

Principles for US/EU Trading Platform Recognition

In order to reduce the risk of market fragmentation and to enhance trading liquidity between US and European markets, the US Commodity Futures Trading Commission (CFTC) and European Union (EU) regulators should establish clear and comprehensive regimes to facilitate mutual recognition of execution platforms and trading requirements. This paper is designed to assist the CFTC with implementing a framework for finding comparability through an analysis of the US swap execution facility (SEF) core principles in the context of the European regulatory framework, and to support the CFTC in developing a 'registration-lite' approach for EU trading venues.

In developing an approach to comparability, the CFTC should apply the principles outlined in the final report issued by the International Organization of Securities Commissions (IOSCO) Task Force on Cross-Border Regulation, and recognize the broad commonalities between the US and EU regimes, rather than focus on technical differences between the underlying rules.

We encourage the CFTC to compare the core principles for SEFs established by the US Congress with corresponding European regulations, with a view to determining whether the rules for EU trading venues achieve the same objectives and offer the same protections as the requirements set out in the SEF core principles. Where these requirements are satisfied, the CFTC should allow EU trading venues to be exempt from SEF registration and compliance with the SEF rules. In addition, parties to a swap subject to the US trading mandate should be able to satisfy their obligations by executing on an EU trading venue in accordance with applicable rules, regardless of their status as a US person or otherwise.

Regulators should cooperate effectively to develop trading rules and establish clear and comprehensive regimes to facilitate mutual recognition

OVERVIEW

Regulatory changes in the derivatives markets have significantly transformed the trading of derivatives across international borders. To reduce the risk of market fragmentation, and to restore trading liquidity, regulators should cooperate effectively to develop trading rules and establish clear and comprehensive regimes to facilitate mutual recognition of execution platforms and trading requirements across jurisdictions¹.

The CFTC has had a long-standing policy of recognizing various foreign market infrastructure providers in connection with cross-border trading activities in futures and other CFTC-regulated products, and has experience in considering the comparability of a foreign jurisdiction's regulatory requirements in a number of contexts. Notably, the CFTC charted the course of international regulatory cooperation when it began issuing no-action relief to foreign boards of trade that allow direct access to their markets by US persons.

Following the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which authorized the CFTC to adopt rules to allow these foreign boards of trade to register with it, the CFTC promulgated rules to allow foreign boards of trade that are "subject to comprehensive supervision and regulation by the appropriate governmental authorities in their home country"² to provide market participants located in the US with direct access to their electronic trading and order-matching systems, conditioned on a registration requirement that provides significant deference to a foreign regulatory regime³.

To achieve the goals set out by the international community at the 2009 Group-of-20 Pittsburgh summit, and by Congress in the Dodd-Frank Act⁴, and to promote consistent standards in swaps oversight, the CFTC has participated in numerous international working groups, including the IOSCO Task Force on Over-the-Counter (OTC) Derivatives, which the CFTC co-chairs with the US Securities and Exchange Commission. More recently, the CFTC issued its first exemptive letters⁵ to foreign central counterparties (CCPs) pursuant to the CFTC's authority under Section 5b(h) of the Commodity Exchange Act (CEA) to exempt foreign CCPs from the requirement to register with the CFTC as a derivatives clearing organization (DCO), on the basis that these foreign CCPs are subject to "comparable, comprehensive supervision and regulation by . . . the appropriate government authority in the home country of the organization"⁶.

¹ See Testimony of Chairman Timothy G. Massad before the US House Committee on Agriculture, February 12, 2015 ("[A]s other jurisdictions develop their rules on trading, we will look to try to harmonize the rules as much as possible so as to minimize the risk of market fragmentation . . . Our goal should be to create a regulatory framework that not only achieves the Congressional mandate of bringing this market out of the shadows, but which also creates the foundation for the market to thrive. To do so, our rules must ensure transparency, integrity and oversight, while at the same time permit innovation, freedom and competition.")

² CFTC Rule 48.5(d)(2)

³ See Part 48 (Registration of Foreign Boards of Trade) of the CFTC's Regulations

⁴ See Section 752 of Dodd-Frank ("In order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in section 1a(39) of the Commodity Exchange Act), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities.")

⁵ See Order of Exemption from Registration for ASX Clear (Futures) Pty Limited (August 18, 2015), Order of Exemption from Registration for Korea Exchange, Inc. (October 26, 2015) and Order of Exemption from Registration for Japan Securities Clearing Corporation (October 26, 2015)

⁶ Section 5b(h) of the CEA

In the spirit of the CFTC's continued legacy of international cooperation, this paper recommends a roadmap for comparability determinations for European trading venues, such as regulated markets⁷ (RMs), multilateral trading facilities⁸ (MTFs) and organized trading facilities⁹ (OTFs) – together known as EU trading venues. As acknowledged by CFTC chairman Timothy Massad, “[m]utual recognition is critical” with respect to the recognition of trading platforms in the US and in the EU, and regulators “should focus on overall outcomes, not on item-by-item similarity”¹⁰.

THE CFTC'S REGULATORY FRAMEWORK

The CFTC has required that all swaps that are subject to the US trading mandate and are determined to be ‘made available to trade’ must be executed on a SEF or DCM

Dodd-Frank established a comprehensive regulatory framework for swaps-trading platforms. It created new types of facilities for the execution of swaps, known as SEFs, and introduced a requirement that certain swaps subject to the trade execution requirement (which don't fall under one of the two exemptions in Section 2(h)(8)(B)) must be executed on a SEF or designated contract market (DCM). In establishing this framework, Congress promulgated the SEF core principles¹¹. In June 2013, the CFTC released rules establishing requirements for SEFs to operate in accordance with these principles¹². Among other requirements, the rules compel all facilities that offer a trading system or platform to register as a SEF if more than one market participant has the ability to execute or trade swaps with more than one other party¹³. Further, and although not expressly mandated by Dodd-Frank, the CFTC has required that all swaps that are subject to the US trading mandate and are determined to be ‘made available to trade’¹⁴ must be executed on a SEF or DCM via an order book or a request-for-quote-to-three system that operates in conjunction with an order book¹⁵.

Despite promulgating rules establishing requirements for SEFs, by designating SEFs as self-regulatory organizations (SROs), the CFTC has allowed SEFs discretion in determining how to comply with the SEF core principles and devising their own rules and procedures. This includes requirements relating to governance and conflict-of-interest rules and enforcement and market-surveillance programs, as well as trading-platform development.

⁷ In accordance with MIFID Article 4(1)(21), a ‘regulated market’ means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorized and functions regularly and in accordance with Title III of MIFID II

⁸ In accordance with MIFID Article 4(1)(22), a ‘multilateral trading facility’ means a multilateral system, operated by an investment firm or a 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 in accordance with Title II of MIFID II

⁹ In accordance with MIFID Article 4(1)(23), an ‘organized trading facility’ means a multilateral system that is not an RM or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MIFID II

¹⁰ Keynote remarks of Chairman Timothy Massad before the Swap Execution Facility Conference, SEFCON VI, October 26, 2015

¹¹ Section 5h(f) of the CEA

¹² See Core Principles and Other Requirements for Swap Execution Facilities, 78 Fed. Reg. 33476 (June 4, 2013)

¹³ CFTC Rule 37.3(a)

¹⁴ See Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 Fed. Reg. 33606 (June 4, 2013)

¹⁵ CFTC Rule 37.9(a)(2)

The CFTC should consider a jurisdiction-by-jurisdiction approach to determining comparability of the regulation of foreign trading venues

CFTC'S AUTHORITY TO EXEMPT FOREIGN TRADING FACILITIES

In recognizing the global nature of the derivatives markets and the importance of international regulatory cooperation, Congress directed the CFTC to exempt a trading venue from registration if the CFTC finds that the facility is “subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility”¹⁶ (the SEF exemption).

