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IM READY: BILINGUAL INITIAL MARGIN DOCUMENTATION GUIDE FOR CHINESE COMPANIES

准备就绪：面向中资机构的双语初始保证金文件
制备指南

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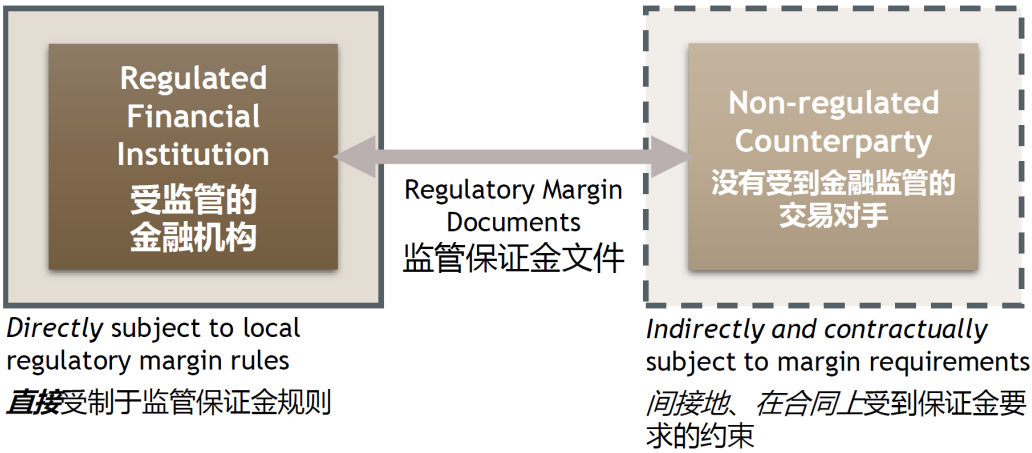


When the *PRC Futures and Derivatives Law* comes into effect on 1 August 2022, China will become a ‘clean netting jurisdiction’. Therefore, *now* is the time for Chinese companies and their international financial institution counterparties to actively focus on regulatory margin requirements for OTC derivatives and negotiate initial margin and variation margin documentation.

Based on KWM’s extensive experience in assisting major international and Chinese financial institutions with margin documentation negotiations, this bilingual guide is designed to help Chinese companies gain a better understanding of the key initial margin documents used in the international market.

当《中华人民共和国期货和衍生品法》于2022年8月1日生效时, 中国将成为“干净的净额结算管辖区”。因此, 中资机构和他们的国际金融机构对手方**现在**起就积极关注场外衍生品监管保证金要求, 并进行初始保证金和变动保证金文件制备谈判, 可谓正逢其时。

金杜在协助国内外主要金融机构进行保证金文件制备谈判方面具有丰富的经验, 本篇双语指南旨在帮助中资机构更好地了解国际市场上主要采用的初始保证金文件。



Please refer to our [earlier bilingual article](#) for further information about regulatory margin requirements, their scope of application (including cross-border application), the distinction between initial margin and variation margin, substituted compliance and other related topics.

关于监管保证金要求、其适用范围(包括跨境适用)、初始保证金和变动保证金的区别、替代性合规和其他相关主题的进一步信息, 请参考我们早前发布的[双语文章](#)。

1. OVERVIEW OF REGULATORY MARGIN REQUIREMENTS

监管保证金要求概述

The Basel Committee on Banking Supervision and the International Organization of Securities Commissions have jointly published a set of global regulatory margin standards which require counterparties to OTC derivatives to post and collect initial margin and variation margin to and from each other. To implement the global regulatory margin standards, most major jurisdictions have introduced their own local regulatory margin rules subject to some important jurisdiction-specific variations.

Generally speaking, regulated financial institutions (such as banks) are **directly** subject to local regulatory margin rules issued by the relevant financial regulator(s). These rules generally require the institution to both post and collect (i.e., exchange) variation margin and initial margin to and from certain types of counterparties.

To comply with the regulatory requirement to exchange margin, a regulated financial institution will negotiate and enter into margin documents with each of its counterparties, which will impose contractual obligations on each side to exchange margin. Therefore, even if a counterparty to a regulated financial institution is not directly subject to regulatory margin rules – either because **(1)** it is not financially regulated or **(2)** the jurisdictions in which it operates has not yet issued local regulatory margin rules – the counterparty becomes indirectly and contractually subject to margin requirements by virtue of entering into margin documents with a regulated financial institution.

Financial regulators in the People’s Republic of China (“**China**” or “**PRC**”) have not yet published local regulatory margin rules, but are expected to do so in the future. However, Chinese financial institutions and general corporates would still be *indirectly and contractually* subject to margin requirements upon entering into margin documents with a foreign regulated financial institution.

巴塞尔银行监理委员会和国际证监会组织已经联合发布了一套全球监管保证金标准, 要求场外衍生品的交易双方互相之间交纳和收取初始保证金 (initial margin, “**IM**”) 和变动保证金 (variation margin, “**VM**”)。为实施全球监管保证金标准, 大多数主要的司法管辖区已经引入了自己的当地监管保证金规则, 但各自存在一些重要的差异。

一般而言, 包括银行在内的受监管金融机构将**直接**受制于其母国金融监管机构发布的当地监管保证金规则。这些规则通常要求受监管的金融机构向特定类型的交易对手方交纳并收取(交换) 变动保证金和初始保证金。

为遵守交换保证金的监管要求, 受监管的金融机构将与其每一个交易对手协商并签订保证金文件, 将一方在当地监管保证金规则的义务转化为双方合同上的义务。因此, 即使受监管的金融机构的对手方并不直接受监管保证金规则的约束——因为 **(1)** 其没有受到当地金融监管; 或 **(2)** 其运营地所在的司法管辖区尚未发布当地监管保证金规则, 但由于其与受监管的金融机构签订了保证金文件, 该交易方也会间接地、在合同上受到保证金要求的约束。

中华人民共和国 (“**中国**”) 的金融监管机构虽然尚未发布当地监管保证金规则, 但预计会在今后问世。然而在目前的市场中, 中国的金融机构和普通企业在与境外受监管的金融机构签订保证金文件时, 仍将间接地且在合同上受到保证金要求的约束。

2. OVERVIEW OF KEY INITIAL MARGIN DOCUMENTS

主要的初始保证金文件概述

The International Swaps and Derivatives Association (“**ISDA**”) has developed a large number of industry standard margin documents that are designed to comply with initial margin requirements.

The local regulatory margin rules in most jurisdictions generally require initial margin to be held in a segregated account and not to be rehypothecated, repledged or reused. Initial margin should generally be held in an account with an independent third-party custodian which is segregated from the proprietary assets of the security-taker and custodian, and adequately protected from insolvency of the security-provider, security-taker and custodian. This segregation requirement, which applies to initial margin (but not to variation margin) means that initial margin arrangements are documented separately to variation margin arrangements. This article provides a high-level overview of the key initial margin documents. We will cover variation margin documents in a subsequent article.

ISDA has developed a wide range of standard initial margin documents designed to work with different types of custodians and governing laws. For example, ISDA has developed initial margin documents for circumstances where the custodian is a bank and where the custodian is an international central securities depository such as Euroclear or Clearstream.

Generally, the initial margin documents involve the “**security-provider**”¹ granting a security interest in favour of the “**security-taker**”² over collateral held by the independent third-party custodian (which can be a bank or a clearing house such as Euroclear or Clearstream).

