

Hard Brexit: An Impact Assessment for US Market Participants and Entities Registered with the CFTC¹
November 2018

This document highlights the issues that must be addressed in the case of a ‘hard’ Brexit. Specifically, it:

- Identifies existing US Commodity Futures Trading Commission (CFTC) equivalence determinations and no-action relief that is currently provided to the European Union (EU) and should be extended to entities registered with the CFTC in order to preserve continuity and market stability once the UK exits the EU.
- Analyzes the impact of a hard Brexit on US market participants, and where appropriate, proposes regulatory and contractual solutions to minimize any negative impacts a hard Brexit would have on US market participants.

We note that Brexit discussions are ongoing and, based on developments, the regulatory and contractual approaches may change.

¹ While not officially defined, a hard Brexit is generally considered to be a position where the UK not only exits the EU, but also the wider European Economic Area (EEA)



CFTC Comparability Determinations and No-Action Relief to Review in a Hard Brexit Scenario²

The chart below identifies areas where the CFTC must take action in order to avoid market disruption on March 29, 2019.

Assumptions:

- Entities located in the UK maintain their current Principles for Financial Market Infrastructures (PFMI) status.
- While the below contemplates a hard Brexit scenario, we note that a ‘soft’ Brexit scenario, depending on the nature of the agreement reached, may still require action or clarification on behalf of the CFTC.
- We assume that CFTC no-action relief provided to ‘non-US persons’ generally would be available for UK market participants post-Brexit without any action on behalf of the CFTC. These include:
 - CFTC Letter No. 18-13, allowing non-US persons to exclude swaps with international financial institutions from their swap dealer *de minimis* threshold (subject to certain specified conditions);
 - CFTC Letter No. 17-36, exempting non-US swap dealers from certain transaction-level requirements;
 - CFTC Letter No. 13-64, allowing non-US persons to exclude swaps with guaranteed entities or conduit affiliates from their swap dealer *de minimis* threshold (subject to certain conditions); and
 - CFTC Letter No. 13-29, allowing non-US persons to use alternatives to fingerprinting in order to satisfy CFTC associated person requirements.

² While many of the legal conclusions summarized herein may have been predicated on the review of EU law, we have only included those regulations and directives the CFTC explicitly cited in their analysis



#	Summary of Existing Comparability Determination or Relief	Topic ³	Analysis or Relief Predicated On ⁴	Action Required ⁵	Time Limited Relief ⁶	Impact ⁷	Relevant EU Directive or Regulation ⁸
1.	<p>CFTC Comparability Determination for the European Union: Dually-Registered Derivatives Clearing Organizations and Central Counterparties</p> <p>The CFTC determined that certain EU regulations provide a sufficient basis for finding comparability with respect to certain regulatory obligations applicable to CFTC-registered derivatives clearing organizations (DCOs). The regulatory obligations applicable to DCOs include:</p> <ul style="list-style-type: none"> • Regulation 39.11 - Financial Resources - Sets forth requirements by which a DCO must identify and adequately manage its general business risks and hold sufficient liquid resources to cover potential losses that are not related to clearing members' defaults so that the DCO can continue to provide services as a going concern. • Regulation 39.13 - Risk Management - Requires a DCO to maintain appropriate tools and procedures to manage the risks associated with discharging the responsibilities of a DCO in compliance with core principles set out in Section 5b of the CEA. • Regulation 39.16 - Default Rules and Procedures - Requires a DCO to have rules and procedures designed to allow for the efficient, fair and safe management of events during which members or participants become insolvent or otherwise default on the obligations of the members or participants to the DCO. • Regulations 39.1-39.3 - DCO/CCP Registration - In the interest of comity, the CFTC generally will tailor its registration process both in terms of administration and substantive review to reflect the availability of substituted compliance for EU CCPs. 	Clearing	The comparability determination is predicated on both registration in the EU and complying with the attendant legal requirements. Depending on the form on the hard exit from the EU takes, the CFTC will need to clarify how the existing determination applies to entities in the UK, particularly if they remain registered with the EU and continue to comply with the EU framework.		No	 <p>Potential for significant market disruption to CCPs and clearing members and market participants</p>	<ul style="list-style-type: none"> • Financial Resources: EMIR, Art. 43; RTS-CCP, Art. 51(2) and 53(1); RTS-CCP, Art. 30(2) and 59(5); EMIR, Art. 44 and 47(3)-(5); RTS-CCP, Chapter VIII (Art. 32-34); EMIR, Art. 46 and 47; EMIR, Art. 16 and 47(2); RTS-CR, Art. 2(2); RTS-CCP, Art. 43-46 and Annex II • Risk Management: RTS-CCP, Art. 4; RTS-CCP, Art. 3(3) and 4(6); EMIR, Art. 48(2); EMIR, Art. 48(2); EMIR, Art. 41(2), 49(1); RTS-CCP, Art. 24(4)(b); RTS-CCP Art. 24(1); RTS-CCP, Art. CCP 25; RTS-CCP, Art. 27 and 59(9); RTS-CCP, Art. 49 and 60(2); RTS-CCP, Art. 40(2) and EMIR Art. 46(1); RTS-CCP, Art. 41(2) and 59(1). • Default Rules and Procedures - EMIR, Art. 48, 37(6) and 45; RTS-CCP, Art. 58, 59(12) and 61(2); ESMA Q&A CCP Question 8(f)(1)

