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CFTC and EU OTC Derivatives Regulation
An Outcomes-based Comparison

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Disclaimer

Deloitte MCS Limited was jointly commissioned by the Securities Industry and Financial Markets Association (SIFMA) and the Association for Financial Markets in Europe (AFME) to produce a Deloitte point of view paper on an outcomes-based assessment of European derivatives regulations in relation to the Commodity Futures Trading Commission (CFTC) 'Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act'.

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Executive summary

Summary of findings

In September 2009 global leaders committed to reform over-the-counter (OTC) derivatives markets with the key objectives of reducing systemic risk, improving transparency, supporting financial stability and combatting market abuse. These high level commitments have now been translated into concrete rules and actions, with global jurisdictions at differing stages of implementation.

But the implementation of these rules at a global level has thrown up challenges as the constraints of domestic law, differences in market structure and timing hamper the ability for rules to work globally across the spectrum of market participants. The need for a consistent and co-ordinated approach from regulators is essential. Without it there is a real risk that market participants will be subject to conflicting, duplicative or over-lapping requirements.

Much of the focus to date has been on the variances in the detail of the approach taken by different jurisdictions. The purpose of this paper is to examine whether a difference in the approach leads to a difference in outcomes, if over-arching regulatory objectives are met.

To consider this we have taken the approaches in the two largest derivatives markets: the EU and the US. We have considered the regulations in the EU which relate to OTC derivatives, namely: the European Market Infrastructure Regulation (EMIR), the Capital Requirements Directive (CRD), the Markets in Financial Instruments Directive (MiFID) and the Market Abuse Directive (MAD). We then compared the detailed EU requirements against the 15 categories identified by the Commodity Futures Trading Commission (CFTC) in its proposed interpretative guidance for the cross-border application of rules. The purpose was to find whether differing approaches led to broadly similar regulatory outcomes.

Overall we found:

- **High alignment of regulatory objectives:** Across all 15 regulatory categories identified by the CFTC, the regulatory objectives in the EU and US are highly aligned.

- **High similarity in approach:** Overall there is a high degree of similarity in approach to achieving these over-arching objectives. In 8 of the 15, the approach to implementation was highly similar. In five we found there to be strong alignment (capital; physical commodity swaps reporting; mandatory trade execution, daily trading records; external business conduct standards) and in two we found some degree of similarity.

- **Some differences in the detail:** The categories where there is the greatest degree of variance are swap data reporting and clearing and swap processing.

- **Consistency in regulatory outcomes:** When combining both the objective and approach, we found that the outcome against all 15 categories was highly similar.

In summary, from an outcomes-based perspective, the EU package of derivatives regulation is likely to lead to a broadly similar set of outcomes as envisaged by the 15 categories identified by the CFTC in its proposed interpretative guidance on the cross-border application of OTC derivatives requirements.

1 Introduction

Global markets, global regulatory response

OTC derivatives markets are global. Although reforming OTC derivatives markets remains a priority for global policy makers, and there is a strong commitment to the high-level principles agreed by the G20 leaders at their summit in 2009[1], the need for a consistent and co-ordinated approach to implementation has become more evident recently as firms and regulators grapple with the intricacies of implementation.

Global regulators recognise this challenge stating that[2]: *"It is clear that coordination among jurisdictions regarding the regulation of cross-border activities should facilitate the implementation of the objectives of the G-20 regulatory reform agenda for the OTC derivatives market. However, complete harmonization – perfect alignment of rules across jurisdictions – is difficult as it would need to overcome jurisdictions' differences in law, policy, markets and implementation timing, as well as to take into account the unique nature of jurisdictions' legislative and regulatory processes."*

The reality is that global derivatives counterparties are being required to implement multiple and, at times, conflicting regulations. In the extreme, an example is the potential need to clear the same transaction through separate US and EU recognised clearing houses to meet corresponding rules.

