



**COMPARATIVE ANALYSIS OF CFTC AND EU MiFID II/MiFIR<sup>1</sup> DERIVATIVES TRADING AND TRANSPARENCY REGIMES AND MFA RECOMMENDATIONS TO FACILITATE COMPARABILITY/EQUIVALENCE**

**October 19, 2017**

MFA supports efforts by the U.S. Commodity Futures Trading Commission (“**CFTC**”) and the European Commission (“**EC**”) to reach comparability/equivalence determinations for their respective trading regimes for over-the-counter (“**OTC**”) derivatives. OTC derivatives market participants, including MFA members, have been closely monitoring whether U.S. swap execution facilities (“**SEFs**”) are declared “equivalent” to European Union (“**EU**”) trading venues such that they can be used to satisfy the MiFID II/MiFIR derivatives trading obligation, and whether EU Multilateral Trading Facilities (“**MTFs**”) and Organised Trading Facilities (“**OTFs**”) are granted an exemption pursuant to Section 5h(g) of the Commodity Exchange Act such that they can be used to satisfy the U.S. derivatives trading obligation. In this regard, MFA supports the common approach between the CFTC and EU with respect to derivatives trading venues that was announced on October 13, 2017.

In connection with these efforts, MFA has prepared a comparative analysis of certain key topics under the U.S. and EU OTC derivatives trading and transparency regimes. As detailed below, MFA believes the two regimes are aligned in many important areas, including (1) straight-through processing requirements; (2) impartial/non-discriminatory access to trading venues; and (3) the scope of products covered by a trading mandate. In other areas, some differences between the two regimes are noted, but are unlikely to be viewed as sufficiently material to affect comparability/equivalence determinations. However, MFA has identified two areas that may merit closer attention as the common approach is implemented: (1) the calibration of the transparency regime in the EU; and (2) whether pre-arranged trading is permitted for instruments subject to the trading obligation in the EU.

MFA presents its analysis first in abridged form, and then provides full citations to applicable U.S. and EU law and regulations in Annex 1.

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<sup>1</sup> Directive 2014/65/EU on markets in financial instruments (the “**MiFID II Directive**”), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>, together with Regulation (EU) No 600/2014 on markets in financial instruments (“**MiFIR**”), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN>.

## Executive Summary (Abridged Summary and Recommendations)

Topic	United States	European Union	MFA Comments / Recommendations
<p><b>Pre-Trade Transparency/ Modes of Execution</b></p>	<p>Promoting pre-trade price transparency is an explicit statutory goal of the SEF framework.</p> <p>The current CFTC framework seeks to achieve pre-trade transparency by establishing required methods of execution for instruments subject to the trading obligation.</p> <p>By requiring those instruments to be transacted by RFQ-to-3 or on an Order Book, market participants are provided with competing quotes or bid/offers that are visible prior to execution.</p> <p>Block trades and derivatives not subject to the trading obligation are not covered by these requirements.</p>	<p>MTFs/OTFs are not required to implement specific trading protocols for derivatives subject to the trading obligation.</p> <p>However, MTFs/OTFs are subject to separate pre-trade transparency requirements, with the intent that quotes or bids/offers are visible to other market participants.</p> <p>Waivers from these pre-trade transparency requirements are available in a number of circumstances, depending on whether the instrument has been deemed “liquid” and whether the transaction size is above a specified threshold.</p> <p>ESMA, through its “transitional transparency calculations”, determined nearly all OTC derivatives to be “illiquid”, which resulted in expansive waivers from pre-trade transparency requirements even for derivatives subject to the trading obligation.</p>	<p><b>In the near term</b>, ESMA should continue to evaluate its “transitional transparency calculations” and ensure it is using data that captures all trading activity in the market (<i>i.e.</i>, <b>trade repository data that includes both on-venue and off-venue trading activity rather than solely on-venue trading</b>) to ensure that the appropriate sub-classes of fixed-to-float swaps are classified as liquid, that appropriate post-trade LIS thresholds for such sub-classes are calculated accurately, and that market participants are receiving sufficient transparency.</p> <p><b>Looking forward</b>, the CFTC may want to consider allowing more flexibility with respect to execution on SEFs, provided that the CFTC preserves pre-trade transparency (and other core principles such as impartial access are not undermined).</p>