³ Describes the primary relief or determination discussed





⁴ Describes who is able to rely on the relief or comparability determination

⁵ Denotes whether intervention on the part of the CFTC is required.  =  = equivalence determination required;  = clarification required



⁶ Indicates whether the relief is extended for a specific period of time or indefinitely



⁷ Indicates severity of impact -  = significant impact (i.e., many market participants will be impacted or significant action is required);  = impact (i.e., some market participants will be impacted or clarification is required)







⁸ Lists EU directives and regulations referenced in the comparability determination or regulation

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2.	<p>Comparability Determination for the European Union: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants</p> <p>The CFTC determined that certain EU regulations provide a sufficient basis for finding comparability with respect to margin requirements for uncleared swaps applicable to certain CFTC-registered swap dealers (SD) and major swap participants (MSPs).</p> <ul style="list-style-type: none"> The relevant margin requirements include: Entities Subject to Margin Requirements; Treatment of Inter-Affiliate Derivative Transactions; Methodologies for Calculating the Amounts of Initial and Variation Margin; Process and Standards for Approving Margin Models; Timing and Manner for Collection of Payment of Initial and Variation Margin; Margin Threshold Levels or Amounts; Risk Management Controls for the Calculation of Initial and Variation Margin; Eligible Collateral for Initial and Variation Margin; Requirements for Custodial Arrangements, Segregation and Rehypotheication; Requirements for Margin Documentation; Supervision of Enforcement <p>The prudential regulators have also issued a final rule with respect to Margin and capital Requirements for Covered Swap Entities. Such rule will also need to reviewed in this context.</p>	Swap Dealers - Margin	The comparability determination is predicated on the margin framework of the EU. The CFTC will have to clarify whether UK entities can rely on such a determination if the rules in the UK remain unchanged but there is a hard exit from the EU. If the UK implements rules that diverge from EU directives and regulation, the UK may be required to complete a request for an affirmative finding of comparability and submit it to the CFTC.		No	 <p>Significant impact on non-US SDs located in the UK; impact on US firms' transactions with non-US SDs located in the UK.</p>	Several provisions of EMIR and corresponding Regulatory Technical Standards (RTS). ⁹
3.	<p>CFTC Comparability Determination for the European Union: Certain Transaction Level Requirements</p> <p>The CFTC determined that certain EU regulations provide a sufficient basis for finding comparability with respect to the following regulatory obligations applicable to CFTC-registered SDs and MSPs:</p> <ul style="list-style-type: none"> Regulation 23.504 - Swap Trading Relationship Documentation - SDs and MSPs must have policies and procedures reasonably designed to ensure that the SD and MSP enter into swap trading relationship documentation with each 	Swap Dealers - Business Conduct	The comparability determination is predicated on the legal framework in the EU. The CFTC will have to clarify whether UK entities can rely on such a determination if the rules in the UK remain unchanged but there is a hard exit from the Union. If the UK implements rules that diverge from EU directives and regulation, the UK may be required to complete a request for an affirmative finding of		No	 <p>Significant impact on non-US SDs located in the UK; impact on US firms' transactions with</p>	<ul style="list-style-type: none"> Portfolio Compression: OTC RTS Art. 14 Trade Confirmation: OTC RTS Art. 12.1-12.4 Daily Trading Records: MiFID Article 13.6 and MiFID L2D Articles 5.1.f and 51; MiFID Article 25(2); MiFID L2R Articles 9 to 16.



⁹ Specific EMIR and RTS provisions are cited in the CFTC's margin comparability determination, available [here](#)