In the absence of complete harmonisation, one way to reduce the burden is for the regulator in one country (A) to satisfy itself that another country's (B) rules will deliver a broadly similar level of protection to its own. In such circumstances, firms from Country B operating in full compliance with the rule-set should not need to apply Country A's rules in respect of business in that country. This thinking underpins a variety of regulatory approaches, including 'substituted compliance', 'mutual recognition' and 'third country equivalence'. All are intended to allow firms to meet a comparable and comprehensive set of requirements offering broadly similar regulatory protection across jurisdictions. All are dependent on regulators reaching a judgment that the rules and regulations applying to OTC derivatives business in different countries offer broadly similar levels of protection.

OTC derivatives reforms are now at a critical juncture in both the EU and the US, with the parallel implementation of EMIR and Dodd-Frank Title VII still underway. Combined, these regulations will capture close to 90%[3] of the global OTC derivatives market. Other jurisdictions are at varying stages of implementation and the aggregate impact of these regulations will be magnified as the rules in more regimes become applicable. It is therefore crucial that regulatory regimes not only work for their respective domestic market but that they knit together to serve global participants and end-users.

It is vital for regulators to recognise that different approaches to implementing derivatives rules can lead to similar outcomes. Without this recognition, there is a risk that firms will need to meet duplicative requirements; the lack of certainty is already slowing down implementation plans and could cause a fragmentation in cross-border investment.

In June 2012 the CFTC approved proposed interpretative guidance[4] on how its rules would apply to non-US entities transacting in the US markets; these are referred to as the 'cross-border guidance'. The SEC has more recently published[5] its approach to cross-border application of its rule-set via the rule making process.

[1] G20 Leaders statement, Pittsburgh Sep 2009.
[2] Global derivative regulators Dec 2012 Group: http://www.cftc.gov/PressRoom/PressReleases/pr6439-12.
[3] 2010 BIS Triennial Central Bank: http://www.bis.org/publ/rpfxf10t.pdf.
[4] www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/Cross-BorderApplicationofSwapsProvisions/index.htm.
[5] http://www.sec.gov/news/press/2013/2013-77.htm.

The CFTC's proposed guidance is broken down into 15 categories – six of which introduce requirements at the entity level and nine of which exist at a transaction level.

We have taken the various EU regulations and compared them to each of the 15 categories, in order to assess whether the EU regime provides a similar level of regulatory protection. We conclude that across all 15 categories the two regimes deliver broadly the same outcomes in respect of the key regulatory goals of reducing systemic risk, improving transparency, combatting market abuse and supporting financial stability. There are, for the reasons given above, understandable differences in the detail of the requirements and also in the way in which the requirements are being implemented. However, these differences are not, in our view, material and therefore do not detract from achieving broadly similar outcomes.

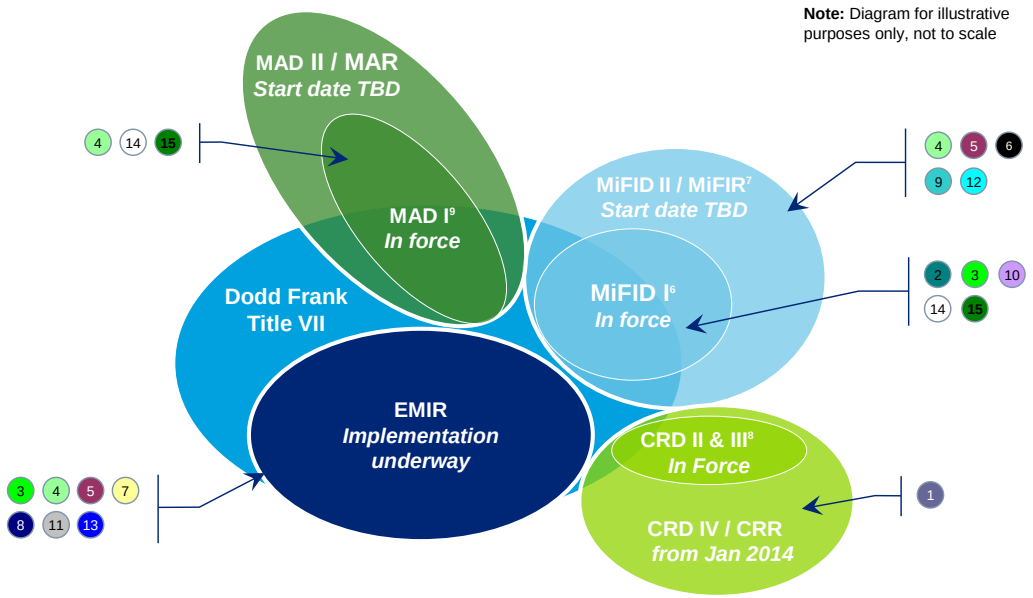
2 EU – US derivatives regulatory landscape

