**MIFID II AND MIFIR MODEL PROVISIONS FOR INCLUSION IN ISDA/FIA CLIENT CLEARED OTC DERIVATIVES ADDENDUM OR OTHER RELEVANT AGREEMENT OR TERMS BETWEEN THE CLEARING MEMBER AND THE CLIENT**

**BACKGROUND**

A Clearing Member who is subject to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Directive 2002/92/EC and Directive 2011/61/EU (**MIFID II**) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (**MIFIR**) may wish to include the below model provisions (**Provisions**) to form part of their Addendum or any other relevant agreement or terms between the Clearing Member and the Client for the purposes of complying (or establishing the need to comply) with certain requirements of MIFID II and MIFIR.

The requirements of MIFID II and MIFIR that have been considered for this purpose are as follows:

(a) Article 25 of Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading (**RTS 6**);

(b) Article 26 of RTS 6;

(c) Article 4 of Commission Delegated Regulation (EU) 2017/582 of 29 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (**RTS 26**); and

(d) Commission Delegated Regulation of 22 September 2017 amending Commission Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6270 final) and Commission Delegated Regulation of 22 September 2017 supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6268 final) (the **Indirect Clearing RTS**).

***Parties should consult with their own legal advisers in order to determine:***

***(i) what their regulatory obligations are and whether it is appropriate to incorporate all or some of the Provisions into the Addendum or any other relevant agreement or terms between the Clearing Member and the Client; and***

***(ii) how to form agreement between the Clearing Member and the Client in relation to the Provisions.***

***For the avoidance of doubt based on such advice parties may form the view that not all of the Provisions need to be included.***

***Parties should also note that the Provisions were drafted primarily for use with an Addendum. Although drafting options have been suggested where the Provisions are used other than in conjunction with an Addendum, parties should also consult with their own legal advisers to discuss any further amendments or customisation that may be needed, as the suggested drafting options are mainly to allow for differences in defined terms. In this context, note than in the case of an agreement or terms other than the Addendum, even the terms "Clearing Member", "Client" and "CCP" may not be appropriate.***

**PROVISIONS**

*[ ] [****Additional][[1]](#footnote-1) Definitions*.** [The following definitions are inserted in alphabetical order in Section 20 of the Addendum][[2]](#footnote-2) [The following terms have the following meaning][[3]](#footnote-3).

"***CCP Information***" means all information required by a CCP from the parties in respect of a [Clearing Eligible Trade][[4]](#footnote-4)/[transaction][[5]](#footnote-5) in order to clear such [Clearing Eligible Trade][[6]](#footnote-6)/[transaction][[7]](#footnote-7).

"***Conclusion Time***" means, [with respect to a Clearing Eligible Trade concluded by Client, the time at which such Clearing Eligible Trade was concluded][[8]](#footnote-8)/[with respect to a transaction concluded by Client and in relation to which Clearing Member will be the clearing broker, the time at which such transaction was concluded][[9]](#footnote-9).

"***Indirect Clearing RTS***" means the Commission Delegated Regulation of 22 September 2017 amending Commission Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6270 final)[[10]](#footnote-10) and Commission Delegated Regulation of 22 September 2017 supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6268 final).

"***RTS 6***" means the Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading.

"***RTS 26***" means the Commission Delegated Regulation (EU) 2017/582 of 29 June 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards specifying the obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing.

***[ ] Article 25 of RTS 6.*** Client acknowledges and agrees that Clearing Member, in accordance with Clearing Member’s obligations under Article 25 of RTS 6 will, on at least an annual basis, review the on-going performance of Client against the following criteria:

* + 1. credit strength, including any guarantees given;
		2. internal risk control systems;
		3. intended trading strategy;
		4. payment systems and arrangements that enable Client to ensure a timely transfer of assets or cash as margin required by Clearing Member in relation to the clearing services Clearing Member provides;
		5. systems setting and access to information that helps Client to respect any maximum trading limit agreed with Clearing Member;
		6. any collateral provided to Clearing Member by Client
		7. operational resources, including technological interfaces and connectivity; [and][[11]](#footnote-11)
		8. any involvement of Client in breach of the rules ensuring the integrity of the financial markets, including involvement in market abuse, financial crime or money laundering activities[.][[12]](#footnote-12)/[;and][[13]](#footnote-13)
		9. [*insert any additional criteria*].[[14]](#footnote-14)

If in the [reasonable][[15]](#footnote-15) opinion of Clearing Member, Client fails to satisfy any of the criteria set out in (a) to [(h)][[16]](#footnote-16)/[(i)][[17]](#footnote-17) above, Clearing Member may [in its sole discretion][[18]](#footnote-18) take [any of][[19]](#footnote-19) the following action[s][[20]](#footnote-20):

* + - 1. *[insert any relevant action][[21]](#footnote-21)*.

