

ISDA Clearing Opinions: CRR Article 305(2)(c) opinions

Background

ISDA is considering commissioning a number of clearing related legal opinions to assist ISDA members apply the risk weightings under CRR Article 305 (**Article 305**).

One of the conditions to apply the reduced risk weightings under Article 305 is that the client of a clearing member has a legal opinion that it would bear “no losses” on account of the insolvency of its clearing member or any of the clearing member’s clients under the laws of the jurisdiction of: (a) the client; (b) its clearing member; (c) the central counterparty (**CCP**); (d) the law governing the transactions and contracts the client clears through the CCP; and (e) the law governing the collateral and the law governing any contract or agreement necessary to meet the porting condition (see Article 305(2)(c)).

Opinion Approach

We would propose that the legal opinions are prepared using a modular architecture that will effectively allow the opinion required to be provided through a combination of three modules. Each module covers an element of the relevant analysis and combined, will provide the opinion we believe would be required. We think the modular approach provides greater flexibility, allowing ISDA members the ability to select which modules they require in order to obtain the requisite Article 305 opinion, and ensures a consistent approach. It will also allow ISDA to commission a larger number of modules within the budget and resources available and add to modules as we go forward.

The intention would be that Module 1 covers the core analysis in relation to the requirements of Article 305(2). Modules 2 and 3 then draw down on that core analysis. Module 2 constitutes an insolvency analysis in respect of the jurisdiction of the clearing member and Module 3 constitutes an analysis of the relevant CCP. For each of Modules 2 and 3, we will confirm and, where necessary, expand the core analysis from Module 1.

Modules 1, 2 and 3 include assumptions such as the rule set of the CCP and the client clearing agreement are effective as drafted. We would expect other opinions to cover whether this is, in fact, the case.

We would expect institutions to require Module 1 and at least one of each of the Modules 2 and 3, depending on their clearing member(s) and the number of CCPs that they use for clearing. Opinion modules for relevant jurisdictions would need to be prioritised by ISDA members in the usual anonymised way.

Note that these opinions would be available to ISDA members as a membership benefit, as with all ISDA’s opinions, and so there would be no additional charge for these opinions.

Module 1 Core Opinion

- Reasoned interpretation of “losses” (Article 305(2)(c))
- Description of client clearing account types - individually segregated and gross omnibus accounts - and identifying key features of these
- Analysis of key features of these accounts on the “no losses” requirement with reference to both the 2% and 4% risk weightings (Article 305(3)) and drawing on the reasoned interpretation of “losses” more generally
- A reasoned interpretation of the meaning of joint losses (Article 305(3))

Draw Down



Module 2 Insolvency Opinion

For each jurisdiction:

- Undertaking a regulatory characterisation on the clearing member and any applicable client asset regime
- Preparing a drawdown legal opinion to Module 1 in relation to the insolvency regime applicable to a clearing member

Draw Down



Module 3 Opinion on CCP

For each CCP:

- Diligencing the rule set for the CCP to confirm the existence of the key features of accounts identified in Module 1 and to identify any other features that would impact the core analysis in Module 1
- Preparing the drawdown legal opinion to Modules 1 and 2 for the CCP which will confirm and, where necessary, expand on the analysis in Modules 1 and 2 as applied to the CCP and the legal regime in which it operates