国际掉期与衍生工具协会(International Swaps and Derivatives Association, “**ISDA**”)已经制定了大量的行业标准保证金文件, 以协助市场主体遵守初始保证金的相关要求。

大多数司法管辖区的当地监管保证金规则通常要求将初始保证金放置于具有隔离保护的账户中, 并且其中的初始保证金不得被再押记、再质押或再使用。初始保证金应存放于独立的第三方托管人处开立的账户中 (“**独立账户**”), 该账户与担保品接收方和托管人的自有资产相隔离, 且充分远离担保品提供方、担保品接收方和托管人的破产风险。上述隔离要求只适用于初始保证金而非变动保证金, 因此初始保证金和变动保证金有各自不同的法律文件。本文拟对主要的初始保证金文件进行基础性概述。我们将在随后的文章中介绍变动保证金文件。

为与不同类型的托管人和管辖法律相配合, ISDA已制定了一系列的标准初始保证金文件。例如, 对于托管人是银行或国际性中央证券存管机构(International Central Securities Depository, (“**ICSD**”) (如欧洲清算银行 (“**欧清**”) 或明讯银行 (“**明讯**”)) 这两种不同的情况, ISDA已经均制定了不同的初始保证金文件。

一般而言, 初始保证金文件涉及 “**担保品提供方**”¹ 以其在独立的第三方托管人 (可以是银行, 也可以是欧清或明讯等中央清算所) 处存放的担保品设立受益人为 “**担保品接收方**”² 的担保权益。



1. The security-provider is also referred to as the “pledgor” or “chargor” in certain initial margin documents. 在某些初始保证金文件中 “担保品提供方” 也被称为 “出质方” 或 “押记方”
2. The security-taker is also referred to as the “secured party” in certain initial margin documents. 在某些初始保证金文件中 “担保品接收方” 也被称为 “被担保方”

‘TRI-PARTY’ OR ‘THIRD PARTY’ CUSTODIAL SERVICES
“三方”(TRI-PARTY)或“第三方”(THIRD PARTY)托管服务

Generally, custodians offer either ‘tri-party’ or ‘third party’ custodial services in respect of initial margin:

‘Tri-party’ model

Under the tri-party services model, the custodian plays a more active role in collateral selection, valuation, verification, optimization and management, which means the security-provider and security-taker in turn play a more hands-off role and, from their perspective, the initial margin exchange process appears more automated. Euroclear and Clearstream provide tri-party custodial services (but not third party services) in respect of initial margin.

‘Third party’ model

In contrast, under the third-party services model, the custodian plays a more passive role, which means the security-provider and security-taker in turn play a more hands-on role in collateral selection, valuation, verification, optimization and management.

The choice between tri-party and third party has implications for the initial margin documents and, where the custodian is a bank, the account control agreement.

ENGLISH LAW IM CSD AND NEW YORK LAW IM CSA –
FOR USE WITH BANK CUSTODIANS
英国法IM CSD和纽约法IM CSA——用于银行托管人的情形

We generally see two types of ‘flagship’ initial margin documents adopted in the market:

English law governed IM CSD

As far as the English law documents are concerned, ISDA’s ‘flagship’ initial margin document is the 2018 Credit Support Deed (“**CSD**”) for Initial Margin (“**IM CSD**”). The IM CSD is based on the ISDA 1995 English law CSD and is therefore a separate security document executed as a deed and not forming part of the ISDA Master Agreement. Instead of relying on title transfer, the IM CSD involves creating a security interest over the segregated account and the collateral held in it. Significantly, pursuant to regulatory margin requirements, initial margin must generally be transferred on a two-way gross basis, which means that each counterparty must transfer collateral to the other counterparty’s segregated account and these two separate transfer obligations cannot be netted or set off against each other.

New York law governed IM CSA

As far as the New York law documents are concerned, ISDA’s ‘flagship’ initial margin document is the 2018 Credit Support Annex (“**CSA**”) for Initial Margin (“**IM CSA**”). The IM CSA is based on the ISDA 1994 New York law CSA and also involves creating a security interest over the segregated account and the collateral held in it.

一般而言,托管人将为初始保证金提供“三方”或“第三方”托管服务。

“三方”(tri-party)托管服务

在三方服务模式下,托管人在担保品的选择、估值、核实、优化和管理方面发挥着更加积极的作用,这意味着担保品提供方和担保品接收方相反则更像“甩手掌柜”,因此从他们的角度来看,交换初始保证金的过程会显得更加自动化。欧清和明讯仅就初始保证金提供三方托管服务而不提供第三方托管服务。

“第三方”(third party)托管服务

相比之下,在第三方服务模式下,托管人扮演的角色则相对被动,也就是说担保品提供方和担保品接收方反过来在担保品的选择、估值、核实、优化和管理方面则需要“亲力亲为”。

当托管人是银行时,对于三方和第三方模式的不同选择将导致需要采用不同的初始保证金文件和《账户控制协议》。

我们在市场上常看到以下两种“旗舰性”初始保证金文件:

英国法IM CSD

就英国法文件而言,ISDA的“旗舰性”初始保证金文件是《2018年版初始保证金信用支持契据》(“**IM CSD**”)。IM CSD系基于ISDA《1995年版英国法CSD》而制,因此是一份独立的担保文件,以契据方式签署,不构成ISDA主协议的一部分。IM CSD不依靠担保品的所有权转让,而是对独立账户和其中的担保品设立担保权益。重要的是,根据监管保证金要求,初始保证金通常须以全额为基础进行双向交付,这意味着各方必须将担保品交付到对方的隔离账户中,且这两个单独的交付义务不能相互抵销。

纽约法IM CSA

就纽约法文件而言,ISDA的“旗舰性”初始保证金文件是《2018年版初始保证金信用支持附件》(“**IM CSA**”)。IM CSA基于ISDA《1994年版纽约法CSA》而制,因此也涉及对独立账户和其中持有的担保品设立担保权益。

In this article, the IM CSA and IM CSD shall be collectively referred to as the “**IM CSA/CSD**”. The elections and variables paragraph of the IM CSA/CSD allows parties to make various elections and amendments to meet applicable commercial and regulatory requirements. The most common types of elections are discussed further below.

The IM CSA/CSD can be used where the security-provider will post initial margin to a segregated account held with a bank custodian. The parties will also need to enter into an account control agreement and custody agreement.

Where the jurisdiction in which the bank custodian is located is different to the jurisdiction the laws which govern the ISDA Master Agreement between the parties, the parties may effectively ‘split’ the IM CSA/CSD into a collateral transfer agreement and a security agreement, as explained below.

SPLITTING THE IM CSA/CSD INTO TWO: THE COLLATERAL
TRANSFER AGREEMENT AND THE SECURITY AGREEMENT
将IM CSA/CSD一分为二:《担保品交付协议》和《担保协议》

ISDA has also published the Bank Custodian Collateral Transfer Agreement for initial margin and several Bank Custodian Security Agreements governed by the laws of different jurisdictions. The Bank Custodian Collateral Transfer Agreement and Bank Custodian Security Agreement represent the two halves of the IM CSA/CSD:

- 1. the Bank Custodian Collateral Transfer Agreement governs the mechanical and operational aspects of the margin exchange process and is generally governed by the same governing law as the relevant ISDA Master Agreement; and
- 2. the Bank Custodian Security Agreement relates to the creation and enforcement of the security interest and is governed by the law where the segregated account is located.

