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Comparison between the European Markets Infrastructure Regulation ("EMIR"), and relevant aspects of the Markets In Financial Instruments Directive/Regulation ("MiFID") and Dodd-Frank Wall-Street Reform and Consumer Protection Act ("DFA")

Issue	EMIR/MiFID	Title VII of the DFA
1. Clearing Obligation		
Clearing Obligation	Article 4(1) of EMIR requires certain OTC derivatives as determined by ESMA which entered into between parties who are EU authorised counterparties, relevant non-financial counterparties and certain non-EU entities to be subject to mandatory clearing. There is no distinction drawn in EMIR relating to different classes of Swaps (per DFA).	Standardized derivatives will be subject to mandatory clearing and execution requirements under the DFA. Whether a swap or security-based swap is subject to mandatory clearing will be determined by the CFTC and the SEC, respectively, pursuant to Sections 723 and 763 of the DFA. Once a swap or security-based swap is determined to be subject to mandatory clearing, then such swaps or security-based swaps must be cleared through a derivatives clearing organization ("DCO") or a security clearing agency ("SCA"), respectively, barring an exemption. As discussed below, such swaps and security-based swaps are also subject to mandatory trade execution requirements if they have been made available to trade. The DFA draws a distinction between "security-based swaps," which are derivatives contracts based on a single security or loan, or a "narrow-based security index" (i.e., having fewer than nine components) and "swaps," which comprise virtually all other OTC derivatives (e.g., interest rate swaps, credit default swaps overlying broad-based indices, commodity swaps, etc.). The CFTC has jurisdiction with respect to swaps, while the SEC has jurisdiction over

		security-based swaps.[1]
Review Process for Mandatory Clearing	Article 5 of EMIR introduces two approaches for assessing the eligibility of a class of OTC derivative contracts for mandatory clearing: (i) "bottom up" procedure - ESMA is notified when a CCP is authorised to clear a class of OTC derivatives. ESMA will then determine whether the clearing obligation should apply to such contracts and, if so, shall carry out a public consultation to determine the relevant technical standards; and (ii) "top down" – ESMA identifies classes of derivative that should be cleared, but for which no CCP has received authorisation. ESMA must then call for proposals for clearing these contracts.	DCOs and SCAs must submit swaps that they wish to clear to the CFTC or SEC, respectively, for review. The agencies must then determine whether the swaps should be subject to mandatory clearing, considering, among other things, notional exposures, liquidity, pricing data, credit support infrastructure, and the effect clearing might have on mitigating systemic risk. In addition, the DFA requires that the CFTC and the SEC conduct their own independent reviews of individual swaps and groups of swaps to determine whether they should be subject to mandatory clearing. A DCO is "presumed eligible" to clear swaps that it already clears, but must request a determination that it is eligible to clear new swaps.
Application to Existing Contracts	"Front-loading" of clearing obligations will apply – article 4(1) of EMIR provides that clearing will apply to classes of derivatives entered into after the notification by a CCP's regulator that a CCP has been authorised to clear that class, but before ESMA declaring that the class is subject to the clearing obligation, if that class is subsequently declared eligible to be cleared by ESMA. ESMA has 6 months from notification to make that decision. Contracts that have a residual maturity of less than that	Pre-existing uncleared swaps will not be subject to mandatory clearing, though they will have to be reported to swap data repositories ("SDRs"). The DFA is ambiguous as to whether pre-existing swap contracts may be subject to mandatory initial and variation margin requirements under DFA-promulgated rules. The head of the CFTC has indicated that his agency does not intend to impose margin payment requirements on such pre-existing swaps.[2]

[1] Throughout this chart, we generally refer to SEC-regulated security-based swaps and CFTC-regulated swaps as "swaps."

[2] *See* Testimony of Gary Gensler, Chairman, Commodity Futures Trading Commission, Before the U.S. Senate Committee on Agriculture, Nutrition & Forestry (Mar. 3, 2011) ("With respect to the clearing requirement and margin, I believe that the new rules should apply on a prospective basis only as to transactions entered into after the rules take effect.").

