19 April 2012

The Honourable Timothy F. Geithner
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Commissioner Michel Barnier
EU Commissioner for Internal Markets and Services
European Commission
B-1049 Brussels

RE: Extraterritorial legislation: the problems posed for markets, clients and regulators

Dear Secretary Geithner and Commissioner Barnier:

As you and your colleagues prepare to meet at the upcoming G20 Finance Ministers meeting in Washington, we now write to follow up on the 17 February letter submitted by the Global Financial Markets Association (GFMA) raising concerns about regulatory reforms that may be creating conditions resulting in a fragmented transatlantic capital market. In that letter we referenced more detailed work we were undertaking to provide specific examples as to the extent to which a range of extraterritorial regulatory provisions are giving rise to difficulties in both interpretation and practice. A copy of this paper is attached in Annex 2 and 3.

In this paper, GFMA, The Financial Services Roundtable, the International Banking Federation (IBFed), and the International Swaps and Derivatives Association (ISDA) (collectively, the "Associations")[1] have set out six types of concerns:

1. Duplicative requirements;
2. Incompatible or conflicting requirements;
3. Distortion of competition/reduction of customer choice;
4. Unintended impact on clients / counterparties who are not directly subject to regulation;
5. Lack of process for mutual recognition or comparability; and
6. Regulatory uncertainty and disproportionate compliance burden

[1] A description of the Associations is set forth in Annex 1 to this letter.

Some of the most problematic instances of extraterritorial legislation for our members include:

1. Provisions of Dodd-Frank, including: the Volcker rule and the registration requirements for non-U.S. swap dealers and major swap participants;
2. Foreign Account Tax Compliance Act (FATCA);
3. Markets in Financial Instruments Directive (MIFID); and
4. European Market Infrastructure Regulation (EMIR)

While we welcome the ongoing discussions among U.S. and EU finance officials and relevant regulators to coordinate their respective regulatory reforms, a strong concern continues to be the emphasis on equivalency. We believe that standards of comparability should be outcomes based, and not used as a tool to export regulations from one jurisdiction to another. Similarly, we believe that policies that promote the concept of reciprocity may be equally dangerous and could cause a serious rift. Instead, in addition to conducting a global market impact assessment, we encourage the use of three "gateways" for modernizing the regulation of global business – mutual recognition, exemptive relief, and targeted rules convergence – in solving the difficulties to which extraterritorial measures give rise. Given our concerns, we are participating in the parallel follow-up work being taken forward by the EU-U.S. Coalition[2] on these issues. Further to this, we have attempted to outline practical solutions as described below:

1. Global Impact Assessment: It is essential that domestic and international regulators build into their impact assessment of proposed regulatory measures an analysis of the *overall* impact that relevant measures will have on markets globally. As part of this it is important to determine what policy makers are seeking to achieve and why extraterritorial measures may be thought to be necessary to meet these objectives. This would provide the opportunity to establish whether there are alternative means to secure these objectives that are less disruptive to firms and their clients. On occasion, unintended – and sometimes damaging – extraterritorial effects will arise simply from a

[2] In early 2005, a group of leading EU and U.S. financial service industry associations agreed to work together to address the urgent need to simplify the regulation of wholesale Transatlantic financial services business; and subsequently agreed to form themselves into the EU/US Coalition on Financial Regulation. They comprise, currently: American Bankers Association Securities Association (ABASA), Association for Financial Markets in Europe (AFME), Bankers' Association for Finance and Trade (BAFT), British Bankers' Association (BBA), Futures Industry Association (FIA), Futures and Options Association (FOA), International Capital Market Association (ICMA), Investment Industry Association of Canada (IIAC), International Swaps and Derivatives Association (ISDA), Securities Industry and Financial Markets Association (SIFMA), Swiss Bankers Association (SBA) and Observer: European Banking Federation (EBF). The group submitted the following letter: http://www.sifma.org/uploadedfiles/newsroom/2008/us-eucoalition-fin-regualtion-reportmar08.pdf (March 2008)

failure to consider wider consequences and possible alternatives: this can, we believe, be addressed by the development of a common approach to impact assessment that includes consideration of such potential effects. However, this procedure would not deal in itself with the instances where extraterritorial measures are consciously intended, and that we address in Annex 2 and 3 of this letter.

2. Mutual Recognition and Exemptive Relief: Common regulatory standards should be measured against equality of outcomes and effects, and not against the agreement of identical legal text. Recognising that complete and precise commonality of detail is likely to be elusive, mutual recognition – or exemptive relief for certain activities – would usefully extend the effect of broadly comparable standards. In addition, establishing and enhancing dialogue between regulators together with peer review processes would ensure that there is a commonality of standards, and a good understanding of priorities, so that mutual recognition would be developed on sound foundations of trust and shared interest.

3. Targeted Rules Convergence: Our view is that the G20 process, which can assist rules convergence as well as mutual recognition, should address the need for common regulatory standards to be developed. The Financial Stability Board (FSB) is well placed to take a leadership role in providing guidance as to where it is critical to have consistent implementation and where the detail of that implementation is less important for systemic risk mitigation purposes. As was noted in the G20 Summit in November 2008: *"... our financial markets are global in scope, therefore, intensified international cooperation among regulators and strengthening of international standards, where necessary, and their consistent implementation is necessary to protect against adverse cross-border, regional and global developments affecting international financial stability. Regulators must ensure that their actions support market discipline, avoid potentially adverse impacts on other countries, including regulatory arbitrage, and support competition, dynamism and innovation in the marketplace."* [3]

Without a "course correction," U.S. and EU regulatory reform efforts have the potential to create a patchwork quilt of reforms which can only increase complexity to market participants, regulators, and supervisors, and limit the capacity of capital markets to meet clients' needs. In addition, the ambiguity and legal uncertainty created by extraterritorial legislation has the potential to actually foster systemic risk by making it more difficult for regulators to monitor and capture activity in financial markets. As our shared goal and interest is to implement reforms in a coordinated and consistent manner, we hope that the issues that our paper highlights can be

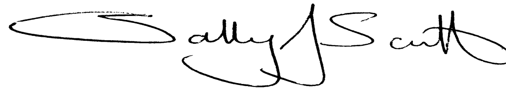
[3] Declaration of the Summit on Financial Markets and the World Economy. The White House. 15 November 2008. Retrieved 14 April 2012.

explored, discussed, and resolved through the continued interaction in the Financial Market Regulatory Dialogue (FMRD) and other forums.

