Global Financial Services Regulatory Guide - United States of America

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# 1. Who regulates banking and financial services in your jurisdiction?

## Who regulates banking and financial services in your jurisdiction?

Banks

The United States has a dual banking system comprising both federally chartered and state-chartered banks. In addition, the United States permits banks to have a corporate structure, including bank holding companies and financial holding companies, some of which may now be designated “systemically important financial institutions.”1

All banks engaging in banking activities, including the acceptance of deposits, must obtain a bank charter before conducting business in the United States. There are many different charters available to banks in the United States, each with different financial powers as prescribed by state and federal laws. The principal categories of banks in the United States include national banks, state member banks and state non-member banks. Foreign banks may also establish a presence in the United States by obtaining authorization to operate various types of offices depending on the types of activities to be conducted. Other types of banks that are included within the US banking system, but which are smaller in number, include private banks, uninsured state banks, bankers’ banks, trust companies, industrial banks and savings banks.2

Almost all banks are subject to the regulatory authority of more than one bank regulatory agency. All banks fall under the supervision and regulation of their chartering authority, at either the state or federal level. If deposit insurance is obtained (which it almost always is), a bank is subject to certain statutes of the Federal Deposit Insurance Act, and in the case of a state non-member bank, to direct supervision by the Federal Deposit Insurance Company (FDIC). If a state bank becomes a member of the Federal Reserve System, the Federal Reserve is its primary federal supervisor. Bank holding company and financial holding company structures subject their bank and other subsidiaries to an additional layer of regulation and supervision at the parent company level.

The regulatory agencies primarily responsible for supervising the internal operations of commercial banks and administering the state and federal banking laws applicable to commercial banks in the United States include the Federal Reserve System, the Office of the Comptroller of the Currency (OCC), the FDIC and the state banking agencies.

**The Federal Reserve System**. The Federal Reserve directly supervises state-chartered banks that choose to become members as well as foreign banking offices and Edge Act corporations.3 The Federal Reserve is also the primary supervisor and regulator of bank holding companies and financial holding companies. For bank holding companies and financial holding companies, the Federal Reserve either reviews or receives the notification of their formation and expansion and is also responsible for supervising the overall banking organization, which gives it insight into the operation of banks not directly under its supervision. The Federal Reserve has a number of powers to enforce its supervisory policies and regulations, including the authority to issue cease-and-desist orders, remove bank and holding company officers and other affiliated parties, levy fines, revoke membership, and order divestiture or termination of financial holding company activities.

**The Office of the Comptroller of the Currency**. The OCC is the oldest of the federal bank regulatory agencies, and is the primary supervisory agency for national banks, savings associations and federal branches of foreign banks. The OCC is a bureau of the US Department of Treasury. The OCC is responsible for chartering national banks, reviewing national bank branch and merger applications, implementing regulations, and examining and supervising all national banks. The OCC may also issue cease-and- desist orders; levy fines against national bank officers, directors, employees or other affiliated parties for violating laws or regulations or engaging in unsafe or unsound banking practices; remove or suspend bank officials and other parties affiliated with a national bank; and place national banks into conservatorship or revoke their charters.

**The Federal Deposit Insurance Corporation**. The FDIC was organized in 1934 to provide federal insurance of deposits at commercial banks. Deposit insurance is required of all Federal Reserve member banks and is extended to non-member banks with the approval of the FDIC. Nearly all non-member banks are FDIC-insured. The FDIC is empowered to examine all banks with FDIC insurance; however, to prevent regulatory duplication, the FDIC only directly supervises and examines state-chartered banks that are not members of the Federal Reserve System.

As part of its insurance responsibilities, the FDIC also acts as receiver for failed banks and administers the deposit insurance funds. The FDIC is empowered to make special examinations of banks to determine the condition of the bank for insurance purposes. The FDIC’s enforcement powers include the ability to terminate deposit insurance at insured institutions and to issue cease and desist orders, remove bank officials and other affiliated parties, levy fines at state non-member banks, or recommend or pursue enforcement actions against other insured depository institutions. It may also appoint itself conservator or receiver of an insured depository institution.