How EU derivatives regulation sits within Dodd-Frank Title VII

US and European regulations to reform OTC derivatives markets are similar in overall intent. In the EU, EMIR provides the framework for implementing the majority of G-20 commitments, and will be complemented by other initiatives including:

- changes to the MiFID (MiFID II)[6] and the introduction of a new Regulation (MiFIR)[7];
- changes to the CRD (CRD IV)[8] and new Regulation (CRR); and
- changes to the MAD (MAD II)[9] and new Regulation (MAR).

Dodd-Frank Title VII has varying degrees of overlap with all four of these initiatives. The diagram below outlines how all of the 15 categories identified by the CFTC are captured by EU regulations[10]. In some instances, the categories are covered in multiple regulations.



Key

No.	CFTC Categories	EU Regulation	No.	CFTC Categories	EU Regulation
1	Capital	CRD IV / CRR	9	Mandatory Trade Execution	MiFID II / MiFIR
2	Chief Compliance Officer	MiFID	10	Swap Trading Relationship Documentation	MiFID I
3	Risk Management	EMIR, MiFID I	11	Portfolio Reconciliation and Compression	EMIR
4	Swap Data Record Keeping	EMIR, MiFID II / MiFIR, MAD	12	Real-Time public reporting	MiFID II / MiFIR
5	SDR Reporting	EMIR, MiFID II / MiFIR	13	Trade Confirmation	EMIR
6	Physical Commodity Swaps Reporting	MiFID II / MiFIR	14	Daily Trading Records	MiFID I, MAD
7	Clearing and Swap Processing	EMIR	15	External Business Conduct Standards	MiFID I, MAD
8	Uncleared Margin Requirements	EMIR			

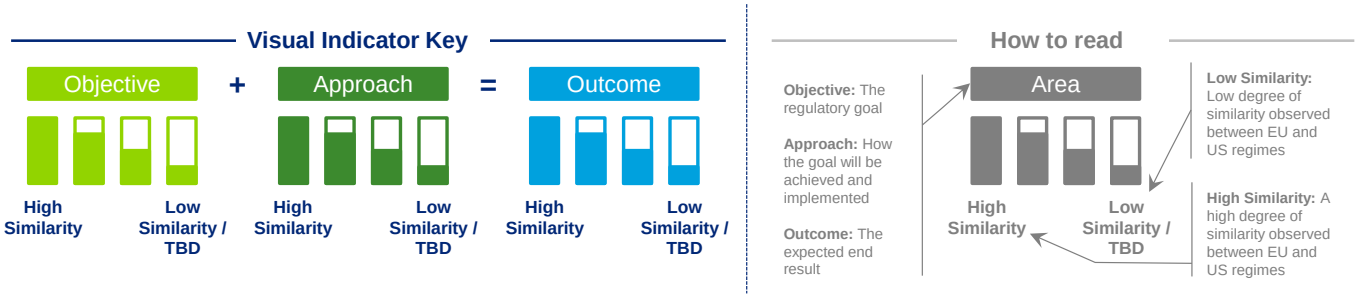
[6] MiFID I will be repealed and replaced by MiFID II. All areas covered by MIFID I will covered by MiFID II.
[7] European legislation typically consists of a Directive or a Regulation. A Regulation is directly applicable and binding on all Member States whereas Member States do have some degree of discretion on how they implement Directives. There is an increasing trend to use Regulations.
[8] CRD II and III will be repealed and replaced by CRD IV. All areas covered by CRD II and III will be covered by CRD IV.
[9] MAD will be repealed and replaced by MAD II / MAR. All areas in MAD will be covered by MAD II.
[10] EMIR, MAD I, MAD II, MiFID I, MiFID II, MiFIR, CRD II, CRD III, CRD IV and CRR

3 Comparison of EU and CFTC regulatory outcomes

Comparison of the EU requirements against the 15 identified categories on an Objective, Approach and Outcomes basis

We have carried out a high-level assessment of the EU derivatives-related requirements against the CFTC's 15 swap provision categories to assess whether the EU regime leads to a similar set of regulatory outcomes. In order to compare the likely outcomes, we have considered the regulatory objective, as well as the approach taken by each regime to achieve the objective for each category.

