Global Financial Services Regulatory Guide - Japan

4. How do the licensing requirements apply to cross-border business in your jurisdiction?

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# How do the licensing requirements apply to cross-border business in your jurisdiction?

**Overview of regime**

Japanese financial regulations apply on a territorial basis (i.e., whether or not the activity is carried out within Japan) but to a certain extent, the effect in Japan of any relevant activity outside Japan is taken into consideration. Japanese licensing requirements apply to a firm’s activities undertaken directly (by its staff) or indirectly (through agents) within Japan or into Japan (i.e. The issue of whether marketing or solicitation is made in Japan by a foreign firm is an important factor in determining whether Japanese laws will apply. However, even when financial services are provided by a foreign firm at the client’s request (i.e., on a reverse solicitation basis), the regulations could apply to the foreign firm and the service.

There is little guidance as regards the application of licensing requirements to cross-border business into Japan. Generally, if a person outside Japan deals with a client or a counterparty located in Japan, those activities would be subject to Japanese licensing requirements.

**Specific considerations and rules for cross-border application**

Receiving deposits

There is no clear rule as to whether a foreign bank without a Japanese banking license may receive deposits from Japanese residents. However, it is clear that when a foreign bank engages in marketing or solicitation in Japan (directly or indirectly through agents or brokers) to receive deposits, it must obtain a Japanese banking license. However, if a foreign bank has a licensed branch in Japan and that branch is licensed to provide foreign bank agency services, the foreign bank may receive deposits via the foreign bank agent. A foreign bank may also engage in some non-core banking activities that are delegated by a licensed bank, such as acting as a calculation agent, subject to detailed relevant guidelines in Japan as to the outsourcing of banking services.

Lending

There is no clear rule as to whether a foreign lender without a Japanese license (either a banking license or a money-lending business license under the MLBA) may lend to residents of Japan. However, when a foreign lender engages in marketing or solicitation in Japan (directly or indirectly through agents or brokers) for lending, it must obtain a Japanese banking license. It is not clear whether the relevant regulations apply to money lending by a foreign lender to residents of Japan when the transaction takes place solely at the borrower’s request (i.e., reverse solicitation basis).

Funds transfer services, issuance of prepaid payment instruments, crypto-asset exchange services and business related to transactions of electronic payment instruments

There is no clear provision in the Banking Act and the PSA covering these services provided to residents of Japan by a foreign firm. However, when a foreign firm engages in marketing or solicitation in Japan (directly or indirectly through agents or brokers) for fund transfers, it will trigger the licensing requirements under the Banking Act and/or the PSA.

Furthermore, the PSA clearly states that a foreign service provider providing either of these services may not solicit residents of Japan without registering under the PSA.

Underwriting or sales agency/brokerage of securities and securities-related derivatives

A foreign securities company is not allowed to engage in business such as underwriting or sales agency/brokerage of securities and securities-related derivatives (“**Securities-Related Business**”) with persons located in Japan, unless it is registered under the FIEA.

However, as an exemption to this requirement, an unregistered foreign securities company with no business base in Japan is allowed to engage in Securities-Related Business with persons in Japan if they either (i) take orders without solicitation or (ii) take orders through an agency or brokerage service provided by a person licensed under the FIEA (e.g., a traditional securities company). Furthermore, a foreign securities company may trade financial instruments on exchanges in Japan if authorized under Article 60 of the FIEA.

Cross-border transactions using the internet

A foreign securities company that posts advertisements on its website regarding Securities-Related Business will be deemed to be engaging in solicitation in Japan unless it takes reasonable measures, including the following steps, to prevent investors in Japan from receiving services of Securities-Related Business from the foreign securities company:

Disclaimer

The website must include a disclaimer stating that the advertised service is not targeted at investors in Japan. In judging whether an adequate disclaimer has been implemented, attention must be paid to the following points:

No computer operation other than viewing the advertisement should be necessary for reading and understanding the disclaimer.

The disclaimer must be written in a language reasonably likely to be readable and understandable by investors in Japan who access the website.

Measures to prevent transactions

Measures to prevent transactions regarding Securities-Related Business must be in place. In judging whether adequate measures are in place, attention must be paid to the following points:

When conducting transactions, the foreign securities company checks the location of the investors by requiring them to provide information as to their residence, location, mailing address, email address, payment method and other items.

Care must be taken to avoid taking orders from investors in cases where there are reasonable grounds to believe that the orders relate to Securities-Related Business involving investors in Japan.

Care must be taken to avoid inducing investors in Japan to receive services of Securities-Related Business by, for example, refraining from establishing a call center targeted at customers in Japan and establishing links to web pages targeted at investors in Japan.

These measures are merely examples, so if other measures equivalent or more effective than these have been implemented, the posting of advertisements on the internet by foreign securities companies should not constitute solicitation in Japan.

**Investment advice and investment management**

In principle, a foreign firm providing investment advice or investment management services may not offer those services to residents of Japan without having the relevant license under the FIEA. However, certain exemptions to these license requirements may be available to foreign fund managers, including (i) a full delegation scheme to use a licensed entity in Japan; (ii) the so-called Article 63 exemption if investors meet certain qualification thresholds; (iii) off-shore fund exemptions where less than one-third of the total assets are acquired by a limited number of professional investors that reside in Japan; or (iv) less than 50% of total managed assets consist of securities and derivatives.

**Insurance**

ISA

Trust-related business

The Trust Business Act/TBA has a license and registration framework for foreign trust business operators. However, the TBA applies only where there is a Japan nexus; it does not relate to services that are received and provided wholly outside of Japan.

Issuance of credit cards

The Installment Sales Act /ISA does not have any specific provisions covering foreign firms issuing credit cards to residents of Japan. However, it is generally understood that such foreign card issuers should be registered through a business office in Japan.

Credit card-acquiring business

In 2018, the ISA was amended to regulate credit card-acquiring businesses, under which acquirers (including foreign acquirers) are obliged to register with the relevant regulatory authority in Japan (i.e., METI).

Issuance of prepaid cards (including any other prepaid-type payment methods)

The Payment Services Act / PSA clearly states that a foreign prepaid instrument issuer may not solicit residents of Japan to purchase prepaid instruments issued outside Japan.

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