**State banking agencies**. Every state has its own regulatory agency responsible for chartering and supervising state banks, as well as foreign banks located within the state. The organizational features of these agencies vary from state to state. Banks chartered by the state must follow all applicable state laws and regulations. In addition, if a state bank takes out deposit insurance or becomes a member of the Federal Reserve, it must also comply with the appropriate federal regulations. State regulatory agencies issue bank charters, conduct bank examinations, construct and enforce bank regulations, and decide on proposed branch and merger applications. All state regulatory agencies can impose sanctions such as revoking a state bank’s charter, issuing cease-and-desist orders, removing bank officials and levying fines.

**Other regulators.** Other state and federal regulatory agencies are also responsible for various supervisory and other matters over US banks, some of which agencies are more active and more powerful than others.  Generally, these state regulators are principally responsible for non-bank lending institutions. Some of the more important agencies are the Consumer Financial Protection Bureau (CFPB), the Financial Crimes Enforcement Network, the Federal Financial Institutions Examination Council, the Department of Justice, the Securities and Exchange Commission, and the Federal Trade Commission.

**Securities and investments**

Companies engaged in securities4 or investment-related activities are primarily regulated by the US Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority, Inc. (FINRA) and the state securities agencies. The SEC, an independent federal agency, was established in 1934 to regulate practices in the securities industry. The SEC’s responsibilities include the protection of investors; the maintenance of fair, orderly and efficient markets; and the facilitation of capital formation. The SEC oversees the key participants in the securities industry, including securities exchanges, securities brokers and dealers, investment advisors, and investment companies (i.e., mutual funds). FINRA is a non-governmental, self-regulatory organization that is overseen by the SEC, and that supervises and regulates the conduct of its member brokerage firms,  alternative trading systems that are registered as broker-dealers, and their regulated employees. In addition to the SEC and FINRA, all states have securities regulatory agencies that supervise the securities and investment activities within their state.

**Derivatives**

The US Commodity Futures Trading Commission (CFTC), which is an independent federal agency of the US government, has exclusive jurisdiction over transactions in “Commodity Interests” that are executed or booked in the United States. The term “**Commodity Interests**” collectively refers to the following instruments: (i) futures contracts; (ii) options on futures contracts; (iii) swaps; (iv) leveraged retail foreign exchange and commodity contracts; and (v) certain other leveraged products.

**Insurance**

Individual states and their insurance commissioners or departments have general authority to regulate insurance activities. Companies that desire to engage in insurance activities must comply with state licensing laws and other state insurance laws and regulations.

**Money transmission**

Individual states are responsible for licensing the money transmission services business and their activities. In addition, most money services businesses (MSBs) must register with the federal government through the Financial Crimes Enforcement Network (FinCEN), a division of the US Department of Treasury.  A money transmitter is a type of MSB, which also includes entities such as issuers of stored value products, check cashers or currency exchangers. MSBs are subject to various anti-money laundering requirements pursuant to the US Bank Secrecy Act.  Depending on the type of business, product or activity, the SEC, the CFTC and/or the CFPB, among others, may also have jurisdiction over the business.

1. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was passed in the wake of the 2008 recession, the newly created Financial Stability Oversight Board was charged with determining whether banks and other nonbank financial institutions could pose a threat to the country's financial stability, which is the source of this designation.

2. Although not covered in this chapter, credit unions are another type of financial institution in the United States that are similar to banks, but operate as cooperative, non-profit entities. Credit unions are regulated by the National Credit Union Administration, and are subject to independent statutes, rules and regulations under the Nation Credit Union Act.

3. An Edge Act corporation is a subsidiary of a US or foreign bank that engages in foreign banking operations; these entities were first created in 1919 by an amendment to the Federal Reserve Act of 1913.

4.  A “security” under US securities laws includes “any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security,” or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”

# 2. What are the main sources of regulatory laws in your jurisdiction?

## What are the main sources of regulatory laws in your jurisdiction?

**Banking**

Financial institutions, their holding companies and their affiliates are extensively regulated under federal and state laws in the United States. Federal and state banking statutes, regulations of the bank regulatory agencies issued under them, as well as less formal guidance, interpretations, letters and notices from the regulatory agencies, impose a comprehensive system of supervision, regulation and enforcement over the operations of financial institutions, their holding companies and affiliates.