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	<p>counterparty prior to executing any swap with such counterparty. Does not apply to cleared swaps.</p> <ul style="list-style-type: none"> Regulations 23.502 and 23.503 - Portfolio Reconciliation and Compression - Requirements for the timely and accurate netting of all swaps entered into by SDs and MSPs. Regulation 23.501 - Trade Confirmation - Requires confirmation of swap transactions among SDs and MSPs by the end of the first business day following the day of execution. Regulation 23.202 - Daily Trading Records - Generally requires that SDs and MSPs retain daily trading records for swaps and related cash and forward transactions. 		comparability and submit it to the CFTC.			non-US SDs located in the UK.	
4.	<p>CFTC Comparability Determination for the European Union: Entity Level Requirements CFTC determination that certain EU regulations provide a sufficient basis for finding comparability with respect to the following regulatory obligations applicable to CFTC-registered SDs and MSPs:</p> <ul style="list-style-type: none"> Regulation 3.3 - Chief Compliance Officer - Sets forth requirements for CCO of SD or MSP. Regulations 23.600-609 - Risk Management Duties - Sets forth requirements for Risk Management Programs; Monitoring of Position Limits; Diligent Supervision; Business Continuity and Disaster Recovery; Conflicts of Interest; Availability of Information for Disclosure and Inspection; Clearing Member Risk Management. Regulations 23.201 and 23.203 - Swap Data Recordkeeping - Generally require SDs and MSPs to retain records of each transaction, each position held, general business records (including records related to complaints and marketing materials), records related to governance, financial records, records of data reported to SDRs, and record of real-time reporting data along with a record of the date and time the SD or MSP made such reports. Transaction records must be kept in a form and manner identifiable and searchable by transaction and counterparty. 	Swap Dealers - Business Conduct	The comparability determination is predicated on the legal framework in the EU. The CFTC will have to clarify whether UK entities can rely on such a determination if the rules in the UK remain unchanged but there is a hard exit from the EU. If the UK implements rules that diverge from EU directives and regulation, the UK may be required to complete a request for an affirmative finding of comparability and submit it to the CFTC.		No	 <p>Significant impact on non-US SDs located in the UK; no apparent impact on US firms</p>	<ul style="list-style-type: none"> CCO: MiFID Articles 13(2); 13(3); and 18; MiFID L2D Articles 5, 6, 9, 21 and 23 Risk Management Duties - Risk Management Duties: MiFID Article 13(5) and MiFID L2D Article 5; MiFID L2D Article 6; MiFID L2D Article 9; MiFID L2D Article 7; Directive 2002/87/EC Article 9; ESMA Guidelines on compliance function requirements (ESMA/2012/388); MiFID L2D Articles 21 to 23; MiFID Article 50; CRD Annex V; CRD Article 22; Monitoring of Position Limits: MiFID L2D; MiFID L2D Article 9; Diligent Supervision: MiFID Article 13, MiFID L2D Articles 5, 6 and 11, and 12 and ESMA/2012/388 MiFID Article 9; Business Continuity and Disaster Recovery: MiFID L2D Article 5(3), MiFID Article 13(4);

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							<p>Conflicts of Interest: MiFID Articles 13(3) and 18; MiFID L2D Articles 21 to 23; MiFID L2D Articles 24 to 25; MiFID Articles 18 and MiFID L2D Article 22, MiFID L2D Article 25; MiFID L2D Article 24;</p> <p>Availability of Information for Disclosure and Inspection: MiFID Article 13(6) and 25(2) and 50; Clearing Member Risk Management: MiFID Article 13(5) and MiFID L2D Article 5, MiFID L2D Article 6, MiFID L2D Article 9; MiFID L2D Article 7; Directive 2002/87/EC, Article 9; EMSA Guidelines on compliance function requirements; MiFID L2D Articles 21 to 23; MiFID Article 50; CRD Annex V; CRD Article 22;</p> <p>• Swap Data Recordkeeping - MiFID Article 13(6); MiFID L2R Article 7; MiFID L2D Article 51; MiFID Article 25(2).</p>
5.	<p>CFTC Letter No. 17-66: No-Action Relief from Certain Provisions of the Outward-Facing Swaps Condition in the Inter-Affiliate Exemption from the Clearing Requirement</p> <ul style="list-style-type: none"> Allows an entity to use CFTC regulation 50.52(b)(4)(ii) or 50.52(b)(4)(iii) to meet the requirements of the outward-facing swaps condition in the inter-affiliate exemption; or Allows an entity to use CFTC regulation 50.52(b)(4)(ii) to meet the requirements of the outward-facing swaps condition in the inter-affiliate exemption in connection with a swap executed 	Clearing	Both prongs of relief set forth in CFTC Letter No. 17-66 are only applicable to eligible affiliate counterparties located in enumerated jurisdictions. While the EU is included in such a list, the UK is not. Therefore, we believe further action will be required on the part of the CFTC before UK entities can rely on such		Yes	 <p>Significantly impacts the ability of CFTC-registrants (including US firms) that have</p>	<ul style="list-style-type: none"> No EU regulations or directives explicitly cited.



