Sea of Change
Regulatory reforms – charting a new course

Regulation of OTC derivatives markets

A comparison of EU and US initiatives

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CLIFFORD CHANCE

ISDA Safe, Efficient Markets

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Both the EU and the US have now adopted the primary legislation which aims to fulfil the G20 commitments that all standardised over-the-counter (OTC) derivatives should be cleared through central counterparties (CCPs) by end 2012 and that OTC derivatives contracts should be reported to trade repositories (and the related commitments to a common approach to margin rules for uncleared derivatives transactions). The US Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in July 2010 and the text of the EU Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR) was finally published in the Official Journal on 27 July 2012.

There is a significant commonality of approaches between EMIR and the Dodd-Frank Act in relation to the regulation of OTC derivatives markets, but there are also some significant differences. This paper summarises the way in which the two regimes treat different categories of counterparty and highlights certain other major differences between EMIR and the Dodd-Frank Act in relation to OTC derivatives regulation.

However, both EMIR and the Dodd-Frank Act require the adoption of extensive implementing rules and technical standards before they can become fully effective and these will significantly affect how the two regimes operate in practice. While the US regulators have now adopted many of the rules required to implement the Dodd-Frank Act, a number of key points are not yet settled and the EU consultation process on implementing measures under EMIR is still in progress. Both the EU and the US regulators have paused progress on their proposals for margin rules for uncleared derivatives pending the outcome of the BCBS-IOSCO consultation on common international standards.

In addition, the Dodd-Frank Act addresses issues relating to the execution of OTC derivative contracts on electronic trading platforms, post-trade transparency and position limits for commodity derivatives. The EU is addressing these issues (and others relating to trading and transparency of OTC derivatives markets) in the proposals to replace the existing Markets in Financial Instruments Directive (MiFID) with a new restated Directive (MiFID 2) and a new companion EU Regulation (MiFIR). This legislation is only likely to be adopted in 2013 and will itself also require extensive implementing measures before it comes into effect. *Comments in this paper on MiFID 2 or MiFIR are based on the latest proposed compromise text of the legislative proposals prepared by the Presidency of the EU Council of Ministers.*

This paper is not intended to be comprehensive or to provide legal advice.

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There is significant commonality of approach between the EU and the US but some important differences

- Both the EU and the US regimes aim to impose clearing and reporting on a broadly defined class of OTC derivatives (with differences for some classes of derivatives) and give regulators the ultimate decision on when the clearing obligation applies.
- The EU clearing regime is potentially less burdensome for end-users. In the US, the clearing obligation falls on everyone who trades an eligible contract, with a narrow exemption when non-financial entities enter into certain hedging transactions. In the EU, the clearing obligation only applies to transactions between financial counterparties, non-financial counterparties whose positions (excluding certain hedges) exceed a specified clearing threshold and certain non-EU entities.
- Both the EU and US regimes include a broad requirement on counterparties to report all derivatives transactions to trade repositories and to keep records of transactions.
- Both the EU and US regimes envisage that there will be mandatory margin rules for uncleared derivatives transactions but both EU and US regulators have paused progress on these rules pending the outcome of the BCBS-IOSCO consultation on common international standards.
- While both regimes envisage registration and conduct of business rules for dealers (the EU already had rules under MiFID), the US regime also extends registration, business conduct, margin and other risk mitigation rules and capital requirements to "major swap participants" as well. EMIR applies some obligations even more broadly: some risk mitigation rules (e.g. on confirmations, reconciliation, compression and dispute resolution) apply to all financial and non-financial counterparties and obligations to carry out daily valuations and exchange collateral apply to all financial counterparties and non-financial counterparties over the clearing threshold."
- Both regimes seek to allow cross-border clearing by allowing the recognition/exemption of non-domestic CCPs. They are less flexible in relation to cross-border provision of trade repository services, with the US requiring compliance with full US requirements and the EU making recognition of non-EU repositories conditional on conclusion of a treaty.
- The US regime requires the execution of OTC derivatives subject to the clearing obligation on a swap execution facility or designated contract market (if such a facility or market makes the swap available to trade), real time post-trade transparency for cleared derivatives trades and position limits. In the EU, these issues are being addressed separately as part of the legislative proposals to replace MiFID.
- The EU regime has no equivalent to the US "push out" rule restricting the derivatives trading activities of banks, the "Volcker rule" restricting the proprietary trading operations of bank groups or the provisions allowing regulators to restrict bank ownership of CCPs. However, the UK government proposes legislation to implement the recommendations of the Independent Commission on Banking would significantly limit the derivatives business of ring-fenced retail banks. The European Commission has also appointed a high level expert group to review the structure of the EU banking sector.

There is significant commonality of approach between the EU and the US but some important differences (2)

- EMIR contains exemptions from both the clearing and the margin and other risk mitigation rules for intra-group transactions. There are no corresponding provisions in the Dodd-Frank Act but the CFTC has proposed rules exempting transactions between affiliates from the clearing obligation, subject to a number of conditions, including requirements for payments of variation margin where both the affiliates are financial entities.
- The US and EU regimes take different approaches to the extra-territorial application of their rules. In particular, the CFTC has proposed guidance that would impose the US swap dealer requirements on non-US persons that engage in more than *de minimis* swap dealing activities with US persons, but non-US persons may be able to comply with certain swap dealer requirements through compliance with home-country rules. While EMIR does apply to certain transactions between EU and non-EU entities (and between non-EU entities), it also contains a general provision that deems a transaction to have complied with the clearing, reporting and risk mitigation rules where at least one of the counterparties is established in a non-EU jurisdiction that the European Commission has determined to have an equivalent regulatory regime which is applied in an equitable and non-distortive manner.
- The US headstart on the adoption of implementing rules means that a significant part of the US regime could be in force in advance of the corresponding EU rules.