The reason for splitting the IM CSA/CSD into a collateral transfer agreement and a security agreement is to allow the parties to enter into a security agreement the governing law jurisdiction of which matches the location of the segregated account, while allowing the collateral transfer agreement to be governed by the same governing law as the relevant ISDA Master Agreement.

The IM CSA/CSD, the Bank Custodian Collateral Transfer Agreement and the Bank Custodian Security Agreement are bilateral agreements entered between the parties.

本文中,IM CSA和IM CSD统称为“**IM CSA/CSD**”。IM CSA/CSD允许双方进行各种选择和修订,以满足适用的商业和监管要求。下文将进一步讨论最常见类型的选择。

IM CSA/CSD可用于担保品提供方将初始保证金存入银行托管人处开立的独立账户的情形。如下文所述,在该情形下,除了IM CSA/CSD之外,双方还需要签订《账户控制协议》和《托管协议》。

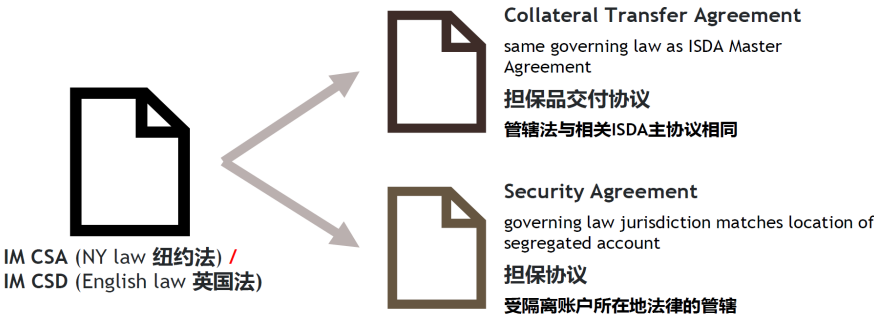
如果银行托管人所在的司法管辖区与双方之间ISDA主协议准据法的司法管辖区不同,那么双方可以将IM CSA/CSD“拆分”为《担保品交付协议》和《担保协议》,请见下文所述。

ISDA还发布了适用于初始保证金的《银行托管人担保品交付协议》和数份由不同司法管辖区法律管辖的《银行托管人担保协议》。《银行托管人担保品交付协议》和《银行托管人担保协议》分别处理了原IM CSA/CSD的两块内容:

- 1. 《银行托管人担保品交付协议》规定了保证金的交换流程,并受到与相关ISDA主协议相同的管辖法的约束,是一种合约性安排;及
- 2. 《银行托管人担保协议》涉及担保权益的设立和处置,并受隔离账户所在地法律的管辖,是一种偏担保物权性质安排。

将IM CSA/CSD拆分为担保品交付协议和担保协议的原因是:根据一般的冲突法规则,设立担保物权的安排(即担保协议)的法律有效性通常需要适用独立账户所在地的司法管辖区法律并以此来诠释,而纯合约性的担保品交付协议则应跟随其主合同——ISDA主协议的准据法的管辖。

需注意,IM CSA/CSD、《银行托管人担保品交付协议》和《银行托管人担保协议》均是由交易双方签署的双边协议。



ACCOUNT CONTROL AGREEMENT
账户控制协议

Where the security-provider will post initial margin to a segregated account held with a bank custodian, the security-provider, the security-taker and the bank custodian must enter into an account control agreement. The account control agreement governs, among other things, the circumstances and manner in which the security-taker or security-provider can exercise exclusive control over the segregated account and instruct the bank custodian to transfer collateral out of the account.

Notably, the account control agreement is a tri-partite agreement among the security-provider, the security-taker and the bank custodian.

Generally, an account control agreement allows the security-taker to obtain exclusive control over the segregated account by giving a Notice of Exclusive Control to the bank custodian. After receiving a Notice of Exclusive Control, the bank custodian would generally only act in accordance with instructions from the security-taker. An account control agreement would also allow the security-provider to obtain exclusive control over the segregated account by giving a Control Event Notice³ to the bank custodian. After receiving a Control Event Notice, the bank custodian should generally only act in accordance with instructions from the security-provider.

Major bank custodians have published standard form account control agreements, which are subject to certain elections that the parties can make to reflect their commercial and regulatory needs. These elections allow the parties to, among other things:

- **When notice effective:** agree on whether to impose a delay period before the Control Event Notice takes effect. If there is a delay period, the parties can further agree on: **(1)** the length of the delay period; **(2)** whether the security-taker can give a Notice to Contest to the bank custodian stating that the Control Event Notice is groundless, which invalidates the Control Event Notice before it takes effect; and **(3)** the circumstances in which certain acceleration events can override the delay period; and
- **Competing notices:** agree on how the bank custodian should deal with a competing Control Event Notice and Notice of Exclusive Control, including whether the bank custodian must nevertheless comply with a Notice of Exclusive Control given by the security-taker after the security-provider has already given a Control Event Notice to the bank custodian but before the Control Event Notice takes effect.

3. A Control Event Notice is sometimes also referred to as a Pledgor Access Notice or Notice of Return of Collateral.
《控制事件通知》有时也被称为《出质方准入通知》(Pledgor Access Notice) 或《担保品返还通知》(Notice of Return of Collateral)

如果担保品提供方将初始保证金缴纳至在银行托管人处开立的独立账户, 那么担保品提供方、担保品接收方和银行托管人需要订立《账户控制协议》。《账户控制协议》应规定担保品接收方或担保品提供方可以对独立账户行使排他控制和指示银行托管人转出担保品的情形及方式, 以及其他内容的条款。

值得一提的是, 《账户控制协议》是担保品提供方、担保品接收方和银行托管人之间的三方协议。

通常来说, 《账户控制协议》将允许担保品接收方通过向银行托管人出具《排他控制通知》(Notice of Exclusive Control) 的方式实现对独立账户的排他控制。在收到该通知后, 银行托管人通常只会根据担保品接收方在通知中指示的内容行事。此外, 《账户控制协议》还允许担保品提供方通过向银行托管人出具《控制事件通知》(Control Event Notice)³ 的方式实现对独立账户的排他控制。在收到该通知后, 银行托管人通常只会根据担保品提供方在通知中指示的内容行事。

多数托管银行已经发布了标准格式的《账户控制协议》, 其中包含了可以反映商业和监管需求的特定选择。这些选择允许双方就以下内容和其他内容达成一致:

- **通知的生效时间:** 就是否在《控制事件通知》生效前施加延迟期限达成一致。如有延迟期限, 双方可以进一步约定: **(1)** 延迟期限的长度; **(2)** 担保品接收方是否可以向银行托管人出具《反对通知》(Notice to Contest), 说明《控制事件通知》是缺乏根据的, 从而在《控制事件通知》生效前使其无效; 和 **(3)** 哪些情况下特定的加速事件的效力优先于延迟期限; 以及
- **相互冲突的通知:** 就银行托管人应如何处理有冲突的《控制事件通知》和《排他控制通知》达成一致, 包括在担保品提供方已经向银行托管人出具《控制事件通知》之后但在其生效之前, 银行托管人是否仍必须遵守担保品接收方出具的《排他控制通知》。

ELIGIBLE COLLATERAL SCHEDULE
合格担保品附件

An Eligible Collateral Schedule is a schedule that sets out the types of eligible collateral that the security-provider can post to the security-taker, including applicable regulatory and foreign exchange haircuts and concentration limits. Under the tri-party services model, the Eligible Collateral Schedule is agreed amongst the security-provider, the security-taker and the custodian, and is included as part of the account control agreement. Under the third party services model, the security-provider and the security-taker typically agree between them the Eligible Collateral Schedule.