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	opposite an eligible affiliate counterparty located in the European Union, Australia, Canada, Hong Kong, Mexico or Switzerland.		relief in the case of a hard exit from the EU.			UK affiliates to use inter-affiliate swaps to manage their risks	
6.	CFTC Letter No. 17-67 Extension of No-Action Relief from Commodity Exchange Act Section 2(h)(8) for Swaps Executed Between Certain Affiliated Entities that Are Not Exempt from Clearing Under Commission Regulation 50.52 Inter-affiliate transactions, not otherwise exempted from clearing, are exempted under this letter subject to certain conditions.	Clearing/ Trading	To be eligible for relief, among other things, the relevant entity must comply with a foreign jurisdiction's clearing mandate that is determined to be comparable by the CFTC and the entity must qualify for 'eligible affiliate counterparty' status. The CFTC must clarify whether these conditions are met with regards to UK market participants.	  = 	No	 Significantly impacts the ability of CFTC-registrants (including US firms) that have UK affiliates to use inter-affiliate swaps to manage their risks	No EU regulations or directives explicitly cited.
7.	CFTC Letter No. 17-64 Extension of Time-Limited No-Action Relief from Certain Requirements of Part 45 and Part 46 of the Commission's Regulations, for Certain Swap Dealers and Major Swap Participants Established under the Laws of Australia, Canada, the European Union, Japan or Switzerland <ul style="list-style-type: none"> Permits a non-US SD or major swap participant established in Australia, Canada, the European Union, Japan or Switzerland, that is not part of an affiliated group in which the ultimate parent entity is a US SD, US MSP, US bank, US financial holding company, or US bank holding company, not to comply with the requirements of the Swap Data Repository Reporting Rules with 	Reporting	The relief applies to specific entities from enumerated jurisdictions, including Australia, Canada, the European Union, Japan or Switzerland. The CFTC will need to extend the scope of the relief to include relevant UK entities.		Yes ¹⁰	 Impact on non-US SDs located in the UK transacting with other non-US persons; no apparent impact on US firms	No EU regulations or directives explicitly cited.

¹⁰ Specifically, relief until the earlier of: (a) 30 days following the issuance of a comparability determination by the CFTC with respect to the SDR Reporting Rules for the jurisdiction in which the non-US SD or non-US MSP is established, and (b) December 1, 2020

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	respect to its swaps with non-US counterparties that are not guaranteed affiliates, or conduit affiliates, of a US person.						
8.	In the Matter of the Exemption of Multilateral Trading Facilities and Organised Trading Facilities Authorized Within the European Union from the Requirement to Register with the Commodity Futures Trading Commission as Swap Execution Facilities Exemption Order <ul style="list-style-type: none"> Order exempting certain MTFs and OTFs from the requirement to register with the CFTC as swap execution facilities (SEFs). 	Trading Facilities	<p>The exemption order is predicated on EU-wide legal requirements but includes UK entities. The CFTC will have to clarify whether the order remains unaffected in a hard Brexit scenario, or whether it will need to be revisited as the UK implements or revises EU directives and regulations. The CFTC will also need to clarify whether US persons may still access recognized trading venues located in the UK to satisfy CFTC mandatory trading requirements. The CFTC should also extend equivalence to new MTFs/OTFs established in the EU as a result of Brexit and that are complying with relevant EU directives and regulations.</p> <p>A UK entity is able to trade on a SEF or DCM per an equivalence decision covering CFTC authorized SEFs and DCMs. It is unclear if the UK will need to adopt a new, separate equivalence determination in the circumstance of a hard Brexit.</p>		No	 <p>Significant impact on CFTC-registrants located in the US and UK using MTF/OTF platforms to satisfy trading obligation for certain IRS and CDS</p>	<ul style="list-style-type: none"> Article 4(1)(22) of MiFID II. Article 4(1)(23) of MiFID II.

#	Summary of Existing Comparability Determination or Relief	Topic ³	Analysis or Relief Predicated On ⁴	Action Required ⁵	Time Limited Relief ⁶	Impact ⁷	Relevant EU Directive or Regulation ⁸
9.	CFTC Letter No. 17-16 Extension of Conditional Masking No-Action Relief <ul style="list-style-type: none"> Permitting Part 45 and Part 46 reporting counterparties to mask legal entity identifiers, other enumerated identifiers and other identifying terms, and permitting Part 20 reporting entities to mask identifying information in certain enumerated and non-enumerated jurisdictions, in each case subject to conditions. 	Other	For non-enumerated jurisdictions, relief is predicated on a requesting party (reporting party, group or industry association, etc) notifying DMO that it has formed the requisite reasonable belief with respect to the privacy laws of a non-enumerated jurisdiction and meets the requisite conditions.		Yes ¹¹	 <p>Market participants or requesting parties will likely want clarification that they can rely on such letter with respect to their reasonable belief in the UK's privacy laws post-Brexit; no apparent impact on US firms</p>	GDPR
10.	CFTC Letter No. 13-45 Corrected: No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR Allows certain SDs and MSPs to comply with EMIR Risk Mitigation Rules in lieu of CFTC Risk Mitigation Rules, subject to certain conditions.	CFTC Confirmation, Reconciliation, Compression, and STRD Requirements.	Relief is provided to swap transactions that are subject to both CFTC Risk Mitigation Rules and EMIR Risk Mitigation Rules. CFTC must clarify that UK SDs that continue to follow EMIR Risk Mitigation rules post-Brexit can rely on this relief.		No	 <p>Impact on CFTC-registrants based in the UK; may impact US transactions with non-US SDs located in the UK</p>	EMIR Risk Mitigation Rules: Articles 11(2), 12, 13, 14, 15(2), of the EMIR Regulatory Technical Standards.

