15 September 2015

International Swaps and Derivatives Association

Comparison of EU and U.S. trading obligations and trading venues for OTC derivatives

The EU Markets in Financial Instruments Directive and Regulation (MiFID2/MiFIR) will make wide ranging changes to the regulation of EU securities and derivatives markets, including the introduction of an obligation to trade certain cleared OTC derivatives only on regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs). However, MiFIR also permits the execution of those derivatives on certain non-EU venues where the European Commission (the Commission) has determined that equivalent requirements apply in the relevant non-EU jurisdiction and, in order to avoid the application of duplicative or conflicting rules, exempts counterparties from the trading mandate and certain other requirements altogether where one of the counterparties is established in a non-EU jurisdiction determined to have an equivalent regulatory regime.

This paper compares selected features of MiFID2/MiFIR with the U.S. Commodity Futures Trading Commission (CFTC) rules to illustrate how the CFTC trade execution requirement for swaps and the regulation of Swap Execution Facilities (SEFs) under CFTC rules are comparable to the EU trading obligation and the EU regime for MTFs and OTFs in relation to OTC derivatives.

In particular, this paper focuses on the equivalence determinations that the Commission is empowered to make in relation to the mandatory trading obligation under MiFIR (to disapply duplicative or conflicting rules) and in relation to the recognition of non-EU trading venues as permitted execution venues for the mandatory trading obligation under MiFIR.

This paper provides a summary description of the relevant requirements in the EU and under the CFTC rules. It is not intended to constitute legal advice or to be a comprehensive review of all requirements that may be relevant for an equivalence assessment under MiFIR. In particular, it does not review the additional position management and reporting requirements applicable under MiFID2 in relation to MTFs or OTFs that trade commodity derivatives or the corresponding U.S. requirements since it seems unlikely that any OTC commodity derivatives will be declared subject to the mandatory trading obligation under MiFIR in the near future.

1. Executive summary

In relation to the mechanism in MiFIR for disapplying duplicative or conflicting rules, ISDA considers that:

- The Commission should not rule out determining that the U.S. trade execution requirements are equivalent to the EU trading obligation under MiFIR simply because the corresponding SEC rules are not yet adopted or in effect. The Commission should adopt an outcomes based approach (with the detail of the SEC rules to be assessed once final), taking into account in particular that, at least in the short term, the derivatives

that are subject to the U.S. trade execution requirement are unlikely to differ significantly from those subject to the EU trading obligation because the SEC rules are not yet in effect.

- The key elements of the CFTC trade execution requirement are comparable to the corresponding elements of the EU trading obligation. In particular, both allow for execution on domestic and foreign venues and the process for deciding the scope of the obligations is similar, in that in the end the scope of the obligation is subject to regulatory control. It is not possible to comment on the differences in the treatment of block trades or packages as ESMA and the Commission are yet to develop their approach to these issues.

In relation to recognition of SEFs as permitted execution venues, ISDA considers that:

- The key elements of the CFTC framework for the regulation of SEFs are comparable to the EU framework for the regulation of MTFs and OTFs. Where there are differences between the two regimes, the CFTC framework still aims to achieve comparable outcomes to the EU framework.
- The CFTC SEF framework is different from the EU trading framework in two ways: it only applies to venues that trade swaps (while the EU framework applies more broadly) and it requires any multilateral platform that "facilitates" execution of any swap (regardless of whether it has been declared mandatorily cleared and traded) to be registered as a SEF (the U.S. framework captures a broader class of venues that have to be registered as a SEF). These differences should not be an obstacle to the recognition of SEFs as a permitted execution venue, as Article 28(4) MiFIR permits the Commission to limit its decision on equivalence to particular classes of trading venue.
- When considering the effect of recognition of SEFs under Article 28 MiFIR, the Commission should bear in mind that this recognition determination is exclusively for the purposes of the trading obligation. Even if it is considered to be equivalent under Article 28 MiFIR, a SEF would still need to comply with national legislation in each EU Member State in order to provide services on a cross-border basis to participants in the EU, unless and until a separate equivalence determination is made by the Commission under Article 47 MiFIR.