**Federal banking statutes**. Most of the federal statutes applicable to banks are codified in Section 12 of the US Code. Many other laws applicable to banks have been adopted throughout the years in various other “acts”; however, these laws and acts were adopted in the form of amendments to the statutes below. The banking statutes found in the US Code are as follows:

National Bank Act of 1864 - The National Bank Act (formerly, the Currency Act of 1863) created the national bank charter and the first federal banking agency in the United States (OCC), and regulated the distribution of currency national banks were authorized to issue. The authorization of the national bank charter created the parallel scheme of state and federally chartered banks still in place today.

Federal Reserve Act of 1913 - This created the Federal Reserve System and the Board of Governors of the Federal Reserve System. It granted the Federal Reserve the power to make loans secured by eligible paper of member banks, which allowed banks to obtain funds to meet large cash withdrawals or increases in credit and authorized the Federal Reserve to hold reserves of member banks and to conduct monetary policy through open-market operations.

Home Owners’ Loan Act (HOLA) - This created a dual system for savings associations, allowing for federal savings associations, in addition to state savings associations. HOLA was extensively amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1998.

Federal Credit Union Act - This established the federal credit union system, which is regulated now by the National Credit Union Administration.

Federal Deposit Insurance Act (FDIA) - Initially enacted in 1933 as an amendment to the Federal Reserve Act, the FDIA offered deposit insurance for accounts in banks. The FDIA created the Federal Deposit Insurance Company (FDIC) to administer this insurance program, and provided for the primary regulation and supervision of state non-member banks and the secondary regulation and supervision of national banks and state member banks.

The Bank Holding Company Act of 1956 (BHCA) - This gave the Federal Reserve the authority to regulate the formation and operation of bank holding companies (BHCs), and limits the nonbanking activities of all BHCs to those that are “so closely related to banking as to be a proper incident thereto.”

International Banking Act of 1978 - This provides equal treatment for foreign and domestic banks in the United States with respect to branching, reserve requirements and other regulations.

Significant amendments to the banking statutes above include the following:

The Gramm-Leach-Bliley Act of 1999 (GLBA) was adopted in order to allow affiliations among banks, securities firms and insurance companies under a financial holding company structure supervised by the Federal Reserve. The GLBA also provides privacy safeguards for limiting disclosures of personal information.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (**Dodd-Frank Act**) was adopted in July 2010, and represented a material reform of the supervisory and regulatory framework applicable to financial institutions and capital markets in the United States. The Dodd-Frank Act created 13 new federal offices, including the Consumer Financial Protection Bureau (CFPB), and required numerous regulations to be adopted by the bank and other financial institution regulators.

**Federal regulations.** Federal regulations applicable to banks in the United States are located in Title 12 of the US Code of Federal Regulations. The OCC, Federal Reserve, FDIC and the CFPB each have their respective regulations in Title 12.

**Securities and investments**

There are many laws and regulations in the United States that govern securities and investment-related activities, products and services. The following are the primary federal statutes applicable to securities and investment activities and products:

Securities Act of 1933 - This law governs the issuance and distribution of securities in the primary market and requires issuers of securities to register each public offering with the SEC, unless an exemption is available, so that investors receive financial and other significant information concerning the securities being offered. The Securities Act also prohibits deceit, misrepresentations and other fraud in the sale of securities.

Securities Exchange Act of 1934 - This law broadly regulates all participants in the secondary markets that list or trade securities after issuances.  The Exchange Act grants the SEC the authority to register, regulate and oversee broker-dealers, transfer agents, stock exchanges, self-regulatory organizations and clearing agencies. The Exchange Act identifies and prohibits certain types of conduct in the markets and gives the SEC disciplinary powers over regulated entities and their associated persons.  The SEC also has broad enforcement powers in connection with any market participant, whether or not directly regulated, found to have engaged in fraudulent conduct, or manipulative or deceptive practices in connection with securities trading.

Investment Company Act of 1940 - This regulates the organization of companies, including mutual funds, that engage primarily in investing, reinvesting and trading in securities, and whose own securities are offered to the investing public.

