MAYER • BROWN

EU and US developments in the regulation of funds and derivative trading

FIRMA 28th National Risk Management Training Conference

Orlando, Florida

Mark Compton
Partner
+44 (0)20 3130 3388
mcompton@mayerbrown.com

Jerome Roche
Partner
+1 202 263 3773
jroche@mayerbrown.com

Monday 28th April, 2014

908773599

Agenda

- Fund Manager Regulatory Developments
  - AIFMD
  - Dodd-Frank Title IV
- Derivative Regulatory Developments
  - EMIR
  - Dodd-Frank Title VII
- Other Financial Services Regulatory Developments
  - MiFID 2

Overview of the AIFMD

- Harmonising regulatory framework across the EU for EEA-established managers of alternative investment funds.
- Applies irrespective of where the AIF is established.
- Contains provisions that apply to non-EU AIFMs marketing AIFs within the EU.
- Implementing Regulation – exemptions, general operating conditions, depositaries, leverage, transparency and supervision.
- EU Commission Q&As.
- National Implementation

Status of the AIFMD

- Entered into force on 21 July 2011.
- Member state implementation by 22 July 2013 - in theory.
- Transitional provision that applies until 22 July 2014.
- Grandfathering provisions.

Impact of the AIFMD: main issues

- Requires AIFMs to be authorised and supervised by their home EU state regulator.
- Capital requirements of at least €125,000 on AIFMs + professional liability cover.
- Subjects AIFMs to governance, risk and conduct of business standards.
- Requires AIFMs to have remuneration policies and practices in place.
- Introduces procedures for independent valuation of AIF assets.
- Imposes restrictions on the delegation of AIFM functions.
- Makes key service providers, including depositaries, subject to regulatory standards.
- Enhances the transparency of AIFMs and the funds they manage.
- “Passport" lets AIFMs manage and market EU AIFs to professional investors throughout the EU.
- Imposes conditions on the management and marketing of non-EU AIFs.

What is an AIF?

- Any collective investment undertaking which:
  - raises capital from investors
  - with a view to investing it
  - in accordance with a defined investment policy
  - for the benefit of those investors

  but not UCITS funds

- It does not matter:
  - what legal form the AIF takes

    "whether constituted under the law of contract, under trust law, under statute, or has any other legal form"
  - whether it is "open-ended" or "closed-ended"
  - whether it is internally managed or externally managed

AIFs: what's in?

- Private equity funds
- Hedge funds
- Investment trusts
- Non-UCITS regulated funds

AIFs: what's out?

- UCITS funds
- Pension funds
- Supranational institutions (e.g. European Central Bank)
- National central banks
- National, regional and local governments and bodies managing funds supporting social security and pension systems
- Employee participation schemes or employee savings schemes

AIFs: what about?

- Single investor funds and managed accounts
  - Should not normally be an AIF
    - Provided constitutionally limited to one investor
    - Unless there are overarching co-investment arrangements
- Ordinary commercial business
  - Should not normally be an AIF
    - Unless business is ‘investing’
    - Not always clear, e.g. how to distinguish a property development company from a real estate fund?
- Joint ventures
  - Should not normally be an AIF, but consider
    - Does it raise external capital?
    - Does it carry on ordinary commercial business?
    - Is there a defined investment policy?
- Securitisation special purpose entities

AIFs: what about? (continued)

- Debt issuers
- Listed companies
- Holding companies
- Group exemption (only investors are group companies)
- Fund-related vehicles such as
  - Carried interest vehicles
  - Co-investment vehicles
  - AIVs
  - AcquisitionCos
    - with/without co-investors

Identifying the AIFM

- What is an AIFM?
  - A legal person whose regular business is managing one or more AIFs
  - ‘Managing AIFs’ means performing at least portfolio management or risk management for one or more AIFs
- Each AIF must have a single AIFM
- Issues
  - Non-discretionary advisers
  - ‘Letter box’ entities

Introducing the geographical dimension

	EU AIFM	Non-EU AIFM
EU AIF		
Non-EU AIF		

Definitions

- ‘EU AIF’ means an AIF which:
  – is authorised or registered in an EU Member State; or
  – has its registered office and/or head office in an EU Member State
- ‘Non-EU AIF’ means an AIF which is not an EU AIF
- ‘EU AIFM’ means an AIFM which has its registered office in an EU Member State
- ‘Non-EU AIFM’ means an AIFM which is not an EU AIFM

So what does it all mean?