2. MiFIR equivalence determinations

This paper focuses on the equivalence determinations that the Commission is empowered to make:

(i) under Article 33 MiFIR to provide relief from duplicative or conflicting requirements, and

(ii) under Article 28 MiFIR in relation to the permitted non-EU trading venues which may be used for compliance with the trading obligation.

Article 33 of MiFIR provides a mechanism to avoid the application of duplicative or conflicting rules. Under that Article, the Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a non-EU jurisdiction:

- are equivalent to the requirements resulting from Articles 28 and 29 MiFIR;
- ensure protection of professional secrecy that is equivalent to that set out in MiFIR; and
- are being effectively applied and enforced in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in the relevant non-EU jurisdiction.

Where the Commission has adopted such an implementing act, the counterparties entering into transactions subject to MiFIR will be deemed to have fulfilled the obligations contained in Articles 28 and 29 MiFIR where at least one of the counterparties is established in that non-EU jurisdiction and the counterparties are in compliance with the legal, supervisory and enforcement arrangements of the non-EU jurisdiction.

Article 28 of MiFIR establishes the obligation for counterparties to trade certain cleared derivatives on regulated markets, MTFs, OTFs and certain permitted non-EU venues. Article 29 of MiFIR imposes requirements on the operator of a regulated market to ensure that all transactions in derivatives concluded on that market are cleared by a central counterparty (CCP) and requirements on CCPs, EU trading venues and investment firms that act as clearing members to have effective systems, procedures and arrangements to ensure that transactions in cleared derivatives are submitted and accepted for clearing as soon as technologically practicable using automated systems.

The trading obligation under Article 28 of MiFIR may be satisfied by trading on a non-EU venue where:

- the Commission has adopted a decision determining that the legal and supervisory framework of the non-EU jurisdiction ensures that a trading venue authorised in that non-EU jurisdiction complies with legally binding requirements which are equivalent to the requirements for regulated markets, MTFs and OTFs resulting from MiFIR, MiFID2 and the EU Market Abuse Regulation and which are subject to effective supervision and enforcement in that country;
- the non-EU jurisdiction provides for an effective equivalent system for the recognition of trading venues authorised under MiFID2 to admit to trading or trade derivatives declared subject to a trading obligation in that non-EU jurisdiction on a non-exclusive basis.

The decision of the Commission may be limited to a category or categories of trading venues in the non-EU jurisdiction.

3. Article 33 MiFIR – Relief from duplicative or conflicting rules

In order to make a determination that the legal, supervisory and enforcement arrangements in the U.S. are equivalent to the requirements resulting from Articles 28 and 29 MiFIR, the Commission will need to review the U.S. rules and arrangements relating to:

- the trade execution requirement for swaps;
- the clearing of derivatives traded on U.S. exchanges; and

- the straight-through processing of cleared swaps that are executed on or outside U.S. trading venues;
- the protection of professional secrecy;
- effective enforcement and supervision.

This paper mainly focuses on the trade execution requirement but it also comments briefly on the other requirements below.

a) Trade execution requirement

The U.S. Dodd-Frank Act provides for the imposition of trade execution requirements for both swaps subject to the jurisdiction of the CFTC and security-based swaps subject to the jurisdiction of the U.S. Securities and Exchanges Commission (SEC) (Sec. 2(h)(8) of the Commodity Exchange Act; Sec. 3C(h) of the Securities Exchange Act). The CFTC rules providing for the trade execution requirement for cleared swaps are already in effect and apply to a range of cleared swaps (see Sec. 2(h)(8) of the Commodity Exchange Act)[1]. ISDA considers that the Commission should take an outcomes-based approach, taking into account that:

- The EU trading obligation only applies to derivatives pertaining to a class of derivatives that has been declared subject to the clearing obligation under EMIR.
- The classes of derivatives so far declared subject to the clearing obligation under EMIR are closely aligned with, if not identical to, the classes of swaps declared subject to the clearing obligation under CFTC rules.
- Therefore, the classes of derivatives that, at least in the near term, are subject to the U.S. trade execution requirement are unlikely to differ significantly from those subject to the EU trading obligation merely because the SEC has not yet adopted its rules in this area.

Otherwise, there would be a risk that Article 33 MiFIR would not grant the intended relief from duplicative or conflicting EU rules on the trading obligation even if the product scope of the U.S. trade execution requirement were identical to the eventual product scope of the EU trading obligation.

