

2015 NSCP National Conference
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Global Compliance

Christopher Mahon
Alliance Bernstein

Steven Stone
Morgan, Lewis & Bockius LLP

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Global Compliance

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- Foreign Jurisdiction & Licensing
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Sizing Up Applicable Laws

- Complicated issues in global dealings
- Concepts of “jurisdictional nexus” and “minimum contacts”
- Countries differ in defining jurisdiction and imposing registration, disclosure, taxation and other requirements
 - US approach with broker-dealers & investment advisers
 - EU approach with passporting, MiFID-II (and MiFIR) & AIFMD
- Cross border inter-company agreement structures have differing effects
- All this can result in conflicting requirements

How US Law Applies to Foreign Firms & Clients

Adviser Regulation

- Focus on conduct and effect
- No differentiation between institutional and non-institutional clients
- Scope of regulation differentiates between US and foreign RIAs
 - US RIAs - Advisers Act applies to US and non-US clients
 - Non-US RIAs - Advisers Act applies to US clients only
 - Involvement of US adviser affiliate can trigger Advisers Act requirements

Broker-Dealer Regulation

- Focus on presence and solicitation
- Differentiation between major institutional and other clients
- SEC and FINRA generally do not differentiate between US and non-US clients regardless of where broker is domiciled

Foreign Jurisdiction & Licensing

- “Jurisdictional nexus”
 - Look to “contacts”
 - Many countries take expansive view of jurisdiction
 - Web presence makes a difference
 - Regulations differ across borders
- Many foreign countries license advisers and brokers
- Securities regulators cooperate
- De minimis and institutional exemptions may be available
- Look before you leap

Different Approaches to Cross-Border Regulation

[IOSCO Task Force on Cross-Border Regulation \(9/15\)](#)

National Treatment

- Foreign firms treated like domestic ones despite foreign regulatory scheme

Passporting

- Permits market access between covered jurisdictions based on common set of rules

Recognition

- Enables domestic regulator to permit activities of firms from recognized foreign jurisdictions
- Can be one-way (unilateral recognition) or reciprocal (mutual recognition)

Example: MiFID II

- MiFID 2, Article 1: “This Directive shall apply to investment firms, market operators, data reporting services providers, and third-country firms providing investment services or performing investment activities through the establishment of a branch in the Union.”
- MiFIR Article 1(1)(f) applies to: “provision of investment services or activities by third-country firms following an applicable equivalence decision by the Commission with or without a branch.”
- MiFIR Article 1(5) : “Title VIII of this Regulation applies to third-country firms providing investment services or activities within the Union following an applicable equivalence decision by the Commission with or without a branch.”
- Title VIII of MiFIR: “A third-country firm may provide investment services or perform investment activities with or without any ancillary services to eligible counterparties and to professional clients ... established throughout the Union without the establishment of a branch where it is registered in the register of third-country firms kept by ESMA in accordance with Article 47.”
- Article 46 paragraph 3: “Where a third-country firm is registered in accordance with this Article, Member States shall not impose any additional requirements on the third-country firm in respect of matters covered by this Regulation or by Directive 2014/65/EU and shall not treat third-country firms more favourably than Union firms.”
- Chapter IV of MiFID 2: “A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State.”

Rough Guidelines When Dealing with Non-US Person Prospects

- Solicitation should occur in jurisdiction where firm is licensed
- Solicitation activities shouldn't occur in foreign territory
- The prospect should:
 - Appear in the solicitation jurisdiction to complete documents
 - Have independent, legitimate purpose for being there other than hiring the firm
- Have a regular business or financial tie or other significant relationship to US other than hiring the firm
 - Family, vacationing or a time-share in US wouldn't count
 - Have a history of routine visits to US
 - Already have US bank account and mailing address for delivery of statements, confirmations and other written communications

Rough Guidelines When Dealing with Non-US Person Prospects

- Prospect should be sufficiently fluent in English to read and understand documents
 - If not, have a translator review documents with the prospect
- Control Internet pitch
 - Say who the site is directed to
 - Show information in \$US
 - Don't direct the site or banner ads to foreigners

This may not work in all foreign jurisdictions!

Anti-bribery

- Enforcement of anti-bribery increasing across the globe
- An increasing number of countries are focusing on bribery of their own government officials.
- Non-U.S. enforcement actions have more than doubled since 2012, and in 2014 total non-U.S. enforcement actions concerning bribery of foreign officials outnumbered total U.S. enforcement actions
- U.S. regulators continue to focus on non-U.S. companies in their sights.