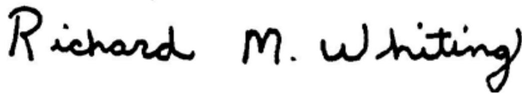
As the world's largest capital markets, the U.S. and the EU are well-placed to play a leadership role in developing common global approaches to regulation. We appreciate your attention to these issues and look forward to continued dialogue with you and your staffs on this issue.

Sincerely,

Simon Lewis
CEO
GFMA



Sally J. Scutt
Managing Director
IBFed



Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

Robert Pickel
CEO
ISDA

CC: G20 Finance Ministers
FSB Chairman Mark Carney
FSB Secretariat

ANNEX 1

Global Financial Markets Association

The Global Financial Markets Association (GFMA) brings together three of the world's leading financial trade associations to address the increasingly important global regulatory agenda and to promote coordinated advocacy efforts. The Association for Financial Markets in Europe (AFME) in London and Brussels, the Asia Securities Industry & Financial Markets Association (ASIFMA) in Hong Kong and the Securities Industry and Financial Markets Association (SIFMA) in New York and Washington are, respectively, the European, Asian and North American members of GFMA. For more information, please visit http://www.gfma.org.

The Financial Services Roundtable

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

IBFed

The IBFed is the representative body for national and international banking federations from leading financial nations around the world. Its membership includes the American Bankers' Association, the Australian Bankers' Association, the Canadian Bankers Association, China Banking Association, the European Banking Federation, the Indian Banks' Association, the Japanese Bankers' Association, Korean Federation of Banks, Association of Russian Banks, the Bankers' Association of South Africa and FEBRABAN (Federacao Brasileira de Bancos). This worldwide reach enables the Federation to function as the key international forum for addressing legislative, regulatory and other issues of interest to the global banking industry.

ISDA

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

ANNEX 2

Regulatory Reform Programme – Extraterritoriality Issues

Background

The recent financial crisis has led to an unparalleled period of regulatory innovation and change impacting the financial services sector. Change on the scale of the US Dodd-Frank legislation and the EU programme of regulatory reform brings with it a unique opportunity to build a regulatory framework that achieves significant gains in levels of protection for customers and levels of financial stability for the global economy.

However, undertaking reform on such a significant scale also risks making changes that are broader in scope than may be necessary or which are focused purely on domestic concerns or issues whilst ignoring the impacts on wider, international financial markets. This can lead to regulation that is inappropriately extraterritorial in effect and elements of regulation that diverge significantly between major financial centres. This is a danger that is particularly pronounced in an industry that is as global and interconnected in nature as financial services.

At the end of each section of this paper we have referred to specific examples of legislation or regulation which illustrate the concerns to which measures are giving rise. In most cases further detail on the potential impact of this legislation or regulation is set out in the Table (Annex 3) prepared with Clifford Chance attached which is still work in progress, because there are measures still being discussed where the final outcome is not clear and the references to section numbers below are references to sections of this Table (Annex 3).

1. **Duplicative requirements**

Regulators in the US and EU have been calling for consistency in implementing G20 and other reforms, to avoid regulatory arbitrage. This is welcome and indeed crucial to avoid the danger identified under the next heading below. However, introducing identical or similar requirements in different jurisdictions could lead to some entities becoming subject to multiple overlapping regulatory regimes. This could have the effect of:

- Reducing the quality or usefulness of information available to regulators (e.g. where the same trade is required to be reported multiple times);

- Introducing unnecessarily duplicative requirements; and distorting competition as between market participants by the uneven application of duplicative regimes;

- Encouraging participants to make venue choices based on avoidance of administrative complexity, potentially reducing the focus upon execution quality and fragmenting international markets;

- Increasing the compliance burden or costs of compliance for regulated entities without achieving any additional benefits by way of customer protection or market stability (e.g. where such entities are required to comply with requirements in several different jurisdictions, firms will need to build systems to ensure compliance with the various requirements). There are can also be cases where additional obligations can be imposed on non-regulated entities.

Examples of legislation or regulation which may result in duplicative requirements are:

In the EU: Regulation 1060/2009 on credit rating agencies ("CRAs") (see attached table, section **1**)[1]; the provisions on remuneration and credit risk retention ("skin in the game") in the Capital Requirements Directives 2 & 3 (section **5**); the requirements in the European Market Infrastructure Regulation for counterparties to report transactions in derivatives (section **9**); the disclosure requirements in the Short Selling Regulation (section **11**); and the provisions of the Market Abuse Directive (section **13**) and the proposed Regulation on energy market integrity and transparency (section **12**).

In the US: the proposed US rules on credit rating agencies (section **29**); the registration requirements for non-US swap dealers and major swap participants under Dodd Frank (section **22**) together with the Section 165/166 enhanced supervision framework for foreign banks; the provisions for credit risk retention under Dodd Frank (section **30**); and the reporting obligations imposed by the Office of Financial Research (section **33**).

2. Incompatible or conflicting requirements

In the past, regulators have commented that duplicative regulation is not a particular concern, as firms subject to multiple regimes should comply on a "highest common factor" basis. However, it may not always be possible for a regulated entity (or another entity subject to the relevant regulation) to comply with the requirements it may be subject to in every jurisdiction. For example, if an entity is subject to a clearing requirement in two jurisdictions, it may not be possible for it to comply with both requirements (unless legislation is introduced in at least one jurisdiction recognizing CCPs authorized or registered in the other jurisdiction).