《合格担保品附件》(Eligible Collateral Schedule) 是用于规定担保品提供方可以向担保品接收方提交的合格担保品类型的附件, 包括适用的监管、外汇折扣率以及集中度限制。在三方服务模式下, 《合格担保品附件》在担保品提供方、担保品接收方和银行托管人之间达成, 并被包含为三方协议《账户控制协议》的一部分。在第三方服务的模式下, 担保品提供方和担保品接收方一般会在双边的基础上同意《合格担保品附件》。

CUSTODY AGREEMENT
托管协议

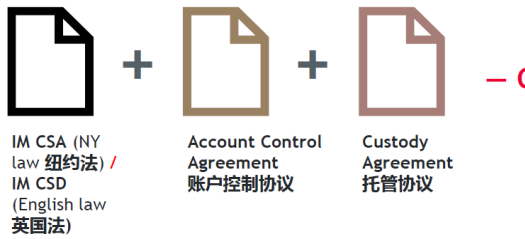
Where the security-provider will post initial margin to a segregated account held with a bank custodian, the security-provider will enter into a custody agreement, which will govern the terms of the custody account that the security-provided has established with the bank custodian. To comply with regulatory margin requirements, initial margin will be transferred from the custody account into the segregated account. Each bank custodian has its own standard form custody agreement.

如果担保品提供方将初始保证金缴纳至开立在银行托管人处的独立账户, 那么担保品提供方将订立一份《托管协议》, 规定其已经与银行托管人协商设立的条款。为遵守保证金监管要求, 初始保证金将会被从托管账户转入独立账户。每家银行托管人都有其自己标准格式的《托管协议》。

Where the custodian is a bank 当托管人是银行时

If location of segregated account is **same** as governing law jurisdiction of ISDA Master Agreement

如果独立账户的所在地与ISDA主协议的准据法所在地相同



If location of segregated account is **different** from governing law jurisdiction of ISDA Master Agreement

如果独立账户的所在地与ISDA主协议的准据法所在地不同



EUROCLEAR AND CLEARSTREAM INITIAL MARGIN DOCUMENTS
欧清和明讯初始保证金文件

Where the custodian is not a bank but Euroclear or Clearstream, the parties would enter into:

1. in the case of Euroclear, the 2019 Euroclear Collateral Transfer Agreement and the 2019 Euroclear Security Agreement; or
2. in the case of Clearstream, the 2019 Clearstream Collateral Transfer Agreement and the 2019 Clearstream Security Agreement.

如果银行托管人不是银行而是欧清或明讯, 那么:

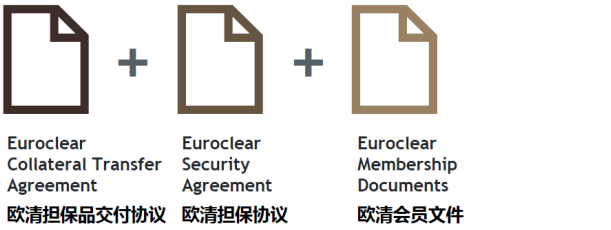
1. 当双方选择欧清为托管人时, 双方将签订《2019年版的欧清担保品交付协议》和《2019年版的欧清担保协议》; 或
2. 当双方选择明讯为托管人时, 双方将签订《2019年版的明讯担保品交付协议》和《2019年版的明讯担保协议》。



Again, the credit support document is split into the collateral transfer agreement and the security agreement for similar reasons as in the bank custodian context. The Euroclear Collateral Transfer Agreement and Clearstream Collateral Transfer Agreement are generally governed by the same governing law as the relevant ISDA Master Agreement. The Euroclear Security Agreement is governed by the laws of Belgium, where Euroclear is based, while the Clearstream Security Agreement is governed by the laws of Luxembourg, where Clearstream is based.

The Euroclear and Clearstream initial margin documents are designed to specifically work with the Euroclear and Clearstream membership documents, respectively, which are entered into by the relevant parties. Therefore, the elections and variations provisions in the Euroclear and Clearstream initial margin documents are somewhat different to those found in the bank custodian initial margin documents. The membership documents perform a similar role to the account control agreement in the bank custodian context and contain the terms of the tri-party custodial services provided by Euroclear or Clearstream, as the case may be.

Where the custodian is Euroclear
当托管人是欧清时



出于与银行托管人部分提到的类似原因，信用支持文件被拆分为担保品交付协议和担保协议。欧清和明讯的担保品交付协议通常与相关ISDA主协议的管辖法一致，而担保协议方面的管辖法则不同：由于欧清位于比利时，《2019年版的欧清担保协议》适用比利时法；由于明讯位于卢森堡，《2019年版的明讯担保协议》则适用卢森堡法。

欧清或明讯的初始保证金文件还需要分别与交易方与欧清或明讯之间订立的会员文件（membership documents）配合使用。欧清和明讯初始保证金文件中的选择和变量会与银行托管人初始保证金文件中的条款设置有所不同。欧清和明讯会员文件的作用与银行托管人的三方《账户控制协议》类似，也包含由欧清和明讯提供的三方托管服务的条款。

Where the custodian is Clearstream
当托管人是明讯时



ONE-WAY AND TWO-WAY INITIAL MARGIN DOCUMENTS
单向（ONE-WAY）和双向（TWO-WAY）初始保证金文件

An initial margin document can be a one-way document or a two-way document. A one-way document governs the initial margin posting leg of only one party (being the security-provider), which posts initial margin to the other party (being the security-taker). In contrast, a two-way document governs each party’s initial margin posting leg but these two separate initial margin flows cannot net be netted or set off against each other.

At the parties’ election, each of the IM CSA/CSD, Bank Custodian Collateral Transfer Agreement, Euroclear Collateral Transfer Agreement and Clearstream Collateral Transfer Agreement may be used as a one-way or a two-way initial margin document. To do this, the parties simply specify in the relevant initial margin document whether the “One Way Provisions” are “Applicable” or “Not Applicable”.

初始保证金文件可以是单向也可以是双向的。所谓单向文件就是仅规管一方（担保品提供方）向另一方（担保品接收方）缴纳初始保证金的环节。相比之下，双向文件则规管双方缴纳初始保证金的环节，但是两者中各自产生的初始保证金现金流不能适用轧差或抵销。

根据双方的选择，每份IM CSA/CSD、《银行托管人担保品交付协议》、《欧清担保品交付协议》和《明讯担保品交付协议》都可能被用作单向或双向的初始保证金文件。为实现双方的选择，双方只需要在有关的初始保证金文件中指明“单向条款（One Way Provisions）”是否适用即可。

Please note, however, that each Bank Custodian Security Agreement, Euroclear Security Agreement and Clearstream Security Agreement can only be used as a one-way document. For example, even if the parties enter into a two-way Euroclear Collateral Transfer Agreement, they must still enter into two separate Euroclear Security Agreements, one for each party’s initial margin posting leg. As illustrated below, the ability to use the IM CSA/CSD or collateral transfer agreement as a one-way document is useful where each party uses a different type of custodian.



然而需要注意的是，每份《银行托管人担保协议》、《欧清担保协议》和《明讯担保协议》只能作为单向文件使用。例如，即使双方订立一个双向的《欧清担保品交付协议》，他们仍必须订立两份单独的单向《欧清担保协议》，分别规管每一方的初始保证金缴纳环节。如后文所示，在各方使用不同类型托管人的情况下，能将IM CSA/CSD或担保品交付协议作为单向文件来使用就非常有帮助。



3. HOW DO I DECIDE WHICH INITIAL MARGIN DOCUMENTS TO USE?
用哪种初始保证金文件？

The choice of initial documents for any given pair of counterparties depends on a number of factors, including the custodian used by each counterparty, the location of each segregated account and the governing law of the ISDA Master Agreement between the parties.