¹¹ Upon the occurrence of a 'reasonable belief expiration date' (for certain prongs of relief), as further described in the relief

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11.	<p>CFTC Letter No. 12-70: Relief for Certain Swap Dealers, De Minimis Dealers, Agent Affiliates, and Associated Persons from Registration as an Introducing Broker under Section 4d or a Commodity Trading Advisor under Section 4m of the Commodity Exchange Act, and Interpretation that Certain Employees of De Minimis Dealers are not an Introducing Broker as defined in Section 1a(31) of the Commodity Exchange Act</p> <p>Agent affiliates of SDs does not need to register with the CFTC as an IB or CTA subject to certain conditions, including the requirement such Agent affiliate is licensed with a financial regulator in the European Union, Switzerland, Canada, Japan, Hong Kong, Singapore, or Australia.</p>	Registration Requirements	<p>Relief is provided to certain Agent affiliates of SDs that are licensed with foreign regulators.</p> <p>CFTC must expand the relief to include UK Agent affiliates licensed with UK financial regulators, provided that such Agent affiliates continue to comply with the other conditions outlined in the relief.</p>		No	 <p>Impact on UK entities affiliated with US SDs that otherwise would have been required to register with the CFTC.</p>	N/A

Contractual Issues Impacting US Market Participants in the Event of a Hard Brexit

The chart below analyzes contractual issues related to the impact of a hard Brexit on US market participants. Importantly, we note that the chart below provides a high-level summary of these issues; for ISDA’s official position on Brexit, please see the [ISDA Brexit FAQs](#).

A note about EU law and our assumptions¹²:

- For purposes of EU law, a directive sets out regulatory goals, and requires that each member state meet them through implementing national legislation, by a set date. It is, in essence, an instruction to the member states of the EU that unless their national laws already meet the EU’s goal, the member states must pass national legislation to achieve the goal set by the EU in the directive. Member states have discretion in how they implement such rules, and in certain cases, may also go above the regulatory ‘threshold’ measure laid out in the directive.
- A regulation, on the other hand, is EU law directly applicable to its member states. It does not require further transposition by the member states (although member states may need to make consequential amendments to existing national law). Member states may not ‘mask’ the nature of a regulation by replicating it in national law.
- Brexit (in whatever form it takes) will occur on March 29, 2019, at 11 pm UK time (Brexit day) when the European Communities Act 1972 (which gave them effect in UK law) is repealed by Section 1 of the UK European Union (Withdrawal) Act 2018 (the 2018 Act).
- As we currently understand:
 - The UK has agreed to transpose all EU law in UK law when it leaves the EU.
 - The UK has already implemented, through domestic legislation, those directives that were required to be enacted by EU member states prior to Brexit day.
 - Regulations will be incorporated by reference on Brexit day¹³. In practice, this means that EU regulations will stay in effect post-Brexit day until the UK legislators choose to pass domestic legislation that supersedes them.
- In other words, in the case of a hard Brexit, going forward, it will be up to UK whether to follow new EU regulations or implement new EU directives into UK law¹⁴.
- We assume a hard Brexit scenario, for the purposes of our analysis below.

¹² See Official Website of the European Union, *Regulations, Directives and other acts* (September 2018), https://europa.eu/european-union/eu-law/legal-acts_en; see also UK Parliament Website European Union (Withdrawal) Bill Explanatory Notes (January 2018), <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079en.pdf>

¹³ Specifically, Section 3(1) of the 2018 Act provides that “Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”

¹⁴ If the UK agrees to a soft Brexit (ie, effected through joining the European Free Trade Association and remaining within the EEA), the current situation (where EU regulations are directly effective without the need for UK legislation and EU directives are required to be implemented by UK legislation) may be preserved. However, as of the date of publication, this has been rejected by the UK government