In any event, in ESMA's 2013 technical advice to the Commission under EMIR on the equivalence of U.S. rules, ESMA considered corresponding issues with respect to the provisions of EMIR relating to duplicative or conflicting rules with respect to the scope of the clearing obligation under EMIR. It indicated that there is a common understanding between the EU and the U.S. authorities that where there are differences in the scope of the clearing obligations between the EU and the U.S., the strictest rule would apply. For example, in situations where an EU counterparty would be subject to the clearing obligation whereas its U.S. counterparty would benefit from an exemption with no

[1] The SEC has not yet adopted its rules on the clearing or trade execution of security-based swaps. However, ISDA considers that the Commission should not rule out determining that the U.S. trade execution requirements are equivalent to the EU trading obligation under MiFIR simply because the corresponding SEC rules are not yet adopted or in effect.

equivalent in the EU, the clearing obligation resulting from EU rules would apply and the counterparties would have to clear. See paragraph 110 of ESMA's Final Report - technical advice on third country regulatory equivalence under EMIR – US, 1 September 2013 (the ESMA 2013 technical advice). If a similar approach applies with respect to the trading obligation under MiFIR then the absence of SEC rules on trade execution should not be an obstacle to an equivalence determination.

ISDA considers that the key elements of the CFTC trade execution requirement are comparable to the corresponding elements of the EU trading obligation:

- ***What is the requirement?*** The CFTC rules require transactions in swaps that are "Required Transactions" (see below) to be executed on a SEF through an order book or through a request for quote (RFQ) system to 3 that operates in conjunction with an order book. SEFs include non-U.S. SEFs that are registered with the CFTC. This is comparable to the EU requirement to execute derivatives pertaining to a class of derivatives that has been declared subject to the trading obligation on specified venues, including non-EU venues that are the subject of equivalence determinations.
- ***Who is subject to the requirement?*** The CFTC trade execution requirement and the EU trading obligation both apply to counterparties subject to the respective clearing obligations that apply in the two jurisdictions. The ESMA 2013 technical advice noted that there are differences between the personal scope of the clearing obligations under the two rule sets, but both are aimed at imposing broad ranging clearing obligations on financial entities and systemically significant non-financial entities, with exemptions for non-financial entities that are end-users of derivatives and for transactions between members of a group of companies. If the Commission determines that the clearing obligation in the U.S. is equivalent to the clearing obligation under EMIR (under the provisions of Article 13 of EMIR creating a mechanism for addressing duplicative or conflicting rules under that regulation), the differences in scope between the respective clearing obligations should not be a bar to a finding that the CFTC trade execution requirement is equivalent to the EU trading obligation.
- ***What products are in scope for the requirement?*** A swap is a Required Transaction subject to the CFTC trade execution requirement if it is subject to mandatory clearing, made available to trade (MAT) by a SEF or designated contract market (DCM) and is not a block trade. Under the CFTC rules, the made available to trade determination can be made by certification by a SEF or DCM if the swap is listed on the SEF or DCM and the SEF or DCM makes the swap available to trade, but is subject to CFTC review and approval, based on factors relating to the demand and trading frequency of a particular swap (if the SEF or DCM applies for CFTC approval under rule 40.5), or is subject to CFTC review based on the same factors (if the SEF or DCM uses the self-certification process under rule 40.6). A current list of the products subject to a MAT determination is available here[2]. This process is comparable to the EU process which requires ESMA and the Commission to consult on and, if appropriate, develop regulatory technical

[2] http://www.cftc.gov/ucm/groups/public/@otherif/documents/file/swapsmadeavailablechart.pdf

standards (RTS) applying the trading obligation after a determination that a class of derivatives is subject to the clearing obligation but only where the derivative if admitted to trading or traded on at least one specified venue and if it is sufficiently liquid to trade only on the specified venues. Although the U.S. process is initiated by a SEF or DCM, the trade execution requirement only applies where the CFTC approves, or has not objected to, the MAT determination.