Investment Advisers Act of 1940 - This provides for the registration and regulation of persons and entities who are engaged in providing advice to others regarding securities investments by the SEC. The Advisers Act also requires such persons and entities to conform to standards and regulations designed to protect investors.

Each of the foregoing statutes are also amplified by a comprehensive set of regulations. Further, the Dodd-Frank Act had a significant impact on the securities laws. In addition to the foregoing, securities and investment activities and products are also subject to orders and interpretations of the SEC.

In addition to the federal statutes, US broker-dealers are required to become members of the Financial Industry Regulatory Authority (FINRA), which is subject to oversight by the SEC. US broker-dealers are subject to FINRA’s rules set forth in the FINRA Manual. The FINRA Manual contains a comprehensive set of rules regulating all aspects of the business of a broker-dealer. All FINRA rules are approved by the SEC prior to adoption.

Broker-dealers are considered "financial institutions" under applicable anti-money laundering regulations including the Bank Secrecy Act and the USA PATRIOT Act.  In addition to those laws, FINRA Rule 3310, and regulations promulgated by FinCEN and the Office of Foreign Assets Control (OFAC), contain the laws, rules and regulations concerning anti-money laundering controls, processes, suspicious activity reporting, disclosure, sanctions-screening and other requirements applicable to most financial institutions and other businesses conducting activities that could raise money laundering risks. Notably, registered investment advisers are not similarly defined as financial institutions and thus are not subject to requirements to implement an anti-money laundering program; however, the vast majority have done so as a condition of conducting business with other regulated entities.  All US persons and institutions are required to conduct OFAC sanctions screening.

Each state has its own set of securities laws and regulations that are designed to protect investors against fraudulent sales practices and activities. Even though the laws vary from state to state, most state laws require companies making security offerings to register the offerings before being sold in that state, unless there is a specific state exemption available, or unless such securities are "covered securities" pursuant to Section 18 of the Securities Act, which pre-empts state law application. State laws and regulations may also require registration of personnel or entities engaged in securities and investment activities, unless an exemption is available.

**Derivatives**

Transactions in Commodity Interests are governed by the Commodity Exchange Act (CEA), as amended by Title VII of the Dodd-Frank Act, and the rules, orders and interpretations of the Commodity Futures Trading Commission (CFTC).

**Insurance**

Each state has its own laws and regulations governing the sale of insurance products and other insurance activities. Insurance products that have links to any securities or securities products will also be governed by securities regulators.

**Money transmission**

Each state has its own laws and regulations defining and governing the conduct of a money transmission business. Depending on the particular product or service being offered, the laws, rules or regulations of the SEC, CFTC or CFPB could be applicable, as well.  In addition, most money services businesses (MSB) must register with FinCEN, which requires MSBs to establish and enforce an anti-money laundering program.

The Bank Secrecy Act, the USA PATRIOT Act, as well as regulations promulgated by FinCEN and the Office of Foreign Assets Control, contain the laws, rules and regulations concerning anti-money laundering controls, processes, reporting, disclosure and other requirements applicable to most financial institutions and other businesses conducting activities that could raise money laundering risks.

# 3. What types of activities require a license in your jurisdiction?

## What types of activities require a license in your jurisdiction?

**Banking**

A broad range of activities may be regulated as banking activities in the US. Examples of such activities include the following:

Soliciting or receiving funds for deposit, including typical retail banking activities involving the operation of demand deposit, savings or other accounts

Lending activities, including loans to consumers and certain commercial lending

Providing trust services (which may require a separate license or special powers)

**Securities and investments**

Any person who is engaged in the business of effecting transactions in securities for the account of others, or is engaged in the business of buying and selling securities for their own account, through a broker or otherwise, is required to register as a broker-dealer in the United States, unless an exemption is available. These types of activities include soliciting securities transactions, offering or selling securities to customers or discussing securities transactions with them.

Any person that issues securities and is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting or trading in securities, or that owns or proposes to acquire a certain amount of investment securities is required to be registered as an investment company, unless an exemption is available.

In addition, a person that is engaged in the business of providing investment advice to others or issuing reports or analyses regarding securities, for compensation, would be considered an investment adviser and be required to be registered as such, unless an exemption is available.