Another example would be reporting requirements where regulators require disclosures or reports to be made exactly as specified in local legislation: for example, where reports are to be made in a particular format, or exact figures must be given calculated according to national requirements (e.g. UK large shareholding reporting requirements, loan-level data requirements for securitisation transactions), and penalties apply if the reports are not made in this way.

Similar issues arise in relation to regulators' powers to impose bans on particular products or practices. If firms are prohibited from carrying on particular trading practices (e.g. short selling, high frequency trading) unless they comply with particular conditions, and different and incompatible conditions apply in different jurisdictions, the answer may simply be to stop trading in that product / jurisdiction.

As discussed at 1. above, these circumstances may shape market participants' choices about business location and venue of execution, leading to fragmented markets, the structure of which is distorted by conflicting or even incompatible regulation.

Examples of legislation or regulation which may result in incompatible or conflicting requirements are:

In the EU: the proposal to apply prudential requirements to non-EU subsidiaries of EU persons under the Capital Requirements Directive IV (section **6**); the obligation to clear OTC directives on a CCP established in the EU under the European Market Infrastructure Regulation unless the CCP is established in a jurisdiction recognised by ESMA (section **7**); the requirements of the European Central Bank and the Bank of England for loan-level data disclosure for securitisation transactions.

[1] But note that while Section 939A DFA seeks to *eliminate* CRA references, EU concerns are currently more focused on *over*-reliance on CRAs – so there are issues of inconsistency of objectives; see, in addition, Section 3 below.

In the US: the restrictions on proprietary trading under the Volcker rule (section **19**); the margin requirements under Title VII of Dodd Frank (section **23**); the position limits under Title VII of Dodd Frank (section **26**); the provisions for credit risk retention under Dodd Frank (section **30**); the requirements of the SEC under Reg AB for loan-level data disclosure for securitisation transactions.

3. Distortion of competition/reduction of customer choice

Where regulation is applied extra-territorially, it may have the effect of distorting competition in particular markets. For example, not all firms operating in a particular jurisdiction may be subject to the same degree of regulation. If local entities are not subject to (e.g.) capital or margin requirements, but firms operating cross-border are, then local entities will have a competitive advantage.

Regulation may also have the effect of restricting the ability of regulated entities to carry out cross-border business with entities in other jurisdictions (as service providers, clients or counterparties). For example, EU firms will be restricted from using ratings issued by "unendorsed" non-EU CRAs for regulatory purposes, non-EU fund managers are restricted from marketing AIFs to investors in the EU, the removal of the private adviser exemption in the Investment Company Act may restrict non-US investment advisers from accepting US customers, and the Volcker rule prohibition on proprietary trading may restrict customer choice as US banks are precluded from participating in certain markets and non-US banks with US operations might be subjected to extraterritorial restrictions to their worldwide trading and funds business which would not apply to non-US banks having no US operations. In addition, the (inadvertent) discrimination of non-insured US branches of non-US banks vis-à-vis US-incorporated banks in the "swap desk push out provision" (Section 716) of the Dodd-Frank Act may reduce customer choice in the US.

Removal of cross-border business exemptions and requirements for entities to establish a local subsidiary and obtain authorization may reduce willingness of non-EU entities to do business in the EU, reducing competition within the EU and reducing customer choice.

Some firms may need to restructure their group so that they use locally regulated booking entities / risk management entities. This is likely to result in increased costs for that entity, making it less competitive, or in it passing on these increased costs to end clients. In a similar vein, some firms such as non-bank financial companies may have legal structures that differ from bank holding companies; this can result in unique regulatory challenges for the non-bank such as how regulatory capital is calculated.

Problems in this area can also reduce the ability of developing countries to access funding from developed markets.

Regulatory reforms which apply differentially as between participants on the basis of location or origin distort the provision of services, fragment markets and distort competition in those markets. There is insufficient recognition that financial markets (especially those for instance in derivatives) are global, and are inhabited by global firms offering global capabilities and scale, seeking to compete on a level basis wherever they serve clients.

<u>Examples of legislation or regulation which may distort competition or reduce consumer choice are</u>:

In the EU: the potential restriction on EU firms using "unendorsed" non-EU credit ratings for regulatory capital purposes, the proposed mandatory requirements for issuers to rotate their appointed CRAs and the requirements for harmonised rating scales, all under proposed changes to Regulation 1060/2009 (section **1**); the restrictions on the activities of non-EU fund managers in the EU under the Alternative Investment Fund Managers Directive (section **2**); the Capital Requirements Directives 2, 3 & 4 (sections **4**, **5** and **6**); requirements of the European Market Infrastructure Regulation (sections **7**, **8**, **9** and **10**) and the Markets in Financial Instruments Directive (section **14**)

In the US: the proposed rules on determining systemic significance (section **16**); the FDIC funding requirements (section **17**); the proposed elimination under Section 939 DFA of the use of external credit ratings: for example, in calculating regulatory capital requirements for securitisations - this results in more punitive and risk-insensitive weightings in the US than in Europe; the removal of the private advisor exemption from the Investment Company Act (section **18**); the restrictions on proprietary trading under the Volcker rule (section **19**); and the proposed Rule 127B on conflicts of interest in securitisation transactions which could prohibit securitisation activity of a European affiliate whether or not it was involved in a securitisation in the US.

In addition, in the US, the swap dealer registration requirements for non-US entities who deal with US clients would seem to lead to US margin and other requirements applying to *all* business done by that non-US entity, including business it does with non-US clients. This will put such entities at a potentially significant competitive disadvantage relative to those institutions which deal with the same non-US client base but do not have to register as a Swap Dealer (because they do not face US clients) (sections **22** and **23**).