	EU AIFM	Non-EU AIFM
EU AIF	• AIFM must be authorised under the Directive • EU marketing passport • Depositary requirement	
Non-EU AIF		

So what does it all mean?

	EU AIFM	Non-EU AIFM
EU AIF	• AIFM must be authorised under the Directive • EU marketing passport • Depositary requirement	
Non-EU AIF	• AIFM must be authorised under the Directive (but not subject to all Directive requirements) • EU marketing under private placement regimes (subject to conditions) and, from 2015 at earliest, EU marketing passport • “Depositary light” • ESMA reviews in 2015 and 2018	

So what does it all mean?

	EU AIFM	Non-EU AIFM
EU AIF	• AIFM must be authorised under the Directive • EU marketing passport • Depositary requirement	• No authorisation under the Directive required or available until 2015 at earliest • EU marketing under private placement regimes (subject to conditions) but access to EU marketing passport once authorised • ESMA reviews in 2015 and 2018
Non-EU AIF	• AIFM must be authorised under the Directive (but not subject to all Directive requirements) • EU marketing under private placement regimes (subject to conditions) and, from 2015 at earliest, EU marketing passport • "Depositary light" • ESMA reviews in 2015 and 2018	

So what does it all mean?

	EU AIFM	Non-EU AIFM
EU AIF	• AIFM must be authorised under the Directive • EU marketing passport • Depositary requirement	• No authorisation under the Directive required or available until 2015 at earliest • EU marketing under private placement regimes (subject to conditions) but access to EU marketing passport once authorised • ESMA reviews in 2015 and 2018
Non-EU AIF	• AIFM must be authorised under the Directive (but not subject to all Directive requirements) • EU marketing under private placement regimes (subject to conditions) and, from 2015 at earliest, EU marketing passport • “Depositary light” • ESMA reviews in 2015 and 2018	• No authorisation under the Directive required to manage • No authorisation under the Directive to market available until 2015 at earliest • EU marketing under private placement regimes (subject to conditions) but access to EU marketing passport once authorised • ESMA reviews in 2015 and 2018

Thresholds, transitional provisions, grandfathering

- Thresholds for mandatory authorisation
  - €500m for managers of non-leveraged funds with no redemption rights in the first 5 years
  - €100m for managers of leveraged funds
- Transitional provisions
  - Existing AIFMs prior to 22 July 2013 have one year to comply
- Grandfathering
  - Closed-ended funds under management before 22 July 2013 that will not make any additional investments after 22 July 2013
  - Closed-ended funds that had a final closing prior to 21 July 2011 and whose fund term expires no later than 22 July 2016 (partial grandfathering)
- Also relevant for non-EU AIFMs

Can non-EU AIFMs continue to market EU AIFs in the EU after 22 July 2013?

- Yes, up to July 2015, subject to national private placement rules.
- However, in order to do so, the following conditions must also be met:
  - Non-EU manager must comply with disclosure and reporting provisions of the AIFMD;
  - If non-EU manager manages an AIF which acquires control of a non-listed company, the provisions of the AIFMD relating to major holdings and control must be complied with;
  - Cooperation arrangements must be in place between the non-EU manager's regulator and regulators of the EU AIF;
  - Cooperation arrangements must be in place between the non-EU manager's regulator and the regulators of the member states where the AIFs are marketed; and
  - Non-EU manager's home country must not be listed as a Non-Cooperative Country and Territory by the Financial Action Task Force.
- Reverse solicitation?
- Pre-Marketing?

National Private Placement Rules

- NPPRs will be driven by the rules in the member state in which it is intended to market.
- To use NPPRs in UK, managers must notify FCA of the intention to market.
- The FCA notification requires confirmation that the management of the AIF complies with certain conditions.
- These UK notification conditions vary depending on whether assets managed are above or below a size.
- Some like Germany and France have abolished or restricted use of NPPRs.
- Others, like Ireland, are similar to UK allowing use of NNPRS on written notification to the regulator.
- Confirm the position in each jurisdiction in which you want to market – still a lot of uncertainty.