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<b>Prohibition on Pre-Arranged Trading</b>	Pre-arranged trading is explicitly prohibited, except for block trades which still must be executed pursuant to the rules of a SEF.	ESMA has indicated that it is considering the legitimacy of pre-arranged trading, particularly for derivatives subject to the trading obligation. As a result, there is some uncertainty regarding whether it will be permitted.	<b>In the near term</b> , ESMA should confirm that pre-arranged trading is prohibited, except for truly “large in scale” transactions, which should still be executed pursuant to the rules of an MTF/OTF (note MFA’s comments above relating to ESMA’s “transitional transparency calculations”, which should be revisited to determine the appropriate size thresholds).
<b>Post-Trade Transparency</b>	Real-time public reporting. 15-minute delay for block trades.  Notional amounts are capped for block trades.	Real-time public reporting (in any case within 15 minutes of execution for the first 3 years and within 5 minutes of execution thereafter).  A two-day to four-week delay can be granted in a number of circumstances, depending on whether the instrument has been deemed “liquid” and whether the transaction size is above a specified threshold.  Notional amounts are not capped for large trades.  ESMA, through its “transitional transparency calculations”, determined nearly all OTC derivatives to be “illiquid”, which resulted in expansive deferrals from post-trade transparency requirements being available even for derivatives subject to the trading obligation.	The length of public reporting delays (15 minutes vs. four weeks) is a material difference between the two regimes. This disparity is magnified by ESMA’s “transitional transparency calculations”, which determined nearly all OTC derivatives to be “illiquid”, making them eligible for reporting delays regardless of the size of the transaction.  <b>In the near term</b> , ESMA should continue to evaluate its “transitional transparency calculations” and ensure it is using data that captures all trading activity in the market ( <i>i.e.</i> , <b>trade repository data that includes both on-venue and off-venue trading activity rather than solely on-venue trading</b> ) to ensure that the appropriate sub-classes of fixed-to-float swaps are classified as liquid, that appropriate post-trade LIS thresholds for such sub-classes are calculated accurately, and that market participants are receiving sufficient transparency.  <b>Looking forward</b> , ESMA may want to consider limitations on the use of the extended deferral period of four weeks, particularly for transactions in derivatives subject to the trading obligation. In

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			addition, ESMA may want to consider capping notional amounts for large trades.
<b>Straight-Through Processing (STP)</b>	<p>SEFs must facilitate pre-trade credit checks by clearing members on an order-by-order basis for all trades that are intended to be cleared (including blocks).</p> <p>Transactions executed on a SEF must be submitted to clearing within 10 minutes of execution. CCPs must accept/reject transactions within 10 seconds.</p> <p>Transactions executed on a SEF that are not accepted for clearing are void <i>ab initio</i>. Resubmission is possible to correct operational or clerical errors.</p>	<p>MTFs/OTFs must facilitate pre-trade credit checks by clearing members on an order-by-order basis for all trades that are intended to be cleared (including blocks).</p> <p>Transactions executed on a MTF/OTF must be submitted to clearing within 10 seconds of execution (if executed electronically) or 10 minutes of execution (if executed by voice). CCPs must accept/reject transactions within 10 seconds.</p> <p>Transactions executed on a MTF/OTF that are not accepted for clearing are void <i>ab initio</i> (if executed electronically) or governed by the rules of the trading venue (if executed by voice). Resubmission is possible to correct operational or clerical errors.</p>	<p>The US and EU STP rules are substantially similar.</p> <p>MFA notes continued monitoring and enforcement of these requirements is necessary to ensure they are faithfully implemented by trading venues.</p>
<b>Impartial /Non-Discriminatory Access to Trading Venues</b>	<p>A SEF must provide market participants with impartial access to its market.</p> <p>SEFs are prohibited from, among others, (a) requiring self-clearing memberships</p>	<p>MTFs and OTFs must have transparent and non-discriminatory rules governing access to their facilities.</p> <p>MTFs/OTFs are prohibited from, among others, (a) requiring self-clearing memberships to join, (b)</p>	<p>The US and EU impartial/non-discriminatory access rules are substantially similar.</p> <p>MFA notes continued monitoring and enforcement of these requirements is necessary to ensure they are faithfully implemented by trading venues.</p>