We note that the SEF exemption contains comparable language to the DCO exemption, and have considered how the CFTC might implement the SEF exemption given how it has already applied the DCO exemption. Based on this analysis, we encourage the CFTC to recognize that a different approach may be warranted in a number of respects when applying the SEF exemption, particularly considering the vastly different risk profiles presented by clearing venues versus trade execution venues, and the significant similarities in the regulation and operation of US SEFs and EU trading venues, as discussed below. Importantly, the CFTC should recognize that trading venues provide a service that is limited to the execution of swap transactions. As such, there is no need for robust customer asset protection regimes, as trading venues do not hold customer collateral. Therefore, the CFTC's approach to a CCP-by-CCP determination of whether a CCP may take advantage of the DCO exemption, as taken in the DCO exemptive letters, as well as the broad restrictions on clearing by most US persons on an exempted DCO¹⁷, is not appropriate in the context of exempting foreign trading venues from regulation as a SEF. Instead, the CFTC should consider a jurisdiction-by-jurisdiction approach to determining comparability of the regulation of foreign trading venues, and should not restrict the execution by US persons on foreign trading venues, so long as the rules of these jurisdictions meet the objectives of the SEF core principles and the persons who have access to these trading venues qualify as eligible contract participants (ECPs) under the CEA.

Although the CFTC has not yet employed the SEF exemption for any foreign trading venues, the CFTC's Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight have provided conditional no-action relief (the qualifying MTF letter)¹⁸, effective until the CFTC promulgates final rules implementing the SEF exemption. This exempts qualifying multilateral trading facilities (QMTFs) overseen by competent authorities in EU member states from the SEF-registration requirement in connection with allowing any US persons or persons located in the US to trade or execute swaps on or pursuant to the rules of the facility, either directly or indirectly, provided the QMTF complies with certain requirements. However, to qualify for this relief, an applicant must demonstrate strict compliance with many prescriptive CFTC rules and conditions that are directly applicable to SEFs, such as requiring QMTFs to maintain an order book, complying with minimum block-trade requirements, and meeting strict rule enforcement and monitoring requirements. As a result, compliance with the qualifying MTF letter would require an entity to comply largely with the SEF rules without allowing the entity the flexibility to rely on its compliance with comparable regulations in the EU.

¹⁶ Section 5h(g) of the CEA. Emphasis added

¹⁷ Generally, the DCO exemptive letters at paragraph (2) only allow (a) a US person that is a clearing member of the exempted DCO to clear swaps for itself and its affiliates and (b) a non-US person that is a clearing member of the exempted DCO to clear swaps for US persons that are affiliates

¹⁸ CFTC Letter No. 14-16, Conditional No-Action Relief with respect to Swaps Trading on Certain Multilateral Trading Facilities Overseen by Competent Authorities Designated by European Union Member States (February 12, 2014) (NAL 14-16). On April 9, 2014, NAL 14-16 was superseded by CFTC Letter No. 14-46

Had Congress wanted the CFTC to adopt such a restrictive approach to mutual recognition, it would not have provided it with the broad exemptive authority set out in the SEF exemption. Instead, Congress intended the CFTC to pursue a more flexible approach that is based on global regulatory collaboration. Because the qualifying MTF letter provides only temporary conditional no-action relief, obtaining QMTF status would not represent a long-term solution to mutual recognition with Europe. We understand that no EU trading venues have sought status as a QMTF, and instead have chosen to register separate affiliates as SEFs, giving rise to market fragmentation. As the CFTC continues to review its rules to improve SEF trading in a number of different areas, and looks to propose permanent changes to its SEF regulations¹⁹, it should do so with a view to creating a sound legal framework that will facilitate mutual recognition of appropriately regulated foreign trading venues on both sides of the Atlantic²⁰.

THE EU FRAMEWORK

MIFID II/MIFIR will impose extensive pre-trade transparency obligations on transactions executed on an EU trading venue

Similar to Dodd-Frank, the EU Markets in Financial Instruments Directive and associated regulation (MIFID II/MIFIR) will introduce a requirement to trade certain OTC derivatives that are subject to the trading obligation on EU trading venues or third-country trading venues subject to a regime that is considered equivalent under MIFID II/MIFIR (a third-country trading venue). Although there is no requirement for derivatives subject to the EU trading mandate to be executed in a particular way (eg, via an order book), MIFID II/MIFIR will impose extensive pre-trade transparency obligations on transactions executed on an EU trading venue.

While MIFID II/MIFIR entered into force on July 2, 2014, the main implementation date for MIFID II/MIFIR is January 2017²¹.

The EU trading mandate will only apply to classes of derivatives that are subject to the clearing obligation under the European Market Infrastructure Regulation (EMIR). The first classes of interest rate derivatives determined to be subject to a clearing obligation under EMIR were announced at the end of 2015. Further classes of derivatives are expected to become subject to the clearing obligation over time. These classes are closely aligned with those subject to the clearing obligation under CFTC rules.

¹⁹ For example, CFTC chairman Timothy Massad has noted that the CFTC continues to consider changes with respect to the execution of package transactions and block trades, confirmations and confirmation data reporting, and execution methods. See keynote remarks of chairman Timothy Massad before the Swap Execution Facility Conference, SEFCON VI, October 26, 2015. See also ISDA Petition for Rulemaking to Amend Parts 1 General Regulations under the Commodity Exchange Act), 37 (Swap Execution Facilities) and 43 (Real-Time Public Reporting) of the Commodity Futures Trading Commission Regulations (dated June 15, 2015)

²⁰ Article 28(4) of MIFIR provides that the EC may “adopt decisions determining that the legal and supervisory framework of a third country ensures that a trading venue authorised in that third country complies with legally binding requirements which are equivalent to the requirements for [Regulated Markets, MTFs and OTFs], resulting from [MIFIR, MIFID II, and the market abuse regulation (Regulation (EU) No 596/2014)], and which are subject to effective supervision and enforcement in that third country”

²¹ However, the European Commission has recently made public their belief that this implementation date should be delayed by a year to allow market participants additional time to comply with the requirements under MIFID II/MIFIR

The European Securities and Markets Authority (ESMA) is required to develop regulatory technical standards (RTS) specifying the classes of derivatives subject to the clearing obligation that are also to be subject to the EU trading mandate, and the date or dates from which the EU trading mandate will take effect, including any phase-in. ESMA is required to submit those RTS with respect to a class of derivatives to the European Commission within six months after a determination that such class of derivatives is subject to the clearing obligation. In order for the EU trading mandate to take effect, the relevant class of derivatives must be admitted for trading or traded on at least one EU trading venue or third-country trading venue, and there must be sufficient liquidity in it.

As to the EU trading venues, MTFs and RMs are traditional exchanges²² that are managed by market operators and investment firms, and are currently used by market participants for the execution of financial instruments. They provide for non-discretionary execution and are subject to the pre-trade and post-trade requirements. To ensure there is appropriate oversight for the trading of derivatives on other multilateral trading facilities not currently regulated as an RM or MTF, MIFID II/MIFIR introduces a new category of trading venue: OTFs. Alongside RMs and MTFs, OTFs will be a third type of multilateral system in which multiple buyers and sellers can interact in a way that results in contracts. The main distinguishing factor between RMs/MTFs and OTFs is that execution of orders on OTFs is carried out on a (limited) discretionary basis²³.

CRITERIA FOR MAKING COMPARABILITY DETERMINATIONS WITH THE EU TRADING RULES

The CFTC's comparability determination should recognize and highlight EU and US regulatory commonalities

Comparability Determinations Must be in Line with the IOSCO Cross-border Report

In the IOSCO report, most industry participants expressed clear support for the use of recognition as a tool for regulating cross-border securities market activities²⁴. According to the IOSCO report, a host regulator may recognize “a foreign regulatory regime, or parts thereof, following an assessment of the foreign regulatory regime by the host regulator”²⁵. The IOSCO report emphasizes that regulators must strive to achieve mutual recognition, such “that both regulators agree to recognize each other, each operating as home as well as host jurisdiction in respect of the same cross-border activities”²⁶.

Consistent with the principles outlined in the IOSCO report, the CFTC's comparability determination should recognize and highlight EU and US regulatory commonalities rather than focus on the more technical differences from the SEF rules, some of which may change or be updated in due course. Instead of engaging in a line-by-line examination of the provisions set out in the RTS, the CFTC should be encouraged to undertake a principles-based review of the EU regulatory framework to determine whether the EU regime supports and enforces regulatory objectives in the oversight of EU trading venues that are comparable to the regulatory objectives supported by the CFTC.

²² MTFs are the most similar to SEFs

²³ OTFs are likely to be used for voice broking because of the limited ability to exercise discretion on these trading venues

²⁴ IOSCO Task Force on Cross Border Regulation (Final Report) (September 2015)

²⁵ Id

²⁶ Id

To do so, the analysis of the EU trading rules should be conducted against the objectives of the SEF core principles established by Congress. This will allow the CFTC to consider comparability by looking for consistency with the objectives of the SEF core principles, and not for disparities and variations in the minutia of the EU rules. This approach will allow EU regulators the flexibility to apply their trading requirements in a manner they deem appropriate, while still ensuring that EU rules comply with the SEF core principles.