#	Topic	Summary of Issue	Regulatory Solution ¹⁵	Contractual Solution ¹⁶	Market Participant Mitigation ¹⁷	Impact on U.S. Market Participants ¹⁸
PART 1. REGULATORY ISSUES WITH A CONTRACTUAL IMPACT						
1.	Passporting	A hard Brexit, implies a loss of the ‘passporting’ rights that allow financial firms to do business across the EU. UK-based financial entities would no longer automatically be licensed in the EU. They would lose the right to sign new derivatives contracts with European counterparties and the status of their existing contracts could be thrown into doubt ¹⁹ .	Equivalence determination.	See Market Participant Mitigation.	If the UK leaves the European Economic Area (EEA), some UK market participants are considering transferring some or all of their derivative relationships to EU affiliates or EU branches. However, once the UK is a ‘third country’ post-Brexit, this approach would only give access to counterparties in the relevant EU member state in which the branch is located.	US market participants that engage with UK entities will have to closely watch how such entities respond to ensure their existing agreements, rulebooks and regulatory requirements are not impacted. Note: if US market participants decide to set up new entities engaged in derivatives trading in the EU, such new entities may be subject to CFTC registration requirements.
2.	Trade Repositories	European Market Infrastructure Regulation (EMIR) requires counterparties to report their trades to a trade repository (TR) that is authorized or recognized in the EU. Authorization is applicable to EU TRs and recognition is applicable to non-EU TRs. UK TRs will need to be recognized as third-country TRs under EMIR in order for EU market participants to continue to report their trades to them. Non-EU TRs are recognized if, pursuant to Article 77 of EMIR, the European Commission determines that the non-EU legal and supervisory arrangements relating to such TRs are equivalent to those under EMIR.	Equivalence determination. ²⁰	See Market Participant Mitigation.	DTCC announced that it would set up its business in Dublin to enable firms within the EU to continue using DTCC’s Global Trade Repository (GTR) services (regardless of the outcome of the final negotiations between the EU and the UK). DTCC’s GTR will also maintain a presence in the UK,	US market participants operating in the EU (ie, through subsidiaries) may not be able to use UK-based TRs to satisfy their reporting obligations under EMIR. From an operational perspective, such participants should ensure that they have access, and can send their trades, to an EU-based TR post-Brexit.

¹⁵ Summarizes options available to UK and EU regulators to mitigate the issue

¹⁶ Summarizes contractual amendments that could mitigate regulatory obstacles

¹⁷ Summarizes efforts by market participants to work around regulatory uncertainty

¹⁸ Highlights possible impact on US market participants, albeit indirectly

¹⁹ The loss of passporting rights will have the most significant impact on standard derivatives documentation. [ISDA's FAQ](#) provides a detailed analysis of how passporting may impact each provision of an ISDA, some of which is described in Part 2 of this chart

²⁰ We note there may be a lag between a hard Brexit and a determination that could cause difficulties for EU market participants reporting to UK TRs

#	Topic	Summary of Issue	Regulatory Solution ¹⁵	Contractual Solution ¹⁶	Market Participant Mitigation ¹⁷	Impact on U.S. Market Participants ¹⁸
		If UK TRs are not granted equivalence, there may be a period where EU market participants do not have access to their TR. This would indirectly impact contractual continuity.			ensuring ongoing compliance with both European Securities and Markets Authority (ESMA) and the Financial Conduct Authority (FCA) requirements under the relevant legislation in both jurisdictions. EU entities also have the option of shifting their reporting from DTCC to other TRs organized in the EU, although this may present operational issues.	
3.	CCPs	<p>In the case of a hard Brexit, in order for UK CCPs to be able to continue offering their services to EU firms: (1) the European Commission must determine that the UK has equivalent regulatory oversight of CCPs; and (2) ESMA must recognize the relevant UK CCP.</p> <p>In the case of a hard Brexit, UK clearing members may lose their eligibility as clearing members of EU CCPs. The converse could be applicable to EU members of UK CCPs.</p> <p>Recognition under the EMIR third-country regime allows non-EU CCPs to obtain qualifying CCP (QCCP) status under the Capital Requirements Regulation. If UK CCPs are not recognized, this means that EU banks' exposures to UK CCPs will be subject to a higher risk weighting in calculating their regulatory capital.</p>	Equivalence determination.	See Market Participant Mitigation.	<p>The London Metal Exchange (LME) indicated that it may be unable to process trades for some European members of its clearing house after Brexit²¹.</p> <p>ICE and other exchanges have moved or duplicated contracts to their New York entities to ensure no market disruptions due to Brexit.</p>	<p>EU subsidiaries of US market participants that are members of LME could experience both a service interruption and increased compliance obligations.</p> <p>EU subsidiaries of US market participants may not be able to clear their trades through UK-based CCPs.</p>

²¹ In the Brexit Fact Sheet published on its website, the London-based exchange said it wanted members to understand the “potential implications of an interruption to clearing services”. The exchange also stated a hard Brexit may imply that LME contracts would be treated as OTC derivatives, which could trigger further obligations under EU market regulations