Application of OTC derivatives rules to different categories of counterparty

	Clearing obligation applies to eligible OTC transactions?	Reporting obligation applies to OTC transactions?	Margin requirements apply to uncleared OTC transactions	Capital requirements apply to uncleared OTC transactions?	Authorisation/ registration and business conduct requirements apply?
OTC derivative dealers	**EU:** Yes† **US:** Yes*	**EU:** Yes **US:** Yes	**EU:** Yes† **US:** Yes‡	**EU:** Yes† **US:** Yes	**EU:** Yes (under MiFID) **US:** Yes
Other financial counterparties/entities	**EU:** Yes† **US:** Yes*	**EU:** Yes **US:** Yes	**EU:** Yes† **US:** Yes if major swap participant or if counterparty a dealer/ major swap participant‡	**EU:** Yes† **US:** No unless major swap participant	**EU:** No (except for existing sectoral rules) **US:** No unless major swap participant (but bank activities limited by "push-out" rule)
Non-financial counterparties/entities	**EU:** No except for non-financial counterparties whose positions exceed clearing threshold † **US:** Yes but non-financial entities may qualify for exemption for transactions hedging commercial risk*	**EU:** Yes **US:** Yes	**EU:** Yes if own positions exceed clearing threshold† **US:** Yes if major swap participant or if counterparty a dealer/ major swap participant (possible exceptions for end-users) ‡	**EU:** No **US:** No unless major swap participant	**EU:** No **US:** No unless major swap participant

Notes:

* Under the Dodd-Frank Act, derivatives subject to the clearing obligation must also be traded through a swap execution facility or designated contract market, unless one of the parties is a non-financial entity which opts for the clearing exemption, and mandatory real time public reporting will apply to all cleared trades whether or not subject to the mandatory clearing requirement. The Act also requires regulators to establish position limits for OTC derivatives. In the EU, trading and transparency issues are being addressed separately as part of legislative proposals to replace MiFID.

† Under EMIR, the clearing obligation applies to transactions between financial counterparties, non-financial counterparties whose positions (excluding certain hedges) exceed a specified clearing threshold and certain non-EU entities. EMIR requires financial counterparties and non-financial counterparties over the clearing threshold (and certain non-EU entities) to have procedures for the exchange of collateral and to carry out daily valuations of transactions, but additional risk mitigation rules apply to all financial and non-financial counterparties. EMIR also requires financial counterparties to hold appropriate capital for uncollateralised risk, the level to be set by implementing measures.

‡ The Dodd-Frank Act requires the regulators to impose margin requirements on dealers and major swap participants for their uncleared transactions, without an express exemption for cases where the counterparty to the uncleared transaction is an end-user (but US legislators have indicated that margin requirements should not apply to end-users).

Scope

Application of EMIR and the Dodd-Frank Act

	EU: EMIR	US: Dodd-Frank Act
Instruments	EMIR applies to a broad range of OTC derivatives relating to specified underlyings. Spot foreign exchange transactions and certain types of physically settled commodity transactions are excluded (the treatment of forward foreign exchange contracts is being considered by EU regulators).	Dodd-Frank applies to “swaps” and “security-based swaps”, which broadly include options, contingent forwards, and exchanges linked to economic interests of any kind; but excluding (under the current Treasury proposal) physically settled foreign exchange swaps and forwards (although reporting and business conduct standards still apply to FX swaps and forwards); spot FX; and physically settled commodity or security forwards.
Entities	EMIR applies to financial counterparties and non-financial counterparties. Non-financial counterparties are subject to some of the same requirements as financial counterparties where derivative activities that are not objectively measurable as reducing the risks of the commercial activities or of the treasury financing activity of their group exceed a clearing threshold to be set by ESMA. ❑ **Financial counterparties** covers banks, investment firms, insurance companies, registered funds (UCITS), pension funds and private funds (e.g. hedge funds and private equity funds), where authorised in accordance with relevant EU Directives. ❑ **Non-financial counterparties** covers any other undertaking established in the EU. ❑ **Exemptions**: EMIR will not apply to EU central banks, certain EU public bodies and the Bank for International Settlements. There are also more limited exemptions from some of the specific obligations.	**Swap Dealers (SDs) and Major Swap Participants (MSPs):** Dodd-Frank imposes a full set of regulatory requirements (capital, margin, business conduct, etc.) on SDs and MSPs. **Financial Users of Swaps:** Will be subject to clearing, trade execution, reporting and, if the counterparty is an SD/MSP margin, documentation and other requirements. **End-Users:** Exempt from clearing and trade execution for swaps used for hedging; but proposed margin rules require margin arrangement (although no specified margin amount reporting required). **Central Banks:** Excluded from clearing and from SD and MSP registration.
Geography	❑ Clearing obligation also extends to transactions between a financial counterparty, or non-financial counterparty above the clearing threshold, and an entity established in a third country that would be subject to clearing if it was established in the EU. ❑ Clearing and risk mitigation obligations also extend to transactions between two entities established in non-EU jurisdictions that would be subject to the clearing or risk mitigation obligation if they were established in the EU, if the contract has a direct, substantial and foreseeable effect within the EU or if appropriate to avoid evasion of the rules. ❑ It is not yet clear how EMIR applies to non-EU branches of EU entities or non-EU entities that have branches in the EU. ❑ A transaction is deemed to have complied with EMIR's clearing, reporting and risk mitigation rules where at least one of the counterparties is established in a non-EU jurisdiction that the European Commission has determined to have an equivalent regulatory regime which is applied in an equitable and non-distortive manner.	Under the CFTC Proposal: **SD Requirements:** Apply to a non-US entity who has more than de minimis swap dealing activity with US persons; but non-US persons may be able to comply with certain SD requirements through compliance with home-country rules. **Transactional Requirements:** Generally apply to a swap between a non-US person and a US person; do not necessarily apply to a swap between a non-US SD and a non-US person. **Branches:** Are not generally treated as separate persons; but, for branches of US Banks that are SDs, transactions requirements for swaps with non-US persons may be met by compliance with local rules if CFTC determines comparability.