	determined by ESMA will not be front-loaded.	
Extraterritorial Provisions	Article 4(2) of EMIR provides that the obligation to clear OTC derivative transactions applies where one or both of the counterparties are non-EU entities which would be subject to the clearing obligation if they were established in the EU, and the contract has a "direct, substantial and foreseeable effect" within the EU or "where the obligation is necessary or appropriate to prevent the evasion of any provisions of EMIR"[3].	The DFA contains two provisions on extraterritoriality. Section 722 (governing extraterritoriality of swap rules) and Section 772 (governing extraterritoriality of security-based swap rules) provide that Title VII does not apply to transactions outside the United States unless the transaction violates anti-evasion rules adopted by the CFTC or the SEC. Section 722 also allows application of swap rules to transactions that "have a direct and significant connection with activities in, or effect on, commerce of the United States." These provisions could be read quite broadly, and until actual rules or guidance addressing them are provided, speculation will continue as to what position regulators will take as to Title VII's scope. Both the CFTC and the SEC have indicated that they will propose rules and/or guidance on how rules they have adopted under Title VII will impact cross-border transactions and non-U.S.-based registrants, though neither has done so yet.
Use of Overseas CCPs	Article 25 of EMIR provides that a non-EU CCP may provide clearing services to clearing members or trading venues established in the EU only where the CCP has been recognised by ESMA, subject to the satisfaction of certain conditions, including that the Commission has determined that the non-EU country legal regime to which the CCP is subject provides for an effective, equivalent system for the recognition of	Section 725(b) of the DFA allows the CFTC to exempt a non-U.S. CCP from registration if it is subject to comprehensive supervision and regulation in its home country that is comparable to U.S. regulation of DCOs. Non-U.S. CCPs must apply for such an exemption. Section 763(b) gives the SEC the authority to grant similar exemptions to non-U.S. CCPs that wish to clear security-

[3] ESMA published a discussion paper on 16 February 2012 seeking views on whether it should specify the contracts that in its view have a "direct, substantial and foreseeable effect". Consultation closed on 19 March 2012.

	CCPs authorised under (other) non-EU country regimes (e.g. reciprocal CCP authorisation arrangements).	based swaps.
Exceptions from Clearing Mandate for Particular Products	Whilst EMIR does not provide for exemptions for any particular products, it does provide for certain relaxations in relation to: • FX contracts – recital 19 provides that where the risks associated with a particular asset class relate to settlement rather than counterparty risk (as is the case for FX), clearing may not be appropriate, and ESMA may decide not to include FX asset classes in the clearing obligation as a result. The recital also helpfully states: "the regime for such contracts should rely notably on preliminary international convergence and mutual recognition of the relevant infrastructure". • Covered bonds – recital 24 of EMIR provides that ESMA should "take into account the specific nature of derivatives concluded with covered bond issuers or with cover pools for covered bonds". This is a concession that has been won by the covered bonds industry, for whom it is currently very unclear how EMIR could be sensibly complied with. Whether the above will also be exempt from the bilateral risk-mitigation techniques requirements for non-cleared OTC derivatives remains to be seen.	The DFA allows the Secretary of the Treasury to make a determination that physically settled foreign exchange swaps or forwards are not "swaps" within Title VII and thus not subject to mandatory clearing although they would still be subject to various other requirements under the DFA. Treasury has proposed to make such a determination, though it has not yet finalized it. The exemption would not encompass many commonly traded foreign exchange products, including non-deliverable forwards. The definition of "swap" in Title VII also excludes commodity and security futures, and security options. Those instruments are already subject to separate regulation. The sale of a nonfinancial commodity or security for deferred shipment or delivery is not a swap so long as the transaction is intended to be physically settled. This is intended to encompass traditional forward transactions that were historically outside the scope of the CEA.

Exemptions from Clearing Mandate for Certain Counterparties	Certain Non-Financial Counterparties – (Article 10) a partial exemption only for non-financial counterparties where their positions fall below a clearing threshold (excluding positions entered into for purposes of hedging commercial and treasury activity), to be determined by ESMA. Pension schemes – certain pension schemes are exempt from the clearing obligation only for three years from the date of entry into force of EMIR, and in relation to transactions entered into to reduce their investment risks. They are still subject to the bilateral risk-mitigation techniques requirements. Intra-group transactions – exemptions from the clearing obligation may be available where entities are in the same consolidation and exemptions from the bilateral risk management obligations may also be available subject to further requirements. Exemptions from the entire scope of EMIR are available for certain other entities such as the European Central Bank, all national EU central banks, the BIS etc.	The DFA provides an exemption from the clearing mandate for transactions with a "commercial end user." To qualify for this exemption, a purported end user must • Not be a financial entity (e.g., a swap dealer, major swap participant, commodity pool, private fund, bank or other institution primarily engaged in financial activities, or employee benefit plan) • Be using swaps to hedge or mitigate risk, and • Inform the CFTC or the SEC of how it generally meets its obligations with respect to uncleared swaps. Pension funds are considered a "financial entity," and are therefore not eligible for the commercial end user (or any other) exemption from the mandatory clearing requirement. A commercial end user may elect to clear a swap if it wishes. There is no statutory exemption for inter-affiliate swap transactions, though the CFTC and the SEC may ultimately adopt rules exempting inter-affiliate swaps from the mandatory clearing requirement.
Reporting Requirements	Article 9 of EMIR requires counterparties (including non-financial firms) and CCPs to report details of all derivative contracts (whether cleared or not cleared), and traded on exchange or OTC, to trade repositories. Reporting may be delegated, and counterparties and CCPs have an obligation to ensure that details of their derivative contracts are	Title VII requires the CFTC and the SEC to adopt rules requiring the real-time reporting and dissemination of certain swap trade data, including price and volume. Swaps traded on a swap execution facility ("SEF") or a designated contract market ("DCM") are generally reported by the SEF or DCM, while the burden of reporting off-facility trades is generally assigned to swap dealers or major swap participants.