The table below sets out our analysis, and summarises each category with a visual indicator, with the three components of the indicator key defined below:



	Categories	Regulatory Objective	Key EU and US Approach Similarities	Key EU and US Approach Differences
Entity Level Rules	1. Capital	Firms transacting in OTC derivatives markets are adequately capitalised and do not pose a risk to financial stability.	The EU and US have committed to implement Basel III[11]. In broad terms this will mean increased regulatory capital for all banks (entities must meet a minimum own funds requirement of 8% of total capital); enhanced regulatory capital; additional capital buffers; introduction of a leverage ratio; and a liquidity framework. Non-prudentially regulated entities are subject to separate capital requirements.	Prescriptive liquidity standard. (EU) Divergence between the EU and US on the implementation of the capital treatment of credit valuation adjustment ("CVA") risk.

[11] For the purpose of this paper we have undertaken a high-level assessment of the capital approaches in the context of Dodd-Frank Title VII requirements. There are many areas of the capital regime not captured by the scope of this report which may identify differences.

Categories	Regulatory Objective	Key EU and US Approach Similarities	Key EU and US Approach Differences
2. Chief Compliance Officer	Strong governance role to oversee and ensure compliance with regulatory requirements.	Firms must appoint a Chief Compliance Officer who undertakes an internal governance and oversight role.	No material differences identified.
3. Risk Management	Sound risk management practices to ensure firms understand the risks posed by their derivatives business and take appropriate steps to mitigate them.	Firms must meet wide-ranging risk management obligations, including having appropriate policies and procedures in place, sound business continuity arrangements, management of conflicts of interest and monitoring of position limits.	No material differences identified.
4. Swap Data Record Keeping	Effective and accurate records of all stages of the derivative trade are maintained, and can be relied upon if instances of suspected market abuse arise.	All Financial Counterparties (FCs) must keep records of all derivative contracts (and modifications) for at least 5 years after termination. Records include those executed on behalf of clients, those executed by voice, (including pre- and post-execution) and telephone and electronic communications.	No material differences identified.
5. Swap Data Reporting	All OTC derivatives should be reported to a trade repository in order to provide regulators with a full picture of all OTC derivative positions for the entities they regulate and enable market-wide risk monitoring. Market participants to have improved transparency of aggregate market positions.	All OTC derivatives must be reported, including wide ranging counterparty data, key economic terms and lifecycle events. FCs should report daily valuations. Historical data for transactions entered into before and outstanding on specific dates must be reported. Unique trade and counterparty identifier codes must be used. Aggregated trading information must be publicly reported.	**Timing:** Ranging from 30 minutes to 48 hours depending on information reported and reporting counterparty. (US) No later than T+1. (EU) **Scope:** Exchange-traded derivatives must be reported. (EU) **Reporting counterparty:** One counterparty (US); Both counterparties.(EU) **Data reported:** Information on collateral must be reported. (EU)