Core rules

Clearing

	EU: EMIR	US: Dodd-Frank Act
Derivatives subject to mandatory clearing	OTC derivatives will be required to be cleared where a CCP is authorised or recognised to clear them and ESMA has determined that they should be cleared. ESMA takes into account criteria, such as the degree of standardisation of the relevant class of OTC derivatives, liquidity and the availability of reliable pricing determining which classes of OTC derivatives are to be cleared. ESMA can also identify contracts for clearing even if no CCP currently clears the contract (ESMA can call for clearing proposals but cannot compel CCPs to clear the contracts). ESMA will maintain a public register of the contracts subject to the clearing obligation including the date when the clearing obligation will take effect and any phase-in by categories of counterparties.	A swap must be cleared if the CFTC or SEC determines that it must be cleared and a clearing organisation accepts the swap for clearing. The determination process may be initiated by the CFTC or SEC or by a clearing organisation. In its initial proposal on clearing requirement determinations, the CFTC has proposed that broad categories of interest rate swaps and certain CDS index swaps will be subject to the clearing mandate.
Scope of mandatory clearing	The clearing obligation applies to contracts entered into between: two financial counterparties; two non-financial counterparties over the clearing threshold; or between a financial counterparty and non-financial counterparty over the clearing threshold. It also applies to non-EU entities as described below.	The clearing obligation under the Dodd-Frank Act applies to anyone other than end-users that are hedging risks and central banks.
Extraterritorial application?	The clearing obligation also applies to contracts entered into between: a financial counterparty or non-financial counterparty over the clearing threshold and a non-EU entity that would be subject to the clearing obligation if it were established in the EU; and two non-EU entities that would be subject to the clearing obligation if the entities were established in the EU, and if the contract would have a direct, substantial and foreseeable effect within the EU or if appropriate to prevent evasion of the rules (criteria to be determined by ESMA).	Under the CFTC proposal, clearing requirements would apply to a swap with a US person, regardless of whether the counterparty is in or outside the US. The clearing requirements would not apply to a swap between non-US persons, but a swap between a non-US person and a foreign branch of a US SD or a non-US person with a US guarantee could comply by “substituted compliance”, i.e. compliance with home country rules if CFTC determines they are comparable to US rules.
Intra-group exemption?	There is an intra-group exemption for certain entities within a group that are subject to qualifying consolidation and centralised risk evaluation, measurement and control arrangements. In order to make use of this exemption, entities established in the EU must give 30 days’ prior notice to their competent authority. Additional conditions apply where the intra-group transaction is with a non-EU entity.	The CFTC has proposed rules exempting transactions between affiliates from the clearing obligation, subject to a number of conditions, including requirements for payments of variation margin where both the affiliates are financial entities.
Effective date	The clearing obligation will apply to contracts entered into or novated on or after the date from which the clearing obligation takes effect, or (if the contract has a remaining maturity higher than a threshold to be specified), on or after a CCP is authorised to clear those contracts but before the clearing obligation takes effect.	The first mandatory clearing requirements for interest rate swaps and index credit default swaps are likely to become effective around January 1, 2013 for SDs, MSPs and “active funds” (private fund that executes 200 or more trades per month); April 1 for other financial entities; and July 1 for other entities. Swaps executed before the effective date do not need to be cleared.

Trading

	EU: MiFIR	US: Dodd-Frank Act
Derivatives subject to mandatory trading	MiFIR requires ESMA to decide which of the classes of derivatives that are subject to the clearing obligation shall also be subject to mandatory trading. Relevant derivatives must be admitted to trading or traded on at least one regulated market, MTF or OTF, and must be sufficiently liquid. In determining whether a class of derivatives is sufficiently liquid, ESMA shall take into account specified criteria, including the average frequency of trades, the average size of trades and the number of active market participants and the average size of the spreads.	All swaps that are subject to the mandatory clearing requirement must also be executed on an exchange (“DCM”) or swap execution facility (“SEF”), unless no DCM or SEF makes the swap available to trade.
Public register?	ESMA will maintain a public register of the contracts subject to the trading obligation, the venues where they are admitted to trading and the dates from which the obligation takes effect.	The CFTC has indicated that it is considering maintaining a public list of all the swaps made “available for trading”, but has not yet proposed any related rule. It is expected that each DCM and SEF will also list swaps that have been made available for trading on such DCM or SEF.
Mandatory trading requirement	Transactions between parties subject to the clearing obligation in derivatives which are subject to the mandatory trading requirement must be executed on a regulated market, MTF, OTF or a third country trading venue (third country trading venues must have been deemed by the Commission to be subject to equivalent regulatory requirements to EU trading venues, and the relevant third country must permit reciprocal recognition of EU trading venues).	Transactions in derivatives which are subject to the mandatory trading requirement must be executed on a SEF or DCM, unless no SEF or DCM makes the swap available to trade. Retail customers who are not “eligible contract participants” may only enter into a swap if it is executed on an exchange.
Exemptions?	There is an exemption for intra-group transactions subject to the criteria described above.	Exemption if: ❑ exemption available for mandatory clearing ❑ no SEF or DCM makes swap available to trade In its proposed rules on SEFs, the CFTC stated that block trades would be exempt from pre-trade transparency requirements.
Effective date	If adopted, MiFIR is expected to apply in 2015. ESMA will propose technical standards for adoption by the Commission stating the date from which the trading obligation takes effect in relation to each class of derivatives.	The exchange execution obligation will become effective on the date that all the relevant product and entity definitions and relevant CFTC and SEC regulations become effective.

Margin requirements for uncleared trades

	EU: EMIR	US: Dodd-Frank Act
Margining/ collateralisation of uncleared OTC derivatives	EMIR requires financial counterparties and non-financial counterparties over the clearing threshold to have procedures for the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts, and daily mark-to-market (or, where market conditions do not allow marketing to market, marking to model). Financial counterparties are required to hold appropriate capital to cover risks not covered by collateral. In addition to exchange of collateral, for uncleared transactions, financial counterparties and non-financial counterparties need to put in place arrangements to measure, monitor and mitigate operational and credit risk, including requirements for electronic confirmation, portfolio valuation and reconciliation. These obligations also apply to non-EU entities in some circumstances. The detailed requirements will be set out in technical standards after consultation.	The CFTC and prudential regulators have issued proposed rules. The CFTC has recently asked for additional comments in light of the BCBS-IOSCO consultation on common international standards and the bank regulators may do the same. The following summary is based on the proposed rules. SDs and MSPs that enter into uncleared swaps must collect initial and variation margin, subject to possible thresholds. The thresholds and other margin requirements will depend on whether the counterparty to an uncleared swap with an SD or MSP is (i) another SD or MSP, (ii) a Financial Entity, or (iii) a Non-financial Entity. Non-financial Entities must enter into collateral arrangements but a threshold is permitted with no regulatory maximum.
Margin requirement	EU regulators have paused progress on margin requirements (including types of eligible collateral) pending the outcome of the BCBS-IOSCO consultation on common international standards.	Initial Margin Methodology. Initial margin must be posted to an SD or MSP counterparty at or before the date of execution of the uncleared swap. Initial margin must cover 99% of price movements over a 10-day time horizon. Model subject to approval by regulator. In the absence of a model, regulators propose schedule to determine initial margin. Variation Margin Methodology. Variation margin must be collected by SD and MSP counterparties on a daily basis and must cover current exposures. Further, swaps documentation must include agreements on the methodology for valuation of swaps and must address dispute resolution.
Types of eligible collateral?	EU regulators have paused progress on margin requirements (including types of eligible collateral) pending the outcome of the BCBS-IOSCO consultation on common international standards.	Variation margin must be posted as cash or US Treasuries. Initial margin must be posted as cash, US Treasuries or senior debt obligations of certain government sponsored entities. Non-financial entities may post margin in any form that can reasonably be valued on a periodic basis.
Effective date	The technical standards specifying the detailed requirements under EMIR should apply to transactions entered into after the technical standards come into effect. Until then, the high level requirements in EMIR may have limited application.	Proposed margin rules will apply to uncleared swaps entered into after the effective date of the final margin rules, once effective, and would not apply retroactively. Parties could include pre-existing swaps if all swaps are documented under the same agreement.