4. Unintended impact on clients / counterparties who are not directly subject to regulation

Some regulatory obligations imposed on regulated entities may also have an impact on clients or counterparties who are not directly subject to the relevant obligations. For example, if a financial counterparty in the EU is required to clear a trade, its counterparty (unless it is a counterparty that is exempt from EMIR or from the EMIR clearing requirement) will not have a choice about whether the trade is cleared or not. Similarly, while the EMIR text may be read to imply that margin requirements could – on occasion- be imposed on only one counterparty to a trade, this will have an impact on the other counterparty regardless of whether they are also subject to margin requirements. This may result in increased costs or reduced choice for clients.

Examples of legislation or regulation which may have an impact on clients or counterparties who are not directly subject to regulation are:

In the EU: the clearing and risk mitigation requirements under the European Market Infrastructure Regulation (sections **7** and **8**); the mandatory rotation of CRAs proposed under Regulation 1060/2009 (section **1**).

In the US: the requirements of the Foreign Account Tax Compliance Act (section **32**) and the single counterparty credit limit under section 165 notice of proposed rulemaking (NPR) could have an unintended impact on clients and counterparties as the 25% and 10% limits cause bank holding companies to unwind their positions.

5. Lack of process for mutual recognition or comparability

Some provisions of the proposed EU legislation contain requirements for mutual recognition and in some cases for Treaties to be negotiated between states (e.g. EMIR / trade repository recognition). In principle, mutual recognition is a valuable arrangement as a means to make regulation more efficient and to avoid having multiple sets of regulation applicable to a single legal entity. However, without a defined process for attaining such recognition, negotiating treaties may take a long time, or may never happen. Proposals do not seem to be being built into legislation in recognition of this and to address the problem. For example it would seem that it will simply not be possible to use a trade repository in a jurisdiction where there is no treaty with the EU.

Even if no Treaty is required, obtaining formal mutual recognition may depend on all sorts of political factors and it may, for example, be more appropriate for regulators to be able to make judgments

regarding which jurisdictions provide for an appropriate and comparable level of regulation, or to build in an element of flexibility regarding the criteria for recognition.

In principle, therefore, although mutual recognition clearly has an important potential role in reducing the problems to which extraterritorial measures can give rise, it does bring with it a number of challenges that we would urge regulators to take into account. It would be useful, in particular, for legislators and regulators to plan how they will manage the mutual recognition process before implementing any regulation or legislation requiring mutual recognition.

Requirements for exactly "equivalent" regulation or legislation run into similar problems: regulation may not be exactly equivalent in other jurisdictions for a number of reasons e.g. requirements of local law make it impossible for identical regulation to be imposed, the local market is not yet sufficiently developed for identical regulation to be imposed, or the different characteristics of locally originated assets, local business models or local financing structures. A broader concept of equivalence should be built in referring to *the effect* of the regulation or legislation. In addition, as is the case for mutual recognition, there must be a clear process in place for making comparability determinations (i.e. standards/factors). Without such process, there will continue to be a great deal of uncertainty as to the circumstances which give rise to findings of comparability.

Examples of legislation or regulation which lack a clear process for mutual recognition or findings of comparability are:

In the EU: Regulation 1060/2009 on CRAs (section **1**); the Alternative Investment Fund Managers Directive (section **2**); and the European Market Infrastructure Regulation (section **10**).

In the US: Dodd-Frank Act Sec. 712 – "Definitions of a swap and swap dealers"'; Sec 721 – "Registration of swap dealers"; Sec 725 – "Derivative Clearing Organisations"; Sec. 733 – "Swap Execution Facilities"; Sec. 738 – "Foreign Boards of Trade", and Sec. 763 – "Amendments to the Securities Exchange Act of 1934 - Section 3C – "Clearing of Security-Based Swaps" (sections **22** and **25**).

6. Regulatory uncertainty and disproportionate compliance burden

This seems to be an issue both in the EU, where legislation has been proposed giving regulators broad powers to impose temporary emergency restrictions, and in the US, where cross-border aspects of Dodd-Frank implementing regulation have been delayed. As we saw with the emergency short selling bans / reporting regimes imposed in 2008 / 2009, this sort of power can lead to uncertainty for the firms required to comply. They are required to monitor the situation in all countries where they trade, and may be required to set up systems on short notice to comply (or to report / monitor their systems manually if the ban / reporting requirement is only temporary). This can make firms reluctant to trade in particular markets to the detriment of their clients.

Where local regimes have different territorial scope, it can make monitoring and compliance far harder (e.g. a firm would not just have to monitor the markets in which it is trading, but may also have to monitor local regulation in other jurisdictions where a particular security is listed, or where a particular entity is established). Where the extraterritorial scope of emergency powers is unclear (e.g. EU short selling regulation emergency powers), it may be almost impossible for firms to predict which jurisdictions they should be monitoring.

More generally, cases can arise where the precise effect of an extraterritorial rule has to be understood in order for a firm to determine what restructuring is necessary. When implementation dates are set, this aspect is not always recognised.

Examples of legislation or regulation which may result in regulatory uncertainty are:

In the EU: the Short Selling Regulation (section **11**) and the Markets in Financial Instruments Directive (section **14**)

In the US: Application of Section 165 Dodd-Frank (SIFIs requirements) to non-US banks (Fed proposal still pending), Title VII of the Dodd-Frank Act (where SEC and CFTC have announced, but still not proposed, guidance on the cross-border aspects) (section **25**), the application of the Volcker rule (US regulators' October 2011 proposal contained 1,300 questions and was even mute on some aspects such as the compliance regime for non-US banks with US operations, while the statutory deadline for a final rule is July 2012), statutory oversight resulting in discrimination of US branches of non-US banks in swap desk push out rule (Section 716 Dodd-Frank Act) may not be corrected either by Fed or US Congress before statutory implementation deadline (July 2013).