	reported "without duplication". Application to existing derivatives: a reporting requirement applies to all derivative contracts that are entered into before the date of entry into force of EMIR and are outstanding on that date.	Swap dealers, major swap participants, SEFs and DCMs must also report more detailed transaction data to registered swap data repositories, though that data will not be publicly disseminated. Both cleared and uncleared swap data must be reported. Application to existing derivatives: derivatives entered into before, and which remain in force as of, the DFA's enactment must be reported to a swap data repository. Under an interim final rule adopted by the CFTC, swaps entered into after the enactment of the DFA but before the effective date of Title VII must also be reported to an SDR.
Other Requirements on Non-Mandatory Cleared Derivatives	EMIR imposes collateralisation requirements on counterparties subject to the clearing obligation which enter into OTC derivatives not subject to mandatory clearing. They may also be subject to higher capital charges under other EU legislation (e.g. CRD IV).	Uncleared swap transactions are subject to initial and variation margin requirements, the details of which are to be established by the CFTC, the SEC and the federal banking regulators. Each agency is required to adopt rules to govern swap entities for which it is the primary prudential regulator. Both the CFTC and the federal banking regulators have proposed regulations to govern margin requirements for uncleared swap transactions, though the SEC has not yet done so. The two proposals are largely the same, although the CFTC's proposal would not require the posting of margin by commercial end users while the banking regulators' proposal would under certain circumstances.
2. Mandatory Trading		
Exchange Trading Mandate	There is an exchange trading mandate in proposed amendments to the MiFID (article 24 of MiFIR). This provides that ESMA will prepare technical standards	All swaps that are subject to mandatory clearing must be executed on a SEF or DCM if such a facility/market makes the swap available to trade. The same is true for a security-

	to determine which classes of derivatives subject to the clearing obligation under EMIR should be subject to the trading obligation.	based swap made available to trade by a security-based swap execution facility or a national securities exchange.
Type of Trading Venue	The trading venues that derivatives are most likely to be traded on are currently regulated under MiFID as multilateral trading facilities ("MTFs"), and also under proposed additions to MiFID, as organised trading facilities ("OTFs"). The definition of MTFs captures trading systems that bring together multilateral third party buying and selling interests in accordance with non-discretionary rules, that results in a contract. The proposed definition of OTF captures any means, any system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact in the system in a way that results in a contract. This will capture broker crossing networks, but not systems where there is no genuine trade execution taking place such as e.g. bulletin boards. It also excludes bilateral trading systems. A major difference between an OTF and an MTF is that an OTF operation has some discretion over how it executes transactions in the system. OTF operators also prohibited from using their proprietary capital to execute transactions in the system.	A DCM is an organized exchange that permits trading between buyers and sellers of commodity derivatives and swaps, and which has rules governing participants' conduct. A SEF is a trading system in which multiple participants may accept bids and offers made by other participants and which facilitates the execution of swap transactions. A DCM is a public market while participation in SEFs is limited to "eligible contract participants." The universe of swaps that may be executed on a SEF may be limited by the CFTC and the SEC, and SEFs are never allowed to trade in commodity futures contracts.
3. Registration		
Classes of Registrants	Participants in the derivative markets are currently already subject to authorisation and regulation under MiFID unless exempt.	The DFA creates two new categories of market participants: "swap dealers" and "major swap participants" (along with "security-based swap dealers" and "major security-based swap participants"). Such participants must register with the

