
DRAFT STATUTORY INSTRUMENTS

2023 No.

The Financial Services and Markets Act 2023 (Resolution of Central Counterparties: Partial Property Transfers and Safeguarding of Protected Arrangements) Regulations 2023

PART 3

Restriction of Write-down Provision

Application

12. This Part applies to an instrument which makes write-down provision.

Set-off and netting

13.—(1) An instrument to which this Part applies may not make write-down provision in respect of a protected liability (subject to paragraph (6)).

(2) In this regulation, a “protected liability” is a write-down liability which is not within paragraph (3), and meets the following conditions—

- (a) condition 1 is that the liability is owed by the CCP to a person (“P”);
- (b) condition 2 is that the liability is a liability which either P or the CCP is entitled to set-off or net under set-off arrangements, netting arrangements or title transfer collateral arrangements into which P has entered with the CCP (“the relevant arrangements”);
- (c) condition 3 is that—
 - (i) where the liability relates to a derivative, financial contract or qualifying master agreement (see regulation 14 (meaning of “derivative”, “financial contract” and “qualifying master agreement”)), it has not been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of a write-down provision or otherwise;
 - (ii) where the liability relates to any other type of contract, it has neither been converted nor treated as if it had been converted into a net debt, claim or obligation, whether in accordance with the relevant arrangements or through the making of write-down provision or otherwise.

(3) The following liabilities are not protected liabilities—

- (a) liabilities in relation to an unsecured debt instrument which is a transferrable security issued by that CCP, and for these purposes a “debt instrument” is any instrument falling within article 77 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(1) (instruments creating or acknowledging indebtedness);
- (b) liabilities in relation to a capital instrument issued by that CCP;

- (c) liabilities owed in relation to subordinated debt;
 - (d) unsecured liabilities in relation to any instrument or contract which—
 - (i) at the date on which it was issued or made, had a maturity period of 12 months or more; and
 - (ii) is not a derivative, financial contract or qualifying master agreement;
 - (e) unsecured liabilities owed to another member of the same group as the relevant CCP which are not owed in relation to derivatives, financial contracts or qualifying master agreements;
 - (f) liabilities which relate to a claim for damages or an award of damages or a claim under an indemnity.
- (4) For the purposes of paragraph (2)—
- (a) it does not matter whether—
 - (i) the arrangements which permit P or the CCP to set-off or net the liability also permit P or the CCP to set-off or net rights and liabilities with another person;
 - (ii) the right of P or the CCP to set-off or net is exercisable only on the occurrence of a particular event;
 - (b) a liability is treated as if it is converted into a net debt, claim or obligation if the amount due in relation to the liability is reduced by reference to any sums which the debtor would be able to set off against the liability in the event that the debtor decided to exercise set-off or netting rights.
- (5) For the purposes of paragraph (3), undertakings are in the same group if they are group undertakings in respect of each other, and “group undertaking” has the meaning given in section 1161(5) of the Companies Act 2006⁽²⁾.
- (6) Paragraph (1) does not prevent write-down provision from being made in order to convert, or in connection with converting, the protected liability into—
- (a) the net debt, claim or obligation that would be due under the set-off arrangements, netting arrangements or title transfer collateral arrangements at the time the write-down provision providing for this is made; or
 - (b) an estimate of that net debt, claim or obligation.

Set-off and netting: meaning of “derivative”, “financial contract” and “qualifying master agreement”

14.—(1) In this Part—

- (a) “derivative” means a financial instrument referred to in paragraphs 4 to 10 of Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001⁽³⁾;
- (b) “financial contract” means any or any combination of the following (other than a derivative)—
 - (i) a contract for the purchase, sale, transfer or loan of a transferrable security, a group of transferrable securities or index of transferrable securities;
 - (ii) a repurchase or reverse repurchase transaction on any transferable security, group of transferable securities or index of transferable securities;
 - (iii) a commodities contract of a financial nature, including—

⁽²⁾ There are amendments to section 1165 which are not relevant.

⁽³⁾ Amended in relevant part by [S.I. 2006/3384](#), [2017/488](#) and [2018/1403](#).