***[ ] Article 26 of RTS 6***. [Client acknowledges and agrees that Clearing Member has,][[22]](#footnote-22) /[Clearing Member will,][[23]](#footnote-23) in accordance with Clearing Member’s obligations under Article 26 of RTS 6, [provided][[24]](#footnote-24)/[provide][[25]](#footnote-25) Client with the trading and position limits that Client needs to comply with in connection with Client Transactions entered into under the [Addendum][[26]](#footnote-26)/[agreement between the parties][[27]](#footnote-27).

***[ ] Article 4(1) of RTS 26.*** Client agrees that it will take all reasonable steps requested by Clearing Member where Client's cooperation is needed to assist Clearing Member in complying with its obligations under Article 4(1) of RTS 26, including, without limitation:

(a) delivering to Clearing Member evidence of the Conclusion Time where Clearing Member reasonably requires this information for the purposes of Article 4(1) of RTS 26; and

(b) ensuring that the CCP Information is sent to the relevant [Agreed CCP][[28]](#footnote-28)/[CCP][[29]](#footnote-29) within 30 minutes from the Conclusion Time.

***[ ] Indirect Clearing***

[For the purposes of Section 2(a) of the Addendum and at the times specified therein, Client makes the following representation which will constitute an Additional Representation for the purposes of Section 2(a).][[30]](#footnote-30)

***Indirect Clearing Representation***. Client represents to Clearing Member [on the date [of this amendment agreement][[31]](#footnote-31)/[hereof][[32]](#footnote-32) and on each date on which it submits a transaction to be cleared by Clearing Member for clearing][[33]](#footnote-33) that it is not providing and will not provide indirect clearing services as contemplated by the Indirect Clearing RTS to any entity in relation to Client Transactions entered into under the [Addendum][[34]](#footnote-34)/[ agreement between the parties][[35]](#footnote-35).

1. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-1)
2. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-2)
3. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-3)
4. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-4)
5. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-5)
6. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-6)
7. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-7)
8. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-8)
9. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-9)
10. The reference to the Commission Delegated Regulation of 22 September 2017 amending Commission Delegated Regulation (EU) No 149/2013 with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6270 final) is included solely on the basis that it covers the same subject matter as the Commission Delegated Regulation of 22 September 2017 supplementing Regulation (EU) 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements (C(2017) 6268 final). It is not intended to facilitate compliance with Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories. [↑](#footnote-ref-10)
11. Delete as appropriate. [↑](#footnote-ref-11)
12. Delete as appropriate. [↑](#footnote-ref-12)
13. Delete as appropriate. [↑](#footnote-ref-13)
14. Clearing Member may wish to include additional criteria. Insert such additional criteria or delete as appropriate. [↑](#footnote-ref-14)
15. Delete as appropriate. [↑](#footnote-ref-15)
16. Delete as appropriate. [↑](#footnote-ref-16)
17. Delete as appropriate. [↑](#footnote-ref-17)
18. Delete as appropriate. [↑](#footnote-ref-18)
19. Delete as appropriate. [↑](#footnote-ref-19)
20. Delete as appropriate. [↑](#footnote-ref-20)
21. Actions may include imposing additional or amending existing trading and/or position limits, increased clearing fees, terminating Client Transactions or any other action(s) that may be agreed between Clearing Member and Client. [↑](#footnote-ref-21)
22. Delete as appropriate. [↑](#footnote-ref-22)
23. Delete as appropriate. [↑](#footnote-ref-23)
24. Delete as appropriate. [↑](#footnote-ref-24)
25. Delete as appropriate. [↑](#footnote-ref-25)
26. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-26)
27. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-27)
28. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-28)
29. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-29)
30. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-30)
31. Delete or customise as appropriate. [↑](#footnote-ref-31)
32. Delete or customise as appropriate. [↑](#footnote-ref-32)
33. Include if these provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-33)
34. Include if these Provisions are being used in conjunction with an Addendum. [↑](#footnote-ref-34)
35. Include if these Provisions are being used other than in conjunction with an Addendum and customise as appropriate. [↑](#footnote-ref-35)