- ***What is the treatment of block trades and packages?*** The CFTC rules provide an exemption for block trades, which are not Required Transactions and so are not required to be executed through the order book or RFQ system of a SEF. In relation to packages, the CFTC has issued a series of no-action letters[3] under which certain package types (the extent of the relief has been reduced over time) have been exempted from the trade execution requirement. MiFIR directs ESMA to consider whether the class of derivatives declared subject to the trading obligation should be restricted to transactions below a certain size and ESMA and the Commission are currently considering how the trading obligation should be applied to packages.

b) Other requirements

As noted above, the Commission will also need to consider certain other applicable requirements in the U.S.:

- ***Requirements for clearing of derivatives traded on U.S. exchanges:*** CFTC rules already require DCMs to ensure that futures traded on those DCMs are cleared by a designated clearing organisation[4].
- ***Straight-through processing requirements for cleared swaps:*** SEFs are required to have rules and procedures to facilitate prompt and efficient processing by a designated clearing organisation (DCO) or futures commission merchant (FCM). DCOs and FCMs are required to accept or reject all trades executed competitively on a SEF or DCM as quickly as would be technologically practicable as if fully automated systems were used[5]. The EU requirements are to be developed by RTS under Article 29 MiFIR.
- ***Professional secrecy:*** ESMA considered the U.S. regime for the protection of professional secrecy in its 2013 technical advice. It advised the Commission to consider the guarantees of professional secrecy in the U.S. equivalent to the EU regime under EMIR (see paragraphs 98 to 103, 108 and 133 of the ESMA 2013 technical advice). We consider that a similar conclusion should apply in relation to MiFIR.
- ***Effective enforcement and supervision:*** ESMA also considered the measures applicable in the U.S. for breaches of the clearing obligation and risk mitigations techniques in its 2013 technical advice. It advised the Commission to grant equivalence to the U.S. in respect of the effective supervision and enforcement arrangements (see paragraph 136

[3] http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-137.pdf; http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-62.pdf; and http://www.cftc.gov/ucm/groups/public/@newsroom/documents/letter/14-12.pdf
[4] CFTC Rule Sec. 38.601
[5] CFTC Regulations 1.74, 37.702(b), 38.601 and 39.12(b)(7)

of the ESMA 2013 technical advice). We consider that a similar conclusion should apply in relation to EMIR.

4. Article 28 MiFIR - Recognition of SEFs as permitted execution venues

The U.S. Commodity Exchanges Act (CEA) requires anyone operating a "many to many" trading platform for swaps to register with the CFTC as a SEF (or a DCM), subject to limited exceptions. The CEA also establishes 15 Core Principles for the regulation of SEFs (see Annex) which are further elaborated through CFTC rules.

SEFs (similar to DCMs) are subject to the self-regulatory regime. This regime allows the CFTC to retain its role as a regulatory oversight agency to assure compliance with the CFTC regulations, while permitting SEFs to be front-line decision makers with respect to the operational side of derivatives trading. This regime allows the CFTC to implement a robust regulatory framework that requires SEFs, among other things, to:

- establish and enforce rules to protect market participants from abusive practices;
- maintain an automated trade surveillance system capable of detecting trade practice violations;
- retain risk control mechanisms to protect markets' integrity;
- conduct real-time (or close to real-time) market monitoring; and
- establish procedures for conducting investigations.

This framework is comparable to the EU framework for the regulation of MTFs and OTFs except that it is limited to swaps (whereas MTFs and OTFs can trade a broader category of financial instruments). However, this limitation in product scope should not be an obstacle to the recognition of SEFs as a class of trading venues for the purposes of Article 28 MiFIR, since Article 28(4) allows the Commission to limit its decision on equivalence to particular classes of trading venue. The Commission is not required to determine that all trading venues in a non-EU state are subject to equivalent regulation to corresponding EU venues.

In particular, the U.S. rules contain requirements comparable to the EU framework, covering matters such as:

- The rules of the facility (Core Principles 2 and 11);
- Open access (Core Principle 2);
- Admission of instruments to trading (Core Principle 3);
- Monitoring obligations (Core Principle 4);
- Suspension of trading and emergency authority (Core Principle 8);
- Post-trade transparency and access to data (Core Principle 9);
- Financial resources (Core Principle 13);
- General organisational and compliance requirements (Core Principles 14 and 15).

See the comments above regarding the effective supervision and enforcement of CFTC rules.