With respect to the foregoing, the United States takes a broad view of these types of activities, and requires registration before conducting such activities if the person uses the mails or any means or instrumentality of interstate commerce (commonly referred to as “US jurisdictional means”). Accordingly, any person that uses US phone lines, internet, mail or other jurisdictional means in connection with securities or investment activities will be required to register as appropriate, unless an exemption is available. A number of exemptions are available under the federal securities statutes, which should be carefully analyzed before being relied upon.

**Derivatives**

Unless an exemption applies, a broad range of activities related to derivative and commodity interests are regulated and require registration, including, the following:

**Soliciting or accepting orders to buy/sell Commodity Interests and accepting deposits**. A futures commission merchant (FCM) is a person that: (i) solicits or accepts orders to buy or sell commodity interests; and (ii) accepts money or other assets from customers to support such orders. FCMs essentially operate as brokers that execute transactions in futures contracts.

**Soliciting or accepting orders to buy/sell Commodity Interests, but not accepting deposits**. An introducing broker (IB) is a person who solicits or accepts orders to buy or sell Commodity Interests, but does not accept money or other assets from customers to support such orders.

**Providing Commodity Trading Advice**. A commodity trading advisor (CTA) is a person who, for compensation or profit, advises others as to the value of or the advisability of buying or selling Commodity Interests.

**Operating a Commodity Pool**. A commodity pool is an enterprise (e.g., collective investment vehicle) in which funds contributed by a number of persons are combined for the purpose of trading Commodity Interests, or to invest in another commodity pool. Commodity pools seek to provide investors with the opportunity to invest in Commodity Interests under the direction of one or more CTAs (which may also be the CPO).

**Swaps Dealing**. A swap dealer (SD) is a person or entity that: (i) holds itself out as a dealer in swaps; (ii) makes a marketin swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the entity to be commonly known in the trade as a dealer or market maker in swaps.

**Insurance**

Insurance-related activities that require a license are determined by state law. Activities that would most likely be considered insurance-related, and requiring a license, include soliciting insurance business and selling insurance policies.

**Money transmission**

Money transmission and money services businesses that require a license are determined by state law. Activities that are commonly registered and regulated as money transmitters include foreign currency exchange, the sale and issuance of prepaid or stored value cards, check cashing, and money transfers or transmission.

**Virtual Currency and Digital Assets**

The US does not have a separate regulatory regime for crypto/digital assets.  Rather, such assets are classified based on their characteristics and regulated accordingly under the existing regulatory regimes. For example, digital assets that serve as a digital representation of money are considered convertible virtual currency (CVC) pursuant to FinCEN guidance. Accordingly, issuers, administrators or exchangers of CVC require registration as an MSB. Notably, each state regulates money transmission under a separate regime and has varying definitions regarding cryptocurrency and whether it is viewed as a representation of fiat. Accordingly, the state money transmission requirements will vary from state to state.

In addition, cryptocurrencies, such as bitcoin, are classified as commodities by the CFTC. While the CFTC does not regulate the spot markets, it will assert jurisdiction in the event of fraudulent crypto-related activity. Derivatives and futures contracts on crypto/digital assets are subject to CFTC regulation.

Finally, the SEC has determined that many digital assets meet the definition of a security through the application of the "Howey Test"1 which defines an investment contract. Accordingly, those crypto/digital assets that are deemed to be securities are subject to the registration and disclosure requirements of the Securities Act. Persons who offer and sell such digital assets, including electronic platforms, exchanges and other intermediaries are subject to regulation pursuant to the Exchange Act. State securities laws will also apply.

National banks may provide custody of cryptoassets, however, such assets do not qualify for FDIC insurance coverage. Similarly, although certain digital assets may qualify as securities and securities broker-dealers may provide custody, such assets are also not covered by the Securities Investor Protection Corporation (SIPC) insurance coverage.

1. The Howey Test provides that an investment contract exists where the following factors apply: (i) an investment of money, (ii) an expectation of profits from the investment, (iii) the investment of money is in a common enterprise, and (iv) any resulting profit comes from the efforts of a promoter or third party.

