(i) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) AgustaWestland Bollettino Tecnico No. 109–147, dated March 25, 2015.

(ii) AgustaWestland Bollettino Tecnico No. 109EP–143, dated March 25, 2015.

(iii) AgustaWestland Bollettino Tecnico No. 109K–68, dated March 25, 2015.

(iv) AgustaWestland Bollettino Tecnico No. 109S–067, dated March 25, 2015.

(v) AgustaWestland Bollettino TecnicoNo. 109SP–094, dated March 25, 2015.

(3) For Agusta S.p.A. service information identified in this final rule, contact AgustaWestland, Product Support Engineering, Via del Gregge, 100, 21015 Lonate Pozzolo (VA) Italy, ATTN: Maurizio D'Angelo; telephone 39–0331–664757; fax 39–0331–664680; or at *http://www.agustawestland.com/technical-bulletins.*

(4) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy, Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Fort Worth, Texas, on September 1, 2016.

Lance T. Gant,

Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2016–21707 Filed 9–14–16; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of comparability determination for margin requirements for uncleared swaps under the laws of Japan.

SUMMARY: The following is the analysis and determination of the Commodity Futures Trading Commission (''Commission'') regarding a request by the Japan Financial Services Agency (''JFSA'') that the Commission determine that laws and regulations applicable in Japan 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, with one exception, the Commission has found the margin requirements for uncleared swaps under the laws and regulations of Japan comparable to those under the Commodity Exchange Act (''CEA'') and Commission regulations.

DATES: This determination is effective September 15, 2016.

FOR FURTHER INFORMATION CONTACT: Eileen T. Flaherty, Director, 202–418–5326, *eflaherty@cftc.gov,* or Frank N. Fisanich, Chief Counsel, 202–418–5949, *ffisanich@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 Prudential Regulator (collectively, ''Covered Swap Entities'' or ''CSEs'').[2] The Commission published final margin requirements for such CSEs in January 2016 (the ''Final Margin Rule'').[3]

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 (hereinafter, the ''Cross-Border Margin Rule'').[4] The Cross-Border Margin Rule sets out the circumstances under which a CSE is allowed to satisfy the requirements under the Margin Rule by complying with comparable foreign margin requirements (''substituted compliance''); offers certain CSEs a limited exclusion from the Commission's margin requirements; and outlined a framework for assessing whether a foreign jurisdiction's margin requirements are comparable to the Final Margin Rule (''comparability determinations''). The Commission promulgated the Cross-Border Margin Rule after close consultation with the Prudential Regulators and in light of comments from and discussions with market participants and foreign regulators.[5]

On June 17, 2016, the JFSA (the ''applicant'') submitted a request that the Commission determine that laws and regulations applicable in Japan provide a sufficient basis for an affirmative finding of comparability with respect to the Final Margin Rule. The applicant provided Commission staff with an updated submission on July 26, 2016. On August 18, 2016, the application was further supplemented with corrections and additional materials. The Commission's analysis and comparability determination for Japan regarding the Final Margin Rule is detailed below.

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[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 Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable 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 Prudential Regulators published final margin requirements in November 2015. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (''Prudential Regulators' Final Margin Rule'').

[3] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. *See* 17 CFR 23.150 through 23.159, and 23.161. The Commission's regulations are found in chapter I of Title 17 of the Code of Federal Regulations, 17 CFR 1 *et. seq.*

[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 Cross-Border Margin Rule, which became effective August 1, 2016, is codified in part 23 of the Commission's regulations. *See* 17 CFR 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 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 release, 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.*

II. Cross-Border Margin Rule

A. Regulatory Objective of Margin Requirements

The regulatory objective of the Final 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 incur 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 Cross-Border Margin Rule provides that, subject to certain findings and conditions, a CSE is permitted to satisfy the requirements of the Final 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]

Pursuant to the Cross-Border Margin Rule, any CSE that is eligible for substituted compliance under § 23.160 [10] and any foreign regulatory authority that has direct supervisory authority over one or more CSEs and that is responsible for administering the relevant foreign jurisdiction's margin requirements may apply to the Commission for a comparability determination.[11]

The Cross-Border Margin Rule requires that applicants for a comparability determination provide copies of the relevant foreign jurisdiction's margin requirements [12] and descriptions of their objectives,[13] how they differ from the BCBS/IOSCO Framework,[14] and how they address the elements of the Commission's margin requirements.[15] The applicant must 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.[16]

C. Standard of Review for Comparability Determinations

The 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; [17] whether the relevant foreign jurisdiction's margin requirements achieve comparable outcomes to the Commission's corresponding margin requirements; [18] and the ability of the relevant regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's margin requirements.[19]

This process reflects an outcome-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

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

[7] *See* Capital Requirements for Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011).

[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 45300–45301 (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 WGMR 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* 17 CFR 23.160(c)(1)(i).

[11] *See* 17 CFR 23.160(c)(1)(ii).

[12] *See* 17 CFR 23.160(c)(2)(v).

[13] *See* 17 CFR 23.160(c)(2)(i).

[14] *See* 17 CFR 23.160(c)(2)(iii). *See also* 17 CFR 23.160(a)(3) (defining ''international standards'' as based on the BCBS–ISOCO Framework).

[15] *See* 17 CFR 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.

[16] *See id.*

[17] *See* 17 CFR 23.160(c)(3)(i).

[18] *See* 17 CFR 23.160(c)(3)(ii). As discussed above, the Commission's Final 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.

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

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.[20] Accordingly, where relevant to the Commission's comparability analysis, the BCBS/IOSCO Framework is discussed to explain certain internationally agreed concepts and, where appropriate, used as a baseline to compare provisions of the Final Margin Rule with those of the foreign jurisdiction.

The Cross-Border Margin Rule provided a detailed discussion regarding the facts and circumstances under which substituted compliance for the requirements under the Final 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 Cross-Border Margin Rule with respect to the CSE's particular status and circumstances.

D. Conditions to Comparability Determinations

The Cross-Border Margin Rule provides that the Commission may impose terms and conditions it deems appropriate in issuing a comparability determination.[21] 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. 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 will generally rely on an applicant's description of the laws and regulations of the foreign jurisdiction in making its comparability determination. The Commission considers an application to be a representation by the applicant that the laws and regulations submitted are in full force and effect, 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 [23] of CSEs [24] in the relevant jurisdictions.[25] Further, the Commission expects that an applicant would notify the Commission of any material changes to information submitted in support of a comparability determination (including, but not limited to, changes in the relevant supervisory or regulatory regime) as, depending on the nature of the change, the Commission's comparability determination may no longer be valid.[26]

III. Margin Requirements for Swaps Activities in Japan

As represented to the Commission by the applicant, margin requirements for swap activities in Japan are governed by the Financial Instruments and Exchange Act, No. 25 of 1948 (''FIEA''), covering Financial Instrument Business Operators (''FIBOs'') and Registered Financial Institutions (''RFIs''), which include regulated banks, cooperatives, insurance companies, pension funds, and investment funds. The Japanese Prime Minister delegated broad authority to implement these laws to the JFSA. Pursuant to this authority, the JFSA has promulgated the Cabinet Office Ordinance,[27] Supervisory Guidelines,[28] and Public Notifications.[29]

These requirements supplement the requirements of FIEA with a more proscriptive direction with respect to margin requirements.[30]

Pursuant to Article 29 of the FIEA, any person that engages in trade activities that constitute ''Financial Instruments Business''—which, among other things, includes over-the-counter transactions in derivatives (''OTC derivatives'') or intermediary, brokerage (excluding brokerage for clearing of securities) or agency services therefor [31]—must register under the

[20] The Final 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 Final 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* Final Margin Rule, 81 FR at 644. In addition, the definition of uncleared swaps was broadened to include DCOs 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.'').

[21] *See* 17 CFR 23.160(c)(5).

[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 United States Department of Justice, or any applicable prudential regulator. *See* 17 CFR 23.203, 23.606. The Commission further expects that prompt access to books and records and the ability to inspect and examine a non-U.S. CSE will be a condition to any comparability determination.

[23] ''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.

[24] 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.

[25] The Commission has provided the relevant foreign regulator(s) with opportunities to review and correct the applicant's description of such laws and regulations on which the Commission will base its comparability determination. 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.

[26] 78 FR at 45345.

[27] Cabinet Office Ordinance on Financial Instruments Business (Cabinet Office Ordinance No. 52 of August 6, 2007), including supplementary provisions (''FIB Ordinance'').

[28] Comprehensive Guideline for Supervision of Major Banks, etc., Comprehensive Guidelines for Supervision of Regional Financial Institutions, Comprehensive Guideline for Supervision of Cooperative Financial Institutions, Comprehensive Guideline for Supervision of Financial Instruments Business Operators, etc., Comprehensive Guidelines for Supervision of Insurance Companies, and Comprehensive Guidelines for Supervision of Trust Companies, etc. (together, ''Supervisory Guideline'').

[29] JFSA Public Notification No. 15 of March 31, 2016 (''JFSA Public Notice No. 15''); JFSA Public Notification No. 16 of March 31, 2016 (''JFSA Public Notice No. 16''); and JFSA Public Notification No. 17 of March 31, 2016 (''JFSA Public Notice No. 17'').

[30] Collectively, FIEA, FIB Ordinance, Supervisory Guideline, and JFSA Public Notifications are referred to herein as the ''JFSA's margin rules,'' ''JFSA's margin regime,'' ''JFSA's margin requirements'' or the ''laws of Japan.''

[31] *See* Article 2(8)(iv) of the FIEA.

FIEA as a FIBO. Banks that conduct specified activities in the course of trade, including OTC derivatives must register under the FIEA as RFIs pursuant to Article 33–2 of the FIEA. Banks registered as RFIs are required to comply with relevant laws and regulations for FIBOs regarding specified activities. Failure to comply with any relevant laws and regulations, Supervisory Guidelines, or Public Notifications would subject the applicant to potential sanctions or corrective measures.

All current CSEs established under the laws of Japan are registered in Japan as RFIs or FIBOs under the supervision of the JFSA.

