Extraterritoriality – progress & problems

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- Let’s recall – the why and who
- Progress to date ... or not?
- A role for IOSCO
- A longer-term vision?
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Looks familiar?

Source: CFTC and EU OTC Derivatives Regulation – An Outcomes-based Comparison (Deloitte, July 2014)
Let’s recall the ‘why’ (1)

Having to comply with rules that are:

- Conflicting
- Duplicative
- Burdensome (for you and your clients)
- Causing a distortion of competition
- In effect defeating the regulatory objective

Because:

- Transactions/products/businesses are global in nature
- Events in foreign jurisdictions can have significant effects at home e.g. Barings, AIG, London Whale
- Lack of trust amongst regulators
- First movers / full speed ahead
- Ignorance of/indifference to issues (national legislators)

But it’s not always a bad thing: see anti-bribery & AML developments
The regulators themselves think there are problems

- **Inadequate inter-jurisdictional processes** and mechanisms for addressing cross-border issues, coordinating proposed rule changes etc.

- **Differentiated approaches** in overarching legislative framework and political priorities.

- Insufficient confidence in shared principles of good regulation and objectives, which in turn prompts **low levels of confidence in foreign regulatory authorities**

- International **standards** that are **insufficiently granular** and a lack of guidance on the implementation of these standards.

- The **absence of an agreed definition** of what is meant by ‘**equivalence**’ or on measurement standards for assessing eligibility for regulatory recognition.

- **Insufficient legal clarity**, particularly around cross-border enforcement.

- Legal constraints on the ability of authorities to **access data** they consider essential.
...and the ‘who’

- G20

- Financial Stability Board (FSB)

- International Monetary Fund (IMF)

- International Organisation of Securities Commissions (IOSCO)

- Bank for International Settlements (BIS) and BCBS, CPSS etc

- A plethora of derivatives bodies:
  - OTC Derivatives Regulators Group (ODRG)
  - OTC Derivatives Working Group (ODWG)
  - OTC Derivatives Supervisors Group (ODSG)
  - OTC Derivatives Regulators Forum (ODRF)

- International Accounting Standards Board (IASB)
Has there really been progress?

**The wider political context**

- EU/US Path Forward – but timelines and ‘teeth’?
- FMRD – but lagging behind and entrenched positions?
- TTIP – but lagging behind, entrenched positions *and* FMRD?
- Benchmarks (IOSCO principles) – but unclear outcome if narrow equivalence interpretation?
- IOSCO – Task Force on Cross-Border Regulation (but timelines and...)  

**Industry work**

- AFME/GFMA
- CBRF
IOSCO – a new opportunity?

The how

- IOSCO Task Force on Cross-Border Regulation\(^1\) – objectives, survey (Sept 2013) and regional roundtables (April 2014)

- Education of legislators

The what

- Build into any rulemaking a commitment to the avoidance of extraterritorial measures (so the focus should be outcomes-based equivalence standards)

- Dialogue at the outset of policy making, with a view to agreeing international standards

- Ongoing contact and a mechanism for resolution of disputes as and when they arise

- Coordination amongst regulators in establishing reasonable implementation timetables

\(^1\)www.iosco.org/news/pdf/IOSCONEWS273.pdf
And longer term?

• International body for peer review, plus sanctioning through “public notice”? (see also FSB announcement re: Venezuela, June 2014)

• International tribunal to arbitrate on disputes and issue sanctions as per the WTO?
Key opportunities (1)

IOSCO

• Consultation (summer 2014)
• 39th annual conference (Rio, 28 Sept - 2 Oct 2014)
• G20 Leaders Meeting (Brisbane, 15-16 Nov 2014)
• By year-end 2014 – a clearer picture?
Key opportunities (2)

Business 20 (B20)

“...The B20 proposes ...”

- improved processes for the development of global rules
- the adoption of high-level principles for regulation
- process reviews to ensure they are ‘fit for purpose’
- enhanced consultation with business communities and
- a better understanding of the impact of regulation on the real economy

“After the completion of implementation of current reforms ... IOSCO should ensure that they have established mechanisms to assess the impact of proposed new reforms, their complementarity (or otherwise) with existing regulations and potential spill-over effects.

“This process could contribute to better dialogues between policymakers and regulators at the initiation of policy making, reasonable rulemaking timelines coordinated across jurisdictions and a process for identifying and bringing together regulators when differences emerge.”

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1B20 report, July 2014
References

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- GFMA Comments to IOSCO on Recommendations on Foundational Principles for Global Coordination in Cross-Border Regulation (March 2014)  
  www.gfma.org/correspondence/item.aspx?id=578

- CBRF submissions to IOSCO (March and May 2014, News tab)  
  www.icsa.bz/

- GFMA Comments to G20 in Support of Global, Consistent Standards and Meaningful Regulatory Reform (Feb 2014)  
  www.gfma.org/correspondence/item.aspx?id=574

- GFMA Regulatory Recognition Approach (Oct 2013)  
  www.gfma.org/correspondence/item.aspx?id=577

- Joint Associations’ Comments to the US Department of Treasury and the European Commission on Extraterritorial Legislation (April 2012)  
  www.gfma.org/correspondence/item.aspx?id=286

The following refer to the ‘Phase One work’ with Clifford Chance:

- GFMA Paper Detailing Extraterritoriality Issues in US and EU (June 2013)  
  www.gfma.org/correspondence/item.aspx?id=482

- GFMA Views on the Impact of US Extraterritorial Legislation on the Asian Markets (June 2013)  
  www.gfma.org/correspondence/item.aspx?id=481
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