In other words, the CFTC's role in making comparability determinations should be to ensure that the EU's trading rules are comparable with the SEF core principles. How EU regulators achieve comparability with the objectives of the SEF core principles should be left to front-line decision-makers (ie, ESMA and member-state regulators).

In establishing the proposed comparability determination road map, ISDA is guided by the following considerations:

- Recognition of cross-border activities involves some level of reliance on the EU regulators' supervisory oversight. In cases of regulatory gaps, further cooperation among regulators through various information-sharing arrangements may be appropriate²⁷. We also note that a determination by the CFTC that the EU regulatory framework is comparable should not mean that the CFTC would have to solely rely on EU regulatory authorities to monitor the activities of foreign trading venues when their activities involve US persons. In connection with any comparability determination, the CFTC should be able to require that the EU trading venue makes documents, books and records relating to its operations involving US persons open to inspection by the CFTC. We note that this approach would enable the CFTC to more effectively use its oversight authority, while allowing for flexibility.
- The CFTC should consider the totality of regulation – self and governmental – in making the comparability determination and recognize that, in many respects, the EU trading-venue rules for achieving liquid markets and pre- and post-trade transparency are comparable with the pre-trade transparency requirements applicable to SEFs.
- Additionally, as discussed further below, the CFTC should consider an approach that allows an operator of an EU trading venue to file a 'notice of good standing' with the CFTC that certifies its compliance with local rules and regulations. In the context of a broad-based comparability determination with respect to the trading requirements under MIFID II/MIFIR, such a notification or 'registration-lite' approach will allow the CFTC to obtain assurance from individual EU trading venues that they are in compliance with their obligations under MIFID II/MIFIR and can provide the CFTC with a mechanism for appropriate, but not duplicative, oversight.
- Dodd-Frank allows a SEF to have reasonable discretion in establishing the manner in which SEFs comply with the SEF core principles, unless otherwise determined by CFTC rule or regulation²⁸. For the purposes of making a comparability determination, the CFTC should view the SEF rules implemented under the SEF core principles as establishing one way of achieving the objectives of the SEF core principles.

²⁷ Id

²⁸ Section 5h(f)(1)(B) of the CEA

- The CFTC should not focus on comparability with a detailed technical requirement on how certain swap transactions subject to the US trading mandate must be executed, which was not mandated by Congress and not required as part of the SEF core principles²⁹. Instead, the CFTC should focus on whether the EU has rules and regulations for EU trading venues that achieve the same objectives and offer the same protections for the market and market participants as the requirements set out in the SEF core principles.

Where these requirements are satisfied, the CFTC should provide that the EU trading venues are exempt from SEF registration and compliance with the SEF rules. In addition, where a swap is subject to the US trading mandate, the parties to such a swap (regardless of their US person status) should be able to satisfy the obligation to comply with the US trading mandate by executing such a swap on an EU trading venue in accordance with applicable rules. That should be irrespective of that fact that the EU trading venue may not mandate or even offer trading in such a swap via an order book or a request-for-quote to three persons (RFQ to three) system that operates in conjunction with an order book. As discussed in more detail below, pre-trade transparency on EU venues is achieved in an alternative way to an order book or an RFQ to three: the EU regime seeks to achieve pre-trade transparency by requiring bids and offers or indications of interest to be disseminated to the market generally.

Process for Making Comparability Determinations

Below is a list of specific policy objectives that the CFTC may want to consider in making its comparability determination. These policy objectives are consistent with Dodd-Frank's intent to promote trading of swaps on SEFs and facilitate pre-trade price transparency in the swaps market³⁰, and reflect the regulatory objectives of the SEF core principles.

1. Trading venues must promote pre-trade transparency and encourage trading on centralized platforms. We note that the objectives of the CFTC in relation to pre-trade transparency requirements are dealt with in a different but very detailed manner in the EU. This approach should, however, achieve Congress's objectives.
2. Trading venues must have trading, trade-processing and trade-participation rules that deter trading abuses and ensure the integrity of the trading venue (SEF core principle 2)³¹. Since fair and transparent trading is the cornerstone of trade execution requirements, it may be appropriate to consider more granular regulatory goals to determine whether the EU trading framework meets this regulatory objective. These policy goals are:
 - i. Trading venues must deter and investigate market abuses;
 - ii. Trading venues should provide market participants with impartial access to the market; and
 - iii. Trading venues must establish procedures for execution of orders.

²⁹ As noted by commissioner J. Christopher Giancarlo in his white paper on Pro-Reform Reconsideration of the CFTC Swaps Trading Rules: Return to Dodd-Frank, January 29, 2015 at 22, Congress did not prescribe required execution methods for swaps and instead intended "flexibility in swaps trading by permitting trade execution through 'any means of interstate commerce.'" See also Section 1a(50) of the CEA

³⁰ Section 5h(e) of the CEA

³¹ Section 5h(f)(2) of the CEA (compliance with rules)

3. Trading venues must monitor trading activity to prevent market manipulation and price distortion (SEF core principle 4)³².
4. Trading venues must have appropriate record-keeping requirements, and trading records of market participants must be accessible to appropriate regulators overseeing the trading venue (SEF core principles 5 and 10)³³.
5. Trading venues must ensure the financial integrity of transactions executed on the trading venues (SEF core principle 7)³⁴. One of the components of this SEF core principle is the implementation of straight-through-processing rules for cleared swaps. The MIFID II regime has similar requirements³⁵.
6. Trading venues must have rules and procedures to provide for the exercise of emergency authority (SEF core principle 8)³⁶.
7. Trading venues must have procedures in place to minimize conflicts of interest in their decision-making process (SEF core principle 12)³⁷.
8. Trading venues must have adequate financial, operational and managerial resources (SEF core principle 13)³⁸.
9. Trading venues must establish and maintain a sufficient program of risk oversight to identify and minimize sources of operational risk (SEF core principle 14)³⁹.

³² Section 5h(f)(4) of the CEA (the SEF shall monitor trading in swaps to prevent market manipulation and price distortion through surveillance, real-time monitoring of trading and accurate trade reconstruction)

³³ Section 5h(f)(5) of the CEA (the SEF shall establish rules allowing the CFTC to obtain information to carry-out its functions); Section 5h(f)(10) of the CEA (record-keeping and reporting: a SEF shall maintain records of all activities relating to the business of the facility)

³⁴ Section 5h(f)(7) of the CEA (the SEF shall establish and enforce rules and procedures for ensuring the financial integrity of the swaps entered on the SEF, including the clearance and settlement of the swaps pursuant to Section 2(h)(1) of the CEA)

³⁵ Article 29(2) of MIFIR requires that “CCPs, trading venues and investment firms which act as clearing members in accordance with Article 2(14) of [the European Markets Infrastructure Regulation (EMIR)] shall have in place effective systems, procedures and arrangements in relation to cleared derivatives to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems”. In this context, ‘cleared derivatives’ means not just derivatives subject to mandatory clearing but also “all derivatives which are otherwise agreed by the relevant parties to be cleared”

³⁶ Section 5h(f)(8) of the CEA (the SEF shall establish and enforce rules to provide for the exercise of emergency authority)

³⁷ Section 5h(f)(12) of the CEA (the SEF shall establish rules to minimize and resolve conflicts of interest)

³⁸ Section 5h(f)(13) of the CEA (the SEF shall have adequate financial, operational and managerial resources)

³⁹ Section 5h(f)(14) of the CEA (the SEF shall establish and maintain program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and reliable automated systems)

This paper does not analyze certain SEF core principles – the objectives of which are already covered by existing EU law.