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 Final Margin Rule and a description of such requirements. Immediately following a description of the requirement(s) of the Final 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 Final 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 Final 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 incur 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.[32]

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

2. JFSA Statement of Regulatory Objectives

The JFSA states that the objectives of margin requirements are the reduction of systemic risk and promotion of central clearing, as the BCBS/IOSCO Framework defines. To ensure that these objectives are achieved, the laws and regulations of Japan prescribe that financial institutions shall establish an appropriate framework for margin requirements, in line with the BCBS/IOSCO Framework. In addition, the JFSA intends to improve the risk management capabilities of financial institutions through its margin requirements and accordingly, JFSA's Supervisory Guidelines explicitly prescribe that financial institutions are required to establish a framework for margin requirements in order to manage counterparty credit risk.

B. Products Subject to Margin Requirements

The Commission's Final Margin Rule applies only to uncleared swaps. Swaps are defined in section 1a(47) of the CEA [33] and Commission regulations.[34] ''Uncleared swap'' is defined for purposes of the Final Margin Rule in Commission regulation § 23.151 to mean 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.[35]

In Japan, the JFSA's margin rules apply to ''non-cleared OTC derivatives,'' which are defined to mean:

> OTC derivatives except for those cases where Financial Instruments Clearing Organizations (including an Interoperable Clearing Organization in cases where the Financial Instruments Clearing Organization conducts Interoperable Financial Instruments Obligation Assumption Business; hereinafter the same shall apply in paragraph (11), item (i)(c)1.) or a Foreign Financial Instruments Clearing Organization meets the obligation pertaining to OTC derivatives or cases designated by Commissioner of the Financial Services Agency prescribed in Article 1–18–2 of the Order for Enforcement of the [FIEA].[36]

[33] 7 U.S.C. 1a(47).

[34] *See, e.g.,* § 1.3(xxx), 17 CFR 1.3(xxx).

[35] 17 CFR 23.151.

[36] *See* Cabinet Order No. 321 of 1965; *See also* Article 123(1)(xxi)–5 of the FIB Ordinance. ''OTC derivative'' is defined in Article 2(22) of FIEA to mean:

> [T]he following transactions which are conducted in neither a Financial Instruments Market nor a Foreign Financial Instruments Market (except those specified by a Cabinet Order as those for which it is found not to hinder the public interest or protection of investors when taking into account its content and other related factors).
>
> (i) Transactions wherein the parties thereto promise to deliver or receive Financial Instruments (excluding those listed in Article 2(24)(v); hereinafter the same shall apply in this paragraph) or consideration for them at a fixed time in the future, and, when the resale or repurchase of the underlying Financial Instruments or other acts specified by a Cabinet Order is made, settlement thereof may be made by paying or receiving the differences;
>
> (ii) transactions wherein the parties thereto promise to pay or receive the amount of money calculated based on the Agreed Figure and the Actual Figure or any other similar transactions; and
>
> (iii) transactions wherein the parties thereto promise that one of the parties grants the other party an option to effect a transaction listed in the following items between the parties only by unilateral manifestation of the other party's intention, and the other party pays consideration for such option, or any other similar transactions:
>
> (a) Sales and purchase of Financial Instruments (excluding those specified in item (i)); or
>
> (b) any transaction listed in the preceding two items or items (v) to (vii).
>
> (iv) transactions wherein the parties thereto promise that one of the parties grants the other party an option to, only by unilateral manifestation of his/her intention, effect a transaction wherein the parties promise to pay or receive the amount of money calculated based on the difference between a figure which the parties have agreed in advance to use as the Agreed Figure of the Financial Indicator when such manifestation is made and the Actual Figure of the Financial Indicator at the time of such manifestation, and the other party pays the consideration for such option, or any other similar transactions;
>
> (v) transactions wherein the parties mutually promise that, using the amount the parties have agreed to as the principal, one of the parties will pay the amount of money calculated based on the rate of change in the agreed period of the interest rate, etc. of the Financial Instruments (excluding those listed in Article 2(24)(iii)) or of a Financial Indicator agreed with the other party, and the other party will pay the amount of money calculated based on the rate of change in the agreed period of the interest rate, etc. of the Financial Instruments (excluding those listed in Article 2(24)(iii)) or of a Financial Indicator agreed with the former party (including transactions wherein the parties promise that, in addition to the payment of such amounts, they will also pay, deliver or receive the amount of money or financial instruments that amounts to the agreed principal), or any other similar transactions;
>
> (vi) transactions wherein one of the parties pays money, and the other party, as the consideration therefor, promises to pay money in cases where a cause agreed by the parties in advance and listed in the following items occurs (including those wherein one of the parties promises to transfer the Financial Instruments, rights pertaining to the Financial Instruments or monetary claim (excluding claims that are Financial Instruments or rights pertaining to the Financial Instruments), but excluding those listed in item (ii) to the preceding item), or any other similar transactions; or
>
> (a) a cause pertaining to credit status of a juridical person or other similar cause as specified by a Cabinet Order; or
>
> (b) a cause which it is impossible or extremely difficult for either party to exert his/her influence on the occurrence of and which may have serious influence on business activities of the parties or other business operators as specified by a Cabinet Order (excluding those specified in (a)).
>
> (vii) in addition to transactions listed in the preceding items, transactions which have an economic nature similar to these transactions and are specified by a Cabinet Order as those for which it is found necessary to secure the public interest or protection of investors.

As represented by the applicant, however, Japan has separate definitions of ''OTC Derivatives'' and ''OTC Commodity Derivatives.'' [37] Japan also has separate margin rules for OTC Commodity Derivatives that are administered by the Japan Ministry of Economy, Trade, and Industry (METI) and the Japan Ministry of Agriculture, Forestry, and Fisheries (MAFF). METI/MAFF finalized their margin requirements for non-cleared OTC Commodity Derivatives on August 1, 2016.[38] While the margin rules for non-cleared OTC Derivatives and OTC Commodity Derivatives are separate, the METI/MAFF non-cleared OTC Commodity Derivative rules incorporate by reference the corresponding JFSA margin rules,[39] and thus, for all purposes material to the determinations below, the METI/MAFF rules and JFSA margin rules are identical. Accordingly, for ease of reference, the discussion below refers only to the JFSA and the JFSA margin rules, but such discussion is equally applicable to METI/MAFF and the METI/MAFF non-cleared OTC Commodity Derivative margin rules. Further, CSEs may rely on the determinations set forth below regarding non-cleared OTC Derivatives subject to the JFSA margin rules equally with respect to non-cleared OTC Commodity Derivatives subject to the METI/MAFF margin rules.

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 Japan's definitions of ''OTC Derivative,'' ''OTC Commodity Derivative,'' ''non-cleared OTC Derivative,'' and ''non-cleared OTC Commodity 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-cleared OTC Derivative as defined under the laws of Japan. In such cases, the Final Margin Rule would apply to the transaction but the JFSA's margin rules would not apply and thus, substituted compliance would not be available. The CSE could not choose to comply with the JFSA's margin rules [40] in place of the Final Margin Rule.

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

C. Entities Subject to Margin Requirements

As stated previously, the Commission's Final Margin Rule and Cross-Border Margin Rule apply only to CSEs, *i.e.,* SDs and MSPs registered with the Commission for which there is not a Prudential Regulator.[41] Thus, only such CSEs may rely on the determinations herein for substituted compliance, while CSEs for which there is a Prudential Regulator must look to the determinations of the Prudential Regulators. The Commission has consulted with the Prudential Regulators in making these determinations.

CSEs are not required to collect and/or post margin with every uncleared swap counterparty. Under the Final Margin Rule, the initial margin obligations of CSEs apply only to uncleared swaps with counterparties that meet the definition of ''covered counterparty'' in § 23.151.[42] Such definition provides that a ''covered counterparty'' is a counterparty that is a financial end user [43] with material

[37] ''OTC Commodity Derivative'' is defined in Article 2, Paragraph 14 of the Commodity Derivatives Act (Act No. 239 of August 5, 1950) to mean any of the following transactions not executed on any Commodity Market, Foreign Commodity Market, or Financial Instruments Exchange Market (*i.e.,* Financial Instruments Exchange Markets prescribed in Article 2, paragraph (17) of the FIEA (excluding transactions carried out through the facilities listed in each of the items of Article 331 of the Commodity Derivatives Act):

(i) Buying and selling transactions where parties agree to transfer between them a Commodity and the consideration therefor at a certain time in the future and where a resale or repurchase of the Commodity subject to said buying and selling can be settled by exchanging the difference;

(ii) Transactions where parties agree to transfer between them money calculated on the basis of the difference between the Contract Price and the Actual Price or other transactions similar thereto;

(iii) Transactions where parties agree to transfer between them money calculated on the basis of the difference between the Agreed Figure and the Actual Figure or other transactions similar thereto;

(iv) Transactions where parties agree that, on the manifestation of intention by one of the parties, the counterparty grants said party a right to establish any of the following transactions between the parties and said party pays the consideration therefor or other transactions similar thereto:

(a) Transactions set forth in item (i);

(b) Transactions set forth in item (ii);

(c) Transactions set forth in the previous item;

(d) Transactions set forth in item (vi);

(v) Transactions where parties agree that the counterparty grants said party a right to establish between the parties a transaction where parties transfer between them money calculated on the basis of the difference between the price agreed between the parties in advance as a price of a Commodity pertaining to the manifestation of intention by one of the parties (including a numerical value that expresses the price level of a Commodity and a numerical value calculated otherwise on the basis of the price of a Commodity; hereinafter the same shall apply in this item) or the numerical value agreed between the parties in advance as a Commodity Index and the actual price of said Commodity or the actual numerical value of said Commodity Index prevailing at the time of said manifestation of intention and said party pays the consideration therefor, or other transactions similar thereto;

(vi) Transactions where parties mutually agree, with respect to a Commodity for which the volume is determined by the parties, that one party will pay to the counterparty money calculated on the basis of the rate of change in the price of said Commodity or a Commodity Index for a period agreed between the parties in advance and that the latter will pay to the former money calculated on the basis of the rate of change in the price of said Commodity or a Commodity Index for a period agreed between the parties in advance, or other transactions similar thereto;

(vii) In addition to transactions listed in the preceding items, transactions with an economic nature similar thereto that are specified by Cabinet Order as those for which it is considered necessary to secure the public interests or protection of parties thereto.