- (aa) a contract for the purchase, sale, transfer or loan of a commodity, a group of commodities or an index of commodities for future delivery;
 - (bb) a swap or option on a commodity, a group of commodities or an index of commodities;
 - (cc) a repurchase or reverse repurchase transaction on a commodity, a group of commodities or index of commodities;
 - (iv) a futures contract, including a contract (other than a commodities contract) for the purchase, sale or transfer of property of any description under which delivery is to be made at a future date and at a price agreed when the contract is made.
- (2) In regulation 13 (set-off and netting), “qualifying master agreement” means a master agreement in so far as it relates to—
- (a) a derivative;
 - (b) a financial contract; or
 - (c) a contract for the sale, purchase or delivery of the currency of the United Kingdom or any other country, territory or monetary union.

Remedy

- 15.—(1) This regulation applies where any person (“P”) considers that an instrument to which this Part applies has been made in contravention of any provision of this Part and that as a result the liabilities owed to P have been affected by the making of write-down provision.
- (2) P may give notice to the Bank of the alleged contraventions of this Part.
- (3) The notice under paragraph (2) (“the notice”) must—
- (a) be given within a period of 60 days beginning with the day on which the instrument was made;
 - (b) be in writing;
 - (c) specify the provision of this Part which is alleged to have been contravened and the manner in which that contravention is alleged to have occurred; and
 - (d) identify the liability to which the alleged contravention relates.
- (4) P must also, on request, provide such additional information as the Bank may reasonably require.
- (5) Within the relevant period and acting as soon as reasonably practicable, the Bank must—
- (a) if it does not agree that a provision of this Part has been contravened in the manner specified in the notice, take the steps specified in paragraph (6);
 - (b) if it agrees that a provision of this Part has been contravened in the manner specified in the notice, take the steps specified in—
 - (i) paragraph (7), where the Bank has not exercised the bridge central counterparty stabilisation option⁽⁴⁾ in addition to making write-down provision; or
 - (ii) paragraph (8) where, in addition to having made write-down provision, the Bank has at any time exercised the bridge central counterparty stabilisation option.
- (6) The steps are to give reasons to P as to why the Bank considers that no provision of this Part has been contravened in the manner specified in the notice.
- (7) The steps are to remedy the contravention—

(4) The bridge central counterparty stabilisation option is set out in paragraph 29 of Schedule 11 to the Financial Services and Markets Act 2023 (bridge central counterparty).

- (a) where practicable—
 - (i) by requiring the CCP to issue securities; or
 - (ii) by transferring securities issued by the CCP, which the Bank estimates to have a value equal to the relevant sum, to P; or
 - (b) otherwise, by requiring the CCP to transfer the relevant sum to P, whether by exercising a power under the Schedule or otherwise.
- (8) The steps are to remedy the contravention by either—
- (a) requiring the CCP or bridge central counterparty to issue securities which the Bank estimates to have a value equal to the relevant sum to P;
 - (b) transferring securities issued by the CCP or bridge central counterparty which the Bank estimates to have a value equal to the relevant sum to P; or
 - (c) requiring the CCP or bridge central counterparty to transfer the relevant sum to P, whether by exercising a power under the Schedule or otherwise.
- (9) In this regulation—
- “relevant period” has the meaning given in regulation 16;
 - “relevant sum” means such sum as the Bank considers necessary to put P in the position P would have been in had the contravention not occurred.

Remedy: relevant period

- 16.—(1) In regulation 15(5) (remedy), the “relevant period” means—
- (a) a period of 120 days beginning with the day on which the notice under regulation 15(2) is received (“the initial period”); and
 - (b) any period by which the initial period is extended under paragraph (2) or paragraphs (2) and (3).
- (2) The Bank may extend the initial period by a period of up to 120 days if the condition in paragraph (4) is met (“the initial period and first extended period”).
- (3) The Bank may extend the initial period and first extended period by a period of up to 120 days if the condition in paragraph (4) is met.
- (4) The condition is that the Bank considers that the matters raised in the notice under regulation 15(2) are of such complexity that it is impracticable to take a decision without granting the extension.
- (5) Where the Bank extends time under paragraph (2) or (3), the Bank must as soon as reasonably practicable inform the person who gave the notice under regulation 15(2) of the extension of time and the duration of the extension.