- EU law generally prohibits manipulation of any financial contract and bans entities from engaging in anti-competitive practices. Therefore, ISDA believes the key objectives of SEF core principle 3 (swaps not readily susceptible to manipulation) and SEF core principle 11 (antitrust considerations) are already satisfied.
- This paper does not analyze compliance with SEF core principle 9 (timely publication of trading information), because such review should be done in conjunction with the CFTC reporting requirements.
- Both the EU and US regulators have the ability to set position limits on their trading venues. Therefore, the CFTC should allow non-US trading venues to have position limits (SEF core principle 6) established by EU regulators, as long as a member state has the authority to require a trading venue to reduce or liquidate any position to prevent price manipulation⁴⁰.
- Regulatory obligations imposed on a SEF's chief compliance officer (SEF core principle 15) are not relevant for purposes of a comparability determination, as they are unique to SEFs as designated SROs. These regulatory obligations are subsumed by the overall regulatory oversight by member-state regulators over trading venues. Note also that Article 45(1) of MIFID requires that “all members of the management body of any market operator shall at all times be of sufficiently good repute, possess sufficient knowledge, skills and experience to perform their duties. The overall composition of the management body shall reflect an adequately broad range of experience.”

NOTIFICATION/CERTIFICATION PROCESS TO THE CFTC

Receiving formal CFTC acknowledgement will allow EU trading venues to operate on firm legal ground

Should the CFTC determine that the EU regulatory framework is comparable to the SEF core principles, the CFTC may consider requesting that an operator of a EU trading venue file a ‘notice of good standing’ with the CFTC. The notice will contain a certification from the member-state regulator that the EU trading venue is not subject to any disciplinary actions and is subject to regulation by its home-country regulator as an EU trading venue. This notice could be similar to the requirement to obtain a representation of good regulatory standing, as required in the DCO exemptive letters⁴¹.

Since EU trading venues must be properly licensed in their home state, pursuant to the home-regulator rules that are consistent with the regulatory framework established by the European Commission and ESMA, and this paper establishes the overall MIFID II/MIFIR regulatory regime is consistent with the objectives of the SEF core principles, any certification by the home regulator that the EU trading venue complies with all the objectives outlined in this proposal should be sufficient for the CFTC to grant an exemption from registration.

Receiving formal CFTC acknowledgement will allow EU trading venues to operate on firm legal ground. Market participants will also benefit from the knowledge that the EU trading venues operating in the US or admitting US persons for trading on their platforms are determined to be comparable by the CFTC.

⁴⁰ This position is consistent with the approach taken by the CFTC with respect to the registration requirements for foreign boards of trade. See Part 48 of the CFTC's Rules

⁴¹ Paragraph (8) of the DCO exemptive letters

ASSESSMENT OF THE EU REGULATORY FRAMEWORK

The table on the following pages analyzes the EU regulatory framework against the regulatory objectives outlined in the paper. As noted earlier, these objectives generally reflect Dodd-Frank's vision of SEFs and the objectives of the SEF core principles, in particular. We have also, where appropriate, included discussion of representative SEF rules that we believe are helpful in more specifically detailing the CFTC's implementation of the SEF core principles and illustrating similarities between US and EU trading rules⁴². As noted, however, the SEF rules offer one way of achieving the objectives of Dodd-Frank and the SEF core principles. Therefore, comparisons with the SEF rules should not ultimately be determinative in the context of a broader comparability assessment by the CFTC.

⁴² The relevant SEF regulatory provisions can be found in 17 C.F.R. Part 37; the relevant EU legal provisions come from the following sources: MiFID II (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014) and MiFIR (Regulation 600/2014 of the EU Parliament and of the Council of 15 May 2014); the Market Abuse Regulation (Regulation (EU) No 596/2014)

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
Policy objective #1: Trading venues must promote pre-trade transparency and encourage trading on centralized platforms				
<p>Section 1a(50) of the CEA The term 'swap execution facility' or SEF means 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, through any means of interstate commerce...</p> <p>CFTC Rule 37.900(a) Each SEF is required to make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the CFTC.</p> <p>CFTC Rule 37.3(a)(3) To register as a SEF, a platform must, at a minimum, offer an order book, which is a trading system in which all market participants have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.</p>	<p>MIFID II Article 4(21) The term 'regulated market' or RM means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of financial instruments admitted to trading under its rules and/or systems and which is authorized and functions regularly and in accordance with Title III of MIFID II...</p> <p>MIFIR Article 8 Investment firms⁴³ and market operators⁴⁴ operating an EU trading venue make public on a continuous basis during normal trading hours the current bid and offer prices and the depth of trading interest at those prices. The requirement also applies to actionable indications of interest. Competent authorities can waive the obligation on investment firms and market operators to make this information public in specified circumstances and provided that certain conditions are satisfied.</p> <p>MIFIR Article 10 Investment firms and market operators operating an EU trading venue make public the price, volume and time of transactions executed on an EU trading venue, as close to real time as it technically possible. Competent authorities can defer the obligation on investment firms and market operators to make this information public in specified circumstances and provided that certain conditions are satisfied.</p>	<p>MIFID II Article 4(22) The term 'multilateral trading facility' or MTF means a multilateral system operated by an investment firm or a 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 in accordance with Title II of MIFID II...</p> <p>MIFID II, Article 18(7) Member states shall require that MTFs and OTFs have at least three materially active members or users, each having the opportunity to interact with all the others with respect to price formation.</p> <p>MIFIR Article 8 Investment firms and market operators operating an EU trading venue must make public on a continuous basis during normal trading hours the current bid and offer prices and the depth of trading interest at those prices. The requirement also applies to actionable indications of interest. Competent authorities can waive the obligation on investment firms and market operators to make this information public in specified circumstances and provided that certain conditions are satisfied.</p> <p>MIFIR Article 10 Investment firms and market operators operating an EU trading venue must make public the price, volume and time of transactions executed on an EU trading venue, as close to real time as it technically possible. Competent authorities can defer the obligation on investment firms and market operators to make this information public in specified circumstances and provided that certain conditions are satisfied.</p>	<p>MIFID II Article 4(23) The term 'organized trading facility' or OTF means a multilateral system that is not an RM or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MIFID II...</p>	<p>For the regulatory frameworks to be comparable, the regulations do not have to be identical; they simply have to achieve the same goal.</p> <p>Both regulatory frameworks achieve the same objective – they require trading venues to provide pre-trade price transparency by exposing bids or offers to a number of market participants.</p> <p>The CFTC's regime seeks to achieve pre-trade transparency by requiring trades that are determined to be made available to trade (and therefore become required transactions under the SEF rules) to be executed on an order book or an RFQ to three system.</p> <p>The EU regime seeks to achieve pre-trade transparency by requiring bids and offers or indications of interest to be disseminated to the market generally.</p>

⁴³ As defined in MIFID II but, essentially, 'investment firm' is broadly defined to capture entities participating in or providing a service to others to participate in certain activities in respect of a wide range of financial instruments (including derivatives). MIFID primarily seeks to control investment firms

⁴⁴ Defined in MIFID II Article 4(1)(18) as "a person or persons who manages and/or operates the business of a regulated market and may be the regulated market itself"