[38] *See* Ministry of Agriculture, Forestry and Fisheries/Ministry of Economy, Trade and Industry Public Notification No. 2 of August 1, 2016; Ordinance for Enforcement of the Commodity Derivatives Act (Ordinance of the Ministry of Agriculture, Forestry and Fisheries and the Ministry of Economy, Trade and Industry No. 3 of February 22, 2005); Supplementary Provisions of Ordinance for Enforcement of the Commodity Derivatives Act No. 3 of February 22, 2005; and Basic Supervision Guidelines of Commodity Derivatives Business Operators, etc.

[39] *See id.*

[40] Or the METI/MAFF margin rules, as discussed above.

[41] *See* 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a Prudential Regulator must meet the margin requirements for uncleared swaps established by the applicable 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 Prudential Regulators published final margin requirements in November 2015. *See* Prudential Regulators' Final Margin Rule, 80 FR 74840 (Nov. 30, 2015).

[42] *See* 17 CFR 23.152.

[43] *See* definition of ''Financial end user'' in 17 CFR 23.150.

swaps exposure [44] or a swap entity [45] that enters into a swap with a CSE. The variation margin obligations of CSEs under the Final Margin Rule apply more broadly. Such obligations apply to counterparties that are swap entities and all financial end users, not just those with ''material swaps exposure.'' [46]

As represented by the JFSA, the JFSA's margin rules cover all types of financial institutions, such as prudentially regulated banks, cooperatives, securities companies, insurance companies, pension funds, and investment funds.[47] However, similar to the Final Margin Rule's definitions of ''covered counterparty'' and ''financial end-user,'' the JFSA's margin regime does not apply to non-financial institutions nor to financial institutions below certain thresholds of activity in OTC derivatives.[48] As discussed above, CSEs are financial institutions for purposes of the JFSA's margin rules.

Given the definitional differences and differences in activity thresholds with respect to the scope of application of the Final Margin Rule and the JFSA's margin requirements, the Commission notes the possibility that the Final Margin Rule and the JFSA's margin rules may not apply to every uncleared swap that a CSE may enter into with a Japanese counterparty. For example, it appears possible that a financial end user with ''material swaps exposure'' would meet the definition of ''covered counterparty'' under the Final Margin Rule (and thus the initial and variation margin requirements) while at the same time fall under the JFSA's OTC Derivative activity threshold and be subject only to variation margin requirements. It may also be possible that the Final Margin Rule's definition of ''financial end-user'' could capture an entity that is a non-financial end-user under the JFSA's margin regime.

With these differences in scope in mind, the Commission reiterates that no CSE may rely on substituted compliance unless it and its transaction are subject to both the Final Margin Rule and the JFSA's margin rules; [49] a CSE may not voluntarily comply with the JFSA's margin rules where such law does not otherwise apply. Likewise, a CSE that is not seeking to rely on substituted compliance should understand that the JFSA's margin rules may apply to its counterparty irrespective of the CSE's decision to comply with the Final Margin Rule.

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.[50]

1. Commission Requirements for Treatment of Inter-Affiliate Transactions

The Commission determined through its Final 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: (1) 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; (2) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (3) for a company that is not subject to such principles or standards, if consolidation as described in (1) or (2) would have occurred if such principles or standards had applied.[51]

With respect to swaps between margin affiliates, the Final Margin Rule, with one exception explained below, provides that a CSE is not required to collect initial margin [52] 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.[53]

In an exception to the foregoing general rule, the Final 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.[54] This provision is an important anti-evasion measure. It is designed to prevent the potential use of affiliates to avoid collecting initial margin from third parties. For example, suppose that an unregistered non-U.S. affiliate of a CSE enters into a swap with a financial end user and does not collect initial margin. 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 in such cases. The rule would

[44] *See* 17 CFR 23.150, which states that ''material swaps exposure'' for an entity 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 17 CFR 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.

[45] ''Swap entity'' is defined in 17 CFR 23.150 as a person that is registered with the Commission as a swap dealer or major swap participant pursuant to the Act.

[46] *See* 17 CFR 23.153.

[47] *See* FIB Ordinance Article 123(10) and (11). Specifically, ''covered entities'' under the JFSA's margin rules include Type 1 FIBOs, RFIs, insurance companies that are RFIs and trust accounts that are RFIs. Covered entities also include Shoko Chukin Bank, the Development Bank of Japan, Shinkin Central Bank, and the Norinchukin Bank. Covered entities must post and collect initial and variation margin to and from other covered entity counterparties.

[48] *See* FIB Ordinance, Article 123(10)(iv) and (11)(iv). In general, the threshold for variation margin is whether the average total amount of the notional principal of OTC Derivatives for a one-year period from April two years before the year in which calculation is required (or one year if calculated in December) exceeds JPY 300 bn. In general, the threshold for initial margin is whether the average month-end aggregate notional amount of non-cleared OTC derivatives, non-cleared OTC commodity derivatives, and physically-settled FX forwards and FX swaps of a consolidated group (excluding inter-affiliate transactions) for March, April, and May one year before the year in which calculation is required exceeds JPY 1.1 trillion. No margin is required for OTC Derivatives with non-covered entities (*i.e.,* non-financial end-users). However, FIBOs and RFIs that fall below the threshold for variation margin are still required by the Supervisory Guidelines to establish appropriate risk management policies and procedures that require exchange of variation margin and appropriate documentation. *See* Supervisory Guideline Section IV—2–4(4)(i).

[49] Or the METI/MAFF margin rules, as discussed above.

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

[51] *See* 17 CFR 23.151.

[52] ''Initial margin'' is margin exchanged to protect against a potential future exposure and is defined in 17 CFR 23.151 to mean the collateral, as calculated in accordance with 17 CFR 23.154 that is collected or posted in connection with one or more uncleared swaps.

[53] *See* 17 CFR 23.159(a).

[54] *See* 17 CFR 23.159(c).

further require that the CSE collect initial margin even if the affiliate routed the trade through one or more other affiliates.[55]

The Commission has stated 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. Such Framework, for example, states that the exchange of initial and variation margin by affiliated parties ''is not customary'' and that initial margin in particular ''would likely create additional liquidity demands.'' [56] With an understanding that many authorities, such as those in Europe and Japan, are 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 other jurisdictions.

The Final Margin Rule however, does require CSEs to exchange variation margin with affiliates that are SDs, MSPs, or financial end users (as is also required under the Prudential Regulators' rules).[57] 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. Requirement for Treatment of Inter-Affiliate Derivatives Under the Laws of Japan

Under Article 123(10) and (11) of Japan's FIB Ordinance, the JFSA's margin requirements do not apply to OTC derivative transactions between counterparties that are ''Consolidated Companies'' as defined in the Ministry of Finance of Japan's Ordinance on Terminology, Forms, and Preparation Methods of Consolidated Financial Statements.[58] Such ''Consolidated Companies'' are defined generally in keeping with the Commission's definition of ''margin affiliate'' for purposes of the Final Margin Rule, discussed above.

However, in mitigation of not requiring margin between Consolidated Companies, the JFSA has explained that its capital requirements for FIBOs/RFIs apply not only on a consolidated basis but also on individual, non-consolidated basis. Thus, a CSE that is a FIBO/RFI is required to hold enough capital to cover exposures under non-cleared OTC derivatives to individual entities in the same consolidated group. Such capital requirement can be reduced if the CSE collects initial and/or variation margin for such inter-affiliate transactions.

In addition to this, the JFSA has explained that its supervision of FIBOs/RFIs is a principles-based approach, and, in accordance with this approach, the JFSA's ''Guideline for Financial Conglomerates Supervision'' requires financial holding companies and parent companies to measure, monitor, and manage the risks caused by inter-affiliate transactions. Further, the JFSA's ''Inspection manual for financial holding companies'' requires financial holding companies to establish a robust governance framework and risk management system at a centralized group level, that would, in operation, require management of the risks caused by inter-affiliate transactions. Based on the foregoing, the JFSA has emphasized that it is not necessary for it to require the risk management procedures of FIBOs/RFIs applicable to inter-affiliate transactions to rely on margin requirements only. Rather, taking into account capital requirements and the JFSA's supervision and inspection programs, JFSA represents that it ensures the safety and soundness of FIBOs/RFIs as a whole.

3. Commission Determination

Having compared the outcomes of the JFSA's margin requirements applicable to inter-affiliate derivatives to the outcomes of the Commission's corresponding margin requirements applicable to inter-affiliate swaps, the Commission finds that the treatment of inter-affiliate transactions under the Final Margin Rule and under the JFSA's margin requirements are not comparable.

A CSE entering into a transaction with a consolidated affiliate under the Final Margin Rule would be required to exchange variation margin in accordance with §§ 23.151 through 23.161, and in certain circumstances, collect initial margin in accordance with § 23.159(c). Where such CSE and its counterparty are also subject to the JFSA's margin requirements, and qualify as ''Consolidated Companies,'' the JFSA's margin requirements would not require the CSE to post or collect any form of margin.

While not disputing the JFSA's explanation that its general oversight of the risk management practices of Consolidated Companies adequately addresses the risk of inter-affiliate transactions, the Commission reiterates its view that the inter-affiliate margin requirements are an important anti-evasion measure designed to prevent the potential use of affiliates to avoid collecting initial margin from third parties.

For this reason, the Commission finds that the outcome under the JFSA's margin rules is not comparable to the outcome under the Final Margin Rule and accordingly CSEs must comply with the Final Margin Rule with respect to inter-affiliate 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 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

[55] *See id.*

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

[57] *See* 17 CFR 23.159(b), Prudential Regulators' Final Margin Rule, 80 FR at 74909.

[58] *See* Ordinance of the Ministry of Finance No. 28 of October 30, 1976.

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 [59] 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 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 Final 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).[60]
- 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.[61]
- 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.[62]
- 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.[63]
- CSEs shall obtain the written approval of the Commission or a registered futures association to use a model to calculate the initial margin required.[64]
- An initial margin model may calculate initial margin for a netting portfolio of uncleared swaps covered by the same eligible master netting agreement.[65]
- 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.[66]
- 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.[67]
- 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

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

[60] *See* Final Margin Rule, 81 FR at 683.

[61] *See* 17 CFR 23.154(b)(2)(i).

[62] *See* 17 CFR 23.154(a)(1)(i) and (ii).