Basic example

To begin with a straightforward example, if the ISDA Master Agreement is governed by New York law and each party has chosen a bank custodian located in New York, then the parties can enter into a two-way IM CSA governed by New York law to provide for the exchange of initial margin. Similarly, if the ISDA Master Agreement is governed by English law and each party has chosen a bank custodian located in London, then the parties can enter into a two-way IM CSD governed by English law to provide for the exchange of initial margin. In each of these two scenarios, a separate account control agreement and custody agreement would need to be entered into in respect of each party’s posting leg.

任何一对交易对手对初始保证金文件的选择取决于诸多因素，包括各交易对手所使用的托管人，各独立账户所在地以及双方之间ISDA主协议的准据法。

简单例子

让我们从一个较为简单的例子入手，如果ISDA主协议的准据法为纽约法且双方都选择了位于纽约的银行托管人，那么双方可以订立一份双向的受到纽约法管辖的IM CSA，以支持初始保证金的交换。类似的，如果ISDA主协议受到英国法管辖且双方都选择了位于伦敦的银行托管人，那么双方就可以订立一份双向的受到英国法管辖的IM CSD，以支持初始保证金的交换。在前述任意一种情形下，各方都需要就其自身的初始保证金缴纳义务而订立一份独立的《账户控制协议》和《托管协议》。



Other examples

Same type of custodian

However, in reality, the type of custodian chosen by each party, the governing law of the ISDA Master Agreement and the location of each segregated account would not always be so conveniently aligned. As noted above, even if both parties have chosen to use a bank custodian as opposed to Euroclear or Clearstream, if the location of the segregated account is different from the jurisdiction the laws of which govern the ISDA Master Agreement, the parties may choose to split the IM CSA/CSD into a collateral transfer agreement and a security agreement. For example, where the relevant ISDA Master Agreement is governed by English law but the segregated account is located in France, the parties may wish to choose to enter into a Bank Custodian Collateral Transfer Agreement (which shall be governed by English law) and a French law governed Bank Custodian Security Agreement.

Different types of custodian

Things become more complicated where each party chooses a different type of custodian. Since each party can in theory choose between one of three types of custodians (i.e., a bank custodian, Euroclear or Clearstream), this gives rise to nine possible combinations. If the parties have chosen the same custodian type, they can generally enter into a two-way IM CSA/CSD, Bank Custodian Collateral Transfer Agreement, Euroclear Collateral Transfer Agreement or Clearstream Collateral Transfer Agreement, as the case may be. However, each security agreement entered into can only be a one-way document.

If the parties have chosen different types of custodians, the IM CSA/CSD or the relevant collateral transfer agreement would also need to be a one-way document. For example, suppose the ISDA Master Agreement is governed by English law and Party A has chosen a bank custodian based in London. In respect of Party A's posting leg, a one-way IM CSD, account control agreement and custody agreement would be entered into. If Party B has chosen Euroclear as its custodian, then in respect of Party B's posting leg, a one-way Euroclear Collateral Transfer Agreement and Euroclear Security Agreement would be entered into.

其他例子

同类型的托管人

然而,在现实情况下,各方对托管人类型的选择、ISDA主协议的准据法和独立账户所在地并不能总是简单保持一致。如上所述,即使双方都已经选择使用银行托管人,而不是欧清或明讯,如果独立账户的所在地与ISDA主协议的准据法所在地不同,双方仍可以选择将IM CSA/CSD拆分为担保品交付协议和担保协议。例如,如果ISDA主协议是英国法管辖但独立账户位于法国,双方可能希望选择订立一份《银行托管人担保品交付协议》(受英国法管辖)和一份受法国法管辖的《银行托管人担保协议》。

不同类型的托管人

如果双方选择不同类型的托管人,情况将变得更加复杂。由于任一方在理论上都可以在三类托管人中选择一种(即银行托管人、欧清和明讯),这就将产生9种潜在的组合。如果双方选择同类的托管人,他们可以根据实际情况订立双向的IM CAS/CSD、《银行托管人担保品交付协议》,《欧清担保品交付协议》或《明讯担保品交付协议》。然而,每份担保协议均只可作为单向文件使用。

如果双方选择不同类型的托管人,IM CSA/CSD或相关的担保品交付协议都需要作为单向文件。例如,假设ISDA主协议是受到英国法管辖且甲方选择了位于伦敦的银行托管人,那么就甲方的初始保证金缴纳环节而言,应订立一份单向IM CSD,《账户控制协议》和《托管协议》。如果乙方选择欧清作为其托管人,则就乙方的初始保证金缴纳环节而言,应订立一份单向《欧清担保品交付协议》和《欧清担保协议》。

4. NEGOTIATING INITIAL MARGIN DOCUMENTS – OVERVIEW OF SOME COMMON ELECTIONS
谈判初始保证金文件：一些常见的选项

Despite the development and widespread use of industry standard initial margin documents, these legal documents are highly complex and heavily negotiated, because each document allows the parties to make a large number of elections and further amendments to tailor for their specific commercial and regulatory circumstances.

The process of negotiating initial margin documents is comparable to negotiating an ISDA schedule or the elections and variables paragraph of the 1994 New York law CSA or 1995 English law CSD. However, the process can be much more complicated because multiple initial margin and other legal documents are required for each pair of counterparties. Accordingly, many financial institutions and their counterparties engage external law firms to assist with margin documentation, negotiation and related legal and compliance issues.

While each initial margin document comes in a pre-printed form, it contains an elections and variables (or equivalent) provision which allows parties to make various elections and amendments to meet applicable commercial and regulatory requirements.

