

Chapter 6

Custody rules

6.4 Use of safe custody assets

6.4.1

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- (1) A *firm* must not enter into arrangements for *securities financing transactions* in respect of *safe custody assets* held by it on behalf of a *client* or otherwise use such *safe custody assets* for its own account or the account of any other *person* or *client* of the *firm*, unless:
 - (a) the *client* has given express prior consent to the use of the *safe custody assets* on specified terms; and
 - (b) the use of that *client's safe custody assets* is restricted to the specified terms to which the *client* consents.
- (2) A *firm* must not enter into arrangements for *securities financing transactions* in respect of *safe custody assets* held by it on behalf of a *client* in an omnibus account maintained by a third party, or otherwise use *safe custody assets* held in such an account for its own account or for the account of any other *person* unless, in addition to the conditions set out in (1):
 - (a) each *client* whose *safe custody assets* are held together in an omnibus account has given express prior consent in accordance with (1)(a); or
 - (b) the *firm* has in place systems and controls which ensure that only *safe custody assets* belonging to *clients* who have given express prior consent in accordance with (1)(a) are so used.
- (3) For the purposes of obtaining the express prior consent of a *client* under this *rule*, the consent must be clearly evidenced in writing and the signature of the *client* or an equivalent alternative means of affirmative execution is required.
- (4) [deleted]

[Note: article 5(1) and (2) of the *MiFID Delegated Directive*]

6.4.1A

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The *FCA* expects *firms* which enter into arrangements under ■ CASS 6.4.1 R with *retail clients* to only enter into *securities financing transactions* and not otherwise use *retail clients' safe custody assets*.

6.4.1B

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- (1) Prior express consent by *clients* should be given and recorded by *firms* in order to allow the *firm* to demonstrate clearly what the *client* agreed to and to help clarify the status of *safe custody assets*.

(2) *Clients'* consent may be given once at the start of the commercial relationship, as long as it is sufficiently clear that the *client* has consented to the use of their *safe custody assets*.

(3) Where a *firm* is acting on a *client* instruction to lend *safe custody assets* and where this constitutes consent to entering into the transaction, the *firm* should hold evidence to demonstrate this.

[Note: recital 10 to the *MiFID Delegated Directive*]

6.4.1C

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A *firm* must take appropriate measures to prevent the unauthorised use of *safe custody assets* for its own account or the account of any other *person*, such as:

- (1) the conclusion of agreements with *clients* on measures to be taken by the *firm* in case the *client* does not have enough provision on its account on the settlement date, such as borrowing of the corresponding securities on behalf of the *client* or unwinding the position;
- (2) the close monitoring by the *firm* of its projected ability to deliver on the settlement date;
- (3) the putting in place of remedial measures if the *firm* cannot deliver on the settlement date; and
- (4) the close monitoring and prompt requesting of undelivered securities outstanding on the settlement day and beyond.

[Note: article 5(3) of the *MiFID Delegated Directive*]

6.4.1D

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Examples of remedial measures in ■ CASS 6.4.1CR(3) can be found in ■ CASS 6.6.54R.

6.4.2

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Firms are reminded of the *client's best interests rule*, which requires the *firm* to act honestly, fairly and professionally in accordance with the best interests of their *clients*. For any transactions involving *retail clients* carried out under this section the *FCA* expects that:

- (1) the *firm* ensures that *relevant collateral* is provided by the borrower in favour of the *client*;
- (2) the current realisable value of the *safe custody asset* and of the *relevant collateral* is monitored daily; and
- (3) the *firm* provides *relevant collateral* to make up the difference where the current realisable value of the collateral falls below that of the *safe custody asset* , unless otherwise agreed in writing by the *client*.

6.4.2A

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A *firm* must adopt specific arrangements for all *clients* to ensure that the borrower of *client safe custody assets* provides the appropriate collateral and that the *firm* monitors the continued appropriateness of such collateral and

takes the necessary steps to maintain the balance with the value of the *client safe custody assets*.

[Note: article 5(4) of the *MiFID Delegated Directive*]

6.4.2B

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The requirement to monitor collateral under ■ CASS 6.4.2AR applies to a *firm* where it is party to a *securities financing transaction*, including when acting as an agent for the conclusion of a *securities financing transaction* or in the case of a tripartite transaction between a borrower, a *client* and the *firm*.

[Note: recital 9 to the *MiFID Delegated Directive*]

6.4.3

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Where a *firm* uses *safe custody assets* as permitted in this section, the records of the *firm* must include details of the *client* on whose instructions the use of the *safe custody assets* has been effected, as well as the number of *safe custody assets* used belonging to each *client* who has given consent, so as to enable the correct allocation of any loss.

[Note: article 5(2), second sub-paragraph of the *MiFID Delegated Directive*]