	Categories	Regulatory Objective	Key EU and US Approach Similarities	Key EU and US Approach Differences
	6. Physical Commodity Swaps Reporting	Regulators should have full transparency of the physical swaps market; they should have the powers to set limits to prevent market manipulation and the powers to take action if needed.	Regulators have the power to set and monitor position limits and take action if these limits are exceeded. Trading venues must set and monitor position limits.	Physical swaps must be converted to equivalent future positions. (US) Self-clearing members, futures commission merchants (FCMs) and Swap Dealers (SDs) must report data to CFTC. (US)
Transaction Level Rules	**7. Clearing and Swap Processing**	All standardised OTC derivatives to be centrally cleared by well-regulated entities to reduce counterparty credit risk within the system. Client monies should be effectively protected.	**End Users:** End users hedging risk are exempt. **Margin Calculation:** Robust regulatory-endorsed margin models must be used. **Eligible Collateral:** Highly liquid collateral with minimal credit and market risk.	**Products:** Starting point is credit and interest rates with further products to be added over time. (US) Foreign Exchange (FX) swaps and forwards exempt. (US) Exact product set to be determined but overall scope captures credit, interest rates, FX, equity and commodity derivatives. (EU) **Collateral Segregation:** Omnibus segregation permitted but individual segregation must be offered. Clients can choose approach. (EU) Legally Separated Operationally Co-mingled (LSOC) model. (US) **Exemptions:** 3 year exemption for pension funds. (EU) Non-financial counterparties (NFCs) exempt if non-hedging trading volume falls below certain thresholds. (EU) **Inter-affiliate:** Scope for an exemption for the exchange of initial margin (IM). (US) Scope for exemption from IM and variation margin (VM). (EU) **Historical Contracts:** Trades outstanding at the time of a notification to clear (and subsequently subject to a clearing obligation) must be cleared. (EU) Trades executed before the clearing obligation is determined will not have to be cleared. (US)

Categories	Regulatory Objective	Key EU and US Approach Similarities	Key EU and US Approach Differences
8. Margin Requirements (for uncleared trades)	Derivatives which are not standardised enough to be risk managed by a CCP should be subject to adequate margin and risk reducing measures.	NFCs hedging risk exempt. Both EU and US have committed to follow the BCBS/ IOSCO recommendations.	**Inter-affiliate:** Scope for an exemption for the exchange of IM. (US) Scope for exemption from IM and VM. (EU) **Exemptions:** NFCs exempt if non-hedging trading volume falls below certain thresholds. (EU)
9. Mandatory Trade Execution	Standardised derivatives should be traded on well-regulated and transparent exchanges and electronic trading venues.	Mandatory trading on organised trading venues (electronic and in some instances non-electronic) for selected 'clearable' products. Multiple execution methods permitted, including order books and request-for-quote.	If trade is standardised and 'clearable' it must be traded electronically, if made Available to Trade. (US) Clearing eligible and 'sufficiently liquid' derivatives must be traded on an exchange or organised trading venue. (EU) Implementation is on a slower timescale and much of the detail is still outstanding. (EU)
10. Swap Trading Relationship Documentation	Firms should retain appropriate records of all client documentation to support operational processes.	FCs to maintain appropriate documentation of all derivative-related client agreements and client relationships.	No material differences identified.
11. Portfolio Reconciliation and Compression	Firms should undertake regular risk reducing activities to minimise risk within the wider system.	**Reconciliation:** Portfolio reconciliation of key trade terms and valuations must be performed by all counterparties. **Reconciliation frequency:** FCs: each business day when ≥500 contracts with each other; each week for portfolios 51-499 contracts; quarterly for portfolios ≤50 contracts. NFCs below the clearing threshold: quarterly >100 contracts with each other; annually for portfolios ≤ 100 contracts. **Dispute Resolution:** All counterparties should agree policies and procedures to resolve disputes within 5 business days. **Compression:** All counterparties should perform periodic compression exercises.	**Disputes:** FCs must report disputes unresolved after 5 business days and ≥$20m. (US) FCs must report disputes which are >€15m and outstanding for at least 15 business days. (EU)