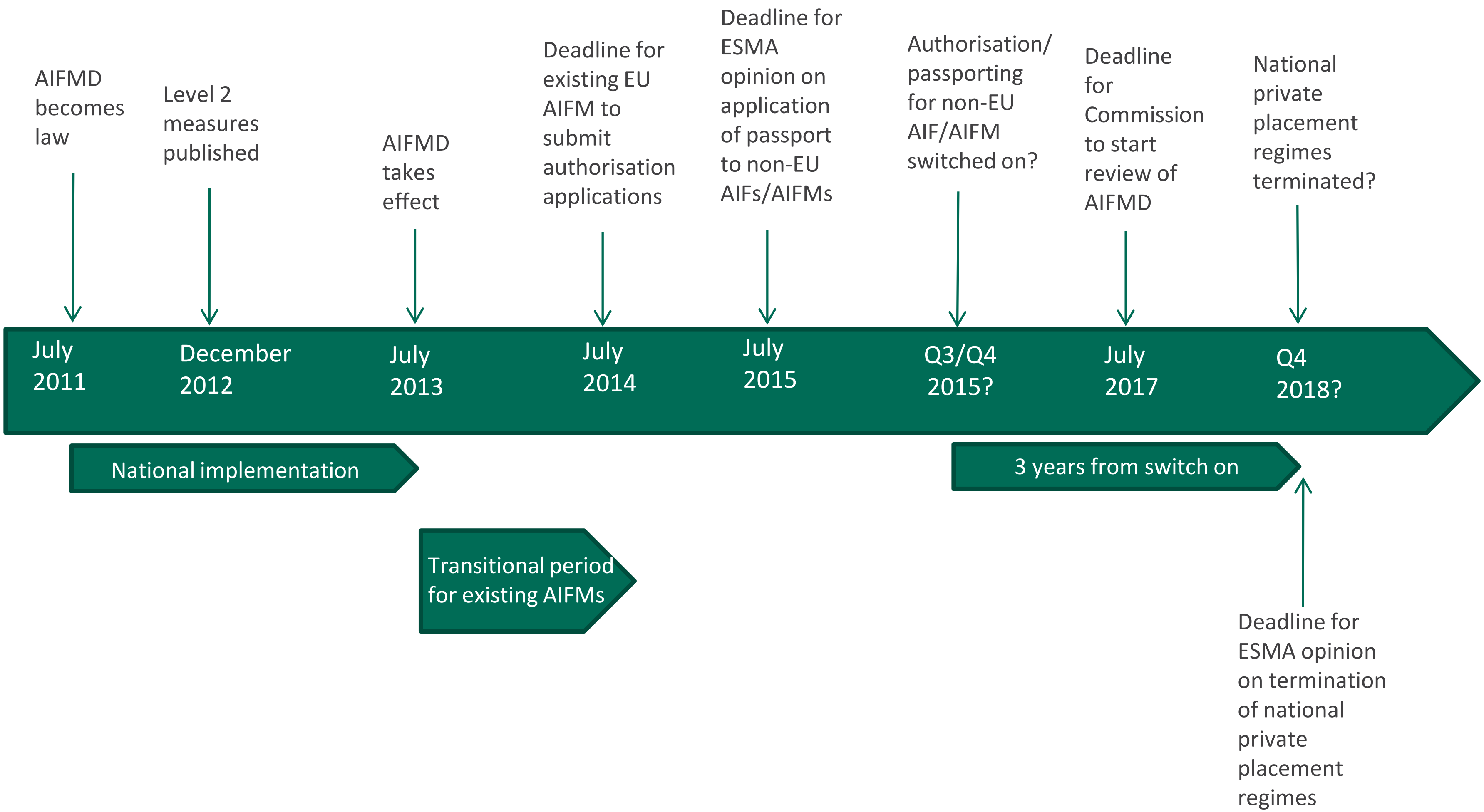
Disclosure & Reporting

- Non-EU managers must complete an annual report for investors which includes:
  - details of remuneration paid to staff; and
  - details of the management fees of the fund.
- Non-EU manager must make specific information available to investors regarding fees and special arrangements in place with other investors.
  - Disclosure of fund's side letters
  - notification of changes to fees or special arrangements (e.g. lockups, side-pockets etc.).
  - Some fund documents may have to be amended to facilitate this disclosure.
- Regular reporting to the regulator in the EU state where the AIF is marketed (the FCA in the UK).
  - Including information on type of asset held, exposure, leverage - similar to Form PF
  - ESMA guidance on reporting requirements – prescriptive regarding format and data required.