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	to join, (b) using enablement mechanisms for cleared derivatives, and (c) requiring breakage agreements for cleared derivatives.	using enablement mechanisms for cleared derivatives, and (c) requiring breakage agreements for cleared derivatives.	
<b>Process for Determining the Derivatives Subject to a Trading Obligation</b>	SEFs determine the derivatives that are considered “made available to trade” (“ <b>MAT</b> ”) via rule filings with the CFTC. The CFTC has solicited public comment on MAT filings.	ESMA determines the scope of the trading obligation, which is then approved by the European Commission, Council, and Parliament. ESMA solicits public comment on its technical standards.	<b>Looking forward</b> , the CFTC may want to consider assuming a more meaningful oversight role in the MAT determination process.
<b>Scope of Instruments Covered by a Trading Obligation</b>	The following instruments are subject to the trading obligation:  IRS: Certain benchmark tenors denominated in USD, EUR, and GBP. Certain USD IMM and MACs.  CDS: the 5Y for CDX IG, CDX HY, iTraxx Main, and iTraxx Crossover.  The most common types of packages containing a component subject to the trading obligation are included.	ESMA has concluded the following instruments should be subject to the trading obligation:  IRS: Certain benchmark tenors denominated in USD, EUR, and GBP. Certain USD IMM.  CDS: the 5Y for iTraxx Main and iTraxx Crossover.  It appears the most common types of packages containing a component subject to the trading obligation will be included.	The instruments covered by the US and EU trading obligations are substantially similar, based on ESMA’s final recommendation.

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<b>Access to Trading Venue Rulebooks</b>	SEFs are required to publicly file their rulebooks, which facilitated due diligence and onboarding by market participants.	MTFs/OTFs are not required to disclose their rulebooks prior to authorization.	EU regulators should encourage MTFs/OTFs to disclose their rulebooks to market participants prior to the implementation of MiFID II to facilitate onboarding and to ensure compliance with the regulatory framework.

## Annex 1 (Full Summary with Citations)

Topic	The CFTC Regulatory Framework	The EU MiFID II/MiFIR Regulatory Framework
<p><b>Pre-Trade Transparency/ Modes of Execution</b></p>	<p>The promotion of pre-trade price transparency on SEFs is an express goal of the CFTC regulatory framework.<sup>2</sup></p> <p>The SEF Core Principles Final Rule<sup>3</sup> seeks to achieve pre-trade transparency by requiring swaps that are subject to the trading obligation to be executed on an Order Book or by RFQ-to-3. In providing an Order Book or RFQ system, a SEF “may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone.”<sup>4</sup></p> <p>The RFQ-to-3 functionality enables market participants to compare quotes from multiple dealers, providing pre-trade transparency.</p> <p>Order books provide pre-trade transparency since bids and offers are visible to market participants prior to execution.</p> <p>The SEF Core Principles Final Rule also provide that block trades and any transaction involving a swap that is not subject to the trading obligation may be traded by any trading protocol.<sup>5</sup> SEFs must still offer Order Book functionality for these transactions.</p>	<p>MTFs/OTFs are not required to implement specific trading protocols for derivatives subject to the trading obligation.</p> <p>Instead, under MiFIR Article 8, EU trading venues 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 for derivatives traded on a trading venue.</p> <p>The pre-trade transparency requirements referred to above are calibrated for different types of trading protocols (<i>i.e.</i>, order-book, quote-driven, hybrid, periodic auction trading and voice trading systems).</p> <p>Waivers from these pre-trade transparency requirements are available in a number of circumstances, including (a) actionable indications of interest in RFQ and voice trading systems that are above the applicable “size specific to the instrument” (<b>SSTI</b>) threshold, (b) orders that are above the applicable “large-in-scale” (<b>LIS</b>) threshold, (c) derivatives that are subject to the clearing obligation but not the trading obligation, and (d) derivatives not subject to the clearing obligation that are considered illiquid. Waivers are granted</p>