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
Policy objective #2: Trading venues must have trading, trade processing and trade participation rules that deter trading abuses and ensure the integrity of the trading venue				
Policy goal #1: Trading venues must deter and investigate market abuses				
<p>CFTC Rule 37.203(a) Abusive trading practices prohibited. A SEF must prohibit abusive trading practices on its markets by members and market participants. SEFs that permit intermediation must prohibit customer-related abuses, such as trading ahead of customers, trading against customer orders, accommodation trading, and improper cross trading, specific trading violations include front-running, wash trading, pre-arranged trading, fraudulent trading, money passes, and other practices that a SEF deems abusive.</p> <p>CFTC Rule 37.203(b) Capacity to detect and investigate rule violations. A SEF shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information on routine and non-routine basis, including the authority to examine books and records kept by the SEF members and by persons under investigation. A SEF's arrangements and resources shall facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.</p> <p>CFTC Rule 37.203(c) Compliance staff and resources. A SEF must establish and maintain sufficient compliance staff and resources to ensure that it conducts effective audit trail reviews, trade practice surveillance, and real time market monitoring. The SEF's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct complete investigations in a timely manner.</p> <p>CFTC Rule 37.203(d) Automated trade surveillance system. A SEF shall maintain</p>	<p>Market Abuse Regulation Article 16(1 and 2) Investment firms and market operators operating an EU trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation (each of these terms is defined in the Market Abuse Regulation), in accordance with Articles 31 and 54 of MIFID II. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions without delay.</p> <p>On September 28, 2015, ESMA published its final report, including draft technical standards on the Market Abuse Regulation. Annex XI contains the technical standards adding detail to Article 16 of the Market Abuse Regulation. Article 2(3) of this technical standard requires that investment firms and market operators operating an EU trading venue must ensure "effective and ongoing monitoring of all orders received and all transactions executed for the purpose of preventing, detecting and identifying [market abuse]". Article 3(1) provides that "the arrangements, systems and procedures referred to in Article [2(3)] shall: (a) allow for the analysis, individually and comparatively, of each and every transaction executed and order placed, modified, cancelled or rejected in the systems of the trading venue ...; (b) produce alerts indicating activities requiring further analysis for detecting potential insider dealing or market manipulation or attempted insider dealing or market manipulation; and (c) cover the full range of trading activities undertaken by the persons concerned".</p>	<p>Market Abuse Regulation Article 16(1 and 2) Investment firms and market operators operating an EU trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation (each of these terms is defined in the Market Abuse Regulation), in accordance with Articles 31 and 54 of MIFID II. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions without delay.</p> <p>On September 28, 2015, ESMA published its final report, including draft technical standards on the Market Abuse Regulation. Annex XI contains the technical standards adding detail to Article 16 of the Market Abuse Regulation. Article 2(3) of this technical standard requires that investment firms and market operators operating an EU trading venue must ensure "effective and ongoing monitoring of all orders received and all transactions executed for the purpose of preventing, detecting and identifying [market abuse]". Article 3(1) provides that "the arrangements, systems and procedures referred to in Article [2(3)] shall: (a) allow for the analysis, individually and comparatively, of each and every transaction executed and order placed, modified, cancelled or rejected in the systems of the trading venue ...; (b) produce alerts indicating activities requiring further analysis for detecting potential insider dealing or market manipulation or attempted insider dealing or market manipulation; and (c) cover the full range of trading activities undertaken by the persons concerned".</p> <p>MIFID II Article 18(1 and 3) Investment firms/market operator of an MTF or OTF must establish transparent rules and procedures for fair and orderly trading, and establish effective objective criteria for the efficient execution of orders.</p> <p>MIFID II Article 19(1) In respect of MTFs only: investment firms/market operators of an MTF must establish non-discretionary rules for execution of orders.</p> <p>MIFID II Article 18(3) Investment firms/market operators of an MTF or OTF must establish, publish, maintain and implement transparent rules and procedures for fair and orderly trading and establish objective criteria for the efficient execution of orders.</p> <p>MIFID II Article 18(4) Investment firms/market operators of an MTF or OTF must have arrangements to identify clearly and manage any potential adverse consequences for the operation of the MTF of conflicts of interests.</p> <p>MIFID II Article 18(1) and 16(2-3) An investment firm must maintain policies sufficient to ensure</p>		<p>Both regulatory frameworks focus on similar regulatory goals: (1) prohibiting abusive trading practices and other practices that are traditionally considered as prohibited conduct by regulators; (2) maintaining trade surveillance and detection systems; and (3) maintaining an effective rule enforcement program.</p>

Continued from P13

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
<p>an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics, compute trade gains, losses, and swap-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.</p> <p>CFRC Rule 37.203(e) Real-time market monitoring. A SEF shall conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify disorderly trading and any market or system anomalies. A SEF shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair and publicly available.</p> <p>CFRC Rule 37.203(f) Investigations/reports. A SEF shall establish and maintain procedures that require staff to conduct investigations of possible rule violations. Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule</p>	<p>Article 3(4 and 5) include that “procedures referred to in the first subparagraph shall include software capable of deferred automated reading, replaying and analysis of order book data, with sufficient capacity to operate in an algorithmic trading environment” and must also “ensure an appropriate level of human analysis ... in the prevention of [market abuse]”.</p> <p>MIFID II Article 47(1) RMs must (a) have arrangements to identify clearly and manage potential adverse consequences, for the operation of the RM, its members or participants, of any conflict of interest between the interest of the RM, its owners and operators; (b) be adequately equipped to manage risks; (c) have arrangements for sound technical management and manage technical disruptions; (d) have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders; (e) to have effective arrangements to finalize transactions; (f) to have available, at the time of authorization and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the ranges and degree of risks to which it is exposed.</p> <p>MIFID II Article 47(2) Market operators must not execute client orders against proprietary capital or engage in matched principle trading on a RM that they operate.</p> <p>MIFID II Article 53 RMs must establish/maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the RM.</p> <p>MIFID II Article 54 RM RMs must monitor the rule</p>	<p>compliance with MIFID II. An investment firm must maintain effective organizational and administrative arrangements to prevent conflicts of interest.</p> <p>MIFID II Article 31(1 and 2) Investment firms/market operators of an MTF or OTF must monitor the rule compliance of its members, participants and users, including monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly trading obligations, possible indications of breaches of the Market Abuse Regulation, and deploy sufficient resource to ensure the monitoring is effective. Any such breaches, disorderly conduct and possible indications must be reported to the competent authority.</p> <p>MiFID II Article 31(3) Investment firms/market operators of an MTF or OTF must supply information to authorities to support market abuse investigations and prosecutions.</p> <p>MIFID II Article 69 and 70 Competent authorities shall be given extensive powers, including investigatory powers and powers to impose remedies, necessary to fulfill their duties under MIFID II/MIFIR, including with respect to running an EU trading venue and market abuse. Sanctions are likewise extensive and include public censure, fines and criminal penalties.</p> <p>MIFID II also contains provisions ensuring products can and will be suspended and removed, not just on one venue but on all relevant venues in the EU, either following a decision by the venue or by the competent authority (including MIFID II Article 32 and 18(9)).</p> <p>MIFIR Article 25(1) Investment firms must keep at the disposal of the competent authority, for five years, all relevant data relating to all transactions in financial instruments. MIFIR 25(2) requires the operator of an EU trading venue to keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments.</p>		

Continued on P15

Continued from P14

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
<p>violation.</p> <p>CFTC Rule 37.205 Audit trail. A SEF shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred. A SEF shall capture and retain all audit trail data necessary to detect, investigate and prevent customer and market abuses and establish a program for effective enforcement of its audit trail and record-keeping requirements.</p>	<p>compliance of its members and participants including monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly conduct, possible indications of breaches of the Market Abuse Regulation, and deploy sufficient resource to ensure the monitoring is effective. Any such breaches, disorderly conduct and possible indications must be reported to the competent authority.</p> <p>MIFID II Article 54(3) A Market operator of a RM must supply information to authorities to support market abuse investigations and prosecutions.</p> <p>MIFID II Article 69 and 70 Competent authorities shall be given extensive powers, including investigatory powers and powers to impose remedies, necessary to fulfill their duties under MIFID II/MIFIR, including with respect to running an EU trading venue and market abuse. Sanctions are likewise extensive and include public censure, fines and criminal penalties.</p> <p>MIFID II also contains provisions ensuring products can and will be suspended and removed, not just on one venue but on all relevant venues in the EU, either following a decision by the venue or by the competent authority (including MIFID 52).</p> <p>MIFIR 25(1) Investment firms to keep at the disposal of the competent authority, for five years, all relevant data relating to all transactions in financial instruments. MIFIR 25(2) requires the operator of an EU trading venue to keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments.</p>			
Policy goal #2: Trading venues should provide market participants with impartial access to the market				
<p>CFTC Rule 37.202(a) Impartial access. A SEF shall provide any ECP and any independent software vendor with impartial access to its markets and market services,</p>	<p>MIFID II Article 53(1) RMs must establish/maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of</p>	<p>MIFID II Article 18(3) Investment firms/market operators of an MTF or OTF must establish, publish, maintain and implement transparent and non-discriminatory rules, based on objective criteria, governing access to the facility.</p>		<p>Both regulatory frameworks require that trading venues provide market participants with impartial access.</p>