Some legislation with extraterritorial effects has particularly high implementation burdens relative to the benefits being sought.

A general difficulty that gives rise to cost burdens is the case where the timing of implementation in different jurisdictions is not aligned, which creates uncertainty about how cross-border transactions should be dealt with in the interim period.

Examples of legislation or regulation which may result in disproportionate compliance burden:

In the EU: the requirements of the Markets in Financial Instruments Directive (section **14**)

The proposed revision of the EU Markets in Financial Instruments Directive (MiFID/MiFIR) would severely curtail access to the EU for financial firms from outside the EU. In particular, equivalence and reciprocity requirements and the need to establish branches for services into the EU will reduce product offering and hence consumer choice without commensurate increases in consumer protection.

In the US: the requirements of the Foreign Account Tax Compliance Act (section **32**), which will require non-US financial institutions to implement unprecedented customer due diligence, documentation, reporting and certification measures.

ANNEX 3

Table: EU and US Regulatory Reform Programme – Extraterritoriality Issues

The financial crisis has triggered a broad ranging programme of regulatory reform in both the EU and the US. However, the legislation currently being adopted or implemented will have effects beyond the EU or US borders and the purpose of this note is to highlight the principal areas of potential extraterritorial impact.

The US Dodd-Frank Act creates a legal framework which requires extensive rule-making by the US regulators responsible for its implementation. However, in many cases the implementing rules have been proposed but not yet adopted and are still under discussion.

The EU legislative programme is less advanced. The EU programme is being implemented by a series of separate pieces of legislation and in only in a few cases has the legislation been finally adopted. In many cases, the EU legislation is still in the process of negotiation or has not yet been formally proposed. Even after primary legislation has been adopted, the final impact may often depend on implementing EU directives or regulations or national implementation rules.

Therefore, at this stage, it is not possible fully to assess the extraterritorial impact of the legislation in either the US or the EU. However, in many cases, the existing proposals indicate areas of possible extraterritorial impact.

This note is not intended to be comprehensive or to provide legal advice on any particular course of action.

EU Legislation and Legislative Proposals

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
1.	**Regulation on credit rating agencies (CRAs) (EC) No. 1060/2009** **(Adopted and being implemented, Directive and Regulation have been proposed reforming the original regulation)**	Restriction on EU firms using ratings issued by non-EU CRAs for regulatory purposes (unless the rating is endorsed by an EU affiliate of the CRA or the CRA is certified as equivalent)	Restriction on reliance on non-EU ratings by EU users Reduced ability of EU firms to use ratings issued by non-EU CRAs for regulatory purposes, possible reduction in availability of ratings for non-EU instruments, reduction in willingness of EU firms to invest in instruments which are only rated by non-EU CRAs	The restrictive nature of the conditions for endorsement may make it difficult for major CRAs to endorse the ratings produced by all their affiliates, particularly those in countries that have not yet adopted legislation regulating CRAs
2.	**Alternative Investment Fund Management Directive** **(Adopted and being implemented)**	Restrictions on non-EU fund managers marketing alternative investment funds in the EU	Restrictions on provision of cross-border services to EU investors Reduced competition and reduced choice for investors in the EU, reduced ability for non-EU funds to raise capital in the EU (particularly from the retail market)	Impact may be mitigated by transitional provisions and potential passport arrangements for non-EU AIFM
3.		Requirements for non-EU fund managers managing EU alternative investment funds to be authorised in the EU	Restriction on cross-border services to EU funds EU funds will have reduced access to non-EU managers, fewer options for fund structures, possibility that existing EU funds with non-EU managers may be required to restructure	May be limited number of fund managers affected
4.	**Capital Requirements Directive 2 &**	Requirements for banking groups (or sub-groups) whose head office is in the EU to apply the provisions	Application of requirements to non-EU subsidiaries of EU persons EU groups' ability to compete in non-	Non-EU subsidiaries of EU groups may also be subject to a duplicative local regime

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
	3 - 2009/111/EC and 2010/76/EU **(Adopted and largely implemented)**	on remuneration to all entities (including non-EU entities) in the group/sub-group, subject to limited exceptions	EU markets is adversely affected to the extent that EU requirements are more restrictive	
5.		Other requirements, including "skin in the game" and trading book capital requirements, also apply to all entities (including non-EU entities) in a group/sub-group headed by an EU entity	Application of requirements to non-EU subsidiaries of EU persons EU groups' ability to compete with non-EU firms (both within and outside the EU) is adversely affected to the extent that EU requirements are more burdensome	Implements "Basel 2.5" Non-EU subsidiaries of EU groups may also be subject to local capital requirements
6.	**Capital Requirements Directive 4** **(Formally proposed)**	Higher capital requirements likely to apply to all entities (including non-EU entities) in a group/sub-group headed by an EU entity	Application of prudential requirements to non-EU subsidiaries of EU persons EU groups' ability to compete with non-EU firms (both within and outside the EU) is adversely affected to the extent that EU requirements are more burdensome	Will implement Basel III, including the additional buffer for globally systemically important banks Non-EU subsidiaries of EU groups may also be subject to local capital requirements
7.	**European Market Infrastructure Regulation (Derivatives and CCPs)** **(Formally proposed – under negotiation between Council and Parliament)**	Obligation on EU counterparties subject to the clearing obligation to clear transactions in eligible derivatives entered into with certain categories of non-EU person Obligations will also apply to transactions entered into between	Becoming more difficult to provide services on a cross-border basis (due to increased costs for counterparties becoming subject to the clearing obligation or difficulties connected with third party also being subject to local requirements) Possible impact on intra-group risk management EMIR contract obligations may	EU requirements may not be acceptable to counterparties (in particular where local requirements to clear on a CCP not recognized in the EU) Intra-group exemptions available in limited circumstances, including where the counterparty is established in a jurisdiction which the Commission considers to have in place equivalent obligations to those under EMIR