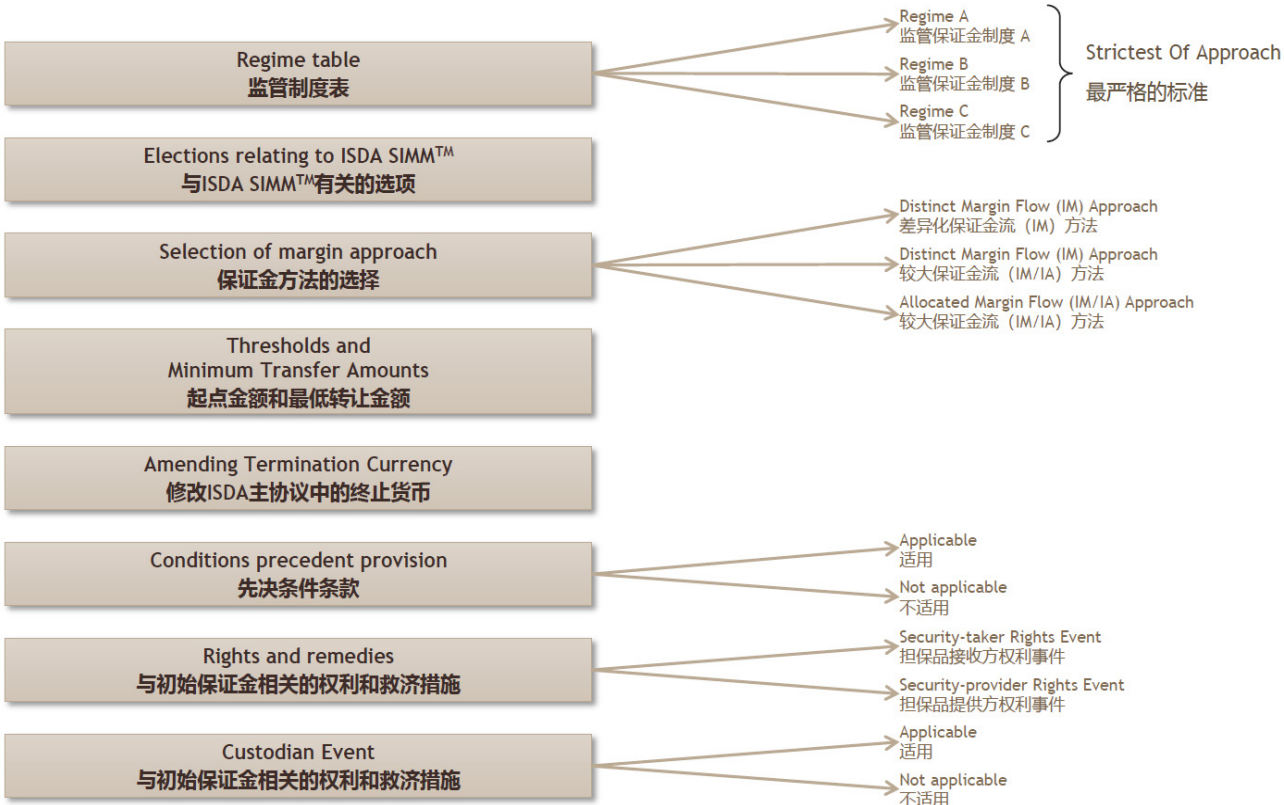
Please note that the initial margin documents are highly complex legal documents and what follows is a merely simplified, high-level and non-exhaustive overview of some common types of elections that can be made in the initial margin documents.

尽管行业标准的初始保证金文件已经普遍发展并得到广泛使用,但是这些法律文件非常复杂,需要进行繁复的谈判,其原因在于每份文件都允许交易双方进行大量选择和进一步修改,以适应其具体的商业和监管情况。

谈判初始保证金文件的过程类似于谈判ISDA附件或谈判《1994年版纽约法CSA》、《1995年版英国法CSD》的选择和变量(elections and variables)条款,但可能要复杂得多,因为每一对交易对手都需要签订多份初始保证金文件及其他法律文件。因此,许多金融机构及其交易对手会聘请外部律所来协助处理保证金文件、谈判以及相关的法律和合规问题。

虽然每份初始保证金文件都采用预先印制的格式,但其中都载有选择和变量(或同等)条款,允许双方进行各种选择和修正,以满足适用的商业和监管要求。

需要注意的是,初始保证金文件是非常复杂的法律文件,以下只是对初始保证金文件中可以进行的一些常见类型的选项进行简明扼要的概述,而无法穷尽。



REGIME TABLE
监 管 制 度 表

The IM CSA/CSD and each Bank Custodian Collateral Transfer Agreement, Euroclear Collateral Transfer Agreement and Clearstream Collateral Transfer Agreement include a regime table for the parties to complete. The regime table allows the parties to identify the regulatory margin regime(s) (i.e. the relevant local regulatory margin rules) that apply to their trading relationship.

Where more than one regime is identified as being applicable, then the initial margin documents will require the security-provider to post initial margin in an amount that will satisfy the strictest requirements among all such Regimes (“**Strictest Of Approach**”). By complying with the strictest requirement, the parties will, as a matter of logic, be complying with the less strict requirements imposed by the other applicable local regulatory margin rules.

Where a party is relying on substituted compliance (a concept which is explained in our [earlier bilingual article](#)) in respect to a regime, that regime generally would not be specified as being applicable in the regime table.

IM CSA/CSD和每份《银行托管人担保品交付协议》、《欧清担保品交付协议》和《明讯担保品交付协议》都包括供双方填写的监管制度表 (regime table)。该监管制度表允许双方确定适用于其交易关系的监管保证金制度 (即相关的当地监管保证金规则)。

如果双方确定需要适用多个制度, 那么初始保证金文件将要求担保品提供方缴纳的初始保证金金额应满足所有该等制度中最严格的要求 (“**最严格的标准**”)。在遵守了最严格的标准后, 从逻辑上讲, 双方也就实现了对其他适用的当地监管保证金规则 (其中含有比最严格的标准宽松的要求) 的遵守。

如果一方对某一制度选择并依赖“替代性合规” (该概念在我们之前的双语文章中有解释), 那么该制度一般不会对在监管制度表中被指定为适用。

ELECTIONS RELATING TO ISDA SIMM™
与 ISDA SIMM™ 有 关 的 选 项

- The local regulatory margin rules in many jurisdictions require the amount of initial margin that is to be exchanged to be calculated using either:
1. a standardized initial margin schedule (known as the ‘regulatory grid’) which generally involves applying regulatory prescribed percentages to the notional amounts of derivatives transactions and adjusting using a net-to-gross ratio (“**Mandatory Method**”); or
 2. a sophisticated initial margin model approved by the regulator.

Since initial margin models are generally more risk-sensitive and recognize the benefits of netting to a greater extent, they tend to result in quantitatively lower initial margin requirements than calculations made using the regulatory grid.

ISDA SIMM™ (“**SIMM**”) is an initial margin model developed by ISDA which is widely used in the industry to calculate initial margin requirements. In the initial margin documents, the parties can elect to use SIMM by specifying “SIMM Exception” as being “Not Applicable”. Even if “SIMM Exception” is specified as being “Applicable”, the parties can further elect the “Fallback to Mandatory Method”, which means that SIMM will still be used unless a party gives notice that it is required under the relevant Regime to use the Mandatory Method for certain types of transactions. Alternatively, the parties can elect for the Mandatory Method to generally apply.

许多司法管辖区的当地监管保证金规则要求使用以下两种方法中的一种来计算需要交换的初始保证金金额:

1. 标准化的初始保证金附件 (称为“监管网格法”, regulatory grid), 该标准通常涉及将监管要求的百分比适用于衍生品交易的名义金额, 并使用净额对全额比率 (net-to-gross ratio) 进行调整 (“**强制法**”); 或
2. 监管机构批准的初始保证金模型 (“**初始保证金模型法**”)。

由于初始保证金模型法通常对风险更加敏感, 并在更大程度上采用净额结算的结果, 因此它们往往会导致初始保证金要求在数量上低于使用监管网格法进行的计算。

ISDA SIMM™ (“**SIMM**”) 是由ISDA开发的一种初始保证金模型, 在行业中被广泛用于计算初始保证金要求。在IM文件中, 双方可以通过规定“SIMM例外情况” (SIMM Exception) 为“不适用”来选择适用SIMM。即使“SIMM例外情况”被规定为“适用”, 双方也可以选择“强制法的后备机制” (Fallback to Mandatory Method), 来实现适用SIMM的目的, 即双方仍应适用SIMM, 但一方通知相关监管制度要求其在某些类型的交易中必须使用强制法的除外。另外一种可能是, 双方可以选择普遍适用强制法。

SELECTION OF MARGIN APPROACH
保 证 金 方 法 (MARGIN APPROACH) 的 选 择

In the initial margin documents, the parties can select one of three margin approaches for addressing the interaction (if any) between initial margin posted under the initial margin documents and non-regulatory independent amounts posted under other credit support documents.