What rules apply after July 2015?

- In 2015 ESMA must give an opinion on whether the passport system should be extended to non-EU AIFMs.
- If ESMA says yes (which is not certain), a non-EU manager of an EU AIF will have to apply to its "member state of reference" for **full** authorisation as an AIFM.
- The MSR is the EU member state where the AIFM intends to "develop effective marketing" for most of its AIFs.
- An alternative could be to designate the EU AIF as a self-managed AIF and therefore the authorised AIFM.
- The EU AIFM could then delegate the portfolio management and risk management functions to the non-EU manager.
- 2015 - 2018, NPPRs and the EU passport could coexist but, in 2018 ESMA could terminate NPPRs

Timeline


AIFMD becomes law
July 2011
Level 2 measures published
December 2012
AIFMD takes effect
July 2013
Deadline for existing EU AIFM to submit authorisation applications
July 2014
Deadline for ESMA opinion on application of passport to non-EU AIFs/AIFMs
July 2015
Authorisation/ passporting for non-EU AIF/AIFM switched on?
Q3/Q4 2015?
Deadline for Commission to start review of AIFMD
July 2017
National private placement regimes terminated?
Q4 2018?
National implementation
Transitional period for existing AIFMs
3 years from switch on
Deadline for ESMA opinion on termination of national private placement regimes

What about the US?

- The Investment Advisers Act of 1940 applies to all "investment advisers" that make use of so-called US jurisdictional means
  - "any person who, for compensation, engages in the business of advising others … as to the value of securities or as to the advisability of investing in, purchasing, or selling securities…"
- Prior to Dodd-Frank, many investment advisers relied on an exemption from registration in Advisers Act Section 203(b)(3), which generally provided an exemption for advisers with fewer than 15 clients in the prior 12 month period
- Dodd-Frank repealed this exemption in July 2011 but created several new ones, and the SEC has adopted rules to implement these changes

Foreign Private Adviser Exemption

- Exemption is contained in "new" Advisers Act Section 203(b)(3), and defined at Section 202(a)(30).
- New Rule 202(a)(30)-1 helps clarify certain aspects of the definition.
- The FPA exemption provides a full exemption from registration, but FPAs are still subject to:
  - the general antifraud provisions under the Advisers Act,
  - the pay-to-play rule (Rule 206(4)-5), and
  - the pooled investment vehicle antifraud rule (Rule 206(4)-8).

Foreign Private Adviser Exemption (cont'd)

- IA must have no "place of business" in the US
- IA must have, in total, fewer than 15:
  - Clients that are "US persons"; and
  - Investors in "private funds" that are "US persons."
- IA must have less than $25 million in RAUM attributable to such US person clients and investors.
- IA must not old itself out to the public in the United States as an investment adviser, or act as investment adviser to a US-registered investment company.

Foreign Private Adviser Exemption
Clients and Investors

- Look generally to Regulation S for definition of US person;
- US person status is determined:
  - At the time the client becomes a client; and
  - Each time an investor acquires securities issued by a private fund
- A number of client counting mechanisms were imported from old rule 203(b)(3)-1
- Investors are generally determined based on who would be counted for purposes of determining the private fund's ability to rely on Investment Company Act Section 3(c)(1) or (7)
  - "Knowledgeable employees" need not be counted
  - IA must look at holders of <u>all</u> securities issued by funds—equity, debt, and short-term paper

Private Fund Adviser Exemption

- Statutory mandate for the exemption is contained in Advisers Act Section 203(m).
- Exemption itself is found in new Rule 203(m)-1.
- An IA relying on the PFA exemption is an "exempt reporting adviser" and must make annual filings with the SEC within 90 days of fiscal year end, and interim amendments in the event of certain material changes.
- In addition, PFAs are also subject to:
  - SEC examination authority,
  - the general antifraud provisions under the Advisers Act,
  - the pay-to-play rule (Rule 206(4)-5), and
  - the pooled investment vehicle antifraud rule (Rule 206(4)-8).
- PFA exemption applies differently depending on whether the IA has its principal office and place of business in the United States or outside the United States.
  - "the executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser "

Private Fund Adviser Exemption (cont'd)

- IA with principal office in the United States:
  - All clients must be private funds; and
  - Must have less than $150 million RAUM.
- IA with principal office outside the United States:
  - All clients that are US persons must be private funds; and
  - If adviser also has a place of business in the United States, personnel in that office may only manage private funds, and total RAUM of those funds cannot exceed $150 million.
  - If no place of business in the United States, no limit on amount of RAUM, number of US person investors, or nature of non-U.S. clients.
- Exemption is very generous to non-US IAs.