Continued on P16

Continued from P15

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
<p>provided that the facility has criteria governing such access that are impartial, transparent, and applied in a fair and non-discriminatory manner.</p> <p>CFTC Rule 37.202(c) Limitations on access. A SEF shall establish and impartially enforce rules governing any decision to allow, deny, suspend or permanently bar ECPs' access to the SEF, including such when such decisions are made as part of a disciplinary or emergency action taken by the SEF.</p>	<p>the RM.</p> <p>MIFID II Article 53(3) RMs may admit as members or participants investment firms (as defined in MIFID II), credit institutions (as defined in Directive 2013/36/EU) and other persons who are of sufficient good repute; have a sufficient level of trading ability, competence and experience; have adequate organizational arrangements; and have sufficient resources available for the given type of trading they will do.</p> <p>MIFID II Article 48(8 and 9) Any co-location must be fair, transparent and non-discriminatory. Fee structures must ensure fair and non-discriminatory markets.</p> <p>MIFID II contains additional provisions to control where the form of trading is algorithmic/automated and/or high frequency (for example, MIFID II Articles 17 and 48(6, 7 and 10)).</p>	<p>MIFID II Article 18(4) Investment firms/market operators of an MTF or OTF must have arrangements to identify clearly and manage any potential adverse consequences for the operation of the MTF/OTF of conflicts of interests.</p> <p>MIFID II Article 18(5) and 48(8 and 9) Any co-location must be fair, transparent and non-discriminatory. Fee structures must ensure fair and non-discriminatory markets. MIFID II contains additional provisions to control where the form of trading is algorithmic/automated and/or high-frequency (for example, MIFID II Articles 17 and 48 (6,7 and 10)).</p>		
Policy goal #3: Trading venues must establish procedures for execution of orders				
<p>CFTC Rule 37.201 (a) Each SEF must establish rules specifying trading procedures to be followed by members and market participants when entering and executing orders trade on a SEF.</p>	<p>MIFID II Article 47(1) RMs must ... (d) have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders; (e) have effective arrangements to facilitate the efficient and timely finalization of transactions ...</p> <p>MIFID II Article 53(1) RMs must establish/maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the RM.</p> <p>MIFID II Article 54 RMs must monitor the rule compliance of its members and participants, including</p>	<p>MIFID II Article 18(1 and 3) Investment firms/market operators of an MTF or OTF must establish transparent rules and procedures for fair and orderly trading and establish effective objective criteria for the efficient execution of orders.</p> <p>MIFID II Article 19(1) In respect of an MTF only, investment firms/market operators of an MTF must establish non-discretionary rules for execution of orders.</p> <p>MIFID II Article 18(3) investment firms/market operators of an MTF or OTF must establish, publish, maintain and implement transparent and non-discriminatory rules, based objective criteria, governing access to the facility.</p> <p>MIFID II Article 31(1 and 2) Investment firms/market operators of an MTF or OTF must monitor the rule compliance of its members, participants and users, including monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly trading conditions or conduct that may indicate breaches of the Market Abuse Regulation, and deploy sufficient resource to ensure the monitoring is effective. Any such breaches,</p>		<p>Both regulatory frameworks require that trading venues have transparent procedures in place for entering and executing orders.</p>

Continued on P17

Continued from P16

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
	<p>monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly breaches of the Market Abuse Regulation, and deploy sufficient resource to ensure the monitoring is effective. Any such breaches, disorderly conduct and possible indications must be reported to the competent authority.</p>	<p>disorderly conduct and possible indications must be reported to the competent authority.</p> <p>MIFID II Articles 18(5) and 48(4 and 5) Trading systems must reject orders above pre-determined values or clear error-trades. The investment firms/market operators must be able to suspend trading or, in exceptional circumstances, vary or correct transactions.</p>		
Policy objective #3: Trading venues must monitor trading activity to prevent market manipulation and price distortion				
<p>CFTC Rule 37.401 General requirements. Each SEF must: (a) collect and evaluate data on its market participants' market activity on an ongoing basis, in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the physical-delivery or cash-settlement process; (b) monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand; (c) demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities; and (d) demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purpose of detecting instances or threats of manipulation, price distortion and disruptions.</p> <p>CFTC Rule 37.406 Trade reconstruction. Each SEF must be able to comprehensively and accurately reconstruct all trading on its facility. All audit-trail data and reconstructions shall be made available to the CFTC in a form, manner and time that is acceptable to the CFTC.</p>	<p>MIFID II Article 54(1 and 2) RMs must monitor the rule compliance of their members and participants, including monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly conduct and possible indications of breaches of the Market Abuse Regulation. They must deploy sufficient resources to ensure the monitoring is effective. Any such breaches, disorderly conduct and possible indications must be reported to the competent authority.</p> <p>MIFID II Article 54(3) A Market operator of an RM must supply information to authorities to support market abuse investigations and prosecutions.</p> <p>Market Abuse Regulation Article 16 (1 and 2) Investment firms and market operators operating an EU trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation (each of these terms is defined the Market Abuse Regulation), in accordance with Articles 31 and 54 of MIFID II. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions without delay.</p> <p>On September 28, 2015, ESMA published its final</p>	<p>MIFID II Article 31(1 and 2) Investment firms/market operators of an MTF or OTF must monitor the rule compliance of its members, participants and users, including monitoring orders, cancellations and executions, to identify breaches of the rules, disorderly trading conditions and possible indications of breaches of the Market Abuse Regulation. They must deploy sufficient resources to ensure the monitoring is effective. Any such breaches, disorderly conduct and possible indications must be reported to the competent authority.</p> <p>MIFID II Article 31(3) Investment firms/market operators of an MTF or OTF must supply information to authorities to support market abuse investigations and prosecutions.</p> <p>Market Abuse Regulation Article 16 (1 and 2) Investment firms and market operators operating an EU trading venue shall establish and maintain effective arrangements, systems and procedures aimed at preventing and detecting insider dealing, market manipulation and attempted insider dealing and market manipulation (each of these terms is defined the Market Abuse Regulation), in accordance with Articles 31 and 54 of MIFID II. Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to detect and report suspicious orders and transactions without delay.</p> <p>On September 28, 2015, ESMA published its final report, including draft technical standards on the Market Abuse Regulation. Annex XI contains the technical standards adding detail to Article 16 of the Market Abuse Regulation. Article 2(3) of this technical standard requires that investment firms and market operators operating an EU trading venue must ensure "effective and ongoing monitoring of all orders received and all transactions executed for the purpose of preventing, detecting and identifying [market abuse]". Article 3(1) provides that "the arrangements, systems and procedures referred to in Article [2(3)] shall: (a) allow for the analysis, individually and comparatively, of each and every transaction executed and order placed, modified, cancelled or rejected in the systems of the trading venue ...; (b) produce alerts indicating activities requiring further analysis for detecting potential insider dealing or market manipulation or attempted insider dealing or market manipulation; and (c) cover the full range of trading activities undertaken by the persons concerned". Article 3(4 and 5) include that "procedures referred to in the first subparagraph shall include software capable of deferred automated reading, replaying and analysis of order-book data, with sufficient capacity to operate in an algorithmic trading environment" and must also "ensure an appropriate level of human analysis ... in</p>		<p>Both regulatory frameworks require trading venues to conduct real-time monitoring, have the ability to reconstruct trades and evaluate general market data to detect and prevent manipulation.</p>

Continued on P18

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
	<p>report, including draft technical standards on the Market Abuse Regulation. Annex XI contains the technical standards adding detail to Article 16 of the Market Abuse Regulation. Article 2(3) of this technical standard requires that investment firms and market operators operating an EU trading venue must ensure “effective and ongoing monitoring of all orders received and all transactions executed for the purpose of preventing, detecting and identifying [market abuse]”. Article 3(1) provides that “the arrangements, systems and procedures referred to in Article [2(3)] shall: (a) allow for the analysis, individually and comparatively, of each and every transaction executed and order placed, modified, cancelled or rejected in the systems of the trading venue ...; (b) produce alerts indicating activities requiring further analysis for detecting potential insider dealing or market manipulation or attempted insider dealing or market manipulation; and (c) cover the full range of trading activities undertaken by the persons concerned”. Article 3(4 and 5) include that “procedures referred to in the first subparagraph shall include software capable of deferred automated reading, replaying and analysis of order-book data, with sufficient capacity to operate in an algorithmic trading environment” and must also “ensure an appropriate level of human analysis ... in the prevention of [market abuse]”.</p> <p>MIFIR Article 25(2) The operator of an EU trading venue must keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments. The information required to be kept includes the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that</p>	<p>the prevention of [market abuse]”.</p> <p>MIFIR Article 25(1) Investment firms must keep at the disposal of the competent authority, for five years, all relevant data relating to all transactions in financial instruments.</p> <p>MIFIR Article 25(2) The operator of an EU trading venue must keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments. The information required to be kept includes the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order. This includes the participant that transmitted the order, the identification code of the order, the date and time of the order and the characteristics of the order (including the type of the order, the validity period, any specific order instructions, details of any modification, cancellation or partial or full execution of the order, and the agency or principal capacity). Further details to be included are the price, trade type, designation to identify the client, designation to identify the persons and computer algorithms responsible for the investment decision, etc.</p>		