Under the Distinct Margin Flow (IM) Approach, as its name suggests, there is no interaction between initial margin calculated and posted under the initial margin documents and non-regulatory independent amounts calculated and posted under other credit support documents between the parties. In other words, they remain two distinct flows of margin.

Under the Allocated Margin Flow (IM/IA) Approach, initial margin calculated under the initial margin documents is posted in accordance with such documents, but non-regulatory independent amounts calculated under other credit support documents between the parties will be *reduced* by the amount initial margin posted under the initial margin documents.

Under the Greater of Margin Flow (IM/IA) Approach, the initial margin and non-regulatory independent amount flows of margin will be combined into a single flow such that the greater of the two amounts must be posted in accordance with the initial margin documents.

如果双方根据其他信用支持文件缴纳非监管型独立金额, 那么双方在初始保证金文件中可以从以下三种保证金方法中选择一种来处理根据**保证金**文件缴纳的**保证金**与非监管型独立金额之间的相互关系 (如有)。

方法一, 差异化保证金流 (IM) 方法 (Distinct Margin Flow (IM) Approach), 顾名思义, 指根据初始保证金文件计算并缴纳的初始保证金与根据其他信用支持文件计算并缴纳的非监管型独立金额之间没有相互作用。换言之, 它们仍然是两种不同的保证金流。

方法二, 分配保证金流 (IM/IA) 方法 (Allocated Margin Flow (IM/IA) Approach), 根据初始保证金文件计算的初始保证金将根据该文件进行缴纳, 但在根据双方之间的其他信用支持文件计算并缴纳非监管型独立金额的过程中, 将**减去**根据初始保证金文件已缴纳的初始保证金。

方法三, 较大保证金流 (IM/IA) 方法 (Greater of Margin Flow (IM/IA) Approach), 指初始保证金和非监管型独立金额的保证金流将合并为单一流, 因此仅根据初始保证金文件缴纳两个金额中的孰高者。

SPECIFYING THRESHOLDS AND MINIMUM TRANSFER AMOUNTS
指 定 起 点 金 额 (THRESHOLD) 和 最 低 转 让 金 额 (MINIMUM TRANSFER AMOUNT)

In the initial margin documents, the parties can specify the “Threshold” for each security-provider, which is basically the amount below which the security-taker is willing to tolerate without receiving any initial margin from the security-provider. The parties should ensure that the Threshold set in the initial margin documents does not breach any upper limits imposed by applicable local regulatory margin rules, which may be determined at a group level.

The parties can also specify the “Minimum Transfer Amount” for each party, which basically means that party will only need to post initial margin if the initial margin amount exceeds its Minimum Transfer Amount. This concept is designed to prevent a party from having to post a nuisance amount of initial margin. The parties should ensure that the Minimum Transfer Amount set in the initial margin documents does not breach any upper limits imposed by applicable local regulatory margin rules.

在初始保证金文件中, 双方可以规定各担保品提供方的“起点金额”, 这基本上是该担保品接收方不需要对方缴纳任何初始保证金金额的风险容忍度。交易双方需要确保在初始保证金文件中规定的起点金额不会违反适用的当地监管保证金规则规定的任何上限, 该等上限可以集团为单位进行确定 (相当于对集团进行统一授信)。

双方也可以为各方规定“最低转让金额”, 这基本上意味着, 只有当一方的初始保证金金额超过其最低转让金额时, 该方才需要缴纳初始保证金。这一概念旨在防止一方需要缴纳无意义的小额初始保证金。双方需要确保在初始保证金文件中规定的最低转让金额不会超过适用的当地监管保证金规定的任何上限。

AMENDING THE TERMINATION CURRENCY IN THE ISDA MASTER AGREEMENT
修改ISDA主协议中的终止货币(TERMINATION CURRENCY)

In the initial margin documents, the parties can elect to amend the definition of “Termination Currency” in the relevant ISDA Master Agreement to eliminate any foreign exchange mismatch between the existing Termination Currency and the primary currency of denomination of posted initial margin. Such an amendment may reduce the foreign exchange haircut that would otherwise apply to the amount of posted initial margin under certain local regulatory margin rules.

在初始保证金文件中, 双方可以选择修改相关ISDA主协议中“终止货币”的定义, 以消除现有终止货币与已缴纳初始保证金的主要计价货币之间的外汇错配。根据某些当地监管保证金规则, 此类修订可能会减少适用于已缴纳初始保证金金额的外汇折扣率。

CONDITIONS PRECEDENT PROVISION
先决条件条款

The conditions precedent provision in the initial margin documents provides that each party’s initial margin transfer obligations are subject to the following conditions precedent:

- 1. no Event of Default, Potential Event of Default or Specified Condition (each as defined in the relevant initial margin documents) has occurred and is continuing with respect to the other party; and
- 2. no Early Termination Date has occurred or been designated for which unsatisfied payment obligations exist which is in respect of all “**Covered Transactions**” (being transactions under the ISDA Master Agreement that are subject to initial margin requirements under applicable regimes).

初始保证金文件中的先决条件条款规定了各方的初始保证金支付义务受限于以下先决条件:

- 1. 另一方没有发生或持续的违约事件、潜在违约事件或特定条件(各自定义见相关初始保证金文件); 以及
- 2. 没有因未履行付款义务的存在而就所有“**涵盖交易**”(ISDA主协议项下的受限于初始保证金监管要求的交易)发生或指定提前终止日。

先决条件条款默认适用, 但在“选择和变量”条款中明确选择不予适用的除外。

The conditions precedent provision will apply unless it is expressly disappplied in the elections and variables paragraph.

RIGHTS AND REMEDIES IN RESPECT OF POSTED INITIAL MARGIN
与初始保证金相关的权利和救济措施

Under the initial margin documents, upon the occurrence of certain trigger events, the security-taker or the security-provider (as applicable) may exercise certain rights and remedies in respect of posted initial margin, including by giving control or access notices to the custodian.

根据初始保证金文件, 在发生某些触发事件时, 担保品接收方或担保品提供方(如适用)可以行使与初始保证金相关的权利和救济措施, 包括向托管人发出指令或准入通知。

In terms of terminology, a trigger event that enables the security-taker to exercise enforcement rights and remedies is referred to as a “**Security-taker Rights Event**”⁴. A trigger event that enables the security-provider to exercise rights and remedies to essentially take back the posted initial margin is referred to as a “**Security-provider Rights Event**”⁵.

根据行业术语规范, 使担保品接收方能够行使强制执行权利和救济措施的触发事件被称为“担保品接收方权利事件”(Security-Taker Rights Event)⁴。使担保品提供方能够行使权利和救济措施以从实质上收回已缴纳的初始保证金的触发事件被称为“担保品提供方权利事件”(Security-Provider Rights Event)⁵。

4. A Security-Taker Rights Event is also referred to as a Secured Party Rights Event or the Enforcement Event in certain initial margin documents. 在某些初始保证金文件中“担保品接收方权利事件”也被称为“被担保方权利事件”或“强制执行事件”。
5. A Security-Provider Rights Event is also referred to as a Pledgor Rights Event, Chargor Rights Event or Security-provider Access Event in certain initial margin documents. 在某些初始保证金文件中“担保品提供方权利事件”也被称为“出质方权利事件”、“押记方权利事件”或“担保品提供方准入事件”。

Subject to further customisation by the parties, a Security-Taker Rights Event generally occurs when an Early Termination Date in respect of all transactions has occurred or been designated under the relevant ISDA Master Agreement as a result of an Event of Default or a Termination Event that is designated in the initial margin Documents as an “Access Condition” with respect to the security-provider. We note that if an account control agreement permits a Notice of Exclusive Control to not include instructions as to the transfer of assets from the segregated account, the security-taker may be entitled under the initial margin documents to deliver a Notice of Exclusive Control (thereby “freezing” the segregated account) as soon as an Event of Default or Access Condition has occurred and is continuing in relation to the security-provider, without having to wait for the occurrence of a Security-Taker Rights Event (which further requires the occurrence or designation of an Early Termination Date in respect of all transactions as a result of an Event of Default or Access Condition). In contrast, the Security-Provider is generally not allowed to deliver a Control Event Notice until a Security-Provider Rights Event has occurred and is continuing.