Derivatives Regulatory Developments: How did we get here?

- The financial crisis of 2008 led to widespread examination of possible root causes by the Group of Twenty Finance Ministers and Central Bank Governors (G-20)
- The September 2009 G-20 meeting in Pittsburgh culminated in the issuance of a "leaders' statement" of goals to address cooperatively the crisis
  - *Improving over-the-counter derivatives markets*
    - Central clearing
    - Exchange trading of standardized contracts
    - Trade reporting
    - Higher capital requirements for uncleared trades
    - Margin requirements for uncleared trades (added in 2011 Cannes G-20 meeting)
  - Building high quality capital
  - Reforming compensation practices
  - Addressing cross-border resolutions and systemically important financial institutions

From these little acorns, mighty oaks have grown

- To meet the G-20 goals, Title VII of the Dodd-Frank Act defines certain covered products (swaps), requires regulation of key swap market participants, and imposes substantive regulation of swaps activities, including:
  - Mandatory clearing and trade execution requirements
  - Margin requirements for uncleared swaps
  - Recordkeeping and data reporting requirements
  - Internal and external business conduct standards
  - Large trader reporting and position limits
- Like the Dodd-Frank Act, EMIR was introduced to implement the G-20 agreement to promote transparency and to reduce risk in OTC derivative markets

EMIR - The European Market Infrastructure Regulation

- EMIR covers:
  - Clearing of OTC derivatives,
  - the regulation of central clearing counterparties (CCPs) and trade repositories (TRs);
- Became law on 16th August 2012 and is directly applicable in all the European member states.
- Implementation staggered.

EMIR - key features

It requires entities that enter into any form of derivative contract to:

- report every derivative contract that they enter into to a trade repository;
- implement new risk management standards, including operational processes and margining, for all bilateral OTC derivatives;
- clear, via a CCP, those OTC derivatives subject to a mandatory clearing obligation;
- places obligations on CCPs, including authorisation, prudential, organisational and conduct of business requirements;
- places obligations on trade repositories, including registration, operational and transparency requirements; and
- regulates interoperability arrangements between CCPs.

EMIR - Scope

- Applies to any entity 'established' in the EEA that is a legal counterparty to an OTC derivative contract.
- Two main categories of counterparty :
  - 'financial counterparty'("FC"); and
  - 'non-financial counterparty' any EEA counterparty not an FC ("NFC").
- Two types of NFC: those whose positions in OTC derivative contracts exceed a clearing threshold ("NFC+") and those whose positions do not ("NFC").

MAYER • BROWN

EMIR - Summary Obligations

- **FC**
  - Clearing obligation
  - Risk mitigation techniques
  - Reporting obligation

- **NFC+**
  - Clearing obligation
  - Risk mitigation techniques (save in relation to the increased capital requirements and the reporting of unconfirmed trades)
  - Reporting obligation

- **NFC**
  - Certain risk mitigation techniques (timely confirmation, portfolio reconciliation and compression, dispute resolution)
  - Reporting obligation

EMIR - Extraterritorial effects

- Clearing obligation applies to contracts entered into by a FC or a NFC+ in the EU and a third country entity – if the third country entity would be subject to the clearing obligation if it were established in the EU.
- Both the clearing obligation and the risk mitigation requirements apply to contracts between any third country entities where:
  - They would both be subject to the clearing obligation if they were established in the EU; and
  - the contract has a "*direct, substantial and foreseeable effect within the*" EU "*or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of*" EMIR.
- The reporting obligation does not have extraterritorial effect.

EMIR Extraterritoriality - Equivalence

- To date ESMA has assessed the equivalence of the regulatory regimes of Australia, Hong Kong, Japan, Singapore, Switzerland and the US.
- Conditional equivalence is proposed to the following regimes:
  - Hong Kong, Japan, Singapore and the US for CCPs.
  - The US and Japan for central clearing, requirements for non-financial counterparties and risk mitigation techniques for un-cleared trades.
  - The US for TRs.