#	Topic	Summary of Issue	Regulatory Solution ¹⁵	Contractual Solution ¹⁶	Market Participant Mitigation ¹⁷	Impact on U.S. Market Participants ¹⁸
4.	Bail-in Protocol/BRRD	<p>Upon a hard Brexit, English law would become non-EEA law, and thus EEA credit institutions that incur liabilities under English law would need to include contractual recognition of bail-in clauses in their English law governed contracts, as required by Article 55 of the Bank Recovery and Resolution Directive (BRRD).</p> <p>This would be a substantial documentation requirement unless an industry wide protocol is implemented. For an in-depth discussion of these issues, please refer to the ISDA Brexit FAQs.</p>	Remain in the EEA, which is by definition is not a hard Brexit.	Industry protocol.	Implementation of to be determined industry protocol.	US market participants will need to monitor whether there are changes to the ISDA BRRD protocol and review their documentation with UK and EU counterparties to determine whether it remains relevant or needs to be amended.
5.	Insolvency	<p>A hard Brexit would create uncertainties in relation to insolvencies involving UK companies that have businesses or significant assets located in EU member states or companies incorporated in EU member states with businesses or significant assets located in the UK.</p> <p>Insolvency proceedings commenced in EU member states are currently subject to the EU Recast Regulation on Insolvency Proceedings (EIR).</p> <p>Unless otherwise agreed, the EIR would cease to apply to the UK once it leaves the EU. As a result, UK insolvency officeholders would not have the power to deal with assets located in those EU member states or would not have the right to enforce insolvency related judgments against entities located in those EU member states.</p>	Make a determination with respect to EIR.	Potential for contractual amendments on applicable insolvency law.	Restructuring of businesses or location of assets particularly with regard to hedging.	May especially impact US market participants that engage with UK entities with EU subsidiaries. The solution chosen (ie, regulatory or contractual) could also impact how transactions are documented to provide for additional protections to UK and EU entities.
6.	Portfolio Compression	<p>Under the rules in six EU member states, as analyzed by ISDA, novations and compressions would be considered regulated activities.</p> <p>Without a ‘passport’ or an equivalence decision, these options would not be available to UK counterparties, and EU firms would be unable to readjust their portfolios in London and therefore may not be able to manage their risk properly.</p>	Grandfather all pre-existing contracts		<p>Transfer all pre-existing contracts to legal entities within the EU.</p> <p>Note: Legacy contracts that are transferred may be viewed as ‘new’ contracts, and would therefore be subject to clearing and collateral requirements, which would in turn raise costs</p>	<p>Review of existing ISDAs needed in order to assess impact.</p> <p>If derivatives contracts are entered into directly with UK or EU counterparties, they may not be impacted.</p>

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					long-term and lead to significant logistical challenges. The Bank of England estimates tens of thousands of firms may be impacted.	
7.	Collateral	<p>The UK's Financial Collateral Arrangements (No. 2) Regulations 2003 implement the EU's Financial Collateral Directive that provides certain protections to financial collateral arrangements (such as those found in credit support documentation published by ISDA). This regulation was enacted pursuant to powers in the ECA. Therefore, upon a hard Brexit, assuming the ECA is repealed without replacement or savings language, the Financial Collateral Arrangements Regulations would be automatically repealed and need to be re-enacted.</p> <p>If repealed, the extent to which a UK bank holding collateral is still able to appropriate collateral and close out transactions with the usual protections provided for by financial collateral arrangements will depend on the governing law of the security interest or title transfer arrangements and the location of the counterparty.</p>	Repeal the ECA with a savings clause for the Financial Collateral Arrangements Regulations.			Review of existing derivatives documentation needed in order to assess impact. Could potentially impact contracts with UK counterparties that involve EU-based collateral.
PART 2. CONTRACTUAL CONTINUITY ISSUES IN DERIVATIVES DOCUMENTATION						
1.	Settlement and Collateral Currency	Many derivatives contracts reference or are settled in sterling or UK assets. Sterling and UK assets are routinely used as collateral in support of derivatives trading relationships. Where margin calls are, or have been, met by posting assets that link to the UK (eg, sterling cash or UK gilts), a deterioration in value of such assets will result in requirements to post additional margin.	N/A		<p>Identify transactions that use UK-linked collateral and consider substitution to euro-denominated collateral.</p> <p>Amendments to existing ISDAs and language to address this issue in new ISDAs.</p>	US market participants should review their derivatives documentation accordingly; US market participants may want to consider substitution to euro-denominated collateral.