[63] *See* 17 CFR 23.154(b)(2)(ii).

[64] *See* 17 CFR 23.154(b)(1)(i).

[65] *See* 17 CFR 23.154(b)(2)(v).

[66] *See id.*

[67] *See id.*

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.[68]

• 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)(i)[69] 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.[70]

• 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).[71]

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 Final 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.[72]

• 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.[73]

• 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.[74]

• 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).[75]

3. Japan Requirements for Calculation of Initial Margin

• Potential future exposure is margin to be posted as deposits corresponding to a reasonable estimate of the amount of expenses or losses that may occur in the future with regard to non-cleared OTC derivatives.[76]

• In cases where potential future exposure cannot be calculated by a method of using a quantitative calculation model, FIBOs/RFIs are required to calculate potential future exposure for the non-cleared OTC derivatives by a method of using a standardized margin schedule.[77]

• When calculating potential future exposure using a quantitative calculation model, FIBOs/RFIs shall use a one-tailed 99% confidence interval and set a margin period of risk for non-cleared OTC derivatives of not less than 10 business days.[78]

• Where calculating potential future exposure by a method of using a quantitative calculation model, FIBOs/RFIs must use historical data which satisfies the following requirements for each category of non-cleared OTC derivatives for which any of commodity, credit, equity, and foreign exchange or interest rate is the major cause of changes in mark-to-market: (i) Based on an observation period of at least one year and not exceeding five years; (ii) to contain a stress period; (iii) to contain the latest market data; (iv) to be equally weighted; and (v) to be updated at least once a year.[79]

• The quantitative calculation models of FIBOs/RFIs must capture non-linear risks, basis risks, and material risks that may have impact on the value of the exposure.[80]

• FIBOs/RFIs must file notice with the JFSA of an intention to use a quantitative calculation model to estimate an amount of potential future exposure, including a description of the model's methodology and structure, the model's compliance with JFSA margin rules, and the policies and procedures of a ''model control unit''.[81]

• FIBOs/RFIs must conduct back testing of the quantitative calculation model against changes in the mark-to-market value of non-cleared OTC derivatives that occurred during a period equivalent to a holding period of not less than 10 business days.[82]

• When calculating potential future exposure for non-cleared OTC derivatives only by a method of using a quantitative calculation model, FIBOs/RFIs may conduct a calculation for each master netting agreement meeting the definition of such as prescribed in Article 2, paragraph (5) of the Act on Close-out Netting of Specified Financial Transaction Conducted by Financial Institutions. (Act No. 108 of 1998).[83]

• Potential future exposure calculated by FIBOs/RFIs by a method of using a quantitative calculation model shall be the sum of amounts calculated for each category of transaction for which any of the following is the major cause of changes in mark-to-market value, with regard to all non-cleared OTC derivatives conducted by the FIBOs: Commodity, credit, equity, and foreign exchange or interest rate.[84]

• FIBOs/RFIs may account for the effects of risk offsets, diversification, and hedging within each broad category of transactions for which commodity, credit, equity, and foreign exchange or interest rates is the major cause of changes in mark-to-market, but not across such risk categories.[85]

• Where a quantitative calculation model is not used, FIBOs/RFIs must compute potential future exposure by multiplying the gross notional size of a non-cleared OTC derivative by the standardized margin schedule set forth in JFSA's Public Notification No. 15[86] 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 master netting agreement.

• FIBOs/RFIs are required to have documentation with each uncleared OTC derivative counterparty that, among other things, identifies dispute resolution measures applicable to margin disputes for uncleared OTC derivatives.[87]

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[68] *See* 17 CFR 23.154(b)(2)(vi).

[69] The standardized margin rates provided in 17 CFR 23.154(c)(i) are, in all material respects, the same as those provided under the BCBS/IOSCO Framework. *See supra* note 59.

[70] *See* 17 CFR 23.154(c).

[71] *See* 17 CFR 23.152(d)(2)(i).

[72] *See* 17 CFR 23.155(a).

[73] *See id.*

[74] *See* 17 CFR 23.153(d)(1).

[75] *See* 17 CFR 23.153(e)(2)(i).

[76] FIB Ordinance Article 123(1)(xxi)–6.

[77] JFSA Public Notice No. 15, Article 1(3).

[78] JFSA Public Notice No. 15, Article 3(1).

[79] JFSA Public Notice No. 15, Article 4.

[80] JFSA Public Notice No. 15, Article 5(1).

[81] JFSA Public Notice No. 15, Article 1(2).

[82] JFSA Public Notice No. 15, Article 6(1)(iii).

[83] JFSA Public Notice No. 15, Article 2(1).

[84] JFSA Public Notice No. 15, Article 3(2).

[85] JFSA Public Notice No. 15, Article 3(3).

[86] The standardized margin rates provide in JFSA Public Notification No. 15 of March 31, 2016, Article 9(2) are, in all material respects, the same as those provided under the BCBS/IOSCO Framework. *See supra* note 59.

[87] *See* Article 37–3 of the FIEA and Article 99 of the FIB Ordinance.

4. Japan Requirements for Calculation of Variation Margin

- FIBOs/RFIs must calculate on each business day for each counterparty the total amount of the mark-to-market for non-cleared OTC Derivatives and the total amount of the mark-to-market of collateral collected or posted as variation margin with respect to the counterparty.[88]
- FIBOs/RFIs may comply with variation margin requirements on an aggregate basis with respect to uncleared OTC derivatives that are governed by the same master netting agreement.[89]
- FIBOs/RFIs are required to have documentation with each uncleared OTC derivative counterparty that, among other things, identifies dispute resolution measures applicable to margin disputes for uncleared OTC derivatives.[90]

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 the JFSA's margin rules would be similar to those calculated under the methodologies required under the Final Margin Rule. Specifically, under the Final Margin Rule and the JFSA'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 is similar;
- Initial margin models must be submitted for review by a regulator prior to use;
- 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 proscribed standardized margin rates are essentially identical.

Accordingly, the Commission finds that the methodologies for calculating the amounts of initial and variation margin for uncleared OTC derivatives under the laws of Japan are comparable in outcome to those of the Final Margin Rule.

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.[91]

1. Commission Requirement for Margin Model Approval

In keeping with the BCBS/IOSCO Framework, the Final 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.[92]
- 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)(2), in addition to the requirements for annual review; [93] control, oversight, and validation mechanisms; [94] documentation; [95] and escalation procedures.[96]
- 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 model summarized above in Section IV(E)(2).

2. Japan Requirements for Approval of Margin Models

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

- FIBOs/RFIs must file notice with the JFSA of an intention to use a quantitative calculation model to estimate an amount of potential future exposure, including a description of the model's methodology and structure, the model's compliance with JFSA rules for use of quantitative calculation models summarized above in Section IV(E)(4), and the policies and procedures of a ''model control unit''.[97]
- FIBOs/RFIs must notify the JFSA without delay of a change in any matters set out in the notice of an intention to use a quantitative calculation model, and any failure to comply with the JFSA rules for use of a quantitative calculation model summarized above in Section IV(E)(4).[98]
- FIBOs/RFIs must establish a proper management framework to use a quantitative calculation model and the JFSA supervises compliance with the model requirements.[99]

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 the JFSA, in the case of FIBOs/RFIs, are comparable to and as comprehensive as the regulatory approval requirements of the Final Margin Rule. Specifically, the notice of an intent to use a quantitative calculation model required under the JFSA's margin rules, prior to its use, must contain a comprehensive explanation and evaluation of the proposed model that is comparable in all material respects to the approval procedures required under the Final Margin Rule. While the Commission recognizes that a notice of intent to the JFSA is not the same as requiring a specific approval from a regulator, the JFSA has represented that it would use its supervisory powers to prohibit the use of an inadequate quantitative calculation model. In light of this representation by the JFSA, the Commission finds that such requirements under the laws of Japan are comparable to those of the Final Margin Rule.

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

[88] FIB Ordinance Article 123(1)(xxi)–5(a).

[89] *See* FIB Ordinance Article 123(1)(xxi)–5(a).

[90] *See* Supervisory Guideline Section IV–2–4(4)(i)(A) and (ii)(A).

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

[92] *See* 17 CFR 23.154(b)(1)(i).

[93] *See* 17 CFR 23.154(b)(4), discussed further below.

[94] *See* 17 CFR 23.154(b)(5), discussed further below.

[95] *See* 17 CFR 23.154(b)(6), discussed further below.

[96] *See* 17 CFR 23.154(b)(7), discussed further below.

[97] JFSA Public Notice No. 15, Article 1(2) and Article 7. The requirements for a model control unit are discussed in Section IV(I) below.

[98] *See* JFSA Public Notice No. 15, Article 8(1).

[99] *See* Supervisory Guideline Section IV–2–4(4)(ii)(C).

initial margin, the Final 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 Final 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.[100]
- 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.[101]

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).[102]

2. Japan 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, the JFSA's margin rules generally provide that:

- Initial margin must be calculated upon execution, termination, or modification of a non-cleared OTC derivative.[103]
- Initial margin must be calculated when necessary based on market changes.[104]
- In any event, initial margin must be calculated no later than one month after the last calculation of initial margin.[105]
- Where FIBOs/RFIs are required to collect initial margin, it must call for the initial margin amount immediately after calculation and collect such amount as soon as practicable.[106]
- Where FIBOs/RFIs are required to post initial margin, it must be posted as soon as practicable after it receives a call for an initial margin amount.[107]
- Required initial margin amounts must be posted and collected by FIBOs/RFIs 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 JFSA's margin rules generally provide that:

- FIBOs/RFIs are required to calculate the variation margin amount each business day.[108]
- Where FIBOs/RFIs are required to collect a variation margin amount, it must be called for immediately and collected as soon as practicable.[109]
- Where FIBOs/RFIs are required to post a variation margin amount, it must be posted as soon as practicable.[110]

3. Commission Determination

Having compared the JFSA'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 the JFSA's margin requirements are, despite apparent differences in certain respects, comparable in outcome.