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		certain categories of non-EU person	apply to contracts between two entities established outside the EU where the contract has a direct, substantial and foreseeable effect within the EU or where the obligation is necessary or appropriate to prevent evasion of EMIR. This has potential implications for entities that may well be subject to requirements in other jurisdictions.	
8.		Obligation on EU counterparties to adopt risk mitigation techniques, including margin, in relation to transactions with any counterparty (including non-EU persons) Obligations will also apply to transactions entered into between certain categories of non-EU person	Becoming more difficult to provide services to non-EU persons Reduction in competitiveness of EU firms in jurisdictions with differing/no similar margin requirements for particular counterparties, cost implications for intra-group risk management	EU requirements may not be acceptable to counterparties (e.g. where local counterparties are exempt from local margin rules) Intra-group exemptions available in limited circumstances, including where the counterparty is established in a jurisdiction which the Commission considers to have in place equivalent obligations to those under EMIR
9.		Obligation on EU counterparties to clear eligible contracts, report transactions and risk manage uncleared transactions may apply to non-EU branches of EU counterparties	Application of EU provisions to non-EU branches of EU persons Possibility that non-EU branches may be subject to duplicative or inconsistent regulation, where they are regulated by the EU and also by the jurisdiction where they are established. This may result in increased compliance costs or prevent non-EU branches from carrying on some kinds of activity	Also it is unclear the extent to which these rules apply to the activities outside the EU of non-EU persons with a branch in the EU

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
			Reduction in competitiveness of EU firms if they are required to post collateral 'one-way' while non-EU firms are not required to do so for similar transactions (with clearing/margin-exempt firms)	
10.		Restriction on non-EU CCPs providing services to clearing members/clients established in the EU unless CCP recognised by ESMA as subject to equivalent regulation	Restriction on non-EU persons providing services to EU persons Reduced competition and reduced choice for firms in the EU. May also prevent EU firms from carrying on business in some markets if they cannot become members of the relevant CCP	May also restrict non-EU CCPs providing services to non-EU firms acting outside the EU if the firm maintains a branch in the EU
11.	**Short Selling Regulation** **(Text is adopted, comes into force in November 2012)**	Private disclosure to EU competent authority of any net short position in EU shares or sovereign debt or uncovered positions in sovereign CDS (when the ban on uncovered CDS is suspended) above certain thresholds Public disclosure of any net short position in EU shares above specified threshold Ban on uncovered short sales of EU shares and sovereign debt and uncovered sovereign CDS	Application of EU requirements to persons outside the EU Increased compliance costs for firms required to comply with multiple regimes, public disclosure requirement may reduce willingness of non-EU firms to trade in EU shares	Text explicitly states that disclosure obligations apply to persons outside the EU as well Proposal does not specify the territorial scope of the restriction on uncovered short sales of EU shares and sovereign debt and uncovered sovereign CDS or the possible additional restrictions that can be imposed in exceptional circumstances (the latter, at least, may also have extraterritorial effect)

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		Additional restrictions may be imposed in exceptional circumstances		
12.	**Regulation on energy market integrity and transparency** **(Adopted, came into force 28 December 2011)**	Prohibition of insider dealing in energy products and market manipulation on EU wholesale energy markets Transaction reporting and registration regime for market participants	Application to persons outside the EU	Unclear whether prohibition against insider dealing is intended to be limited to dealings on or related to EU wholesale energy markets (or applicable generally) Increased compliance costs for firms required to comply with multiple regimes, concerns about sanctions for breach may lead non-EU firms to avoid trading in EU wholesale energy markets
13.	**Market Abuse Regulation and Market Abuse Directive II** **(Formally proposed)**	Current directive applies to persons outside the EU Proposed regulation would extend the scope of the market abuse regime to a wider range of instruments and behaviours Proposed directive would create a criminal market abuse regime	The proposed regulation applies to activity within and outside the EU in relation to the relevant instruments	Increased compliance costs for firms required to monitor behaviour in relation to an increased range of instruments Uncertainty about which instruments are within scope of the regime
14.	**Markets in Financial Instruments Directive II and Markets in**	Requirement for third country investment firms to seek authorization for branches in the	Removal of existing national exemptions for cross border business	Reduced ability for third country investment firms to deal with EU clients and

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
	Financial Instruments Regulation **(Formally proposed)**	EU Requirement for third country investment firms providing cross border services into the EU to register with ESMA (and to restrict cross-border business to eligible counterparty business) Persons established in the EU may receive investment services from a third country firm at their own exclusive initiative and in these circumstances the services should not be deemed as provided in the territory of the Union [delete. Retail clients may only receive investment services from a third country firm if it has a branch in the EU]. Third country investment firms may only obtain authorization for branches or register with ESMA if the third country provides for equivalent regulation and reciprocal recognition Obligation to conclude transactions in eligible derivatives contracts on regulated markets, MTFs, OTFs or third country trading venues (where the third country provides for	Lack of clarity regarding when a person in the EU would be considered to receive investment services "only at their exclusive initiative" Lack of clarity regarding treatment of existing relationships between third country investment firms and EU clients and counterparties Barrier to cross border business as EU firms may not be able to trade on a trading venue with non-EU firms if those non-EU firms are not able to access EU trading venues. May also prevent EU firms from carrying on business in some markets if they cannot access a relevant third country trading venue	counterparties Potential for unequal application of MiFID II to EU and non-EU firms, as it is not clear whether the exemptions available to EU firms under MiFID II will also be available to non-EU firms wishing to provide cross border services into the EU Requirement for "equivalence" and "reciprocity" likely to restrict the number of third country firms which are able to register with ESMA or establish a branch in the EU

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		equivalent regulation and reciprocal recognition)		
15.	**New EU Data Protection Framework**	Updating of 1995 EU legislation to take account of technological advances. Concepts include “privacy by design” and “right to be forgotten”. Increased burden on all firms to demonstrate compliance. Maximum fine of 2% of global turnover.	ET effect applies to all entities offering goods or services to individuals in the EU.	