Categories	Regulatory Objective	Key EU and US Approach Similarities	Key EU and US Approach Differences
12. Real-Time Public Reporting	Market participants should receive adequate price transparency to support price formation.	OTC derivatives must be publicly reported as close to real time as possible. Deferred publication permitted for block trades.	FX forwards and FX swaps are excluded. (US) Delayed reporting for end-users. (US)
13. Trade Confirmation	Trades should be confirmed by electronic means and as soon as possible to reduce operational risk within the system.	All contract terms must be confirmed as soon as possible and no later than T+1 for FCs and T+2 for NFCs. Phased implementation timetable. Transactions unconfirmed for more than 5 days must be reported to regulator.	Both counterparties must confirm all trade terms. (EU) Obligation falls on SDs and Major Swap Participants (MSP). (US)
14. Daily Trading Records	Firms should maintain adequate trading records to enable full oversight of stages of the trade which can be relied upon if suspected market abuse occurs.	Firms must retain records of all orders including all communications by telephone and electronic media for a minimum of 5 years.	Records of the cash and forward transactions to hedge swaps must be kept. (US) Trade reconstruction must be indexed to both counterparty and the trade. (US) In addition to reporting to a trade repository, firms must report transaction details to the regulator as soon as possible, and no later than T+1. (EU)
15. External Business Conduct Standards	To ensure firms establish a market standard for dealing with counterparties including due diligence and disclosure obligations, as well as outright prohibitions against certain practices.	Far reaching conduct of business requirements including managing conflicts of interest and suitability requirements. FCs must perform “know-your-customer” (KYC) due diligence procedures.	Transactions with US counterparties must comply with all CFTC requirements including daily mid-mark, compliance, and Material Economic Terms Disclosure. (US) FCs must take reasonable steps to ensure the best possible result when executing orders for their clients. (EU)

The table on the previous pages demonstrates that against all of the 15 categories, regulatory objectives are highly similar. At the approach level we observe that overall there is strong alignment: 8 out of the 15 categories are highly similar; in five areas there is a strong degree of similarity; and in two areas there is similarity in approaches but also differences. However, these differences are not, in our view, material and therefore do not detract from achieving similar outcomes.

The two categories where we have identified the biggest difference in approach are clearing and reporting to trade repositories. Notwithstanding the variance in how these categories will be implemented, we are not of the view that this will lead to a difference in regulatory outcomes. Section 4 explores this further.

In summary, we believe that there are some differences in how each of the regimes aim to achieve very similar over-arching regulatory objectives, but these differences in approach do not deter from achieving the main regulatory outcomes of improving transparency, reducing systemic risk, supporting financial stability and combatting market abuse.

4 Clearing and trade reporting: different approaches, same outcomes

Variations in approach

Central clearing and reporting to trade repositories are at the heart of the G20 reform agenda. In comparing the detail of the two regimes, we identified a number of differences in the implementation approach. But as we noted before, we do not believe these differences at the micro level are likely to lead to different regulatory outcomes. Our thinking is outlined below.

Clearing

The application of clearing on a cross-border basis is inherently complex, given firms' abilities to direct trades to different CCPs, as well as the potential systemic risk implications represented by clearing houses. It is vital to create consistent sets of rules to allow them to work on a cross-border basis.

a. Products

A key outstanding question is the applicability of the EU clearing requirements. Unlike the US approach, FX swaps and FX forwards may be in scope for the EU regime. At this stage, it is not possible to assess if the same products will be captured by both regimes, but it is intended by regulators in the US and EU to maximise the application of clearing. Indeed, a significant shift to CCP clearing is expected[12] and underway amongst the dealer community and in the US for asset managers. Products captured are expected to grow over time, as CCPs continue to extend their offerings. The broad approach and regulatory aspirations are very similar.

b. Exemptions

Both EU and US regulations coincide on the treatment of end-users who use OTC derivatives to hedge risk and permit exemptions from the clearing and bilateral margin requirements. The calculation of the threshold differs slightly, but the overall intent and expected regulatory outcome remain comparable.

In the EU, end-users are permitted to transact a minimal amount of non-hedging business before the margin requirements apply. Once they exceed this threshold, all their OTC derivatives transactions (hedging and non-hedging) become subject to clearing (or bilateral margining). In practice, this population of firms is expected to be very small.

In the EU, there is a 3 year carve-out for pension funds. But, since pension funds remain subject to capital requirements, a temporary exemption is not perceived as weakening the robustness of the EU approach.