Under the Final Margin Rule, where initial margin is required, a CSE must calculate the amount of initial margin each business day. The JFSA's margin rules allow a maximum of one month between initial margin calculations under some circumstances. However, the JFSA has explained that FIBOs/RFIs that are subject to the first phase of implementation of the JFSA's margin rules for non-cleared OTC Derivatives (*i.e.,* those with the largest notional amounts of outstanding non-cleared OTC Derivatives) regularly trade non-cleared OTC Derivatives. Accordingly, because JFSA margin rules on calculation of initial margin require FIBOs/RFIs to recalculate initial margin whenever transactions are entered, expire, or are modified, and whenever fluctuations occur in markets or other factors affecting the amount of initial margin, such FIBOs/RFIs are likely to be required to recalculate initial margin each business day. Only FIBOs/RFIs subject to the later phase of implementation that do not regularly trade non-cleared OTC Derivatives would not be required to recalculate initial margin each business day.

With respect to the timing of collecting/posting margin, the Final Margin Rule requires CSEs to collect/post any required margin amount (whether initial or variation) within one business day. The JFSA's margin rules specify only that margin be collected or posted ''as soon as practicable,'' which presumably could be longer than one business day. However, the JFSA has represented that, as a supervisory matter, it would expect FIBOs/RFIs that are subject to the first phase of implementation of the JFSA's margin rules for non-cleared OTC Derivatives (*i.e.,* those with the largest notional amounts of outstanding non-cleared OTC Derivatives) to collect or post margin, as applicable, within one business day, with some flexibility for cross-border transactions. FIBOs/RFIs subject to the later phase of implementation would be expected to collect or post margin, as applicable, within two business days, again with some flexibility for cross-border transactions.

In addition, the JFSA has represented that the timing of margin collection and posting will naturally shorten over a relatively brief period of time because the industry in Japan has committed to move toward T+1 settlement of financial instruments by 2018.

[100] *See* 17 CFR 23.153(a).

[101] *See* 17 CFR 23.153(b).

[102] *See* 17 CFR 23.153(e)(2)(i).

[103] *See* FIB Ordinance Article 123(1)(xxi)–6(a). As represented by the JFSA, this requirement is interpreted to mean that IM shall be recalculated in any of the following circumstances:

(a) A new contract is executed with a counterparty;

(b) An existing contract with a counterparty expires;

(c) A relationship of rights pertaining to non-cleared OTC derivatives is changed;

(d) Recalibration is deemed necessary due to fluctuations of markets or other grounds or

(e) One month has elapsed since the latest recalculation.

[104] *See id.*

[105] *See id.*

[106] *See* FIB Ordinance Article 123(1)(xxi)–6(b) and (c).

[107] *See* FIB Ordinance Article 123(1)(xxi)–6(f).

[108] *See* FIB Ordinance Article 123(1)(xxi)–5(a).

[109] *See* FIB Ordinance Article 123(1)(xxi)–5(b) and (c).

[110] *See* FIB Ordinance Article 123(1)(xxi)–5(d).

Finally, the Commission understands that transactions in Japanese Government Bonds (''JGBs'') currently settle in 2 or 3 business days. The JFSA believes this will shorten to T+1 by 2018. However, the Commission is cognizant that if it does not find comparability on this element, JGB's may become ineligible for use as collateral whenever the Final Margin Rule is applicable and thus the market will lose a safe and highly liquid form of eligible collateral, perhaps increasing certain types of risk.

Given the representations of the JFSA with respect to its expectations on compliance with its margin rules in practice, and the current settlement cycle for JGBs, the Commission finds that the requirements of the JFSA's rules with respect to the timing and manner for collection or payment of initial and variation margin are comparable.

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 Final 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.[111]
- 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).[112]

2. Japan Requirements for Margin Threshold Levels or Amounts

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

- FIBOs/RFIs may agree with their counterparties that initial margin may be subject to a threshold of no more than JPY 7 billion applicable to a consolidated group of affiliated counterparties.[113]
- FIBOs/RFIs 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 JPY 70 million (*i.e.,* a minimum transfer amount).[114]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that the JFSA requirements for margin threshold levels or amounts, in the case of FIBOs/RFIs, are comparable to those required by the Final Margin Rule, in the case of CSEs.

The Commission notes that at current exchange rates, JPY 7 billion is approximately $68 million, while JPY 70 million is approximately $680,000. Although these amounts are greater than those permitted by the Final Margin Rule, the Commission recognizes that exchange rates will fluctuate over time and thus the Commission finds that such requirements under the laws of Japan are comparable in outcome to those of the Final Margin Rule.

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 Final 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 CSEs 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.[115]
- 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.[116]
- At least annually, such internal audit function shall report its findings to the CSE's governing body, senior management, and chief compliance officer.[117]

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

- CSEs must maintain documentation setting forth the variation methodology with sufficient specificity to allow a counterparty, the Commission, a registered futures association, and any applicable 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 methodology or a data source, including: The manner in which the methodology meets the requirements of the Final 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. Japan 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, the JFSA's margin requirements generally provide that:

- Where FIBOs/RFIs use a quantitative calculation model to

[111] *See* 17 CFR 23.154(a)(3) and definition of ''initial margin threshold'' in 17 CFR 23.151.

[112] *See* 17 CFR 23.152(b)(3).

[113] JFSA Public Notice No. 17, Article 3(2).

[114] *See* FIB Ordinance Article 123(1)(xxi)–5(b) and (xxi)–6(b).

[115] *See* 17 CFR 23.154(b)(5).

[116] *See* 17 CFR 23.154(b)(5)(iv).

[117] *See* 17 CFR 23.154(b)(5)(iv).

calculate initial margin, it must establish a model control unit, independent from units that execute non-cleared OTC derivatives, responsible for the design and operation of a system for managing such model.[118]

- The model control unit must document policies, control, and procedures for an operation of the quantitative calculation model (including the criteria for assessment of the quantitative calculation model and measures to be taken in cases where the results of the assessment conflict with the criteria set in advance).[119]
- The model control unit shall document procedures and results of back testing against changes in the mark-to-market value of non-cleared OTC derivatives that occurred during a period equivalent to a holding period of not less than 10 business days.[120]
- The model control unit shall establish procedures for validating a quantitative calculation model and properly revising the quantitative calculation model at the time of the development thereof and periodically thereafter, as well as in the risk event where the accuracy of the quantitative calculation model is impaired due to a material modification to the quantitative calculation model or a structural change in the market.[121]
- The model control unit shall confirm that a quantitative calculation model can be properly operated with major counterparties by testing the quantitative calculation model in an appropriate simulated portfolio.[122]
- An internal audit shall be conducted in principle at least once a year with regard to a calculation process of potential future exposure.[123]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that the JFSA requirements applicable to FIBOs/RFIs pertaining to risk management controls for the calculation of initial and variation margin are substantially the same as the corresponding requirements under the Final Margin Rule. Specifically, the Commission finds that under both the JFSA's requirements and the Final 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. Accordingly, the Commission finds that the JFSA's requirements pertaining to risk management controls over the use of initial margin models are comparable in outcome to the controls required by the Final 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 Final Margin Rule generally provides that CSEs may collect or post:[124]

- 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 (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 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 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

[118] *See* JFSA Public Notice No. 15, Article 6(1)(i).

[119] *See* JFSA Public Notice No. 15, Article 6(1)(ii).

[120] *See* JFSA Public Notice No. 15, Article 6(1)(iii).

[121] *See* JFSA Public Notice No. 15, Article 6(1)(iv).

[122] *See* JFSA Public Notice No. 15, Article 6(1)(v).

[123] *See* JFSA Public Notice No. 15, Article 6(1)(vi).

[124] *See* 17 CFR 23.156(a)(1).

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 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).[125]
- 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: [126]

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)(iv)): 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)(iv)): 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)(iv)): 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)(iv)): 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)(iv)): 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)(iv)): 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 Final Margin Rule generally provides that CSEs may collect or post: [127]

- 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.[128]

Finally, CSEs must monitor the value and eligibility of collateral collected and posted: [129]

- 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. Japan 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, the JFSA's margin requirements generally provide that RFIs/FIBOS may collect or post: [130]

- Cash.
- Debt that is issued by a central government, a central bank, or an international financial institution.[131]

[125] *See* 17 CFR 23.156(a)(2).

[126] *See* 17 CFR 23.156(a)(3).

[127] *See* 17 CFR 23.156(b)(1).

[128] *See* 17 CFR 23.156(b)(2).

[129] *See* 17 CFR 23.156(c).

[130] *See* FIB Ordinance, Article 123(8) and JFSA Public Notice No. 16, Article 1(1).

[131] As listed in JFSA Public Notice No. 16, these are generally: Bank for International Settlements, International Monetary Fund, European Central Bank, European Community, International Development Banks (limited to International Bank for Reconstruction and Development, International Finance Corporation, Multilateral Investment Guarantee Agency, Asian Development Bank, African Development Bank, European Bank for Reconstruction and Development, Inter-American

Continued

• Debt that is issued by any other entity (excluding securitizations) with certain high level credit risk ratings, but excluding debt issued by a counterparty or any of its consolidated affiliates.

• Equity securities of issuers included in the major equity index of certain designated countries, but excluding equity securities issued by a counterparty or any of its consolidated affiliates.

• Investment trust securities (excluding securities of the counterparty or any of its consolidated affiliates) where the trust invests in any of the foregoing items and its mark-to-market is published each business day.

The value of any eligible collateral collected or posted to satisfy initial margin requirements must be reduced by the following haircuts: [132]

Cash	0%.
Equities included in major stock indices	15%.
Government and central bank debt; residual maturity of 1 year or less	0.5%, 1%, or 15%, depending on class of credit rating assigned by eligible credit rating firms.[133]
Government and central bank debt; residual maturity between 1 and 5 years.	2%, 3%, or 15%, depending on class of credit rating assigned by eligible credit rating firms.
Government and central bank debt; residual maturity of more than 5 years.	4%, 6%, or 15% depending on class of credit rating assigned by eligible credit rating firms.
Corporate bonds; residual maturity of 1 year or less	1% or 2% depending on class of credit rating assigned by eligible credit rating firms.
Corporate bonds; residual maturity of between 1 and 5 years	4% or 6%, depending on class of credit rating assigned by eligible credit rating firms.
Corporate bonds; residual maturity of more than 5 years	8% or 12%, depending on class of credit rating assigned by eligible credit rating firms.
Investment trust securities	The highest of the above ratios applicable to investments of the trust.