<sup>2</sup> See section 5h(e) of the Commodity Exchange Act (“**CEA**”) (“The goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.”).

<sup>3</sup> See CFTC Final Rule on “Core Principles and Other Requirements for Swap Execution Facilities”, 78 Fed. Reg. 33476 (June 4, 2013) (the “**SEF Core Principles Final Rule**”), available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-12242a.pdf>.

<sup>4</sup> See SEF Core Principles Final Rule, sec. 37.9(a).

<sup>5</sup> *Id.*

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		<p>at the discretion of the relevant national competent authority.<sup>6</sup></p> <p>ESMA, through its “transitional transparency calculations”, determined nearly all OTC derivatives to be “illiquid”, which resulted in expansive waivers from pre-trade transparency requirements being available even for derivatives subject to the trading obligation.<sup>7</sup></p>
<p><b>Prohibition on Pre-Arranged Trading</b></p>	<p>Pre-arranged trading<sup>8</sup> is expressly prohibited on SEFs under CFTC Regulation 37.203(a), with an exception for block trades.</p> <p>SEFs operating Order Books are permitted to allow “cross trades.” In doing so, a SEF shall require that a market participant that seeks to either execute against its customer’s order or execute two of its customers’ orders against each other through the SEF’s Order Book be subject to at least a 15-second time delay between the entry of those two orders into the Order Book. This results in one side of the potential transaction being disclosed to and executable against other market participants before the second side is submitted for execution. This time delay requirement provides other market participants with an opportunity to join the trade.</p>	<p>ESMA has indicated that it is considering the legitimacy of pre-arranged trading, particularly for derivatives subject to the trading obligation.<sup>9</sup></p> <p>Under MiFIR Article 28(1), derivatives subject to the trading obligation must be concluded on a trading venue. In addition, MiFIR permits “negotiated transactions” for equities, but includes no such provisions for derivatives subject to the trading obligation.<sup>10</sup></p> <p>These provisions would suggest that pre-arranged trading should not be permitted for derivatives subject to the trading obligation but there remains some regulatory uncertainty.</p>

<sup>6</sup> See Article 9(1), MiFIR and RTS 2.

<sup>7</sup> See <https://www.esma.europa.eu/policy-activities/mifid-ii-and-mifir/mifid-ii-transitional-transparency-calculation>.

<sup>8</sup> The CFTC Glossary defines “prearranged trading” as trading between brokers in accordance with an expressed or implied agreement or understanding, which is a violation of the Commodity Exchange Act and CFTC regulations.

<sup>9</sup> See page 21 of ESMA’s Final Report on the trading obligation for derivatives under MiFIR, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-227\\_final\\_report\\_trading\\_obligation\\_derivatives.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-227_final_report_trading_obligation_derivatives.pdf).

<sup>10</sup> See Article 4, MiFIR.