BCBS-IOSCO issued their consultation paper on common international standards for margin requirements for non-centrally cleared derivatives in July 2012. They expect to publish their final joint proposal by end 2012, which EU and US regulators will take into account when formulating their final margin rules.

Margin requirements for uncleared trades (2)

	EU: EMIR	US: Dodd-Frank Act
Exemptions	Intra-group transactions are exempt from the margin and risk mitigation requirements if they meet the criteria for exemption from clearing and certain additional criteria (including prior notification to or approval by a competent authority).	❑ SD/MSP must enter into collateral arrangements with all counterparties. ❑ Threshold levels (below which no collateral is required) are set at different levels for different types of counterparties (SD/MSP; financial entity; non-financial entity).

Reporting

	EU: EMIR / MiFIR / MiFID 2	US: Dodd-Frank Act
Reporting to trade repositories	Under EMIR, all counterparties and CCPs must ensure that the details of any derivative contract they have concluded (and any modification or termination of that contract) is reported to a registered trade repository (or where no relevant trade repository is in place, to ESMA). "Counterparty" is not a defined term in EMIR, so it is not clear exactly which entities will be required to comply with this obligation.	Any swap, whether cleared or uncleared, must be reported to a swap data repository (SDR) (or if no SDR is available, to the relevant regulator).
Timing	The details of a contract must be reported no later than the working day following the conclusion (modification or termination) of the contract.	❑ **Off-facility swaps (i.e., not on exchanges or SEFs) subject to mandatory clearing** Primary economic terms must be reported within 30 minutes (first year of rule) and 15 minutes (subsequent years) if SD/MSP reports. ❑ **Off-facility swaps (i.e., not on exchanges or SEFs) not subject to mandatory clearing (and not voluntarily submitted for clearing)** Primary economic terms must be reported within 1 hour/4 hours (first year) and 30 minutes/2 hours (subsequent years), depending on type of swap, if SD/MSP reports.
Effective date	The reporting obligation applies to derivatives contracts which are entered into on or after the date of entry into force (16 August 2012) of EMIR and to those contracts that are already outstanding on that date. The technical standards will determine the date by which contracts are to be reported and any phase-in for existing contracts. Otherwise reporting would start by 60 days after registration of trade repository, with a backstop date of 1 July 2015 for reporting to ESMA for any asset class where no trade repository has registered.	All swaps, including swaps in existence on or after the enactment date of the Dodd-Frank Act (July 21, 2010), must be reported to a registered SDR or the relevant regulator by October 12, 2012 (for interest rate swaps and credit swaps) or January 10, 2013 (for equity swaps, foreign exchange swaps, and other commodity swaps), if reported by an SD/MSP, or by April 10, 2013 (all swaps), if reported by a non-SD/MSP

Reporting (2)

	EU: EMIR / MiFIR / MiFID 2	US: Dodd-Frank Act
What must be reported?	The obligation extends to all derivatives contracts, not just those subject to the clearing obligation. ESMA shall develop regulatory technical standards specifying the details and type of reports to be made for each class of derivatives. Information to be reported will include: the parties to the contract, beneficiary of the rights and obligations arising from it (if different) and the main characteristics of the contract, including type, underlying maturity, notional value, price and settlement date.	Primary economic terms data (price, etc.) and continuation data (any changes to economic terms). Continuation data includes valuation data which must be reported daily for each cleared swap (reported by the DCO) and each uncleared swap where a reporting party is an SD or an MSP.
Which party is responsible for reporting?	A counterparty or CCP may delegate the reporting of the details of the contract, but remains responsible for ensuring that contracts are reported without duplication.	❑ **Exchange-traded swaps**: the relevant SEF or exchange will have sole responsibility for reporting all creation data to an SDR. If a swap is accepted for clearing, the clearing organization must report all confirmation data. ❑ **Uncleared swaps**: the relevant creation data must be reported by (i) an SD (if only one of the counterparties is an SD), (ii) an MSP (if the counterparty is not an SD), (iii) a Financial Entity counterparty (if neither party is an SD or an MSP), or (iv) as agreed by the parties (if both parties are SDs, both parties are MSPs, or both parties are neither SDs or MSPs). Swaps between a US person and a non-US person, where neither party is an SD or MSP, must be reported by the US person.
Other transparency requirements	MiFIR will require all investment firms regulated under MiFID 2 to make public post-trade disclosure of all derivatives that are eligible for clearing or that are required to be reported to trade repositories (subject to a delayed disclosure regime to be set out in more detail in delegated acts to be adopted by the Commission). MiFID 2 and MiFIR also envisage new pre-trade transparency requirements for derivatives trading and position limits/management requirements for commodities derivatives	The Dodd-Frank Act imposes obligations requiring the execution of OTC derivatives that are subject to the clearing obligation on a swap execution facility or designated contract market, obligations for real-time reporting of cleared derivatives trades (i.e., post trade transparency) and position limits.

Reporting (3)

	EU: EMIR / MiFIR / MiFID 2	US: Dodd-Frank Act
Publication	Trade repositories are required to publish aggregate data relating to types of derivatives including the level of aggregate open position per type of derivative. ESMA's proposals envisage that data must be published online in a way that is publicly accessible and updated, at least weekly.	An SDR is required to publicly disseminate the swap data as soon as technologically practicable after receiving the data unless a time delay applies. Time delays will apply to block trades and large notional off-facility swaps (trades with large notional or principal amounts). Because no swap will initially have a minimum block size, any swap that is subject to real-time reporting will be initially subject to a time delay until block sizes are established. All exchange-traded swaps will be subject to a 30 minute dissemination delay during the first year and 15 minutes during the second year after the initial compliance date. For off-exchange swaps the delays range from 30 minutes to 48 hours depending on whether a swap is subject to mandatory clearing, the identity of counterparties and swap's asset class. If at least one counterparty is an SD or MSP, however, the longest delay is four hours after execution.
Breach of duties of confidentiality?	EMIR provides that a counterparty or CCP that reports the details of a derivative contract (or any entity that reports on behalf of a counterparty or CCP) to a trade repository in the EU (or a trade repository in a third country that has been recognized by EU authorities) shall not be considered to be in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision (e.g. restrictions relating to privacy, etc.).	No comparable provision in the Dodd-Frank Act.
Record keeping	EMIR requires counterparties to keep records of derivative contracts entered into and any modification for at least five years following termination of the contract.	SDs and MSPs must: ❑ keep records of all swaps transaction and position information; ❑ report swaps to an SDR and comply with real-time reporting rules; and ❑ maintain all information necessary to conduct trade reconstruction, and data regarding execution, confirmations, reconciliations and swap margining.