In addition to the foregoing, under the JFSA's margin requirements, if the currency of a collateral asset posted for the purposes of initial margin is not the same as a currency specified in respect of the transactions, an additional 8% haircut must be applied.[134]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission observes that the JFSA's requirements pertaining to assets eligible for posting or collecting by FIBOs/RFIs as collateral for uncleared OTC derivatives are similar to the requirements of the Final Margin Rule, but are more stringent in some respects and less stringent in others.

Specifically, the JFSA's requirements are more stringent where they require a larger haircut than the Final Margin Rule on government, central bank, and corporate debt where an issuer's credit risk ratings are less than the highest levels provided by credit rating firms regulated by the JFSA. However, the JFSA's requirements are less stringent where they permit the same haircut for all equities (15%) included in major equity indices of certain designated countries [135] while the Final Margin Rule applies a 25% haircut for certain equities not included in the S&P 500. The JFSA's requirements are also less stringent with respect to the eligible collateral for variation margin for non-cleared OTC Derivatives between FIBOs/RFIs that are CSEs and FIBOs/RFIs that are SDs and MSPs (including other CSEs). The Final Margin Rule only permits 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, while the JFSA's requirements would permit any form of eligible collateral (as described above).

In addition, the JFSA's margin rules allow eligible collateral in the form of securities issued by bank holding companies, savings and loan holding companies, certain intermediary holding companies, foreign banks, depository institutions, market intermediaries, and margin affiliates of the foregoing, all of which are prohibited by the Final Margin Rule.[136]

Finally, the JFSA's margin rules also do not specifically address requirements to monitor the eligibility of posted collateral.[137]

While not identical, the Commission finds that the forms of eligible collateral for initial and variation margin under the laws of Japan provide comparable protections to the forms of eligible collateral mandated by the Final Margin Rule. Specifically, the Commission finds that the JFSA's margin regime ensures that assets collected as collateral for initial and variation margin purposes are highly liquid and able to hold their value in a time of financial stress. Because under JFSA's margin regime, a non-defaulting party would be able to 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 uncleared swaps in the event of a counterparty default, the Commission finds the JFSA's margin regime with respect to the forms of eligible collateral for initial and variation margin for uncleared swaps is comparable to the Final Margin Rule.

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.[138]

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

Development Bank, European Investment Bank, European Investment Fund, Nordic Investment Bank, Caribbean Development Bank, Islamic Development Bank, International Finance Facility for Immunisation and Council of Europe Development Bank), or a regional government, Japan Finance Organization for Municipalities or a government agency in Japan.

[132] *See* FIB Ordinance, Article 123(8) and JFSA Public Notification No. 16 of March 31, 2016, Article 2.

[133] *See* Bank Capital Adequacy Notice (JFSA Notice No. 19 of 2006, as amended).

[134] *See* FIB Ordinance, Article 123(9) and JFSA Public Notice No. 16, Article 2(2).

[135] *See* JFSA Public Notice No. 16, Article 1(1)(iv) and Article 2.

[136] *See* 17 CFR 23.156(a)(2).

[137] *See* 17 CFR 23.156(c).

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

event that the collecting party enters bankruptcy.[139]

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 Final 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.[140]
- 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.[141]
- A posting party may substitute any form of eligible collateral for posted collateral held as initial margin.[142]
- A posting party may direct reinvestment of posted collateral held as initial margin in any form of eligible collateral.[143]
- 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.[144]

2. Japan Requirements 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 JFSA's margin rules generally require that:

- All assets posted by or collected by FIBOs/RFIs as initial margin collateral must be held in a trust or other similar structure (*e.g.,* a custodial arrangement) that constitutes legal segregation or its equivalent.[145]
- The segregation structure must ensure that the collateral will be immediately available to the collecting party in the event of the posting party's default, and that the collateral will be immediately returned to the posting party in the event of the collecting party's bankruptcy.[146]
- Rehypothecation, re-pledge, or re-use of collateral posted as initial margin is prohibited, provided that cash can be re-used where conducted by a safe method and managed in accordance with the initial margin management requirements of the FIB Ordinance, Article 123(1)(xxi)–6(d).[147]
- 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.[148]

3. Commission Determination

The Commission notes that the JFSA's margin requirements with respect to custodial arrangements are less stringent than those of the Final Margin Rule in one material respect. Under the Final 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.[149] The JFSA's margin rules do not prohibit a FIBO/RFI from using an affiliated entity as custodian to hold initial margin collected from counterparties.

However, the JFSA has explained that because the JFSA's margin rules require initial margin to be held in a trust structure under the Trust Act of Japan,[150] the risk of use of an affiliated entity as custodian may be mitigated. A trust account under the Trust Act of Japan is commonly utilized when segregation of assets is required because property deposited to such a trust account (''trust property'') is legally recognized as segregated from the property of the trustor, the property of the trust bank, and other trust property in the trust account. Thus trust property in such a trust account is bankruptcy remote from the trustor and the trust bank.[151] Therefore, the JFSA represents that initial margin held in a trust account with an affiliate of a FIBO/RFI mitigates any risk that such initial margin would be found part of the FIBO/RFI's estate or its affiliated trust bank's estate in the event of the bankruptcy of either.

Accordingly, despite the differences in required custodial arrangements, the Commission has determined that the JFSA's margin requirements applicable to FIBOs/RFIs pertaining to custodial arrangements, segregation, and rehypothecation are comparable to the corresponding requirements under the Final Margin Rule. Specifically, the Commission finds that under both the JFSA's requirements and the Final Margin Rule, a CSE/FIBO/RFI is required to segregate the initial margin posted by its counterparties with a third-party custodian under terms that constitute legal segregation, and such initial margin may not be rehypothecated. Accordingly, the Commission finds that the JFSA's requirements pertaining to custodial arrangements, segregation, and rehypothecation are comparable in outcome to those required by the Final Margin Rule.

L. Requirements for Margin Documentation

1. Commission Requirement for Margin Documentation

With respect to requirements for documentation of margin arrangements, the Final 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 Final Margin Rule.[152]

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[139] *See id.*

[140] *See* 17 CFR 23.157(a) and (b).

[141] *See* 17 CFR 23.157(c)(1) and (2).

[142] *See* 17 CFR 23.157(c)(3).

[143] *See id.*

[144] *See* Final Margin Rule, 81 FR at 672.

[145] *See* FIB Ordinance, Article 123(1)(xxi)–6(d).

[146] *See id.*

[147] *See* FIB Ordinance Article 123(1)(xxi)–6(e).

[148] *See* FIB Ordinance Article 123(1)(xxi)–6(d).

[149] *See* 17 CFR 23.157(a) and (b).

[150] Act No. 108 of 2006 (the ''Trust Act of Japan'').

[151] See Trust Act of Japan, Article 23(1) stating:

Except where based on a claim pertaining to an Obligation Covered by the Trust Property . . . compulsory execution, provisional seizure, provisional disposition or exercise of a security interest, or an auction . . ., or collection proceedings for delinquent national tax . . . is not allowed to be enforced against property that comes under Trust Property.

[152] *See* 17 CFR 23.158(a).

• 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.[153]

2. Japan Requirements for Margin Documentation

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

• FIBOs/RFIs must establish an appropriate agreement with each OTC derivative counterparty (such as an ISDA Master Agreement and Credit Support Annex) documenting the calculation and transfer of initial and variation margin.[154]

• FIBOs/RFIs are required to have documentation with each uncleared OTC derivative counterparty that, among other things, identifies dispute resolution measures applicable to margin disputes for uncleared OTC derivatives.[155]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission has determined that the JFSA's margin requirements applicable to FIBOs/RFIs pertaining to margin documentation are substantially the same as the margin documentation requirements under the Final Margin Rule. Specifically, the Commission finds that under both the JFSA's requirements and the Final Margin Rule, a CSE/FIBO/RFI is required to enter into documentation with each OTC derivative/swap counterparty that sets forth the method for calculating and transferring initial and variation margin, as well dispute resolution procedures. Accordingly, the Commission finds that the JFSA's requirements pertaining to margin documentation are comparable to those required by the Final Margin Rule.

M. Cross-Border Application of the Margin Regime

1. Cross-Border Application of the Final Margin Rule

The general cross-border application of the Final Margin Rule, as set forth in the Cross-Border Margin Rule, is discussed in detail in Section II above. However, § 23.160(d) and (e) of the 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 [156] of the Final Margin Rule.[157]

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.[158]

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.[159] 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 JFSA's Margin Regime

With respect to cross-border transactions, JFSA's margin requirements generally provide that, where the JFSA's margin regime would apply to a transaction that also would require compliance with the margin regime of a foreign state, the Commissioner of the JFSA may exempt such transactions from compliance with the JFSA's margin rules if the Commissioner finds that such exemption is unlikely to be contrary to the public interest or hinder protection of investors due to a FIBO/RFI's compliance with the margin regime of the foreign state that is recognized by the JFSA to be equivalent to the JFSA's margin regime.[160]

With respect to non-cleared OTC Derivatives subject to the laws of a jurisdiction that does not reliably recognize close-out netting under a master netting agreement, the JFSA's margin regime generally provides that an FIBO/RFI is exempt from the requirements to post or collect either initial or variation margin.[161] However, as represented by the JFSA, the JFSA's margin regime also requires that, with respect to such transactions, the FIBO/RFI must establish an appropriate risk management framework for the risks of such transactions that may include collecting margin on a gross basis.[162]

With respect to non-cleared OTC Derivatives subject to the laws of a jurisdiction that has inherent limitations on the ability of a FIBO/RFI to post initial margin in compliance with the custodial arrangement requirements under the JFSA's margin rules, as represented by the JFSA, the JFSA's margin rules provide that the FIBO/RFI is exempt only from the requirement to post initial margin, but must still comply with the requirement to collect initial margin and post/collect variation margin.[163]

3. Commission Determination

Based on the foregoing and the representations of the applicant, the Commission finds that the JFSA's margin regime with respect to its cross-border application is comparable in outcome to that of the Final Margin Rule as set forth in the Cross-Border Margin Rule.