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2.	Termination Events generally, Events of Default, Posting of Additional Margin	<p>Businesses with significant exposure to the UK economy could find their credit rating or their counterparty's view of their creditworthiness impacted by Brexit. If that were to happen, it would be more expensive for such businesses to enter into new derivatives contracts (as the cost of credit would be higher) or to maintain existing positions (because a change in creditworthiness may implicate new or enhanced collateralization obligations in bilateral OTC derivatives contracts). Fluctuations and volatility in relevant markets could create or increase mark-to-market exposures under existing derivatives contracts. This would trigger obligations for additional margin. As a worst case scenario, termination rights in existing documentation could be triggered²².</p> <p>For an in-depth discussion of these issues, please refer to the ISDA Brexit FAQs.</p>	N/A	Industry wide protocol to address questions of contractual uncertainty.	Implementation of to be determined industry protocol.	<p>Review of existing ISDAs needed in order to assess impact.</p> <p>The questions of contract construction will impact both US and EU market participants with respect to their relationship and collateral documentation with UK entities.</p>
3.	Force Majeure and Impossibility	<p>The force majeure termination event in the ISDA 2002 Master Agreement requires an impediment to making or receiving payments or deliveries or from complying with any other material provision of the agreement as a result of an act of state beyond the control of the relevant party. The impossibility termination event²³ requires a similar impediment to performance as a result of, among other things, an act beyond a party's control.</p> <p>Brexit may constitute an act of state for the purpose of the ISDA 2002 Master Agreement and an act beyond the control of the relevant party for the purpose of the 1992 ISDA Master Agreement. However, the requirement for an <u>impediment</u> to performance as a result of such act of state is likely to be missing in most cases. For an in-depth discussion of these issues, please refer to the ISDA Brexit FAQs.</p>	EU-UK agreement regarding passporting.	If regulatory solution is offered, no contractual solution will be needed. Alternatively, amend existing ISDAs to note that Brexit does not trigger a force majeure.	Amendments to existing ISDAs and language to address in new ISDAs.	<p>Review of existing ISDAs needed in order to assess impact.</p> <p>The questions of contract construction will impact both US and EU market participants as their documentation with UK entities include the aforementioned provisions.</p>

²² Contracting parties could seek to exit contracts or renegotiate contractual terms. This could arise as a result of questions of contractual construction and contractual interpretation — examples include: how obligations comply with specific provisions of EU law will be interpreted post Brexit; will the UK be included in the European Union or not; what applies where EU law applied at the time of entering into a contract, but not at the time of performance; and, to what extent should principles of EU case law established prior to Brexit influence the English courts interpretation of similar UK legislation enacted as a result of Brexit

²³ The impossibility termination event is set out as an optional additional clause in the ISDA 1992 Master Agreement User Guide

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4.	Illegality	<p>The illegality termination event is triggered by performance of an obligation becoming illegal under an applicable law. The loss of EU passporting rights when the UK leaves the EU may prohibit a UK entity from entering into derivative transactions with an EU-based counterparty.</p> <p>Merely performing pre-existing contractual obligations entered into pre-Brexit generally should not be subject to local authorization requirements. However, certain events during the life of a transaction may involve more than the mere performance of existing contractual obligations (eg, amending derivatives contracts). If such event is viewed as entering into a ‘new’ derivative transaction that is subject to either MiFID II passporting or authorization in the relevant EU member state, then loss of the passport could render such activity illegal in the EU.</p> <p>For an in-depth discussion of this issue, please refer to the ISDA Brexit FAQs.</p>	EU-UK agreement regarding passporting.	<p>Include additional termination events in 1992 ISDA Master Agreements to address possible illegality scenarios.²⁴</p> <p>For more details, please refer to the ISDA Brexit FAQs</p>	Amendments to existing ISDAs and language to address this issue in new ISDAs.	<p>Review of existing ISDAs needed in order to assess impact.</p> <p>The questions of contract construction will impact both US and EU market participants as their documentation with UK entities include the aforementioned provisions.</p>
5.	CDEA	<p>The cleared transaction illegality/impossibility event under the ISDA/FIA Client Cleared OTC Derivatives Addendum (if applied by the parties) provides that the transaction will terminate if it becomes unlawful under any applicable law or impossible or impracticable for either party to make payment or delivery with respect to the client transaction or to comply with any other material provision of the agreement.</p> <p>In the event of a hard Brexit (assuming a loss of passporting rights with no negotiated access to the EU financial markets for UK banks/investment firms and no equivalence decision for the UK as a third country under MiFID II), it is unlikely that continued performance of existing EU and UK transactions</p>	Equivalence decision regarding passporting.		Amendments to existing CDEAs and language to address this issue in new CDEAs.	Review of CDEAs to assess potential impact.

²⁴ As noted above, in order to remove any uncertainty, one possible option for parties to a 1992 ISDA Master Agreement is to include an additional termination event addressing the circumstances of the inability of a UK entity to continue performance of an existing transaction due to the loss of passporting rights and the existence of local law requirements preventing performance. Non-UK entities might consider including this termination right as well in the circumstances of an amendment to UK law that renders continued performance of derivatives transactions illegal. In addition, if it becomes illegal to exercise a right under a transaction, this will not be an illegality but it may justify an early termination, in which case an additional termination event will be required to address this

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		<p>would be subject to authorization requirements in EU member states, with payment or delivery thereunder consequently rendered unlawful. However, there is a risk that certain EU regulators may determine otherwise and this would depend upon local law and regulation.</p> <p>If there is a novation or a modification of a transaction that may be viewed as entering into a ‘new’ trade, entry into such new trade may be subject to authorization requirements in the relevant EU member state and therefore may trigger the illegality/impossibility event described above.</p> <p>For an in-depth discussion of this issue, please refer to the ISDA Brexit FAQs.</p>				

About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 70 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org. Follow us on Twitter @ISDA.

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