in outcome to the CFTC's Margin Rules. The CFTC staff engaged with staff of the Australian Prudential Regulation Authority (''APRA''), and evaluated prudential standards and other materials provided by APRA to develop an understanding of APRA's regulatory objectives, the products and entities subject to margin requirements, the treatment of inter-affiliate swaps, and other aspects of APRA's margin rules. The in-depth analysis outlined in today's Australia Determination reflects a holistic understanding by the Commission of APRA's margin rules and its prudential oversight practices. The analysis also observes that the CFTC Margin Rules and APRA's margin requirements for uncleared swaps are not identical. In a number of instances, APRA's specific requirements are not as comprehensive as the CFTC's Margin Rules. However, the determination explains how mitigating factors—such as certain of APRA's risk management requirements and differences in the size of the two countries' swap markets and of the market participants in them—support a determination that the two systems of regulation have similar outcomes.

For example, unlike the CFTC Margin Rule, APRA only requires that variation margin be exchanged between counterparties whose average notional amount of uncleared swaps exceeds a certain threshold. However, as noted in the determination, Australia's non-centrally cleared swaps market is highly concentrated in large entities that exceed that threshold, and the large majority of transactions would therefore be subject to variation margin. Furthermore, as noted in the determination, if an Australian entity that would otherwise be subject to the CFTC Margin Rules, but for substituted compliance, enters into swaps with any U.S. entity covered by the CFTC Margin Rules, then both entities are required to exchange margin under our rules. This reduces the potential for risks from swap activities overseas finding their way to the United States.

As with other jurisdictions where the legal and regulatory structure does not mirror our own, and the substituted compliance determinations are based on the overall outcome of the regulatory system, subsequent monitoring may be appropriate to confirm that our initial understanding of the regulatory structure and the expected outcomes is accurate. Accordingly, I encourage the CFTC staff to periodically assess the implementation of this determination to confirm our expectations are accurate.

I thank the CFTC staff for their thorough work on this determination and appreciate their responsiveness to our comments and suggestions. I would also like to thank my fellow Commissioners for their collaboration in helping us reach this positive outcome.

[1] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016).

[2] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants–Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376, at section 752 (2010).

[4] *See* Restatement (Third) of The Foreign Relations Law in the United States, section 101 (1987) (Am. Law Inst. 2019); *https://www.law.cornell.edu/wex/comity.*

[FR Doc. 2019–06319 Filed 4–2–19; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 34

RIN 1505–AC55

Gulf Coast Restoration Trust Fund

AGENCY: Office of the Fiscal Assistant Secretary, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury) is issuing a final rule to revise the method by which the statutory three percent limitation on administrative costs (referred to throughout this notice as the ''three percent administrative cost cap'') is applied under the Direct Component, Comprehensive Plan Component, and Spill Impact Component under the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012, (RESTORE Act or Act). This revision will help ensure that the Gulf Coast States and localities have the necessary funding to efficiently and effectively oversee and manage projects and programs for ecological and economic restoration of the Gulf Coast Region while ensuring compliance with the statutory three percent administrative cost cap.

DATES: Effective May 3, 2019.

FOR FURTHER INFORMATION CONTACT: The Office of Gulf Coast Restoration at *restoreact@treasury.gov,* or Laurie McGilvray, Program Director, at 202–622–7340.

SUPPLEMENTARY INFORMATION:

I. Background

The RESTORE Act makes funds available for the ecological and economic restoration of the Gulf Coast Region, and certain programs with respect to the Gulf of Mexico, through a trust fund in the Treasury of the United States known as the Gulf Coast Restoration Trust Fund (trust fund). The trust fund holds 80 percent of the administrative and civil penalties paid under the Federal Water Pollution Control Act after July 6, 2012, in connection with the *Deepwater Horizon* Oil Spill.

Treasury administers two of the five components established by the Act, the Direct Component and Centers of Excellence Research Grants Program. The Act also established an independent Federal entity, the Gulf Coast Ecosystem Restoration Council (Council), to administer two components of the Act, the Comprehensive Plan Component and the Spill Impact Component. The National Oceanic and Atmospheric Administration (NOAA) administers one component, the NOAA RESTORE Act Science Program. This final rule only affects grants under the Direct Component, Comprehensive Plan Component, and Spill Impact Component of the Act, which are collectively referred to throughout this notice as the three ''components.''

On December 14, 2015, Treasury promulgated final regulations concerning the RESTORE Act, codified at 31 CFR part 34, which became