Dodd-Frank Act and Related Rules

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
16.	**Determination of systemic significance** **(Final rule)**	A non-US bank with US banking operations would be treated as systemically significant if it has US$50bn or more in consolidated global assets	Potential limit on activities of non-US banks in the US Enhanced prudential requirements, increased capital and compliance costs	Would apply Act's enhanced prudential requirements to non-US banks on the basis of global assets, irrespective of how significant their operations are in the US
17.	**FDIC funding** **(Implemented rules)**	FDIC authorized to charge US banks risk-based assessments by reference to the bank's consolidated total assets minus average tangible equity	Potential limit on US activities of non-US banks Potential constraint on activities of US banks outside the US	Only applies to US banking entity and its subsidiaries (not the holding company)
18.	**Investment advisers** **(Final rules)**	Act eliminates private adviser exemption from Investment Advisers Act	Restriction on activities of non-US advisers who have US clients or who advise funds with US investors Increased costs (including registration and compliance costs) for non-US advisers that register under the Advisers Act, or reduced ability to accept US clients and fund investors	Narrow exemption for non-US advisers may not mitigate these effects due to low thresholds Exemption for non-US advisers that manage only private funds in the US is broader, but conditional on annual reporting to the SEC Many non-US advisers may have to register in the US or alter their business model
19.	**"Volcker rule"[2]** **(Proposed rules)**	Prohibition on proprietary trading and sponsorship and investment in hedge funds and private equity funds by banks and their affiliates	Application to non-US affiliates (and branches) of US banks and non-US banks with US operations Requirements may distort competition because US requirements not matched by	

[2] Title VI

			corresponding requirements in other countries	
20.		Limited exception for proprietary trading: Non-US banks may conduct proprietary trading if it is "solely outside the United States". This exception is not available to non-US branches or affiliates of US banks	Impact on activities outside the US of non-US banks which have a presence in the US	Non-US banks may be prohibited from trading any assets if there is some interaction with a US entity (e.g. the use of a US broker, US execution facility or trading personnel)
21.		Limited exception for funds: Non-US banks may invest in and/or sponsor a fund "solely outside the United States" if such fund is not offered to any US persons. This exception not available to non-US branches or affiliates of US banks.	Impact on activities outside the US of non-US banks which have a presence in the US	Offshore funds would effectively be discouraged from selling to US investors because such sales would result in prohibitions on investment in or sponsorship of the funds by foreign banks
22.	**Registration requirements** **(Final rule)**	Non-US swap dealers and major swap participants (MSPs) required to register with CFTC/SEC if they conduct business with US persons	Restriction on activities of non-US swap dealers or MSPs with US clients and counterparties	Non-US swap dealers or MSPs that register may be subject to capital requirements and inspection and supervision by US regulators, as well as other requirements (such as margin rules for uncleared transactions)
23.	**Margin requirements** **(Proposed rules)**	Non-US branch or subsidiary of a US bank (or other entity) that registers as a swap dealer would have to comply with US margin requirements for all its swaps, including swaps with non-US counterparties Non-US entities that register as swap dealers would have to comply with US margin requirements for swaps with US persons, including non-US branches of	Restriction on activities of non-US branches or subsidiaries with non-US persons Restriction on activities of non-US swap dealers with US clients and counterparties	Non-US branches or subsidiaries of US banks at a competitive disadvantage with respect to non-US clients as against non-US banks No exemption for inter-affiliate transactions

		US banks (or guaranteed by US persons) US swap dealers would have to comply with US margin requirements for all swaps, including swaps with non-US persons	Restriction on activities of US swap dealers with non-US clients and counterparties	
24.	**Capital requirements for non-bank swap dealers and security based swap dealers**	The CFTC and SEC must impose capital requirements for non-bank swap dealers and security-based swap dealers. (Title VII, Section 731)	Sophisticated non-bank financial companies could be subject to grid or haircuts if unable to use risk based capital calculations and placed at a competitive disadvantage.	Non-US persons registered as non-bank swap dealers/security based swap dealers should be permitted to comply with capital requirements established by home/host country regulators so long as the home/host country is a signatory to the Basel Accords. Swap dealers should be permitted to use internal models for computing market risk and counterparty credit risk charges for capital purposes if such models have been approved by a foreign regulatory authority and are subject to periodic assessments by such foreign regulatory authority
25.	**Extraterritorial reach of Title VII and registration requirements for swap dealers**	The CFTC adopted regulations to establish a registration process for swap dealers and major swap participants (Title VII, Section 721) and will soon finalize rules defining a swap and swap dealer (Section 712) without defining the extraterritorial reach of Title VII (Section 722)	Provisional registration without knowing the extraterritorial reach of Title VII will require costly, disruptive and time consuming legal restructuring involving extensive redocumentation of client agreements, reallocation of scarce capital, reassignment of personnel and expensive systems redevelopment.	The CFTC should limit the extraterritorial reach of Title VII and work with other jurisdictions to harmonize the rules where possible and avoid conflicting and duplicative rules as necessary.
26.	**Position limits, large trader reporting** **(Final rules)**	Rules imposing aggregate position limits on 28 physical commodities traded on exchanges/SEFs/foreign boards of trade and certain OTC swaps Spot month limits will come into effect 60 days after further definition of	Will apply to non-US entities trading on markets in the US or with US counterparties in certain OTC swaps	Definition of "bona fide hedge" is narrowed: may result in increased volatility and decreased ability to hedge