Other rules

Registration / licensing

	EU: MiFID / MiFIR / MiFID 2	US: Dodd-Frank Act
Requirement for counterparties to OTC derivatives contracts to be authorised	EMIR does not impose any new authorisation or registration requirements for parties to derivatives contracts. EU dealers in OTC derivatives are already required to be authorised as investment firms under MiFID, unless an exemption applies. MiFID 2 will extend the scope of the authorisation requirement by removing some of the existing exemptions under MiFID (for example, in relation to specialised commodities firms). It will also extend the scope of instruments regulated under MiFID, so that firms that only deal in emission allowances may become subject to regulation under MiFID for the first time unless they can make use of an exemption.	The Dodd-Frank Act requires SDs and certain MSPs to be registered and imposes business conduct and other rules on them.
Extraterritorial application	MiFID currently applies only to entities established in the EU. It does not provide for a harmonised approach across the EU to non-EU entities. The original European Commission proposal for MiFID2 and MiFIR would have harmonised the treatment of non-EU entities dealing with EU counterparties, restricting dealings except where equivalence and reciprocity requirements are met and in some circumstances requiring the non-EU entity to operate through a branch (but allowing a qualifying firm with a branch a form of "passport" to provide services across the EU). However, the Presidency compromise text makes significant changes. In particular, Member States would largely be able to continue their current treatment of non-EU entities, except that non-EU entities would be required to establish a branch to deal with retail clients.	The CFTC has issued a cross-border proposal, under which non-US persons must register as SDs if they engage in swap dealing activities with US persons (other than foreign branches of US SDs) as part of a regular business and in excess of certain *de minimis* levels. A non US person must register as an MSP if it holds swap positions with a US counterparty in excess of the thresholds for MSP status. For purposes of the *de minimis* test or the MSP thresholds, positions of a non-US entity will be aggregated with those of its non-US affiliates and cross-border guarantees will further affect the calculation.
Exemptions	MiFID contains exemptions for certain categories of investment firm (such as specialist commodity firms) for which there is no direct parallel in the US However, MiFID 2 is likely to restrict the availability of these exemptions (including removing the exemption for specialist commodity firms, so that firms will only be exempt if dealing activity is ancillary to their main business).	The CFTC and SEC have proposed that swap participants who engage in a *de minimis* level of swap dealing with or on behalf of customers would be exempt from the definition of an SD.

Business conduct

	EU: MiFID / MiFID 2 / MiFIR	US: Dodd-Frank Act
Who do the rules apply to?	MiFID imposes business conduct rules on authorised investment firms. EMIR does not apply additional business conduct rules.	The Dodd-Frank Act and regulations promulgated by the CFTC impose business conduct rules on all SDs and MSPs. The SEC has not yet proposed any similar business conduct rules applicable to security-based SDs .
Exemptions	Exemption from certain business conduct requirements applies where dealing with eligible counterparties. Significantly more onerous business conduct requirements apply where dealing with retail clients.	None. Under the Dodd-Frank Act, SDs and MSPs will also be subject to business conduct rules with respect to any exempt FX Instruments (even though such transactions may be exempt from the exchange-trading, clearing and margin requirements). However, certain due diligence and disclosure requirements do not apply to transactions executed on an exchange or SEF where the SD or MSP does not know the identity of its counterparty prior to execution of the swap. Additionally, an SD or MSP may rely on written representations of its counterparty to satisfy its due diligence and other obligations.
Extraterritoriality	An authorised investment firm that is established and authorised in one EU state and then branches into another EU state will be subject to its home state business conduct requirements. Currently, in many Member States, EU business conduct rules do not apply to non-EU entities unless they operate in that country through a branch or otherwise require a licence. MiFID 2 would require that EU business conduct rules apply to EU branches of non-EU firms.	Under the CFTC's cross border proposal, the business conduct rules apply to any swap with a US person <u>or</u> any swap with a US-based SD; they do not apply to a non-US SD entering into a swap with a non-US person.
Disclosure and communication	Authorised investment firms must provide information, among other things, on the nature and risks of the derivative products offered and execution policy. Additional requirements apply in relation to retail clients. Authorised investment firms are also required to obtain information about their clients and their needs and aims and to assess suitability of products being offered/recommended.	Each SD and MSP must: ❑ disclose to its counterparty the material risks and characteristics of a swap, as well as its material incentives in connection with a swap transaction; ❑ provide its counterparty with a daily mid-market mark for uncleared swaps and notify of its right to receive a daily mark from the DCO for cleared swaps; ❑ notify its counterparty that it has the right to require clearing of a swap and select the DCO through which its swap is cleared; ❑ communicate in a fair and balanced manner based on principles of good faith and fair dealing; ❑ obtain and retain a record of the essential facts concerning each counterparty whose identity is known prior to execution of the swap (SDs, not MSPs); ❑ have a reasonable basis to believe that a swap or trading strategy that it recommends to a non-SD or non-MSP counterparty is suitable for that counterparty; ❑ inform its counterparty of its right to request a scenario analysis for off-exchange swaps (SDs, not MSPs), and, if requested, disclose all material assumptions and calculation methodologies underlying the analysis; ❑ not disclose any material confidential information provided by an end-user or engage in fraudulent, deceptive or manipulative practices.

Business conduct (2)

	EU: MiFID / MiFID 2 / MiFIR	US: Dodd-Frank Act
Dealings with "Special Entities"	Business conduct rules are largely disapplied when dealing with eligible counterparties (such as governments). However, more detailed and more onerous rules apply in relation to marketing disclosure, including risk warnings and suitability, where the client is a retail client rather than a professional client.	An SD or MSP that advises a "special entity" (US and state governmental entities, employee benefit plans, or endowments) must determine that its swap recommendation is in the special entity's best interests. An SD or MSP that is a counterparty to a special entity must have a reasonable basis to believe that the special entity (other than an ERISA plan) has a qualified independent representative.
Conflicts of interest	Authorised investment firms are subject to rules on conflicts of interest. These require firms to identify potential conflicts, record potential conflicts, have methods/arrangements in place to manage conflicts and, in some circumstances, to disclose conflicts to clients.	SDs and MSPs are subject to conflict of interest rules, including: ❑ restrictions on research; and ❑ prohibition from interfering with the provision of clearing or acceptance of clearing customers (whether by the swap entity or any of its affiliates).
Additional conduct of business rules	MiFID and MiFID 2 impose a range of other conduct of business rules on authorized investment firms including rules on client money/assets, the receipt or payment of inducements, suitability/appropriateness, best execution and order handling, record-keeping, outsourcing, compliance and risk management, governance, etc.	SDs and MSPs are subject to the duty to: ❑ verify that its counterparty is an eligible contract participant, and determine whether its counterparty is a Special Entity (as defined above). ❑ establish risk management procedures; ❑ monitor for and prevent violations of position limits; ❑ establish a system of diligent supervision of all activities performed by partners, employees and others; ❑ establish a business continuity and disaster recovery plan; ❑ promptly disclose all information required by a regulator; and ❑ adopt policies and procedures to prohibit any action that would result in an unreasonable restraint of trade.