Anti-bribery

US

- Individual prosecutions top priority
- DoJ and SEC continue to examine closely travel and entertainment expense claims
- Use of bargaining tools, NPAs, to reward companies/individuals for self-reporting, cooperating and remedial actions

UK

- Authority to use DPAs came into force in UK in 2014
- Conditions can include financial penalty, reparation to victims and obligation to implement compliance program
- FCA reviews have found:
 - Inadequate for assessing bribery/corruption risk re monitoring third-party relationships
 - Anti-bribery training programs fail to identify and focus on business specific risks

Soft Dollars / Dealing Commissions

- Proposed abolition of payment for research with dealing commissions (effective beginning 2017)
- ESMA is proposing full unbundling under which managers must either:
 - Pay for research out of their own pockets, or
 - Agree with each client to establish a separate research payment account with its own budget from which the client will contribute to the manager's overall research budget
- Impacts on US firms
 - For covered US advisers, potentially supersedes Section 28(e)
 - For US brokers receiving cash payments for research, poses adviser status issues

Cross Border Compliance – Regulators Expectations

1. Identifying compliance obligations that need to be met in relation to firm activities undertaken outside its home jurisdiction
2. Identifying responsibilities of compliance personnel in the home jurisdiction and other jurisdictions to seek to ensure that all activities being conducted in other jurisdictions are subject to appropriate oversight by the compliance function
3. Identifying reporting and accountability lines for relevant compliance staff responsible for compliance functions
4. Undertaking periodic review of the firm's activities and compliance functions outside the home jurisdiction to seek to ensure that compliance obligations applicable outside the home jurisdiction are appropriate given the nature scope and scale of the firm's activities.
 - A review from time to time may involve the audit of the performance of the compliance function to ensure that the operations are being undertaken in accordance with the documented procedures
5. Having ready access to details of relevant compliance obligations applicable to firm activities outside the home jurisdiction

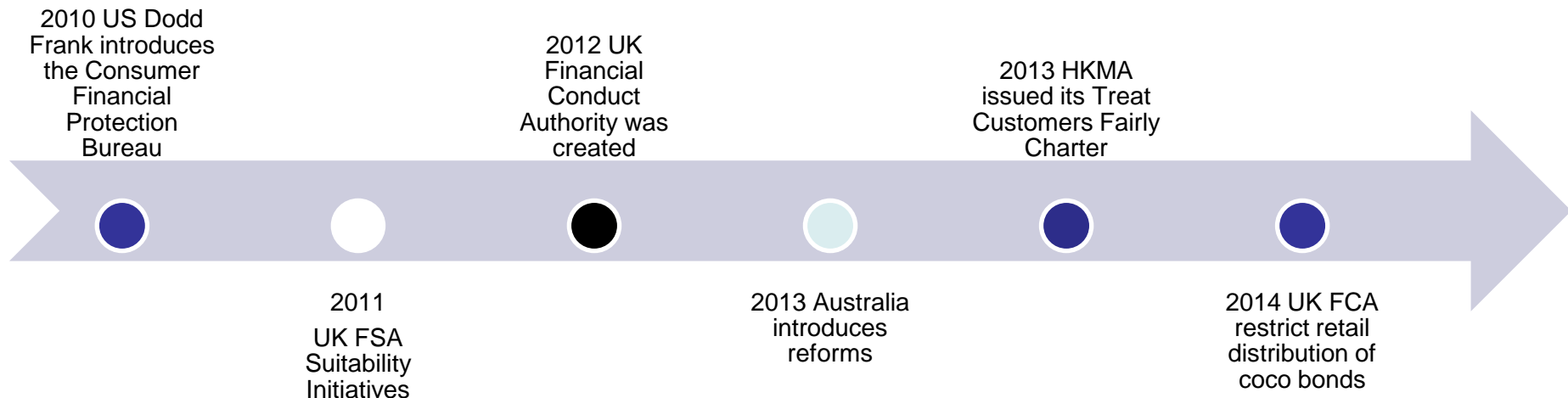
IOSCO [Compliance Function At Market Intermediaries \(2/2006\)](#)

Cross-Border Compliance Strategies

- Communications strategy with regulators
- Early warning system
- Policy, procedure, accountability and discipline
 - Who, what, where, evidence/testing
- Watching the Watchers
- Keeping up with the internal changes
- Have good housekeeping

Global Focus on Conduct Risk

- Global regulators increasingly focused on firms and employee treatment of customers, including suitability



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