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<p><b>Post-Trade Transparency</b></p>	<p>CFTC Part 43 rules implement real-time public reporting for swap transactions, including those swaps executed on or pursuant to the rules of a SEF.<sup>11</sup></p> <p>A SEF must report the swap transaction and pricing data to the appropriate swap data repository “as soon as technologically practicable” after execution of the swap for public dissemination.</p> <p>The data fields described in Tables A1 and A2 of Appendix A to Part 43, to the extent applicable to a publicly reportable swap transaction, shall be publicly disseminated.</p> <p>All block trades are subject to the time delays for public dissemination described in Appendix C of Part 43. Notably, block trades in OTC derivatives that are subject to the clearing obligation receive a 15-minute delay and are published with notional amounts that are capped at the block threshold.</p>	<p>Pursuant to Article 10 of MiFIR, EU trading venues are required to implement public reporting for swap transactions.</p> <p>This post-trade data is required to be made public as close to real-time as is technically possible (and in any case within 15 minutes of execution for the first 3 years and within 5 minutes of execution thereafter).</p> <p>The data fields described in RTS 2, to the extent applicable to a publicly reportable swap transaction, shall be publicly disseminated.</p> <p>Deferrals from these post-trade transparency requirements are available in a number of circumstances, including (a) transactions that are above the applicable “large-in-scale” threshold, and (b) derivatives that are considered illiquid.<sup>12</sup> Deferrals are granted at the discretion of the relevant national competent authority.</p> <p>The length of the deferral can extend from two days to four weeks, also at the discretion of the relevant national competent authority. During the deferral period, national competent authorities can also elect to (a) request that limited details of the transaction are published and (b) allow the publication of several transactions in aggregated form.<sup>13</sup></p> <p>ESMA, through its “transitional transparency calculations”, determined nearly all OTC derivatives to be “illiquid”, which resulted in expansive deferrals from post-trade</p>

<sup>11</sup> CFTC Final Rule, “Real-Time Public Reporting of Swap Transaction Data”, 77 Fed. Reg. 1182 (January 9, 2012) (“**CFTC Real-Time Reporting Final Rule**”), available at : <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2011-33173a.pdf>.

<sup>12</sup> See Article 11(1), MiFIR.

<sup>13</sup> See Article 11(3), MiFIR.

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		transparency requirements being available even for derivatives subject to the trading obligation. <sup>14</sup>
<b>Straight-Through Processing (STP)</b>	<p><b>Pre-trade checks.</b> The CFTC has adopted a final rule on STP of cleared swaps,<sup>15</sup> and issued related staff guidance<sup>16</sup> and letters.<sup>17</sup></p> <p>Clearing FCMs must screen orders prior to execution on a SEF for compliance with risk-based limits for each customer account pursuant to CFTC Regulation 1.73. SEFs must facilitate this pre-execution screening by clearing FCMs on an order-by-order basis.</p> <p><b>Submission Timeframes.</b> CFTC Regulations 1.74, 23.610 and 39.12(b)(7) require that a trade be submitted and accepted or rejected for clearing as quickly as would be technologically practicable if fully automated systems were used.</p> <p>The CFTC has interpreted this standard to require that transactions executed on a SEF must be submitted to clearing within 10 minutes of execution.<sup>18</sup></p> <p>Under the CFTC STP Guidance, CCPs must accept or reject submitted transactions within 10 seconds.</p>	<p><b>Pre-trade checks.</b> Article 29(2) of MiFIR and RTS 26<sup>21</sup> set forth STP requirements for cleared derivatives in the EU.</p> <p>Article 2(2) of RTS 26 requires trading venues to facilitate a pre-execution credit check by clearing members on an order-by-order basis.</p> <p><b>Submission Timeframes.</b> MiFID II requires CCPs, trading venues and clearing members to ensure that cleared derivatives are submitted and accepted for clearing “as quickly as technologically practicable using automated systems.”<sup>22</sup></p> <p>Article 3 of RTS 26 requires that transactions executed on a MTF/OTF must be submitted to clearing within 10 seconds of execution (if executed electronically) or 10 minutes of execution (if executed by voice).</p> <p>CCPs must accept or reject submitted transactions within 10 seconds.</p> <p><b>Rejections from Clearing.</b> Article 5 of RTS 26 specifies that transactions executed on a MTF/OTF that are not accepted for clearing are void <i>ab initio</i> (if executed</p>

<sup>14</sup> See <https://www.esma.europa.eu/policy-activities/mifid-ii-and-mifir/mifid-ii-transitional-transparency-calculation>.