		"swap" is finalised Bona fide hedges in physical commodities are excluded Reporting obligation for certain OTC swaps		
27.	**Swap trading and sales compliance** **(Proposed rules and self-actuating provisions)**	Rules on manipulation and anti-fraud provisions (Title VII section 753)	May apply to non-US transactions with an effect on the US market or on US investors	Could apply to non-US transactions if the CFTC took the view that there was (i) an effect on the US market or on US investors or (ii) if there was significant conduct in the US. Historically regulators (including the CFTC) have taken aggressive views regarding the extent of their extra-territorial jurisdiction. The CFTC could try to claim jurisdiction over non-US OTC interest rate swaps even if not cleared/executed in the US if the CFTC felt there was an effect on US markets or if there was fraud/manipulation committed in the US.
28.	**Swap desk push out requirement (Section 716 Dodd-Frank Act)**	Prohibits federal assistance (i.e. access to Fed facilities like discount window and FDIC insurance / guarantees) to registered swap dealers	US branches of non-US banks would have to push out more swap business, if they want to retain Fed discount window access, than US-incorporated banks, which may continue swap activities related to bona fide hedging and traditional banking activities.	Discriminates US branches of non-US banks in the US swap market. Statutory oversight may not be corrected by Fed (regulatory implementation is due July 2013); doubtful whether Congress will approve correcting amendment (such as contained in current H.R. 1838 including the Representative Himes amendment).
29.	**Credit rating agencies** **(Proposed rules)**	Requirements apply to non-US CRAs registered in the US	Affects global activities of CRAs registered in the US	
30.	**Credit risk retention** **(Proposed rules)**	Securitisers must retain a relevant economic interest (Subtitle D of Title IX, section 941) Any securitiser to retain not less than 5%	Applies to non-US transactions subject to a safe harbour	Applies both to transactions registered with the SEC under the Securities Act 1933 and to those exempt from registration. As a result, these restrictions will apply both to public and private transactions in the US

		of the credit risk for certain assets		(with a very limited safe harbour for non-US transactions selling only a small portion into the US).
31.	**Conflicts of Interest** **(Proposed Rule)**	Securitisation transactions participants and their subsidiaries and affiliates are not to engage in any transaction that would involve or result in any material conflict of interest with respect to any investor in a transaction arising out of such activity. (Section 621)	Applies to all affiliates and subsidiaries of securitisation participants regardless of location.	Applies to both cash and synthetic asset-backed securities transactions. Applies both to transactions registered with the SEC under the Securities Act 1933 and to those exempt from registration. As a result, these restrictions will apply both to public and private transactions in the US.
32.	**Foreign Account Tax Compliance Act** **(Self-actuating provisions, delayed effective date)**	Financial institutions outside the US must submit annual reports to the US Treasury on their US clients and corporates with individual beneficial owners who own at least 10% of the equity and who are US taxpayers.	Directly targeted at firms outside the US. More than one hundred thousand non-US companies (Foreign Financial Institutions, or FFIs) which are active in the financial services sector will be affected. FFIs will have to comply with both the laws of their own jurisdiction and also with FATCA. FFIs will be faced with the choice of complying with either local law or US law.	Firms will suffer a 30% withholding tax on US source income and on sale proceeds of US assets under FATCA. Firms will be forced to close the accounts of non-compliant US account holders, although this may breach local equalities legislation. FATCA will require FFIs to implement unprecedented customer due diligence, documentation, reporting and certification measures. The compliance burden will be disproportionate. An Ernst and Young survey of 12 Tier I financial firms noted (i) they each had an average of 26 million accounts of which 62,000 were US FATCA accounts, and (ii) each firm faced an average FATCA implementation cost of €179 million. Proposed FATCA guidance for pass thru payments will be extremely burdensome if not outright unfeasible. .
33.	**Office of Financial Research**	US Treasury has established the OFR to gather transaction and position data from	US branches and affiliates of non-US banks will be subject to the	The OFR has the authority to require financial companies to submit "periodic or

	(OFR)	other government agencies and financial companies	OFR's data collection requirements	other reports" to assess threats to the financial stability of the US
34.	**Orderly Liquidation Authority / Living wills** **(Proposed & final rules)**	Any non-US banking organization with US banking operations and $50 billion or more in total worldwide consolidated assets will be subject to the US "living wills" requirements, including requirements to provide extensive information to US regulators.	Impact on non-US banking organization operating in the US even if US operations are minimal	The US regulators intend to use the Living Wills as a supervisory tool. Information provided through the relevant reporting requirements may result in heightened supervisory scrutiny. US regulators may insist on funding strategies that support US entities to the detriment of non-US affiliates. A deficient living will may subject the covered company (or any of its subsidiaries) to more stringent capital, leverage or liquidity requirements, or impose restrictions on its growth, activities or operations. Failure to remedy deficiencies within two years could lead to an order by the regulators to divest assets or operations as necessary to facilitate an orderly resolution.

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
35.	**Determination of systemic significance** **(Proposed rules)**	A non-US bank with US banking operations would be treated as systemically significant if it has US $50bn or more in consolidated global assets	Potential limit on activities of non-US banks in the US Enhanced prudential requirements, increased capital and compliance costs	Would apply Act's enhanced prudential requirements to non-US banks on the basis of global assets, irrespective of how significant their operations are in the US
36.	**FDIC funding** **(Implemented rules)**	FDIC authorized to charge US banks risk-based assessments by reference to the bank's consolidated total assets minus average tangible equity	Potential limit on US activities of non-US banks Potential constraint on activities of US banks outside the US	Only applies to US banking entity and its subsidiaries (not the holding company)
37.	**Investment advisers** **(Final rules)**	Act eliminates private adviser exemption from Investment Advisers Act	Restriction on activities of non-US advisers who have US clients or who advise funds with US investors Increased costs (including registration and compliance costs) for non-US advisers that register under the Advisers Act, or reduced ability to accept US clients and fund investors	Narrow exemption for non-US advisers may not mitigate these effects due to low thresholds Exemption for non-US advisers that manage only private funds in the US is broader, but conditional on annual reporting to the SEC Many non-US advisers may have to register in the US or alter their business model