Key Concepts of Dodd-Frank Title VII

- Authority for implementing swaps regulation allocated to CFTC (swaps), SEC (security-based swaps), and both together (mixed swaps)
- What is a swap?
  - A “swap” is broadly defined to include any transaction involving, on an executory basis, the exchange of payments based on the value of commodities, securities or other financial instruments
- What is a security-based swap?
  - A “security-based swap” is defined to include any swap based on a narrow-based security index or on a single security (excluding a US government security, but including non-US government securities) or a loan
- What is a mixed swap?
  - A “mixed swap” is defined as a subset of SBS that also are based on the value of one or more commodities, securities or other financial instruments

Intermediary definitions under Dodd-Frank Title VII

- A swap dealer (SD) or security-based swap dealer (SBSD) is a person who engages in any of the following activities
  - Holding oneself out as a dealer in swaps or security-based swap (SBS)
  - Making a market in swaps or SBS
  - Regularly entering into swaps or SBS as an ordinary course of business for one's own account
  - Engaging in any activity causing oneself to be commonly known in the trade as a dealer or market-maker in swaps or SBS
- A major swap participant (MSP)/major SBS participant (MSBSP) is a non-SD/non-SBSD that meets any of the following criteria:
  - Maintains a "substantial position" in swaps or SBS for any of the major swap or SBS categories, not including positions held for hedging or mitigating commercial risk
  - Outstanding swaps or SBS create "substantial counterparty exposure" that could have serious adverse effects on the financial stability of the US banking system or financial markets
  - A financial entity that is highly leveraged, not subject to US bank capital requirements and maintains a "substantial position" in any category of swaps or SBS

US Swap Dealer Definition – *De Minimis* Threshold

- During an initial "phase-in" period, the *de minimis* threshold for SDs will be:
  - $8 billion notional in swaps; or
  - $25 million notional in swaps with "Special Entities" (e.g., U.S. government agencies, municipalities, pension plans)
- The *de minimis* threshold for SBSDs during the phase-in period will be:
  - $8 billion in CDS that are SBS; or
  - $400 million non-CDS SBS
- After the phase-in period, the *de minimis* thresholds are currently scheduled to be reduced from $8 billion to $3 billion for both swaps and CDS that are SBS; and from $400 million to $150 million for non-CDS SBS (the $25 million threshold for swaps with Special Entities will remain)
  - No clear timeframe for phase-in period; expected to be some time after issuance of staff reports, but both CFTC and SEC have adopted an outer limit of five years
  - Possible that final *de minimis* threshold could be $3 billion as scheduled, or could be higher or lower

US Major Swap Participant Definition – Substantial Position and Substantial Counterparty Exposure

- A substantial position exists where:
  - the daily average current uncollateralized exposure associated with a person's swaps in a "major category" (i.e., rate, credit, equity and other commodity for swaps; debt and other for SBS) amount to $1 billion or more (or $3 billion in the case of rate swaps); or
  - the daily average of the sum of the current uncollateralized exposure plus the potential future exposure associated with its positions in a major category amount to $2 billion or more (or $6 billion for the rate swap category)
- "Substantial counterparty exposure" is measured using the same current uncollateralized exposure and potential future exposure elements that are used to identify a "substantial position"
  - For swaps, the substantial counterparty exposure threshold is $5 billion or more in daily average uncollateralized exposure or $8 billion or more in daily average uncollateralized exposure plus potential future exposure
  - For SBS, the thresholds are $2 billion and $4 billion, respectively

Extraterritorial Application of Title VII

- For CFTC, Dodd-Frank section 722(d) provides:
  - “The provisions of [the CEA]relating to swaps that were enacted by [Title VII of the DFA] shall not apply to activities outside the United States unless those activities—

    ‘‘(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or

    ‘‘(2) contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act . . . ”
- For SEC, Dodd-Frank section 772(b) provides:
  - “No provision of [the Securities Exchange Act of 1934] that was added by [DFA Title VII], or any rule or regulation thereunder, shall apply to any person insofar as such person transacts a business in security- based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent the evasion of any provision [added by DFA Title VII].”