<sup>15</sup> See CFTC Final Rules on “Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management”, 77 Fed. Reg. 21307 (April 9, 2012) available at: <http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-7477a.pdf>.

<sup>16</sup> See “Staff Guidance on Swaps Straight-Through Processing”, issued Sept. 26, 2013 (“**CFTC STP Guidance**”).

<sup>17</sup> See CFTC Letter No. 15-67 (Dec. 21, 2015), available at: <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/15-67.pdf>; and CFTC Letter No. 17-27 (May 30, 2017), available at: <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/17-27.pdf>.

<sup>18</sup> See CFTC Letter No. 15-67 (Dec. 21, 2015), available at: <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/15-67.pdf>.

<sup>21</sup> Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0582&from=EN>.

<sup>22</sup> Article 29(2) MiFIR.

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	<p><b>Rejections from Clearing.</b> Under the CFTC STP Guidance, any swap that is executed on or subject to the rules of a SEF is void <i>ab initio</i> if not accepted for clearing.<sup>19</sup></p> <p>The CFTC has permitted market participants to resubmit a trade that has been rejected from clearing due to operational or clerical errors.<sup>20</sup></p>	<p>electronically) or governed by the rules of the trading venue (if executed by voice).</p> <p>Market participants are permitted to resubmit a trade that has been rejected from clearing due to a technical or clerical problem once more within one hour from the previous submission in the form of a new transaction with the same economic terms, provided that both counterparties have agreed to it.</p>
<p><b>Impartial/Non-Discriminatory Access to Trading Venues</b></p>	<p>Under the CEA and CFTC rules, a SEF must provide market participants with impartial access to its market.<sup>23</sup></p> <p>The CFTC has clarified that this requirement means that SEFs are prohibited from, among others, (a) requiring self-clearing memberships to join,<sup>24</sup> (b) using enablement mechanisms for cleared derivatives,<sup>25</sup> and (c) requiring breakage agreements for cleared derivatives.<sup>26</sup></p>	<p>Article 18(3) of MiFID II requires MTFs/OTFs to establish, publish, implement and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to their facilities.<sup>27</sup></p> <p>ESMA has clarified that this requirement means that MTFs/OTFs are prohibited from, among others, (a) requiring self-clearing memberships to join,<sup>28</sup> (b) using enablement mechanisms for cleared derivatives,<sup>29</sup> and (c)</p>

<sup>19</sup> See CFTC STP Guidance at p.5.

<sup>20</sup> See CFTC Letter No. 17-27 (May 30, 2017), available at: <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/17-27.pdf>.

<sup>23</sup> See Section 5h(f)(2) of the CEA and CFTC Regulation 37.202 in the SEF Core Principles Final Rule. In the preamble of the SEF Core Principles Final Rule, the CFTC clarified that the impartial access requirement is intended to allow market participants to “compete on a level playing field” and increase the participation of SEF liquidity providers to improve the pricing and efficiency of the market and reduce systemic risk. SEF Core Principles Final Rule at 33508.

<sup>24</sup> SEF Core Principles Final Rule at 33508.

<sup>25</sup> See “Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities”, issued Nov. 14, 2013 (“**CFTC Impartial Access Guidance**”), available at: <http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf>.

<sup>26</sup> See CFTC Impartial Access Guidance at footnote 3.

<sup>27</sup> See Article 18(3) of the MiFID II Directive.

<sup>28</sup> See Question 3 on p. 31, ESMA Q&A on MiFID II and MiFIR market structures topics, available at: [https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38\\_gas\\_markets\\_structures\\_issues.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-38_gas_markets_structures_issues.pdf).