On balance, the approach to exemptions in the EU and US is not perceived to be of a sufficient magnitude to lead to a different regulatory outcome.

c. Approach to inter-affiliate trades

The US regime provides relief from margin requirements for inter-affiliate transactions. Provided a number of criteria are met, the financial counterparty is permitted to only exchange variation margin. This differs from the proposed EU framework, where there is scope for an exemption from both initial and variation margining rules

[12] Financial Stability Board estimates that between 40-50% of interest rate derivatives are currently cleared with scope to move to 78% based on current CCP offerings http://www.financialstabilityboard.org/publications/r_130415.pdf

(bilateral or CCP) provided the counterparties are, amongst other things, subject to a consolidated risk framework and a prudential regime (if a financial counterparty). Authorisation to apply the exemption needs to be obtained from the local regulator before carrying out the transaction.

When considered within the wider regulatory framework, any potential gap is mitigated as the counterparty will still be subject to prudential and other regulatory requirements and to the same internal risk framework.

d. Segregation

Segregation requirements are a key area of current debate. The CFTC rules require a LSOC approach, but the EU approach requires omnibus segregation[13] as a minimum. EU CCPs and clearing members must also offer individually segregated[14] accounts as an alternative. At face value, the EU regime offers scope for a higher degree of protection. However, in practice the take-up of individually segregated accounts is expected to be cost-driven and therefore market-wide take-up is less likely.

Overall the outcome under both regimes will lead to an increased degree of protection to client assets, although in some instances the EU approach offers scope for a higher degree of protection through the choice of an individually segregated account.

Trade reporting

Reporting to trade repositories will significantly enhance the transparency of OTC derivatives markets. The end-goal is for regulators to be able to aggregate data, so that they can proactively identify and monitor pockets of systemic risk when and as they occur. It will also provide a helpful tool in understanding the relationship of exposures across global markets in the event of the default of a counterparty. The EU regime does allow for delayed reporting to trade repositories, but under the market abuse regime trading reports must be made to the regulator as soon as possible and no later than T+1. This combined approach should not hamper a regulator's ability to have effective oversight of the market. The mechanisms and implementation details do not detract from its purpose.

The EU regime goes further in a number of areas. For example, all exchange traded derivatives transactions must also be reported, as too must data on collateral across all asset and product sets. And at the reporting level, both counterparties to the transaction, including non-financial counterparties must report their trades. In the US, only one party to the transaction need report. Differences in approach do exist, but these are not likely to alter the original concept and key expected outcome of greater transparency.

[13] Separate records and records enabling each clearing member to distinguish in accounts with the CCP the assets and positions of that clearing member from those held for the accounts of its clients

[14] Separate records and records enabling each clearing member to distinguish in accounts with the CCP the assets and positions held for the account of a client from these held for the account of other clients

5 Conclusion

Findings

Our analysis concludes that EU derivatives rules lead to broadly similar regulatory outcomes as US derivatives rules. In our approach, we took the detailed requirements in each of the EU regulations: EMIR, CRD, MiFID, MAD (and the future revised forms) and considered how these requirements address the provisions laid out in each of the 15 categories identified by the CFTC in its proposed guidance on the cross border application of rules. Consideration was given from three aspects. Firstly, whether the regimes had similar regulatory objectives. Secondly, we considered the level of similarity in approach and implementation to achieve these objectives. Thirdly, we considered, when taking the objective and the approach together, the degree of similarity in terms of likely outcomes.

Against all 15 categories, the regulatory objectives of both regimes have a high degree of similarity. This is to be expected given the global agreement over-arching these reforms. At the approach level we found that overall there is strong alignment: 8 out of the 15 categories had high similarity; five had a strong degree of similarity and in the remaining two areas there was some similarity in approach. The categories where we identified a higher variance in approach are clearing and trade reporting, however in all instances, the differences in approach are not likely to lead to different regulatory outcomes.

This should be an encouraging sign to market participants. Global regulators are at a critical juncture in their on-going rule making and implementation as they continue to consider how their domestic rules will apply to entities from other jurisdictions operating within their markets. Liquidity pools are spread across regulatory boundaries in global OTC derivatives markets. Acknowledgement of robust and consistent regulatory approaches in other jurisdictions as a way of satisfying local requirements is the key to ensuring these markets continue to function smoothly and effectively for the benefit of all market participants and users across the world. Without it, market participants are faced with uncertainty, unduly complex implementation plans and market fragmentation.

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