Global Financial Markets Association[1]

Regulatory Reform Programme – Extraterritoriality Issues in US and EU

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 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 1.1**).

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

[1] 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, visit http://www.gfma.org.

to ensure compliance with the various requirements). There 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**)[2]; 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 Regulation on energy market integrity and transparency (section **12**).

In the US: the proposed US rules on credit rating agencies (section **30**); the registration requirements for non-US swap dealers and major swap participants under Dodd Frank (section **23**); the provisions for credit risk retention under Dodd Frank (section **31**); and the reporting obligations imposed by the Office of Financial Research (section **34**).

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.

[2] 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 **20**); the margin requirements under Title VII of Dodd Frank (section **24**); the position limits under Title VII of Dodd Frank (section **27**); the provisions for credit risk retention under Dodd Frank (section **31**); 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 restriction on EU firms using "unendorsed" non-EU credit ratings for regulatory capital purposes, the mandatory requirements for issuers to rotate their appointed CRAs and the requirements for harmonised rating scales, all under 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**); and 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 rules on determining systemic significance (section **17**); the FDIC funding requirements (section **18**); the 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 **19**); the restrictions on proprietary trading under the Volcker rule (section **20**); 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, absent the providing of substituted compliance, if available. 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).

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 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.

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

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

In the US: the requirements of the Foreign Account Tax Compliance Act (section **33**) and the single counterparty credit limit under section 165 notice of proposed rulemaking.

5. Lack of process for mutual recognition or comparability

Some provisions of 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. 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.

Proposals do not seem to be being built into legislation in recognition of this and to address the problem. For example, if the Commission does not make an equivalence determination in relation to a particular non-EU jurisdiction, CCPs established in that jurisdiction will not be able to provide clearing services to EU clearing members or trading venues. Where those CCPs have existing EU clearing members, they will need to cease providing services to those EU clearing members before the expiry of the transitional provisions.

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.

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

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 **23** and **26**).

6. Regulatory uncertainty

This seems to be an issue both in the EU and US, arising in various contexts as legislation and regulation are in differing stages of proposals and finalization. In the EU, proposed legislation would give regulators broad powers to impose temporary emergency restrictions. 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.

<u>Examples of legislation or regulation which may result in regulatory uncertainty are</u>:

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

In the US: Application of Section 165 Dodd-Frank (SIFIs requirements) to non-US banks, Title VII of the Dodd-Frank Act (section **26**), 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).

<u>Examples of legislation or regulation which may result in disproportionate compliance burden</u>:

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 **33**), which will require non-US financial institutions to implement unprecedented customer due diligence, documentation, reporting and certification measures.

ANNEX 1.1

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. 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 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

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
4.	**Capital Requirements Directive 2 & 3 - 2009/111/EC and 2010/76/EU** **(Adopted and implemented)**	Requirements for banking groups (or sub-groups) whose head office is in the EU to apply the provisions on remuneration to all entities (including non-EU entities) in the group/sub-group, subject to limited exceptions	Application of requirements to non-EU subsidiaries of EU persons EU groups' ability to compete in non-EU markets is adversely affected to the extent that EU requirements are more restrictive	Non-EU subsidiaries of EU groups may also be subject to a duplicative local regime The requirements on remuneration are being further amended under CRD 4
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** **(Final text has been agreed, expected to enter into force 1 January 2014)**	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)**	Obligation on EU counterparties subject to the clearing obligation to clear transactions in eligible derivatives entered into with	Becoming more difficult to provide services on a cross-border basis (due to increased costs for counterparties becoming subject to	EU requirements may not be acceptable to counterparties (in particular where there are local requirements to clear on a CCP not recognized in the EU)

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
	(In force since August 2012)	certain categories of non-EU person EMIR clearing obligation may apply to contracts between two entities established outside the EU where the contact has a direct, substantial and foreseeable effect within the EU or where the obligation is necessary or appropriate to prevent evasion of EMIR.	the clearing obligation or difficulties connected with third party also being subject to local requirements) Possible impact on intra-group risk management Obligations may also apply to transactions entered into between certain categories of non-EU person. This has potential implications for entities that may be subject to requirements in other jurisdictions.	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 No intra-group exemption available where obligations apply to transactions between two non-EU entities
8.		Obligation on EU counterparties to adopt risk mitigation techniques, including margin, in relation to transactions with any counterparty (including non-EU persons) Obligations may 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, costs 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 No intra-group exemption available where obligations apply to transactions between two non-EU entities
9.		Obligation on EU counterparties to clear eligible contracts, report	Application of EU provisions to	Also it is unclear the extent to which these rules apply to a non-EU person