CFTC Cross-Border Guidance

- In July 2013, the CFTC released “interpretive guidance and policy statement” regarding the cross-border application of the swaps provisions of DFA Title VII
  - Definition of US person (still in flux as CFTC has sought comments on further potential modifications)
  - *De minimis* calculation for non-US SDs and threshold calculations for non-US MSPs
  - Treatment of branches and agencies for registration purposes
  - Applicability of substantive swap regulations to non-US registered persons and “substituted compliance” regime
- This guidance and policy statement is subject to court challenge

SEC Cross-Border Guidance

- In May 2013, the SEC released its proposed rules and interpretive guidance regarding the cross-border application of the security-based swaps provisions of DFA Title VII
  - 90-day public comment period ended in August 2013
  - Also the SEC re-opened for public comment all other proposed SBS rules
- Key Aspects of the proposed guidance
  - Definition of US person (different than CFTC)
  - *De minimis* calculation for non-US SBSDs and threshold calculations for non-US MSBSPs
  - Treatment of branches and agencies for registration purposes
  - Applicability of substantive security-based swap regulations to non-US registered persons and "substituted compliance" regime (a first for SEC)

MiFID 2 - Introduction

- The original Markets in Financial Instruments Directive (MiFID) of Nov 2007 aimed to harmonise and introduce competition to financial services in the EU.
- Its predecessor regulated financial services in securities and money market instruments and governed EU-regulated exchanges.
- MiFID broadened scope to cover activities as well as services, advising, a wider range of instruments and trading platforms.
- "MiFID 2" – directive and regulation to address MiFID deficiencies and G-20 initiative
- MiFID 2 will require significant changes in business and operating models, systems, data, people and processes.
- Biggest impact will be on banks, broker dealers and trading venues.
- Investment managers, insurance firms, independent financial advisors, custodians and other asset servicing entities also affected.

MiFID 2 Features - 1

Extension of scope

- **Exemptions restricted**
- **New instruments** – emissions allowances, structured deposits
- **Custody.**
- **New regime for 3rd country firms.**

Market regulation

- **Organised trading facilities** - captures all forms of organised trading that do not match existing categories, including broker crossing and voice networks;
- **Trading of standardised OTC derivatives -** to move to organised venues (exchanges or trading platforms).
- **Algorithmic and high frequency trading** - disclosures to regulators, requirement to provide liquidity and rules to prevent the movement in and out of markets to address market volatility.
- **Non-discriminatory clearing access for financial instruments**
- **Position limits**

Market transparency

- **Extension to equity-like instruments**
- **Extension of transparency regime to non-equity markets**
- **Waivers (pre-trade) and deferred publication (post-trade)**
- **Data consolidation** – introduces a mandatory consolidated tape system for trade data that will be operated by one or more commercial data providers.
- **Transaction reporting to regulators -** extended so that only instruments to fall outside the transaction reporting requirements will be those that are not traded in an organised way and that cannot be used for market abuse.

MiFID 2 Features - 2

Conduct of business

- **New requirements for provision of investment advice** – disclosures as to independence
- **Inducements** - firms that provide advice on an independent basis or portfolio management to be banned from receiving any monetary benefits from any third party relating to the provision of the service to clients.
- **Provision of investment services to non-retail clients** – enhanced protections
- **Execution quality and best execution** – enhanced disclosures by firms and trading venues

Regulatory intervention

- **Product intervention by ESMA or regulators** - regulators given the power to ban or restrict the marketing, distribution or sale of certain financial instruments or financial instruments
- **Sanctions and remedies - minimum rules to ensure that member states apply appropriate administrative sanctions**

Corporate governance

- **New requirements on corporate governance and managers' responsibility for all investment firms and market operators.**

MiFID 2 – extraterritoriality and next steps

Extraterritoriality:

- Will apply to a broad range of financial firms operating in the EU whether by accessing EU regulated trading venues or by providing financial services in the EU by branch, subsidiary or cross border.
- Will establish a harmonised third-country regime for the access of investment firms and market operators to the EU.
- Non-EU investment firms wanting to provide services to retail clients will be required to establish a branch as well as obtain branch authorisation from the local regulator where the branch is situated.

Implementation:

- Political agreement on the proposals reached in January 2014.
- The European Parliament will consider (rubber stamp) this text at its mid-March plenary.
- ESMA also has to draft secondary legislation under MiFID and it will publish discussion papers on this in March with formal consultations in late 2014/early 2015.
- Implementation of the new measures is likely to be late 2015 at the earliest, most likely 2016.

Questions?

Mark Compton
Partner
+44 (0)20 3130 3388
mcompton@mayerbrown.com

Jerome Roche
Partner
+1 202 263 3773
jroche@mayerbrown.com