We would comment on the following areas where the U.S rules for SEFs take a different approach to the EU rules regulating MTFs or OTFs, albeit aiming to achieve similar objectives:

- ***Use of proprietary trading and matched principal trading.*** The EU regime includes specific rules restricting the use of proprietary trading, matched principal trading and systematic internalisation by operators of MTFs or OTFs (and, in relation to OTF operators, their group companies). The U.S. rules include general requirements that a SEF must establish and enforce rules to minimise conflicts of interest in its decision making process and to establish a process for resolving conflicts of interest (Core Principle 12) and transactions subject to the clearing obligation will in any event be cleared by a DCO. There are no legal prohibitions on SEFs engaging in other businesses, but SEFs are subject to conflict of interest and financial resources requirements (among other requirements) which, in practice, are likely to make it difficult for a SEF to engage in other businesses.
- ***Trading functionality and pre-trade transparency.*** The EU regime for MTFs or OTFs does not regulate the way in which MTFs or OTFs execute transactions, except that MTFs must operate on the basis of non-discretionary rules and there are limits on the kinds of discretion that may be exercised by OTFs. However, the EU regime seeks to achieve pre-trade transparency by requiring bids and offers or indications of interest to the market generally, subject to possible waivers for large transactions (in a manner to be defined by RTS). The CFTC regime seeks to achieve pre-trade transparency by requiring trades that are determined to be made available to trade (and thus become Required Transactions under the SEF rules) to be executed on an order book or an RFQ to 3 system. The CFTC also intends to increase pre-trade transparency by requiring market participants to comply with the 15 second rule: SEFs must require that traders that have the ability to execute Required Transactions against a customer's order or to execute two customers' orders against each other are subject to a 15 second timing delay between the entry of the two orders into the SEF's order book to ensure that one side is available to all market participants before the second side of the potential transaction is entered into the order book. The CFTC considers that these arrangements provide sufficient pre-trade transparency for swaps. The same rules apply to block trades executed through the order book or an RFQ system, but since block trades are not Required Transactions they are not required to be executed via an order book or RFQ to 3 and therefore can be pre-negotiated by voice subject to the rules of the SEF on which the trade will be formalised.
- ***Algorithmic trading and direct electronic access.*** The EU regime provides for specific rules relating to algorithmic trading and direct electronic access to MTFs and OTFs to be developed through RTS. The U.S. regime contains general requirements on system safeguards aimed at requiring SEFs to manage operational risks (Core Principle 14). The CFTC has also issued Disruptive Trading Practices that touch upon the scope of permissible algorithmic trading.

However, even if the Commission determines that the U.S. legal and supervisory framework ensures that SEFS comply with legally binding requirements which are equivalent to the requirements for MTFs and OTFs under the EU regime, market participants subject to the EU trading obligation will only be able to execute transactions subject to that obligation on a SEF if the U.S. provides for an effective equivalent system for the recognition of trading venues authorised under MiFID2 to admit to trading or trade derivatives declared subject to the U.S. trade execution requirement on a non-exclusive basis. The U.S. regime allows (and in some cases requires) non-U.S. venues to register as SEFs, and also enables the CFTC to exempt a venue from registration if the CFTC considers that the venue is subject to comparable, comprehensive supervision and regulation on a consolidated basis by the SEC, a prudential regulator, or the appropriate authorities in its home jurisdiction[6]. Non-U.S. venues that register as SEFs must comply with the rules regulating SEFs although the CFTC may provide relief from those rules to a non-U.S. venue on the basis of substituted compliance with home state rules. ISDA would urge the Commission to confirm that these arrangements satisfy the requirements for an "effective equivalent system for the recognition of [EU venues]".

When considering the effect of recognition of SEFs under Article 28 MiFIR, the Commission should bear in mind that recognition is exclusively for the purposes of the trading obligation. In particular, non-EU entities operating SEFs can only offer their services on a cross border basis to EU members and participants (even if those members or participants are categorised as eligible counterparties or per se professional clients under MiFID2) subject to compliance with national licensing requirements in the relevant Member State, unless and until there is an equivalence determination under Article 47 MiFIR (subject to a three year transitional period under Article 54 MiFIR). The licensing rules of a number of Member States would restrict the ability of non-EU firms to offer these services to national market participants.