Continued from P18

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
	<p>stems from that order. This includes the participant that transmitted the order, the identification code of the order, the date and time of the order and the characteristics of the order (including the type of the order, the validity period, any specific order instructions, details of any modification, cancelation or partial or full execution of the order, and the agency or principal capacity). Further details to be included are the price, trade type, designation to identify the client, designation to identify the persons and computer algorithms responsible for the investment decision, etc.</p>			
<p>Policy objective #4: Trading venues must have appropriate record-keeping requirements and trading records of market participant must be accessible to appropriate regulators overseeing the trading venue</p>				
<p>CFCT Rule 37.502 Establish and enforce rules. Each SEF must have rules that allow it to collect information on a routine basis, allow it to collect non-routine data from its market participants, and allow for the examination of books and records kept by the market participants on its facility.</p> <p>CFCT Rule 37.504 Information-sharing agreements. Each SEF must share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the CFTC or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established with such entities, or the CFTC can act in conjunction with the SEF to carry out such information sharing.</p> <p>CFCT Rule 37.1001 Record-keeping. Each SEF must maintain records of all activities relating to the business of the facility, in a form and manner acceptable to the CFTC, for a period of at least five years. A SEF</p>	<p>MIFIR Article 25(1) Investment firms must to keep at the disposal of the competent authority, for five years, all relevant data relating to all transactions in financial instruments.</p> <p>MIFIR Article 25(2) The operator of an EU trading venue must to keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments. The information required to be kept includes the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order. This includes the participant that transmitted the order, the identification code of the order, the date and time of the order and the characteristics of the order (including the type of the order, the validity period, any specific order instructions, details of any modification, cancelation or partial or full execution of the order, and the agency or principal capacity). Further details to be included are the price, trade type, designation to identify the client, designation to identify</p>	<p>MIFIR Article 25(1) Investment firms must keep at the disposal of the competent authority, for five years, all relevant data relating to all transactions in financial instruments.</p> <p>MIFIR Article 25(2) The operator of an EU trading venue must keep at the disposal of the competent authority, for five years, all relevant data relating to all orders in financial instruments. The information required to be kept includes the relevant data that constitute the characteristics of the order, including those that link an order with the executed transaction(s) that stems from that order. This includes the participant that transmitted the order, the identification code of the order, the date and time of the order and the characteristics of the order (including the type of the order, the validity period, any specific order instructions, details of any modification, cancelation or partial or full execution of the order, and the agency or principal capacity). Further details to be included are the price, trade type, designation to identify the client, designation to identify the persons and computer algorithms responsible for the investment decision, etc.</p> <p>MIFID II Articles 18(5) and 48(11) MTFs/OTFs must, upon request by the competent authority, make available data relating to the order book, or give access to the order book so the competent authority can monitor trading.</p> <p>MIFID II Articles 18(1) and 16(6 and 7) An investment firm must arrange for records to be kept of all services, activities and transactions undertaken by it that shall be sufficient to enable the competent authority to fulfill its supervisory tasks and to perform the enforcement actions under MIFID II and MIFIR. Records include taking written notes of orders made in face to face meetings.</p>		<p>Both regulatory frameworks require trading venues to maintain records of their business activities, including an audit trail, investigatory files, and disciplinary files, for five years.</p> <p>Both regulatory frameworks allow for access of records by competent authorities to monitor trading.</p> <p>Both regulatory frameworks require trading venues to collect their participants' trading records.</p>

Continued on P20

Continued from P19

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
<p>shall maintain such records, including a complete audit trail for all swaps executed on or subject to the rules of the SEF, investigatory files and disciplinary files, in accordance with the requirements §1.31 (Books and records; keeping and inspection) and Part 45 (Swap Data Recordkeeping and Reporting Requirements) of the CFTC regulations.</p>	<p>the persons and computer algorithms responsible for the investment decision, etc.</p> <p>MIFID II Article 48(11) RMs must, upon request by the competent authority, make available data relating to the order book, or give access to the order book so the competent authority can monitor trading.</p>			
Policy objective # 5: Trading venues must ensure financial integrity of the transactions executed on the trading venues				
<p>CFTC Rule 37.701 Required clearing. Transactions executed on or through the swap execution facility that are required to be cleared or are voluntarily cleared by the counterparties shall be cleared through a DCO, or a DCO that the CFTC has determined is exempt from registration.</p> <p>CFTC Rule 37.702 General financial integrity. A SEF shall provide for the financial integrity of its transactions: (a) by establishing minimum financial standards for its members, which shall, at a minimum, require that members qualify as an ECP; (b) for transactions cleared by a DCO: (1) by ensuring that the SEF has the capacity to route transactions to the DCO in a manner acceptable to the DCO for purposes of clearing; and (2) by coordinating with each DCO to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of CFTC Rule 39.12(b)(7) (Time Frame for Clearing).</p>	<p>MIFIR 29 All transactions traded on a RM must be cleared at a registered or recognized CCP.</p> <p>EMIR Article 4 will impose a clearing obligation in respect of certain classes of derivatives transactions. MIFIR 32(1)(a) states that classes of derivatives subject to mandatory clearing under EMIR (or a relevant subset thereof) will be subject to mandatory trading under MIFIR Article 28.</p> <p>MIFIR Article 28(1) Financial counterparties . . . and non-financial counterparties [over the clearing threshold] must conclude transactions . . . with other such financial counterparties or other such non-financial counterparties in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation . . . only on: (a) RMs; (b) MTFs; (c) OTFs; or (d) Third-country trading venues.</p> <p>Article 29(1) of MIFIR The operator of a RM shall ensure that all transactions in derivatives that are concluded on that RM are cleared by a CCP authorized or recognized under EMIR.</p> <p>MIFIR Article 29(2) ...EU trading venues ...shall have in place effective systems, procedures and arrangements to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as</p>	<p>EMIR Article 4 will impose a clearing obligation in respect of certain classes of derivatives transactions. MIFIR 32(1)(a) states that classes of derivatives subject to mandatory clearing under EMIR (or a relevant subset thereof) will be subject to mandatory trading under MIFIR Article 28.</p> <p>MIFIR Article 28(1) Financial counterparties . . . and non-financial counterparties [over the clearing threshold] must conclude transactions . . . with other such financial counterparties or other such non-financial counterparties in derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation . . . only on: (a) RMs; (b) MTFs; (c) OTFs; or (d) third-country trading venues.</p> <p>MIFIR Article 29(2) ...EU trading venues ...shall have in place effective systems, procedures and arrangements to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems.</p> <p>In this paragraph, 'cleared derivatives' means all derivatives subject to mandatory clearing under Article 4 of EMIR, and all other derivatives the parties agree to clear.</p> <p>Articles 35 and 36 of MIFIR EU trading venues must have access to CCPs (authorized or recognized under EMIR), and vice versa. These provisions create the rights of access to CCPs. MIFIR allows EU trading venues to have access to more than one CCP.</p>		<p>Both regulatory frameworks require mandatorily cleared transactions to be cleared by a CCP that is registered with the legal regulator or exempt from registration.</p> <p>Both regulatory frameworks require trading venues to have the ability to route mandatorily cleared or voluntarily cleared transactions to an appropriate CCP.</p>