First, the Commission recognizes that the JFSA's margin regime permits substituted compliance to substantially the same extent as the Cross-Border Margin Rule. For example, a CSE subject to the JFSA's margin regime entering into a transaction with a counterparty in the U.S., and thus subject to the Final Margin Rule, could request the Commissioner of the JFSA to exempt

[153] *See* 17 CFR 23.158(b).

[154] *See* Supervisory Guidelines, Section IV–2–4(4)(i)(A) and (4)(ii)(A).

[155] *See* Article 37–3 of the FIEA and Article 99 of the FIB Ordinance.

[156] *See* 17 CFR 23.157 and Section IV(K) above.

[157] *See* 17 CFR 23.160(d) and (e).

[158] *See id.*

[159] *See* 17 CFR 23.160(e) and 23.157(b).

[160] *See* FIB Ordinance, Article 123(10)(v) and (11)(v).

[161] *See* FIB Ordinance, Article 123(10)(i) and (11)(i).

[162] *See* Supervisory Guideline, IV–2–4(4)(iii)(C).

[163] *See* FIB Ordinance 123(1)(xxi)–6(d), (e), and (f).

such transaction from compliance with the JFSA's margin regime upon a finding that the Final Margin Rule is equivalent to the JFSA's margin regime. Thus, where a CSE finds itself subject to both the Final Margin Rule and JFSA's margin regime, but not in a situation where substituted compliance is available under the Cross-Border Margin Regime, it could apply to the JFSA for a finding of equivalence.

Second, with respect to transactions subject to the laws of a non-netting jurisdiction, although the JFSA's margin regime exempts FIBOs/RFIs from the otherwise applicable requirements to collect and post margin, the JFSA's Supervisory Guidelines still require such entities to establish an appropriate risk management framework to protect against the risks of such transactions. The Commission notes that a CSE is also required to have a risk management program pursuant § 23.600, and thus the Commission has the authority to inquire as to the adequacy of the risk management covering uncleared swaps in non-netting jurisdictions.

Finally, with respect to non-cleared OTC Derivatives subject to the laws of a jurisdiction that has inherent limitations on the ability of a CSE/FIBO/RFI to post initial margin in compliance with the custodial arrangement requirements of the JFSA's margin rules and the Final Margin Rule, the Cross-Border Margin Rule would only require the CSE to collect (but not post) initial margin in cash (but not hold such initial margin with an unaffiliated custodian) [164] and to post and collect variation margin in cash. The Cross-Border Margin Rule would also limit the CSE's ability to enter into such transactions to 5% of its total uncleared swap notional outstanding for each broad category of swap asset classes. Meanwhile, the JFSA's margin rules also exempt a FIBO/RFI from the requirement to post initial margin, while still requiring compliance with the requirement to collect initial margin and post/collect variation margin.[165] The JFSA margin rule does not have the cash-only requirement, nor does it limit transactions to 5% of a FIBO/RFI's total notional of uncleared swaps.

Having considered the similarities and differences described above, the Commission finds that: (1) The availability of reciprocity of substituted compliance available from the JFSA makes the JFSA margin regime comparable in this respect to that of the Final Margin Rule and the Cross-Border Margin Rule; (2) the representations of the JFSA regarding the extensive risk management requirements applicable to transactions in non-netting jurisdictions makes the JFSA margin regime comparable in this respect to that of the Final Margin Rule and the Cross-Border Margin Rule; and (3) the generally similar requirements for collection of initial margin and collection/posting of variation margin for transactions in jurisdictions where compliance with custodial arrangements is impracticable makes the JFSA margin regime comparable in this respect to that of the Final Margin Rule and the Cross-Border Margin Rule. Accordingly, the Commission finds the cross-border aspects of the JFSA's margin regime comparable to that of the Commission.

N. Supervision and Enforcement

The Commission has a long history of regulatory cooperation with the JFSA, including cooperation in the regulation of registrants of the Commission that are also FIBOs. Thus, the Commission finds that the JFSA has the necessary powers to supervise, investigate, and discipline entities for compliance with its margin requirements and recognizes the JFSA's ongoing efforts to detect and deter violations of, and ensure compliance with, the margin requirements applicable in Japan.

V. Conclusion

As detailed above, the Commission has considered the scope and objectives of the margin requirements for uncleared swaps under the laws of Japan,[166] whether such margin requirements achieve comparable outcomes to the Commission's corresponding margin requirements; [167] and the ability of the JFSA to supervise and enforce compliance with the margin requirements for non-cleared OTC Derivatives under the laws of Japan.[168]

Pursuant to the foregoing process, the Commission has noted several differences in the margin regimes. However, the only difference for which the Commission has found the JFSA's margin regime to be not comparable is that the Final Margin Rule requires collection and posting of variation margin, and in a limited circumstance, collection of initial margin, for uncleared swaps between consolidated affiliates, while the JFSA's margin rules do not require any margin to be posted or collected on such transactions.[169]

Accordingly, a CSE that is subject to both the Final Margin Rule and the JFSA's margin rules with respect to an uncleared swap that is also a non-cleared OTC Derivative may rely on substituted compliance for all aspects of the Final Margin Rule and the Cross-Border Margin Rule except that such CSE must comply with the inter-affiliate margin requirements of § 23.159 of the Final Margin Rule.

Issued in Washington, DC, on September 8, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

Appendices to Comparability Determination for Japan: 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 Massad and Commissioner Giancarlo voted in the affirmative. Commissioner Bowen voted in the negative.

Appendix 2—Statement of Chairman Timothy G. Massad

Today, the CFTC has furthered its commitment to international cooperation and harmonization.

By issuing this comparability determination with respect to Japan's rules on margin for uncleared swaps, the Commission has ensured that a Japanese swap dealer or major swap participant registered with the CFTC can comply with many aspects of our margin rules by meeting the corresponding Japan Financial Services Agency (JFSA) requirements. This is an important and necessary step toward building a strong international regulatory framework for the over-the-counter swaps market, which is critical to ensuring the safety and soundness of our own financial markets.

It's important to remember that we are still at the early stages of developing this new global framework. Shortly after I took office two years ago, there were significant differences between our rules, Japan's rules, and the rules of other jurisdictions. We made tremendous progress bringing those rules together since that time. And today, we all share the same goal of a strong, international framework. But there are still going to be differences, and we understand our laws and the laws of other jurisdictions will never be identical.

[164] *See* 17 CFR 23.160(e) and 23.157(b).

[165] *See* FIB Ordinance 123(1)(xxi)–6(d), (e), and (f).

[166] *See* 17 CFR 23.160(c)(3)(i).

[167] *See* 17 CFR 23.160(c)(3)(ii). As discussed above, the Commission's Final 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.

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

[169] *See* Section IV(D) supra.

Our comparability determination reflects this understanding. In this instance, as in other decisions, the Commission compared our margin rule with each element of Japan's rules, carefully considering the objectives and outcomes of its specific provisions.

We concluded that while there are differences in our margin regimes, Japan's margin requirements achieve comparable outcomes. The Commission identified only one area where we must make an exception to that conclusion. Our margin rule requires the collection and posting of variation margin and, in certain circumstances, the collection of initial margin for uncleared swaps between consolidated affiliates. However, the JFSA's margin rules do not require any margin to be posted or collected on such transactions.

As a result, the Commission has determined that certain entities subject to both the CFTC's and the JFSA's margin rules with respect to an uncleared swap may rely on the substituted compliance made available under the CFTC's Cross-Border Margin Rule—with the exception that these entities must comply with the CFTC's inter-affiliate margin requirements. I believe this exception is necessary, to help address the risk that can flow back into the United States from offshore activity, even when the subsidiary is not explicitly guaranteed by the U.S. parent. In addition, it will prevent the potential buildup of current exposure among affiliates.

Let me also comment on the concerns regarding differences in our rules with respect to the treatment of collateral, custodial requirements, and swaps with counterparties in so-called ''non-netting'' jurisdictions. I believe we should allow reliance on Japanese rules in these areas. That is because our goal is comparability in outcomes, and that goal is achieved in both cases.

First, on the treatment of collateral, it has been noted that there is a difference in our rules on haircuts for equities. But it is relatively small. We require a haircut of 15 percent on equities included in the S&P 500, and 25 percent on the S&P 1500. Japan's rules say 15 percent on major equity indices. But we should also note that Japan imposes a larger discount than we do on government bonds and corporate debt. Our comparability process should therefore not insist on line-by-line identity, but rather decide what differences are truly significant to overall outcomes.

Similarly, with respect to custodial requirements, I recognize the importance of the protection of margin deposits, especially in the event of the bankruptcy of a counterparty. The means that we require in our rule—segregation with an independent custodian—are not commonly used in Japan. But the Japan rules require the use of trust structures which achieve the same goal under Japanese law, and are recognized under Japanese law in bankruptcy.

With respect to treatment of non-netting jurisdictions, our rule requires a swap dealer to collect initial margin on a gross basis from a counterparty in a jurisdiction that doesn't clearly recognize netting, while the JFSA rule says that the dealer must establish an appropriate risk management framework that may, but is not required to, include collection of margin. To measure outcomes, we must look not only at the specifics but at how the rules work in different scenarios. For example, Japanese swap dealers whose trades are guaranteed by a U.S. person must follow our rules on this issue and collect margin, regardless of what we decide as a matter of substituted compliance. And Japanese swap dealers whose trades are not guaranteed by a U.S. person, and who are not foreign consolidated subsidiaries, would not be required to follow our rule on this issue, regardless of what we decide as a matter of substituted compliance. That is because such trades are excluded from our rules. Japanese swap dealers who are foreign consolidated subsidiaries (and whose trades are not guaranteed by a U.S. person) would be entitled to substituted compliance, but if they engage in trades with counterparties in non-netting jurisdictions they would still be subject to the JFSA risk management requirements, and any parent entity swap dealer would be subject to our consolidated risk management requirements.

For these reasons, I believe it is appropriate to grant substituted compliance without an exception on these issues.

In making these determinations, staff also considers another jurisdiction's supervisory and enforcement authority in assessing outcomes. And here, I agree with staff's conclusion, and want to underscore the fact that we have a very strong and good relationship with the JFSA. In fact, I met with Commissioner Mori and members of his staff just a few months ago. There is mutual respect, and good communication and cooperation between our agencies. We have worked well together on a number of issues, including the formulation of margin requirements. And this determination will strengthen that relationship further.