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		transactions and risk manage uncleared transactions apply to non-EU branches of EU counterparties	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 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)	with a branch in the EU (either to that EU branch or to the non-EU activities of that person)
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** **(In force since November 2012)**	Private disclosure to EU competent authority of any net short position in EU shares or sovereign debt or uncovered	Application of EU requirements to persons outside the EU Increased compliance costs for firms required to comply with	Text explicitly states that disclosure obligations apply to persons outside the EU as well Proposal does not specify the territorial

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		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 Additional restrictions may be imposed in exceptional circumstances	multiple regimes, public disclosure requirement may reduce willingness of non-EU firms to trade in EU shares The market maker exemption is only available to firms who are members of third country markets where the legal and supervisory framework of that third country has been declared equivalent by the Commission	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)
12.	**Regulation on energy market integrity and transparency** **(In force since 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

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
13.	**Market Abuse Regulation and Market Abuse Directive II** **(Formally proposed – under negotiation between Council and Parliament)**	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 Financial Instruments Regulation** **(Formally proposed – under negotiation between Council and Parliament)**	Requirement for third country investment firms to seek authorization for branches in the 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 Third country investment firms	Removal of existing national exemptions for cross border business 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	Reduced ability for third country investment firms to deal with EU clients and 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
		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 equivalent regulation and reciprocal recognition)	relevant third country trading venue	
15.	**New Data Protection Directive and Data Protection Regulation** **(Formally proposed)**	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.	
16.	**New Financial Transaction Tax Directive** **(Formally proposed)**	A financial transaction tax will be charged on transactions in relevant financial instruments where at least one party is a financial institution and at least one party is established in the FTT zone or the issuer of the relevant debt / equity is established in the FTT zone	Application to non-EU entities: Non-EU branches of a financial institution incorporated or with its registered office in the FTT zone will be subject to the FTT. A FTT zone branch of a non-EU financial institution will also be	Concerns about incurring the FTT or failing to pay the FTT where required may lead firms to avoid dealing with entities in the FTT zone or in instruments issued by entities in the FTT zone.

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		(made up of 11 Member States: Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain).	subject to the FTT. A non-FTT zone financial institution will be subject to the FTT where it deals with a counterparty in the FTT zone or in securities issued by an entity established in the FTT zone.	

Dodd-Frank Act and related rules

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
17.	**Determination of systemic significance** **(Final 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
18.	**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)
19.	**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

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
20.	**"Volcker rule"[3]** **(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 corresponding requirements in other countries	
21.		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)
22.		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

[3] Title VI

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
23.	**Swap dealer/Securities-based swap dealer registration requirements** **(Final rules)**	CFTC: Non-US swap dealers required to register with CFTC if they conduct swap dealing activity with US persons in excess of *de minimis* level. Non-US major swap participants (MSPs) required to register with CFTC if they conduct swap activity with US persons in excess of certain thresholds. SEC: SBSD/MSBSP registration is currently not required while the SEC works through its cross border and related rulemakings. It similarly will apply to entities conducting a more than a *de minimis* lever of activity.	Restriction on activities of non-US swap dealers or MSPs with US clients and counterparties.	Registered non-US SD/SBSD are subject to entity and transaction requirements, subject to pending proposed cross border treatment. The determination of "de minimis" activity levels will depend on the final US person guidance/rules, and in the case of the CFTC as currently defined in the exemptive order expiring July 12. Exemption for foreign governments, foreign central banks and international financial institutions (i.e. multilateral development banks). From 26 below
24.	**Margin requirements for uncleared swaps** **(Proposed rules)**	CFTC: Non-US branch or subsidiary of a US bank (or other non-US entity) that registers as a swap dealer would have to comply with US margin requirements for <u>all</u> its swaps, but currently exempt until at least July 2013. US swap dealers would have to comply with US margin requirements for all swaps, including swaps with non-US persons. SEC: Non-US SBSD would be subject to entity level requirements (including	CFTC: 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 Restriction on activities of US swap dealers with non-US clients and counterparties SEC: Substituted compliance may be available	CFTC: No exemption for inter-affiliate transactions in proposed rules. SEC: No exemption for inter-affiliate transactions in proposed rules, but specifically asked for comment and is considering. Both rule proposals may be overhauled once the BCBS/IOSCO work on margin requirements for non-centrally cleared swaps is finalised.