Capital

	EU: EMIR	US: Dodd-Frank Act
Capital requirements for OTC derivatives counterparties	Authorised banks and investment firms are subject to capital requirements relating to their derivatives activities and exposures. The EU fully implemented Basel II and is intending to implement Basel III fully, although implementation may not now take place on 1 January 2013 as planned.	Entities regulated by US Prudential Regulator. SDs and MSPs that are subject to regulation by US prudential regulators would remain subject to existing capital rules for their swaps activities set by the relevant US banking regulator. SDs and MSPs that are not subject to regulation by a US prudential regulator are subject to CFTC capital requirements for their swap activities.
Exemptions?	Some limited exemptions are available to certain specialist commodity firms that are authorised as investment firms, but the EU is considering some exemptions from the credit valuation adjustment (CVA) for some transactions with some sovereign and non-financial entities.	None. All SDs and MSPs would be subject to capital requirements for their swaps activities.
Capital requirements for exposures to CCPs	The EU will implement Basel III proposals, through CRD4, which include risk charges relating to exposure to CCPs.	The CFTC proposed rule does not include a separate charge for exposure to a CCP.

Trading venues

	EU – MTF	EU – OTF	US - SEF
Definition	A multilateral system operated by an investment firm or market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract.	Any system or facility, which is not a regulated market or MTF, operated by an investment firm or a market operator, in which multiple third-party buying and selling interests in financial instruments are able to interact in the system in a way that results in a contract. (MiFID 2)	Under the Dodd-Frank Act, a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, including any trading facility that (a) facilitates the execution of swaps between persons, and (b) is not registered as an exchange.
Operator permitted to use own capital?	Yes	No (MiFID 2)	
Access rules	An investment firm or market operator operating an MTF or an OTF must establish, publish and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to its facility. (MiFID 2)		Each SEF and SB SEF (securities based SEF) must establish and enforce trading, trade processing and participation rules to deter abuses and have the capacity to detect, investigate and enforce those rules, including means to provide participants with impartial access to the market.
Execution delay	No specifications	No specifications	Under the CFTC's proposed rule, each SEF must require that traders who have the ability to execute against a customer's order or to match customer orders be subject to a 15 second delay between the entry of the two orders, so that one side of the transaction is disclosed and made available to the market before the second side is submitted for execution. The SEC did not propose such a requirement for SB SEFs.
Position limits	Under MiFID 2, operators of MTFs and OTFs which admit to trading commodity derivatives must apply position management, including at least position limits, on the size of position in a commodity derivative that a person can have over a specified period of time. Member States must also give competent authorities the power to introduce non-discriminatory position limits.		SEFs must adopt position limits or position accountability levels as necessary and appropriate, and monitor positions for compliance with CFTC-mandated position limits. Under the SEC's proposed rule, SB SEFs must adopt rules permitting the SB SEF to impose or modify position limits or other market restrictions during an emergency.
Emergency authority to intervene	Under MiFID 2, national competent authorities will have the power to prohibit or restrict the marketing or sale of certain financial instruments and any financial activity or practice, as well as powers to to require the reduction of the size of positions/exposures. ESMA will also have similar emergency powers, including powers to impose similar temporary prohibitions/restrictions.		SEFs and SB SEFs must adopt rules to permit the exercise of emergency authority in consultation with the regulators, as is necessary and appropriate, including authority to liquidate or transfer positions or suspend trading.

Regulation of CCPs

	EU: EMIR	US: Dodd-Frank Act
Authorisation	A CCP established in the EU is required to apply for authorisation to the competent authority in the Member State where it is established. Once authorisation has been granted, the relevant CCP can provide its services throughout the EU. However, Member States may adopt or apply additional requirements to CCPs established in their jurisdiction.	The Dodd-Frank Act gives regulators the primary role in developing organisational and business conduct standards for CCPs. CCPs must be registered with the CFTC as a derivatives clearing organization ("DCO") in order to clear futures or swaps and with the SEC as a clearing agency in order to clear security-based swaps.
Recognition of third country CCPs	A CCP established in a third country may provide clearing services to clearing members or trading venues in the EU if that CCP has been recognised by ESMA. ESMA is only permitted to recognise a third country CCP if certain conditions are met, including that the CCP is authorised and subject to equivalent supervision in its home jurisdiction and the Commission has adopted an implementing act determining that the legal and supervisory regime in the third country is equivalent to that in the EU.	The Dodd-Frank Act provides that US regulators may exempt a non-US CCP from the requirement to register as a DCO or clearing agency if the non-US CCP is subject to comparable, comprehensive regulation in its home country. Such an exempt CCP would be eligible to clear swaps. Neither the CFTC nor the SEC has yet issued guidance on recognition of non-US CCPs.
CCP ownership limits	There are no provisions in EMIR limiting CCP ownership, although a person seeking to acquire or increase, directly or indirectly, a qualifying holding of the voting rights or capital in a CCP (10%, 20%, 30%, 50% or so that the CCP would become its subsidiary) is required to seek the prior approval of the competent authority in the Member State where the CCP is established. In addition, the competent authority is only permitted to authorise a CCP where it is satisfied of the suitability of the shareholders with qualifying holdings and where close links exist between the CCP and other natural or legal persons, those links do not prevent effective supervision of the CCP.	The CFTC has proposed rules whereby a DCO would be required to choose between two alternatives: (i) no DCO member could own more than (or vote any interest exceeding) 20% of any class of voting equity in the DCO, and certain enumerated entities (i.e., bank holding companies with $50 billion in consolidated assets, SDs, and major swap participants) could not collectively own more than (or vote any interest exceeding) 40% of any class of voting equity in a DCO; or (ii) no DCO member or enumerated entity (see above) may own more than (or vote any interest exceeding) 5% of any class of voting equity in a DCO. The SEC has proposed rules that would apply the same alternative limits to ownership of a clearing agency by clearing agency participants: a security-based swap clearing agency may not permit any one clearing member to own more than 20% of any class of voting securities of the clearing agency or all clearing members to cumulatively own more than 40% of any class of securities of the clearing agency; or (ii) a security-based swap clearing agency may not permit any clearing agency participant to own more than (or vote any interest exceeding) 5% of any class of voting equity of in a clearing agency.