	No additional provisions brought in	CFTC or the SEC, and they are subject to business conduct, capital and other regulations.
Extra-territorial Reach	Currently, a non-EU firm that deals with EU counterparties in OTC derivatives may be required to become authorised under MiFID. Proposals to amend MiFID provide that that a non-EU firm wishing to provide investment services/activities to retail and opted up professional clients shall be required to establish an EU branch, and obtain authorisation for the branch from the regulator where branch is situated. A non-EU firm may provide certain services to eligible counterparties and professional clients across the EU without first establishing a branch, on the basis of a prior authorisation from the competent authority in one Member State.	Non-U.S. swap dealers may be required to register with the CFTC (or the SEC, if they deal in security-based swaps), though the extraterritorial reach of the registration provisions is not yet clear, including with respect to the treatment of branches, affiliates, etc.
4. Other Implications		
Position Limits	No applicable provisions in EMIR, although draft proposals to amend MiFID tabled by the European Parliament in its draft report currently provide for the imposition of position limits by trading venue operators in respect of commodity derivatives.	Pursuant to the DFA, the CFTC has adopted final regulations that establish aggregate limits for positions in certain physical commodities that may be held by any one person using futures contracts, options on futures, and economically equivalent swaps. The rule contains an exception for bona fide hedging positions. These rules are currently being challenged by ISDA and SIFMA in litigation. The SEC is required by the DFA to adopt rules establishing limits on positions in security-based swaps "[a]s a means reasonably designed to prevent fraud and [market] manipulation." The SEC has not yet proposed such rules.
Separation of Banking	No applicable provisions in EMIR or otherwise in	Section 716 of the DFA (also known as the "Lincoln Amendment") prohibits swap dealers and certain major swap

& Swaps Businesses	European legislation (or draft legislation). The UK government has signalled its intention to implement the Independent Commission on Banking's proposals regarding by 2015. This requires UK banks that provide vital retail banking services on which households and SMEs depend to ring-fence these activities from wholesale and investment banking services (including swaps business). This will have the effect of requiring UK banks to physically separate out into a separate entity retail banking activities from other of its activities.	participants from receiving FDIC deposit insurance or having access to the Fed's discount window. This effectively forces banks to "push out" their swaps business to a separately capitalized entity that is neither FDIC insured nor can access the discount window. There is a significant exception allowing FDIC-insured banks to engage in activities with swaps that reference rates, currencies and other assets that are considered "bank permissible" under the National Bank Act, excluding uncleared CDS. This exception is *unavailable* for U.S. branches of non-U.S. banks that are not FDIC insured.
Proprietary trading restrictions	No such restriction in EMIR.	DFA Section 619, also known as the "Volcker Rule," prohibits banks (including U.S. branches of non-U.S. banks and their affiliates) from engaging in proprietary trading in many instruments, including swaps. According to recent guidance from the federal financial regulators, such "banking entities" will have until July 2014 to come into full compliance with the Volcker Rule. This restriction is subject to statutory exemptions including trading conducted by a banking entity solely outside the United States (unless the entity in question is itself controlled by a U.S. banking entity), trading in certain U.S. government securities, underwriting or market-making related activities, risk-mitigating hedging activities, or trading on behalf of customers.
5. Implementation		
Timing	EMIR will enter into force 20 days from its publication in the EU's Official Journal, which is expected in June	Title VII was supposed to go into effect in July 2011, but the CFTC and the SEC have extended the effective date

	or July 2012. Much of the detail in EMIR, however, has been left to ESMA (and other European Supervisory Authorities) to provide in technical standards. Compliance with EMIR will not be possible until these have been submitted to the Commission (the deadline for which is 30 September 2012) and then endorsed by the Commission (timing for endorsement is unclear but is expected to be by the end of 2012 at the latest). This leaves very little time for ESMA to consult on the standards, and for the industry to implement them. MiFID is not due to be implemented until 2015/2016 at the earliest.	because they have yet to finalize many of the implementing regulations. It is unlikely that all of the rules from both the SEC and the CFTC will be in place before the end of 2012. The CFTC has proposed two regulations that would govern the effective dates of the mandatory clearing, trade execution, trade documentation and uncleared swap margin requirements. Under the proposal, these requirements would commence 90, 180 or 270 days, depending on the nature of the counterparties to a transaction, after the CFTC has adopted a number final regulations and, in the case of the clearing and trade execution requirements, made a determination that a swap is subject to mandatory clearing. Among the final regulations that must be adopted are the so-called "entity definitions" (of "swap dealer," etc.), which was finalized by the CFTC and the SEC on April 18, and the "product definitions" (of terms such as "swap," security-based swap," etc.), which have not yet been finalized. SEC staff have indicated that the agency will propose analogous rules, but it has not yet done so.