<sup>29</sup> *Id.*

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		<p>imposing restrictions on the number of participants with whom a participant can interact.<sup>30</sup></p> <p>In addition, Article 5 of RTS 26 clarifies that breakage agreements are only used for cleared transactions that are executed bilaterally off-venue.</p>
<p><b>Process for Determining the Derivatives Subject to a Trading Obligation</b></p>	<p>Section 2(h)(8) of the CEA requires that transactions involving a swap subject to the clearing obligation must be executed on or pursuant to the rules of a SEF or DCM, unless no SEF or DCM makes such swap “available to trade.”</p> <p>The Final MAT Rule<sup>31</sup> establishes a process for a SEF to submit a “made available to trade” (<b>MAT</b>) determination. In a MAT determination, the SEF must consider, as appropriate, one or more of the six liquidity-related factors.<sup>32</sup></p>	<p>Under Article 28 of MiFIR, all derivatives which are designated as subject to the trading obligation must be traded on an EU trading venue (<i>i.e.</i>, a RM, MTF or an OTF), or on a non-EU trading venue deemed to be equivalent.</p> <p>Article 32 of MiFIR sets out the procedure for ESMA to designate the derivatives that are subject to the trading obligation. Article 32(2) of MiFIR specifies two main criteria: (1) the venue test: the class of derivatives must be admitted to trading or traded on at least one trading venue; and (2) the liquidity test: whether the derivatives are “sufficiently liquid” for the obligation.</p>
<p><b>Scope of Instruments Covered by a</b></p>	<p>A subset of IRS and CDS indices covered by the CFTC’s clearing obligation is subject to the trade execution requirement:<sup>33</sup></p>	<p>ESMA has concluded the following subset of IRS and CDS indices covered by the EU clearing obligation should be subject to the trading obligation:<sup>35</sup></p>

<sup>30</sup> *Id.*

<sup>31</sup> See CFTC Final Rule on “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) (“**Final MAT Rule**”), available at: <http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-12250a.pdf>.

<sup>32</sup> See Final MAT Rule, sec. 37.10(b) (1. Whether there are ready and willing buyers and sellers; 2. The frequency or size of transactions; 3. The trading volume; 4. The number and types of market participants; 5. The bid/ask spread; or 6. The usual number of resting firm or indicative bids and offers).

<sup>33</sup> The following link provides the CFTC’s list of such MAT swaps: <http://www.cftc.gov/idc/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf>.

<sup>35</sup> See ESMA Final Report on the trading obligation for derivatives under MiFIR, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-227\\_final\\_report\\_trading\\_obligation\\_derivatives.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-227_final_report_trading_obligation_derivatives.pdf).

<b>Topic</b>	<b>The CFTC Regulatory Framework</b>	<b>The EU MiFID II/MiFIR Regulatory Framework</b>
<b>Trading Obligation</b>	<p>IRS: Certain benchmark tenors denominated in USD, EUR, and GBP. Certain USD IMMs and MACs.</p> <p>CDS: the 5Y for CDX IG, CDX HY, iTraxx Main, and iTraxx Crossover.</p> <p>The most common types of packages containing a component subject to the trading obligation are included.<sup>34</sup></p>	<p>IRS: Certain benchmark tenors denominated in USD, EUR, and GBP. Certain USD IMMs.</p> <p>CDS: the 5Y for iTraxx Main and iTraxx Crossover.</p> <p>It appears the most common types of packages containing a component subject to the trading obligation will be included.</p>
<b>Access to Trading Venue Rulebooks</b>	<p>Under CFTC rules, SEFs are required to publicly file their rulebooks, which facilitated due diligence and onboarding by market participants.</p>	<p>Under MiFID II, MTFs/OTFs are not required to disclose their rulebooks prior to authorization.</p>

<sup>34</sup> See CFTC Letter No. 16-76 (Nov. 1, 2016), available at: <http://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/16-76.pdf>.