Regulation of CCPs (2)

	EU: EMIR	US: Dodd-Frank Act
Risk committee	A CCP must establish a risk committee composed of representatives of its clearing members, independent members of the board and representatives of its clients. None of the groups of representatives (clearing members or clients) shall have a majority on the risk committee. Regulators may attend risk committee meetings in a non-voting capacity. A CCP must have a board of which at least 1/3 and no fewer than 2 of its members are independent. Client representatives shall always be invited to board meetings for matters relating to transparency or segregation and portability.	❑ DCOs must establish a risk management committee composed of at least 35% public directors . Either the governing board or risk management committee must be composed of at least 10% representatives of customers. ❑ Clearing agencies, depending on which of the two clearing agency ownership-limit alternatives (described above) they choose, would be required to ensure that its governing board, and any committee authorized to act on behalf of the board, is composed of at least 35% (or a majority) independent directors (having no material relationship with the clearing agency, its affiliates or its participants) and that its nominating committee is composed of a majority (or all) independent directors.
Segregation	A CCP must keep records and accounts that will enable it, at any time and without delay, to distinguish the assets and positions held for the account of one clearing member, from those held for any other or from its own assets. A CCP must also offer : ❑ "omnibus client segregation": separate records and accounts enabling a clearing member to distinguish in the accounts with the CCP the assets and positions of the clearing member from those of its clients; and ❑ "individual client segregation": ❑ "separate records and accounts enabling a clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from those held for the account of other clients."	❑ A DCO must segregate customer funds in a manner which minimizes the risk of loss or delay in access to funds. ❑ Clearing agencies would be required to hold assets in a manner whereby risk of loss or delay in access is minimized. ❑ The Dodd-Frank Act contains provisions requiring collateral for cleared swaps to be held with a futures commission merchant or a broker-dealer or securities SD.
Portability	EMIR includes provisions which aim to ensure the portability of client positions and collateral in the event of a clearing member's default. EMIR also has provisions permitting interoperability for CCPs in relation to cash securities clearing.	A DCO must have rules that provide for the transfer of customer positions and funds without requiring the close-out and rebooking of positions.

Regulation of trade repositories

	EU: EMIR	US: Dodd-Frank Act
Authorisation	EMIR sets out requirements for the registration of trade repositories. The registration of a trade repository through a regulator in one member state will be effective throughout the EU.	The Dodd-Frank Act gives US regulators extensive powers to regulate SDRs.
Recognition of third country trade repositories	A non-EU trade repository may only provide its services to EU entities if it has been recognised by ESMA. The non-EU trade repository must submit an application for recognition, including information showing that the trade repository is authorised and subject to effective supervision in a jurisdiction which ; ❑ has been recognised by the Commission as having an equivalent and enforceable regulatory and supervisory framework; ❑ has entered into an international agreement with the EU; and ❑ has in place co-operation arrangements to ensure that EU authorities (including ESMA) have immediate and continuous access to the necessary information.	The Dodd-Frank Act does not contain any provisions allowing the recognition (or exemption) of non-US trade repositories, but such entities might be able to register under the Act if they can comply with its requirements The CFTC final rules provide that if a swap is required to be reported under Dodd-Frank and the law of another jurisdiction to both a US registered SDR and a trade repository registered with the other jurisdiction, the relevant reporting counterparty must also report to the US registered SD, as soon as practicable, the identity of the foreign trade repository and the swap identifier used by that foreign trade repository to identify that swap.
Effective date	It is likely that the requirement for trade repositories to be authorised or recognised will come into force from the date on which the relevant implementing acts come into force (subject to certain transitional provisions).	SDRs must comply with the registration requirement by October 12, 2012
Who can have access to the information in a trade repository?	EMIR contemplates that ESMA, certain EU regulators and central banks will have access to information held by the repository. It also contemplates disclosure to non-EU authorities where there is a relevant international agreement or co-operation agreement in place.	There are specific provisions allowing registered trade repositories to disclose information on request to domestic and foreign regulators, subject to certain confidentiality and indemnity requirements The Dodd-Frank Act permits SDRs to share information with other regulators on a confidential basis. SDRs may share information with the following regulators: each prudential regulator (Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency), the SEC, the Financial Stability Oversight Council; the Department of Justice, the Federal Reserve Bank of New York, the Office of Financial Research and any other person the CFTC deems appropriate, including non-US regulators. The CFTC stated that it will endeavour to provide access to SDR information to foreign regulators as well.
Confidentiality and indemnity	EMIR requires any person who receives confidential information pursuant to EMIR (including acting on behalf of a trade repository) to use it only in the performance of their duties. A similar duty is imposed on employees of regulators who receive such information. There is no obligation for a trade repository to receive an assurance of confidentiality or an indemnity before providing information to a regulator.	Prior to sharing any information with a regulator, the SDR must receive a written agreement from such regulator stating that it will abide by the confidentiality provisions of the CEA and agree to indemnify the SDR and the CFTC for any litigation expenses relating to information provided.

Structural

Volcker Rule and derivatives "push-out"

The Dodd-Frank Act introduces a restriction on proprietary trading by banking groups (the "**Volcker rule**"). The Volcker Rule is an amendment to the US Bank Holding Company Act (BHCA), which generally prohibits entities that are subject to the BHCA from engaging in (i) proprietary trading and (ii) investing in, sponsoring, or controlling hedge funds and private equity funds.

As currently proposed, the Volcker Rule would :

- ❑ restrict a covered entity's ability to enter into proprietary trades on US markets or with US persons,
- ❑ require covered entities to gather and report extensive qualitative and quantitative data,
- ❑ impose a wide-ranging compliance programme on any covered entity that trades with US persons as a principal and
- ❑ limit a covered entity's ability to invest in or control funds organized anywhere in the world that have US investors.