In addition, even if SEFs are permitted venues for the execution of transactions in derivatives under Article 28 MiFIR, it appears that EU investment firms might still be regarded as systematic internalisers (SIs) in those derivatives if they execute those transactions on SEFs and the volume of their transactions on those SEFs meet the relevant thresholds. In that event, those SIs might still have to comply with the pre-trade transparency obligations in Article 18 MiFIR even if they are complying with the SEF rules. ISDA would urge the Commission to clarify that transactions on non-EU venues permitted under Article 28 MiFIR do not count towards the thresholds for determining that an investment firm is an SI and/or clarify that Article 18 does not apply to transactions executed on such a venue. It will also be important for the Commission to provide similar clarification in relation to transactions in other financial instruments executed on other non-EU venues, to ensure that these do not count towards the SI thresholds and to clarify that Article 18 does not apply to those transactions.

[6] Section 5h(g) of the CEA

Annex

Core Principles for SEFs

(1) Compliance with core principles

(A) In general

To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

(i) the core principles described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 12a (5) of this title.

(B) Reasonable discretion of swap execution facility

Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in this subsection.

(2) Compliance with rules

A swap execution facility shall—

(A) establish and enforce compliance with any rule of the swap execution facility, including—

(i) the terms and conditions of the swaps traded or processed on or through the swap execution facility; and

(ii) any limitation on access to the swap execution facility;

(B) establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means—

(i) to provide market participants with impartial access to the market; and

(ii) to capture information that may be used in establishing whether rule violations have occurred;

(C) establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(D) provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2 (h) of this title, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2 (h)(8) of this title.

(3) Swaps not readily susceptible to manipulation

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(4) Monitoring of trading and trade processing

The swap execution facility shall—

(A) establish and enforce rules or terms and conditions defining, or specifications detailing—

(i) trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(ii) procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(5) Ability to obtain information

The swap execution facility shall—

(A) establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in this section;

(B) provide the information to the Commission on request; and

(C) have the capacity to carry out such international information-sharing agreements as the Commission may require.

(6) Position limits or accountability

(A) In general

To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) Position limits

For any contract that is subject to a position limitation established by the Commission pursuant to section 6a (a) of this title, the swap execution facility shall—

(i) set its position limitation at a level no higher than the Commission limitation; and

(ii) monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(7) Financial integrity of transactions

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2 (h)(1) of this title.

(8) Emergency authority

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

(9) Timely publication of trading information

(A) In general

The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(B) Capacity of swap execution facility

The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

(10) Recordkeeping and reporting

(A) In general

A swap execution facility shall—

(i) maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of 5 years;

(ii) report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under this chapter; and

(iii) shall keep any such records relating to swaps defined in section 1a (47)(A)(v) of this title open to inspection and examination by the Securities and Exchange Commission." [1]

(B) Requirements

The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

(11) Antitrust considerations

Unless necessary or appropriate to achieve the purposes of this chapter, the swap execution facility shall not—

(A) adopt any rules or taking [2] any actions that result in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading or clearing.

(12) Conflicts of interest

The swap execution facility shall—

(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.

(13) Financial resources

(A) In general

The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(B) Determination of resource adequacy

The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a 1-year period, as calculated on a rolling basis.

(14) System safeguards

The swap execution facility shall—

(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—

(i) are reliable and secure; and

(ii) have adequate scalable capacity;

(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for—

(i) the timely recovery and resumption of operations; and

(ii) the fulfillment of the responsibilities and obligations of the swap execution facility; and

(C) periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued—

(i) order processing and trade matching;

(ii) price reporting;

(iii) market surveillance and

(iv) maintenance of a comprehensive and accurate audit trail.

(15) Designation of chief compliance officer

(A) In general

Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) Duties

The chief compliance officer shall—

(i) report directly to the board or to the senior officer of the facility;

(ii) review compliance with the core principles in this subsection;

(iii) in consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(iv) be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(v) ensure compliance with this chapter and the rules and regulations issued under this chapter, including rules prescribed by the Commission pursuant to this section; and

(vi) establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(C) Requirements for procedures

In establishing procedures under subparagraph (B)(vi), the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) Annual reports

(i) In general In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

(I) the compliance of the swap execution facility with this chapter; and

(II) the policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(ii) Requirements The chief compliance officer shall—

(I) submit each report described in clause (i) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to this section; and

(II) include in the report a certification that, under penalty of law, the report is accurate and complete.