Subject to further customisation by the parties, a Security-Provider Rights Event generally occurs when an Early Termination Date in respect of all transactions has occurred or been designated under the relevant ISDA Master Agreement as a result of an Event of Default or a Termination Event that is designated in the initial margin documents as an “Access Condition” with respect to the security-taker.

In the initial margin documents, the parties can elect which Termination Events (if any) shall constitute an Access Condition in respect of each party. The initial margin documents also allow the parties to make a number of other elections in respect of the triggers for exercising certain rights and remedies in respect of posted initial margin. For example, the parties may elect to apply the “Security-Provider Full Discharge Condition”⁶, which is basically designed to ensure that the security-provider may only remove posted initial margin out of the segregated account if it has met all its early termination-related payment obligations to the security-taker under the relevant ISDA Master Agreement.

Where initial margin is held with a bank custodian, the relevant account control agreement may already specify the trigger events that would allow the security-provider or security-taker (as applicable) to issue control notices to the bank custodian. In that case, the parties may elect in the initial margin documents for the relevant account control agreement trigger events to override the Security-Taker Rights Events and Security-Provider Rights Events set out in the initial margin documents. These elections are not applicable where the custodian is Euroclear or Clearstream because those custodial arrangements do not involve an account control agreement.

6. The Security-Provider Full Discharge Condition is also referred to as the Pledgor Full Discharge Condition or Chargor Full Discharge Condition in certain initial margin documents. 在某些初始保证金文件中“担保品提供方完全解除条件”也被称为“出质方完全解除条件”或“押记方完全解除条件”。

除非双方进一步另行约定, 当担保品提供方发生违约事件或终止事件(在初始保证金文件中被指定为“准入条件”, Access Condition), 导致根据相关ISDA主协议所有交易的提前终止日已经发生或被指定, 通常会发生担保品接收方权利事件。值得一提的是, 如果《账户控制协议》允许《排他控制通知》不包括关于从独立账户转移资产的指示, 那么担保品接收方可能有权在与担保品提供方有关的违约事件或准入条件持续存在时立即交付《排他控制通知》(从而“冻结”独立账户), 而无需等待担保品接收方权利事件的发生(担保品接收方权利事件进一步要求发生或指定违约事件或准入条件导致的所有交易的提前终止日)。相比之下, 在担保品提供方权利事件发生并持续存在之前, 一般不允许担保品提供方交付《控制事件通知》。

除非双方进一步另行约定, 当担保品接收方发生违约事件或终止事件(在初始保证金文件中被指定为“准入条件”, Access Condition), 导致根据相关ISDA主协议所有交易的提前终止日已经发生或被指定, 通常会发生担保品提供方权利事件。

在初始保证金文件中, 双方可以选择哪些终止事件(如有)应构成双方的准入条件。初始保证金文件还允许双方对已缴纳初始保证金行使特定权利和救济措施的触发要件作出一些其他选择。例如, 双方可以选择适用“担保品提供方完全解除条件”⁶(Security-Provider Full Discharge Condition), 其基本目的是确保担保品提供方只有在履行了其根据相关ISDA主协议对担保品接收方的所有提前终止相关付款义务后, 才能从独立账户中取出缴纳的初始保证金。

在由银行托管人持有初始保证金的情况下, 相关的《账户控制协议》可能已经规定了触发事件, 允许担保品提供方或担保品接收方(如适用)向银行托管人发出控制通知。在这种情况下, 双方可在初始保证金文件中选择使用相关的《账户控制协议》触发事件, 以取代初始保证金文件中规定的担保品接收方权利事件和担保品提供方权利事件。但是, 当托管人是欧清或明讯时, 这些选项就不再适用, 因为这些托管安排不涉及《账户控制协议》。



ALLOCATION OF CUSTODIAN RISK 托管人风险的处理

Since initial margin is required to be held by an independent custodian, the initial margin documents include provisions which provide for the consequences if a Custodian Event, Euroclear Event or Clearstream Event, as the case may be (collectively, “**Custodian Event**”) occurs. At a high-level, a Custodian Event occurs if the custodian bank, Euroclear or Clearstream fails to comply with valid instructions or with its obligations under the account control agreement, Euroclear membership documents or Clearstream membership documents (as applicable) or resigns.

The initial margin documents generally provide that the security provider, but not the security-taker, would be liable for the acts or omissions of the custodian, unless the parties specify “Custodian Event” as being applicable, in which case any act or omission of the custodian which is a Custodian Event would not result in a Credit Support Default Event of Default under the relevant ISDA Master Agreement. Instead, the security-provider must try to cure the Custodian Event by finding an acceptable replacement custodian before an agreed cure period expires. If the Custodian Event continues after such cure period ends, it would constitute an Additional Termination Event with respect to which each Covered Transaction is an Affected Transaction and both the security-provider and security-taker are Affected Parties.

由于初始保证金被要求由独立的托管人持有, 因此初始保证金文件也包括关于托管人事件、欧清事件或明讯事件(统称为“**托管人事件**”, Custodian Event) 发生后果的规定。简单概括而言, 如果托管银行、欧清或明讯未能遵守有效的指示或其在《账户控制协议》、欧清成员文件或明讯成员文件(如适用) 下的义务或辞职, 则发生托管人事件。

初始保证金文件一般规定, 担保品提供方(而非担保品接收方) 将对托管人的作为或不作为负责, 但如果双方指定“托管人事件”适用时, 属于托管人事件的托管人的任何作为或不作为将不会导致相关ISDA主协议下的信用支持违约事件。相反地, 担保品提供方必须在约定的补救期结束前, 通过寻找可接受的替代托管人来努力补救托管人事件。如果托管人事件在该补救期结束后持续存在, 它将构成一个额外的终止事件, 就该事件而言, 每笔涵盖交易都是受影响的交易, 而且担保品提供方和担保接收方都是受影响的一方。

5. WHERE CAN I LEARN MORE ABOUT REGULATORY MARGIN REQUIREMENTS AND LEGAL DOCUMENTATION ISSUES? 在哪里可以了解更多关于监管保证金要求和法律文件问题?

We at KWM are here to help you. KWM regularly assists international and PRC-based financial institutions and corporates with bilingual ISDA/NAMFII, CSA, variation margin and initial margin document negotiations, as well as with designing and documenting innovative and complex cross-border derivatives products. We also regularly advise international and PRC-based clients on margin and other regulatory requirements that apply to derivatives transactions.

KWM has been actively participating in legal developments relating to the enforceability of close-out netting, security interest and title transfer arrangements in the PRC.

We are familiar with the unique issues faced by PRC-based financial institutions and their counterparties and would be pleased to share our insights with you. Please feel free to contact our core team members below.

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