Under the DFA, the conformance period for the Volcker Rule started in July 2012, but the Federal Reserve has indicated that covered entities will have until 21 July 2014 to fully confirm their activities with the Volcker Rule

Under the Dodd-Frank Act, effective July 2013, subject to certain exceptions, an entity registered as an SD or an MSP may not receive certain kinds of US federal government assistance, including advances from the Federal Reserve's discount window. US depository institutions therefore would have to "push out" their swap activities to an affiliate that is registered as a swap entity. US branches of foreign banks may also borrow from the Federal Reserve's discount window and may also be subject to the "push out" rule if subject to SD registration.

Insured depository institutions are excluded where they act as SDs or MSPs and limit their swap activities

UK Independent Commission on Banking

In June 2010 the UK Chancellor of the Exchequer announced the creation of an Independent Commission on Banking, chaired by Sir John Vickers. The Commission was asked to consider the structure of the UK banking sector, and to look at structural and non-structural measures to reform the banking system and promote competition.

The Commission published its final report in September 2011. The report recommended establishing a retail ring-fence for UK banks, requiring banks' UK retail activities to be carried out in separate subsidiaries which are legally, economically and operationally separate from the rest of the banking group to which they belong.

The Commission describes the activities within the scope of the ring-fence:

- ❑ core banking activities which are required to be carried on within the retail ring-fence;
- ❑ ancillary activities which are permitted to be carried on within the retail ring-fence, and
- ❑ prohibited activities which must not be carried on from within the retail ring-fence.

The prohibited activities include services to non-EEA customers, trading book activities and derivatives trading (other than for risk management).

The ring-fenced bank would also have separate prudential requirements (e.g., separate capital and governance requirements).

The legislation implementing these recommendations is expected to be passed this Parliament (i.e., before the end of 2015), with implementation set for the beginning of 2019.

EU High Level Expert Group on the structure of the EU banking sector

The European Commission has appointed a High Level Expert Group on reforming the structure of the EU banking sector, chaired by Erkki Liikanen.

The Group is requested to consider in depth whether there is a need for structural reforms of the EU banking sector, having regard to ongoing reform both in the EU and globally, and to make relevant proposals with the objective of establishing a safe, stable and efficient banking system serving the needs of citizens, the EU economy and the internal market.

The Group should have particular regard to ongoing structural reforms in other jurisdictions (e.g., Volcker Rule, Independent Commission on Banking).

Glossary

EU Glossary

CCP: central counterparty: a legal entity that interposes itself between the counterparties to the contracts traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer

EMIR: EU Regulation on OTC derivatives, central counterparties and trade repositories

ESMA: European Securities and Markets Authority

Financial counterparty: banks, investment firms, insurance companies, registered funds (UCITS), pension funds and private funds, where authorised in accordance with relevant EU Directives

MiFID: Markets in Financial Instruments Directive (2004)

MiFID 2: Current legislative proposal for a recast Markets in Financial Instruments Directive, replacing MiFID

MiFIR: Current legislative proposal for a Markets in Financial Instruments Regulation

MTF: Multilateral Trading Facility

Non-financial counterparty: an undertaking (other than a financial counterparty) established in the EU

OTC: over the counter

OTF: Organised Trading Facility

US Glossary

Swap: a swap is broadly defined to include interest rate, equity, currency, fixed income and broad-based security index swaps, forwards and options, and total return swaps referencing broad-based security indices (comprising 10 or more debt or equity securities). The definition excludes foreign exchange and physical commodity transactions with retail counterparties, spot transactions and “hybrid instruments” that are predominantly securities (which includes most structured notes).

Exempt FX Instruments: foreign exchange forwards and foreign exchange swaps.

Foreign exchange forwards: a transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon at the inception of the contract.

Foreign exchange swap: a transaction that solely involves an exchange of two different currencies and a reverse exchange at a later date, at a fixed rate that is agreed upon at the inception of the contract.

Security based swap: defined to include swaps based on a narrow-based security index, a single security or loan, or the occurrence or non-occurrence or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index.

Financial Entity: includes SDs, MSPs, commodity pools, private funds (as defined in the Investment Advisers Act of 1940), employee benefit plans and persons predominantly engaged in activities that are in the business of banking or in activities that are financial in nature, but excludes certain captive finance affiliates.

US Glossary (ii)

Swap dealer or "SD": The DFA defines a "swap dealer" as any entity that "(i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps." The '34 Act contains a definition in substantially the same terms of "security-based swap dealer."

The CFTC and the SEC published a joint proposed rule, which identified certain distinguishing characteristics and activities of SDs, including: (i) accommodating demand for swaps from other parties; (ii) being generally available to enter into swaps to facilitate other parties' interest; (iii) entering into swaps on their own standard terms or on terms they arrange in response to other parties' interest; and (iv) arranging customized terms for swaps upon request or creating new types of swaps at the dealer's own initiative. In addition, the regulators identified certain non-exclusive factors that would indicate that an entity is "holding itself out" as a "dealer in swaps" within the meaning of the "swap dealer" definition: (i) contacting potential counterparties to solicit interest in swaps, (ii) developing new types of swaps (including financial products that contain swaps) and informing potential counterparties of their availability, and (iii) generally expressing a willingness to offer or provide a range of financial products that would include swaps.

MSP: DFA defines a "major swap participant" as a person, other than an SD, that (i) maintains a substantial position in swaps in any of four major swap categories (rates (including FX), credit, equity and commodities) as determined by the CFTC (excluding positions held for hedging or mitigating commercial risk), (ii) has substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets, or (iii) is highly leveraged relative to the amount of capital it holds. The regulators have proposed to define "substantial position" and "substantial counterparty exposure" with numerical tests based on uncollateralized current and future exposures and notional amounts.

End User: this term is not expressly defined under the CEA, but based on Section 2(h)(7) of the CEA would be an entity that is not a Financial Entity and is using swaps to hedge or mitigate commercial risk.

US Glossary (iii)

Eligible contract participant: this means:

- each of the following acting on its own behalf: (i) a financial institution, (ii) an insurance company, (iii) a registered investment company, (iv) a commodity pool with assets in excess of USD 5 million (provided that with respect to foreign exchange transactions a commodity pool will be an eligible contract participant only if each investor in the pool is itself an eligible contract participant, (v) a corporate entity that has total assets in excess of USD 10 million or net worth in excess of USD 1 million, (vi) an ERISA plan or a benefit plan with total assets in excess of USD 5 million or whose investment decisions are made by a registered investment advisor, financial institution or insurance company, (vii) a government entity, instrumentality or agency, (viii) a registered broker-dealer, (ix) an individual with amounts invested on a discretionary basis in excess of (a) USD 10 million or (b) USD 5 million if it enters into a regulated derivative in order to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, or

- an investment advisor or broker-dealer acting on behalf of another eligible contract participant.