Continued on P21

Continued from P20

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
	<p>technologically practicable using automated systems. In this paragraph, 'cleared derivatives' means all derivatives subject to mandatory clearing under Article 4 of EMIR, and all other derivatives the parties agree to clear.</p> <p>Articles 35 and 36 of MIFIR EU trading venues must have access to CCPs (authorized or recognized under EMIR), and vice versa. These provisions create the rights of access to CCPs. MIFIR allows EU trading venues to have access to more than one CCP.</p>			
Policy objective #6: Trading venues must have rules and procedures to provide for the exercise of emergency authority				
<p>CFTC Rule 37.405 Risk controls for trading. Each SEF must establish and maintain risk-control mechanisms to prevent and reduce the potential risk of market disruptions, including – but not limited to – market restrictions that pause or halt trading under market conditions prescribed by the SEF.</p> <p>CFTC Rule 37.800 Emergency Authority. Each SEF must adopt rules to provide for the exercise of emergency authority, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.</p>	<p>MIFID II Article 48(5) Member states shall require an RM to be able to temporarily halt or constrain trading if there is significant price movement on that market or a related market in a short period and, in exceptional cases, to cancel, vary or correct any transaction. This provision also allows for EU market wide coordinated action.</p> <p>MIFID II also contains provisions ensuring products can and will be suspended and removed, not just on one venue but on all relevant venues in the EU, either following a decision by the venue or by the competent authority (including MIFID 52).</p> <p>MIFIR Articles 39-45 include a suite of product management and intervention powers that could also be applied by the competent authority or ESMA.</p>	<p>MIFID II Articles 18(5) and 48(5) Investment firms/market operators of an MTF or OTF must be able to comply with a member state's requirement to temporarily halt or constrain trading if there is significant price movement on that market or a related market in a short period and, in exceptional cases, to cancel, vary or correct any transaction. This provision also allows for EU market-wide coordinated action.</p> <p>MIFID II also contains provisions ensuring products can and will be suspended and removed, not just on one venue but on all relevant venues in the EU, either following a decision by the venue or by the competent authority (including MIFID II Articles 32 and 18(9)).</p> <p>MIFIR Articles 39-45 include a suite of product management and intervention powers that could also be applied by the competent authority or ESMA.</p>		Both regulatory frameworks have comparable provisions that require trading venues to have adequate procedures for dealing with emergency situations.
Policy objective #7: Trading venues must have procedures in place to minimize conflicts of interest in its decision-making process				
<p>CFTC Rule 37.1200 Each SEF is required to: (a) establish and enforce rules to minimize conflicts of interest in its decision-making process; and (b) establish a process for resolving the conflicts of interest.</p>	<p>MIFID II Article 47(1) RMs must: (a) have arrangements to identify clearly and manage potential adverse consequences, for the operation of the RM, its members or participants,</p>	<p>MIFID 18(4) Investment firms/market operators of an MTF or OTF must have arrangements to identify clearly and manage any potential adverse consequences for the operation of the MTF/OTF, including conflicts of interest between the MTF/OTF, its owners or operators, and the sound functioning of the MTF/OTF.</p>		Both regulatory frameworks seek to minimize conflicts of interest.

Continued on P22

Continued from P21

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
	<p>of any conflict of interest between the interest of the RM, its owners and operators and the sound functioning of the RM...</p> <p>MIFID II Article 53(1) RMs must establish, implement and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the RM.</p> <p>MIFID II Article 47(2): Market operators must not execute client orders against proprietary capital or engage in matched principle trading on an RM that they operate.</p>	<p>MIFID II Article 18(1) and 16(2-3) An investment firm must maintain policies and processes sufficient to ensure compliance with MIFID II. An investment fund must maintain effective organizational and administrative arrangements to prevent conflicts of interest.</p> <p>MIFID II Article 19(5) Investment firms/market operators operating an MTF must not execute client orders against proprietary capital or engage in matched principal trading.</p>	<p>MIFID II Article 20(1-2) Investment firms/market operators operating an OTF must not permit: (i) execution of client orders against the proprietary capital of such investment firm/market operator or any entity in the same group; (ii) matched principal trading in derivatives (among other products), other than where the client has consented to the process; (iii) matched principal trading in derivatives of a class subject to the clearing obligation under Article 4 of EMIR.</p> <p>MIFID II Article 20(4) OTFs and systematic internalisers cannot operate within the same legal entity, and the orders of an OTF and systematic internaliser cannot interact.</p> <p>As above, the EU regime includes specific rules restricting the use of proprietary trading, matched principal trading and systematic internalization by operators of OTFs (and, in relation to OTF operators, their group companies).</p>	
Policy objective #8: Trading venues must have adequate financial, operational and managerial resources				
<p>CFTC Rule 37.1301 General requirements. (a) Each SEF is required to maintain financial resources sufficient to enable it to perform its functions in compliance with the SEF core principles. (c) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the SEF to cover its operating costs for a period of at least one year, calculated on a rolling basis.</p> <p>CFTC Rule 37.1303 Computation of projected operating costs to meet financial resource requirement. Each fiscal quarter, each SEF is required</p>	<p>MIFID II Article 47(1) An RM must ... (f) have available, at the time of authorization and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the ranges and degree of risks to which it is exposed.</p> <p>MIFID II Article 16(5) An investment firm must have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment and effective control and safeguard arrangements for information processing systems.</p>	<p>MIFID II Article 18(1) and 16(5) An investment firm must have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment, and effective control and safeguard arrangements for information processing systems.</p> <p>MIFID II Article 18(1) and 16(8-10) An investment firm holding client resources or funds must make adequate arrangements to protect such resources or funds, including against the event of the investment fund's insolvency.</p> <p>MIFID II Article 19(3)(c) Investment firms/market operators operating MTFs must have, at the time of authorization and on an ongoing basis, sufficient financial resources to facilitate their orderly functioning, having regard to the nature and extent of the transactions</p>	<p>MIFID II Article 20(1-2) Investment firms/market operators operating an OTF must not permit: (i) execution of client orders against the proprietary capital of such investment firm/market operator or any entity in the same group; (ii) matched principal trading in derivatives</p>	Both regulatory frameworks require trading venues to have sufficient financial resources.

Continued on P23

Continued from P22

Representative SEF Rules	RM Regulation	MTF Regulation	OTF Regulation	Analysis
<p>to make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of CFTC Rule 37.1301.</p>	<p>MIFID II Article 16(8-10) An investment firm holding client resources or funds must make adequate arrangements to protect such resources or funds, including against the event of the investment firm's insolvency.</p>	<p>concluded on the market and the range and degree of the risks to which they are exposed.</p>	<p>(among other products), other than where the client has consented to the process; (iii) matched principal trading in derivatives of a class subject to the clearing obligation under Article 4 of EMIR.</p> <p>MIFID II Article 20(4) OTFs and systematic internalisers cannot operate within the same legal entity, and the orders of an OTF and systematic internaliser cannot interact.</p> <p>As above, the EU regime includes specific rules restricting the use of proprietary trading, matched principal trading and systematic internalization by operators of OTFs (and, in relation to OTF operators, their group companies).</p>	
<p>Policy objective #9: Trading venues must establish and maintain a sufficient program of risk oversight to identify and minimize sources of operational risk</p>				
<p>Rule 37.1400 System safeguards. Each SEF must: (a) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems that: (1) are reliable and secure; and (2) have adequate scalable capacity; (b) establish and maintain emergency procedures, back-up facilities, and a plan for disaster recovery that allow for: (1) the timely recovery and resumption of operations; and (2) the fulfillment of the responsibilities and obligations of the SEF; and (c) periodically conduct tests to verify that the back-up resources of the SEF are sufficient to ensure continued: (1) order processing and trade matching; (2) price reporting; (3) market surveillance; and (4) maintenance of a comprehensive and accurate audit trail.</p>	<p>MIFID II Article 48 Member states shall require RMs to have in place effective systems, procedures and arrangements to ensure their trading systems are resilient, have sufficient capacity to deal with peak-order and message volumes, and are able to ensure orderly trading under conditions of severe market stress. Such systems should be fully tested, and business continuity arrangements should be in place to ensure continuity of services if there is any failure of their trading systems.</p> <p>MIFID II Article 50 All EU trading venues and their members and participants must synchronize the clocks they use to record any reportable event.</p>	<p>MIFID II Articles 18(5) and 48 Member states shall require MTFs and OTFs to have in place effective systems, procedures and arrangements to ensure their trading systems are resilient, have sufficient capacity to deal with peak-order and message volumes, and are able to ensure orderly trading under conditions of severe market stress. Such systems should be fully tested and business continuity arrangements should be in place to ensure continuity of services if there is any failure of their trading systems.</p> <p>MIFID II Article 50 All EU trading venues and their members and participants must synchronize the clocks they use to record any reportable event.</p> <p>MIFID II Articles 18(1) and 16(4 and 5) An investment firm must take reasonable steps to ensure continuity and performance of investment services and activities, including in respect of information control and security.</p>		<p>Both regulatory frameworks require trading venues to establish and maintain emergency procedures, back-up facilities, and a plan for disaster recovery. They also require trading venues to periodically conduct tests to verify sufficiency of back-up resources.</p>

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