

Comparison of EU and US Derivatives Regulatory Regimes

	The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)	Draft EU Regulations: European Market Infrastructure Regulation (“EMIR”) and Markets in Financial Instruments Directive and Markets in Financial Instruments Regulation (“MiFID”)
<i>Scope</i>	<ul style="list-style-type: none"> Broad range of OTC derivatives across various asset classes ‘Swaps’ – covers a broad range of swaps transactions, excluding physically settled non-financial or security forwards, futures contracts, listed FX options, but including FX swaps and forwards (regulated by CFTC), although the US Secretary of the Treasury is likely to exclude certain narrowly defined FX swaps and FX forwards from some aspects of the Dodd-Frank regime ‘Security Based Swaps’ – being swaps on a single security or loan or narrow-based security index. It also includes single-issuer credit default swaps (regulated by SEC) 	<ul style="list-style-type: none"> Broad range of OTC derivatives across various asset classes, including those specifically set out within MiFID (See Annex 1, Section C (4) to (10))
<i>Clearing</i>	<ul style="list-style-type: none"> Mandatory requirement to clear swaps or security-based swaps determined to be clearable by CFTC or the SEC as applicable, or submitted for authorisation by clearinghouse Carve out for pre-existing swaps (if reported to data repository) but unclear whether front-loading would be applied Exemption for end-users hedging their risks 	<ul style="list-style-type: none"> Requirement to clear all derivative contracts determined to be eligible for clearing by ESMA Swaps traded post-enactment but pre-determination of clearing obligation may be required to be cleared (“front-loading”) Non-financial counterparties exempt (similar to DF end-user exemption) but only if their non-hedging derivatives are below a clearing threshold (such threshold is not yet defined) 3 year exemption for swaps reducing risk in pension schemes
<i>Parties subject to the Clearing Obligation</i>	<ul style="list-style-type: none"> Swap dealer (“SD”)¹ – a dealer in swaps, that makes a market in swaps or enters into swaps as an ordinary course of business for its own account Major swap participant (“MP”)¹ – maintains a “substantial position” in swaps End Users trading in speculative investments 	<ul style="list-style-type: none"> Financial Counterparties – investment firms, credit institutions, insurance and re-insurance undertakings, undertakings for collective investments in transferable securities and alternative investment fund managers Non-Financial Counterparties – any parties that are not Financial Counterparties (above a clearing threshold)
<i>Registration Requirements</i>	<ul style="list-style-type: none"> Registration with either the CFTC and/or the SEC depending on what products are traded Requirement to remain members of registered futures association Derivatives Clearing Organisations (“DCO”) are subject to CFTC and SEC registration and authorisation requirements 	<ul style="list-style-type: none"> There is no specific registration requirement for trading counterparties, although in order to provide investment services or activities as a regular occupation or business on a professional basis in relation to derivative contracts, a Financial Counterparty must be approved under MiFID Central Clearing Counterparties (“CCP”) established in the EU must apply for authorisation by competent authorities
<i>Trading Requirements</i>	<ul style="list-style-type: none"> Cleared swaps must be executed on an exchange or Swap Execution Facility (“SEF”) SEFs are a new definition of trading facility that is not a designated contract market (“DCM”) 	<ul style="list-style-type: none"> Cleared swaps that are “sufficiently liquid” will be required to trade on Regulated Markets, Multilateral Trading Facilities (“MTF”) or Organised Trading Facilities (“OTF”) OTF’s are a newly defined trading venue under MiFID
<i>Reporting and Record</i>	<ul style="list-style-type: none"> Daily real-time public reporting 	<ul style="list-style-type: none"> All counterparties, including Non-Financial Counterparties, are

¹ For the purposes of this table, references to ‘Swaps’, ‘Swaps Dealers’ and ‘Major Swap Participants’ are also intended to include ‘security-based swaps’, security-based dealers and major security-based participants (as applicable), unless we state otherwise

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<i>Retention Requirements</i>	<ul style="list-style-type: none"> • Trade record retention requirements • Requirements to record complete transaction and position information; keep basic business records, minutes and audit documentation • Reporting of swap data to Swap Data Repository (“SDR”) End Users – • Swaps executed on an SEF or DCM will be subject to real time public reporting 	<p>obliged to report (to a trade repository) details of any cleared or non-cleared OTC derivatives contracts they have entered into. This includes novation, termination or modification of existing contracts</p> <ul style="list-style-type: none"> • MiFID review proposes pre- and post- trading transparency requirements for OTC derivatives traded on an MTF or an OTF, unless waived by national regulators
<i>Capital and Margin Requirements</i>	<ul style="list-style-type: none"> • Applicable to SDs and MPs • Applicable regulators to propose minimum capital requirements and initial / variation margin requirements 	<ul style="list-style-type: none"> • Set by CCPs (in respect of cleared swaps) in accordance with regulatory technical standards • Parties to non-cleared swaps are required to observe ‘appropriate’ procedures regarding the posting of collateral. (Commission will specify regulatory technical standards in due course)
<i>Segregation of Collateral</i>	<p><i>Cleared Swaps</i></p> <ul style="list-style-type: none"> • Collateral of multiple customers may be commingled but the value of the collateral for each customer’s positions is treated on an individual basis <p><i>Uncleared Swaps</i></p> <ul style="list-style-type: none"> • Initial margin may be segregated upon election by end-user • Segregated initial margin must be held at a custodian that is independent of both the counterparty and the SD/MP • No limitation on the type of collateral that can be posted but guidelines on investment of margin 	<p><i>Cleared Swaps</i></p> <ul style="list-style-type: none"> • CCPs must keep records and accounts enabling the segregation and identification of assets and positions of all clearing members and from its own assets • Ability for clients of clearing members to require their collateral to be segregated from that of other clients within the CCP (“full segregation”) • Assets and positions of clearing member’s clients cannot be exposed to losses on proprietary accounts of the clearing member. <p><i>Uncleared Swaps</i></p> <ul style="list-style-type: none"> • Margin may be segregated at counterparty election; <i>currently not limited to initial margin</i>
<i>Business Conduct Standards</i>	<ul style="list-style-type: none"> • For DCOs: Structural governance and ownership policies mitigating conflict of interests; organization and general conduct of business rules and requirements with respect to: trading and products, surveillance, operations, compliance and financial information and resource requirements • For SDs and MPs – includes a duty of fair dealing and good faith communication, duty to disclose material risks, material incentives or conflicts of interest as well as additional responsibilities with respect to “Special Entities” (e.g., states, municipalities, pension plans etc.) 	<ul style="list-style-type: none"> • For CCPs - overriding duty to act fairly, honestly and professionally in the best interests of its clearing members and to effect sound risk management • Those Financial Counterparties governed by MiFID will be subject to conduct of business obligations set out in MiFID including: ensuring that communications are fair, clear and not misleading, as well as requirements in respect of record keeping etc.
<i>Position Limits</i>	<ul style="list-style-type: none"> • Position limits to be placed on 28 core physical delivery contracts (exchange-traded and OTC) • Exemption for bona fide hedging transactions 	<ul style="list-style-type: none"> • ESMA will co-ordinate the measures taken by national-level regulators to manage positions on derivative transactions, and has the specific powers to manage or limit positions when certain criteria are met, such as a threat to financial stability or to the financial markets • Regulators have also been given specific powers to impose limits in respect of the commodity derivatives market