	Legislation (status)	Provision	Possible extraterritorial/ business impact	Comment
		margin).		
25.	Capital requirements for non bank swap dealers and security based swap dealers (Proposed rules)	CFTC: Proposed capital rules require swap dealers and MSPs that are not banks or subsidiaries of bank holding companies to maintain a minimum of \$20mm in capital, and potentially additional amounts for market and credit risk. SEC: proposed capital requirements for non-bank SBSD based on existing capital requirements for broker-dealers.	Non-bank SD/SBSD could be subject to grid or haircuts if unable to use risk based capital calculations (models)and therefore be at a disadvantage versus bank SD/SBSD (that can use models)	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 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.
26.	Extraterritorial reach of Title VII (Proposed guidance and rules)	CFTC: CFTC has proposed cross border guidance and, in the mean time, has adopted an Exemptive Order which address some but not all of the issues in the proposed guidance. The order expires July 12, 2013. SEC: proposed rules on cross border application of swap rules, which are open for comment until August 21, 2013.	Both the CFTC and SEC address issues related to definition of US person, registration calculations, application of entity- and transaction-level requirements to non-entities, and approaches to substituted compliance. The two proposals differ in both form and content.	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. Both the CFTC and SEC are participating in global talks with the stated purpose of taking a consistent approach across jurisdictions.
27.	Position limits, large trader reporting	Rules imposing aggregate position limits on 28 physical commodities traded on exchanges/SEFs/foreign	Will apply to non-US entities trading on markets in the US or with US counterparties in certain	Definition of "bona fide hedge" is narrowed: may result in increased

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	(Final rules)	boards of trade and certain OTC swaps Spot month limits will come into effect 60 days after further definition of "swap" is finalized. Bona fide hedges in physical commodities are excluded. Reporting obligation for certain OTC swaps.	OTC swaps	volatility and decreased ability to hedge
28.	**Transaction and business conduct** **(CFTC final rules and self-actuating provisions; SEC proposed rules)**	CFTC: The December 21, 2012 exemptive order allows on-US swap dealers to delay compliance with most CFTC entity-level swap requirements and allows non-US SDs and non-US branches of US SD to delay compliance with transaction-level requirements with non-US persons. (expiresJuly 12, 2013). Non-US SDs must register as SDs to receive relief.. US swap dealers must comply with US business conduct standards for all swaps, including swaps with non-US persons, no exemption. SEC: Rules for internal and external conduct, trading, clearing, etc are not yet final, and it is expected that effective dates will come after until all rules (including cross border) are	CFTC: Non-US swap dealers are required to comply with external business conduct rule for transactions with U.S. counterparties (no potential substituted compliance). SEC: Proposed rules potentially allow substituted compliance for transaction level rules for non-US SBSDs' non-US business.	CFTC: Non-US swaps dealers must amend existing swap documentation with US counterparties or consider using ISDA's DF-Protocol to facilitate compliance with external business conduct requirements.

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		finalized.		
29.	**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 (effective July 16, 2013)	OCC-regulated banks were given the opportunity to apply for and up to two-year compliance delay. This and other relief that may allow banks to continue swap activities related to bona fide hedging and traditional banking activities, applies only to insured depositories; US branches of non-US banks would have to push out more swap business, if they want to retain Fed discount window access. Further, Section 716 could require that foreign banks whose US branches have discount window access push derivatives activities outside the bank globally.	Discriminates against 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). It is unknown at this time whether the Fed will act to grant relief (via the application of the "separate entity doctrine.".
30.	**Credit rating agencies** **(Proposed rules)**	Requirements apply to non-US CRAs registered in the US	Affects global activities of CRAs registered in the US	
31.	**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% of the credit risk for certain assets	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 (with a very limited

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				safe harbour for non-US transactions selling only a small portion into the US).
32.	**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.
33.	**Foreign Account Tax Compliance Act** **(Final Rule, 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.	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. May be agreements with non-US governments on implementation. Without such agreements there may be conflicts between FATCA and local law.	If firm is not FATCA compliant it will suffer a 30% withholding tax on US source income and on sale proceeds of US assets. Firms will be forced to withhold or 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.

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34.	**Office of Financial Research (OFR)**	US Treasury has established the OFR to gather transaction and position data from other government agencies and financial companies	US branches and affiliates of non-US banks will be subject to the OFR's data collection requirements	The OFR has the authority to require financial companies to submit "periodic or other reports" to assess threats to the financial stability of the US
35.	**Living wills** **(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.