Today's decision will contribute significantly to that international framework and help make sure our derivatives markets continue to be dynamic, competitive, and drivers of economic growth. I want to particularly thank our staff in the Division of Swap Dealer and Intermediary Oversight and in the Office of the General Counsel for their work on this and the implementation of our margin rules generally. I also thank Commissioners Bowen and Giancarlo for their input and consideration of this determination.

Appendix 3—Dissenting Statement of Commissioner Sharon Y. Bowen

I thank the staff for all of its hard work on this margin comparability determination. However, I cannot support it. I will be voting no as I think it would introduce greater risk into the derivatives markets—the very thing that we were sent here by the American people to prevent.

There are just three questions I will answer in my remarks today:

1. What is a margin comparability determination and why does it matter?
2. What are the problems with this particular comparability determination?
3. How can we fix it?

First, what is a margin comparability determination and why does it matter?

For many Americans, a margin comparability determination is truly a foreign concept. But it actually has great significance to our economy. Margin is collateral. The 2008 derivatives market was under-collateralized, and that is what caused it to explode and take our economy with it. The American people expected us, as regulators, to fix that by requiring sufficient collateral to address the risk. We have done that with our margin rule.[1]

In a margin comparability determination, we are defining when our U.S. dealers that are operating in the other jurisdiction, can ignore our margin rule and follow the other jurisdiction's margin rule. Allowing American companies to just follow one set of rules—that of the jurisdiction they are in—makes sense when the rules are basically accomplishing the same thing. I am in favor of that. International comity, harmonization across jurisdictions, and having an outcomes-based approach to comparability all make sense.

Unfortunately, that is not the scenario that we have here. While Japanese law has some strong similarities to our own, there are some areas of divergence that are significant and would allow American companies to do overseas what they would never be allowed to do here. And make no mistake; though these companies are physically located in Japan, their cash line runs right back to the United States. That risk could be borne again by American households. A comparability determination should not be the back door way of undoing or weakening our regulations and thereby incentivizing our companies to send their risky business to their affiliates located in Japan. That would not be good for our economy, Japan's economy, or global financial stability overall.

This determination is doubly important because this is the first one and thus sets the stage for others. By adopting a weak standard today, we pave the way for even weaker determinations in the future. Moreover, we are not establishing this determination in conjunction with the Prudential Regulators, who oversee roughly half of U.S. swap dealers and are our counterparts on these issues. We have worked effectively with our Prudential counterparts on the international Working Group on Margin Requirements (WGMR)[2] thus far; making this determination without harmonization amongst U.S. regulators is ill-advised. Differences in requirements would only open the door to regulatory arbitrage domestically.

[1] Though, as noted in my dissent, this rule was far weaker than it should have been due to how it dealt with inter-affiliate margin. *See* Dissenting Statement of Commissioner Sharon Y. Bowen Regarding Final Rule on Margin for Uncleared Swaps (Dec. 16, 2015), *available at http://www.cftc.gov/PressRoom/SpeechesTestimony/bowenstatement121615a.*

[2] Working Group on Margin Requirements of the Basel Committee on Banking Supervision and the International Organization of Securities Commissions.

Second, what is the problem with this particular comparability determination?

The answer: Bankruptcy. Bankruptcy is something that we do not like to think about, but in finance, it is something that we must always consider when designing deals. We know the old adage: Hope for the best, but plan for the worst. In my work as a law firm partner and Acting Chair of the Securities Investor Protection Corporation (SIPC), I have seen too many bankruptcies. And there are three key differences in our margin rule and the Japanese margin rule that would leave our American companies operating under Japanese law vulnerable. The key differences are:

1. *Where the customer money is kept.* Our rules require customer collateral to be held by a third party—not by either one of the counterparties. This is a safeguard for bankruptcy. If the money is held by one of the counterparties, then a bankruptcy court may use that money to meet the counterparty's debts. Or in a stress event, the counterparty could potentially take the customer money to meet its obligation. If, however, the money is at a third party, it is far more likely that it will get back to the customers that provided it. Japanese law does not have a comparable rule. Thus, in a bankruptcy situation, U.S. customers may be unable to receive back their customer funds. This discrepancy is noted in the determination,[3] but the staff states that the fact that the funds are segregated sufficiently mitigates against the risk. I disagree. In my experience with bankruptcies, I have learned that access to customer funds largely depends on the *location* of those funds. Third-party custodianship is an important safeguard.

2. *Transacting with counterparties in bankruptcy-risky jurisdictions.* There are certain developing countries where there is little certainty that collateral will be there if there is a bankruptcy (non-netting jurisdictions), and/or where they do not adequately protect customer funds from that of the dealer (''non-segregation jurisdictions''). Under our rules, our U.S. dealers have to limit the way they trade with counterparties in these bankruptcy-vulnerable jurisdictions because we are not confident that our American investors will get their money back in a bankruptcy scenario.[4] These safeguards vary depending on the circumstances and include limiting the amount of business that our dealers can do with these counterparties, and limiting the type of acceptable collateral. Japan does not have these kinds of limits on their dealers who deal in these bankruptcy-vulnerable jurisdictions. Thus, the American companies operating in Japan could potentially have an unlimited number of deals with counterparties in these developing countries. This could put some of our major American financial firms, and thus our economy, at risk.

3. *Types of collateral allowed.* There are significant differences in the treatment of collateral between our margin rule and the Japanese rule. First, while our rules limit daily variation margin to cash for dealer-to-dealer swaps, under Japanese law, variation margin could be in a number of much less liquid instruments. And second, while we require a 25% haircut for certain equities not included in the S&P 500, under Japanese law, equities included in major equity indices of certain designated countries just have a 15% blanket haircut.[5] That means that we require our companies to value equities much more conservatively than under Japanese law. That means that in a crisis, American companies in Japan could be exchanging instruments that are virtually worthless since they cannot be readily converted to cash, thereby putting them in jeopardy.

If these were insignificant differences, I would happily brush them aside and accept this comparability determination as is. But these issues could mean the difference between an orderly bankruptcy, and a disaster overseas that pulls down a significant American financial company, and potentially our economy.

And last, how could we have fixed it?

Fixing this is actually rather simple. We could provide a partial comparability determination—our American businesses could follow the Japanese margin rule except in the areas above where they would have to follow our rule. We have already done this in the current draft in the area of inter-affiliate margin. We would simply extend the same treatment to these three areas as well.

Unfortunately, that common sense approach was not followed here. And that is why I am unable to vote for it. While our two jurisdictions are partly comparable, there are significant areas in which there are material divergences. A partial comparability determination, as described above, would be the best way to strike the balance between international harmonization and protection of American financial companies that are located elsewhere but still directly linked to our economy.

Appendix 4—Statement of Commissioner J. Christopher Giancarlo

When the Commission issued its rule addressing the cross-border application of margin requirements for uncleared swaps in May of this year[1] I expressed my disagreement with the approach the Commission established as overly complex and unduly narrow.[2] I also expressed my concern that the Commission's ''element-by-element'' methodology for determining when substituted compliance with a foreign regulator's margin regime would be permitted is contrary to the principles-based, holistic analysis the Commission has used in the past in certain circumstances[3] and could result in an impracticable patchwork of U.S. and foreign regulations for cross-border transactions.[4]

My concerns were realized last week when Asian swaps markets ground to a halt amidst confusion about the application of new margin rules to major market participants. Once again, there were reports of counterparties avoiding trading with U.S. persons. I believe this rule's subjectivity and complexity will continue to be a source of regulatory uncertainty at the expense of U.S. financial firms, their employees and the American businesses they serve.

I nevertheless support the comparability determination for Japan. In this instance, the Commission has appropriately recognized that certain differences between the U.S. margin regime and Japan's margin regime achieve comparable outcomes. Wrong approach; right outcome. I therefore vote in favor of the determination.

[FR Doc. 2016–22045 Filed 9–14–16; 8:45 am]

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[3] *See* ''Comparability Determination for Japan: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants,'' pp. 63–65. (''The Commission notes that the JFSA's [Japan Financial Services Agency] margin requirements with respect to custodial arrangements are less stringent than those of the Final Margin Rule in one material respect. Under the Final 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. The JFSA's margin rules do not prohibit a FIBO/RFI from using an affiliated entity as custodian to hold initial margin collected from counterparties.'').

[4] *Id.* at pp. 69–70. (''[W]ith respect to transactions subject to the laws of a non-netting jurisdiction JFSA's margin regime exempts FIBOs/RFIs from the otherwise applicable requirements to collect and post margin. . . . [W]ith respect to non-cleared OTC Derivatives subject to the laws of a jurisdiction that has inherent limitations on the ability of a CSE/FIBO/RFI to post initial margin in compliance with the custodial arrangement requirements of the JFSA's margin rules and the Final Margin Rule . . . [t]he JFSA margin rule does not have the cash-only requirement, nor does it limit transactions to 5% of a FIBO/RFI's total notional of uncleared swaps.'').

[5] *Id.* at pp. 58–59. (''[T]he JFSA's requirements are less stringent where they permit the same haircut for all equities (15%) included in major equity indices of certain designated countries while the Final Margin Rule applies a 25% haircut for certain equities not included in the S&P 500. The JFSA's requirements are also less stringent with respect to the eligible collateral for variation margin for non-cleared OTC Derivatives between FIBOs/RFIs that are CSEs and FIBOs/RFIs that are SDs and MSPs (including other CSEs). The Final Margin Rule only permits 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, while the JFSA's requirements would permit any form of eligible collateral (as described above). In addition, the JFSA's margin rules allow eligible collateral in the form of securities issued by bank holding companies, savings and loan holding companies, certain intermediary holding companies, foreign banks, depository institutions, market intermediaries, and margin affiliates of the foregoing, all of which are prohibited by the Final Margin Rule. Finally, the JFSA's margin rules also do not specifically address requirements to monitor the eligibility of posted collateral.'').

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[1] *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.

[2] *Id.* at 34853–54.

[3] As I noted in my dissent, the Commission employs a principles-based, holistic approach for substituted compliance determinations under Commission Regulation 30.10 and for purposes of permitting direct access by U.S. customers to foreign boards of trade. *Id.* at 34853 n.5.

[4] *Id.* at 34853–54.