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

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

**Banking**

In general, US banking laws and regulations, including licensure requirements, apply if a foreign bank or financial services firm has a presence in the United States where it conducts banking business, or solicits or conducts banking business through employees or agents based in the United States, through employees or agents based outside the United States, but who periodically travel to the United States to meet with customers, or otherwise through the use of US jurisdictional means (e.g., the US mail or US telephone lines). Generally, US federal laws do not prohibit a foreign bank from servicing deposit accounts of US persons outside of the US, nor do they require a bank to obtain a US federal banking license or other US federal banking approval or consent. However, lending activity, specifically mortgage lending, is generally regulated by state law and will need to be addressed on a state-by-state basis.

**Securities and Investments**

Generally, a foreign financial services firm that engages in a securities or investment business in the US, has a presence in the US where it conducts securities or investment business, or solicits or conducts a securities or investment business through employees or agents based in the US is required to register with the SEC as a broker-dealer. This is also true if the firm conducts a securities or investment business through employees or agents based outside the United States, but who periodically travel to the US to meet with customers, or otherwise through the use of US jurisdictional means (e.g., the US mail, email or US telephone lines). While certain exemptions may be available to foreign financial services firms who interact solely with US registered banks, broker-dealers or certain institutional investors, such exemptions require specific adherence to the applicable rules and may require the intermediation of a US registered broker-dealer.

The SEC takes an expansive view of its ability to enforce US securities laws in connection with the activities of persons or firms that use US jurisdictional means to solicit transactions with US "persons," and the concept of US "persons" also is quite broadly defined by statute.

Investment advisers also generally require registration with the US SEC; provided, however, US federal law provides certain limited exemptions for foreign investment advisers with no place of business in the US who advise a *de minimis* number of US persons, with less than USD 25 million under management. In addition, foreign advisers to private funds with US investors are exempt from registration under certain circumstances.

**Derivatives**

With respect to transactions involving futures contracts (and options thereon), if the solicitation, advice or management is occurring in the United States, registration will be required. Thus, to the extent that a person solicits orders, advises US residents or manages any investments from the United States, registration will be required, absent an exemption.

The Dodd-Frank Act added Section 2(i) to the CEA, which provides that the swap provisions of Title VII apply to cross-border activities when such activities have a “direct and significant connection with activities in, or effect on, commerce of the United States” or when they contravene CFTC rules or regulations aimed at preventing evasion of Title VII. Prior to the Dodd-Frank Act, swaps were not subject to CFTC regulation (or any federal agency regulation).

The CFTC has issued both a policy statement (the Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations ("**Guidance"**)) and Rule 23.23 the "Cross-Border Rule" ("**Rule**") regarding the cross-border application of the CFTC’s swaps regulatory regime. Although the Rule largely supersedes the Guidance, the Guidance will remain applicable to most swap arrangements prior to 14 September 2021, certain legacy swaps relationships until 31 December 2027, and with respect to certain CFTC rules (e.g., clearing and trade reporting determinations) until the CFTC adopts new cross-border rules or guidance with respect to those rules.

The application of most CFTC rules (other than margining and segregation of margin) to a cross-border transaction depends, in large part, on whether one of the counterparties to the transaction is a “US person,”as defined in the Guidance. The Guidance defined the term “US person” broadly to include, but not be limited to the following:

Any natural person who is a resident of the United States

Any estate of a decedent who was a resident of the United States at the time of death

Any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than a “US Pension Plan” or a “US Trust,” each as defined below) (**Specified Legal Entity**), in each case that is organized or incorporated in the United States or having its principal place of business in the United States

Any pension plan for the employees, officers or principals of a Specified Legal Entity, unless the plan is primarily for foreign employees of such entity (**US Pension Plan**)

Any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over its administration

Any commodity pool or other collective investment vehicle that is not a Specified Legal Entity and that is majority-owned by one or more persons described above (**US Collective Investment Vehicle**), except any such entity that is publicly offered only to non-US persons and not offered to US persons

Any Specified Legal Entity (other than a limited liability company, limited liability partnership or similar entity where all the owners have limited liability) that is directly or indirectly majority-owned by one or more persons described above (other than a US Collective Investment Vehicle) and in which such person(s) bear unlimited responsibility for the obligations and liabilities of the entity

"Conduit affiliates" (i.e., non-US entities that have certain trading, ownership or accounting relationships with US affiliates)

Any individual account or joint account (discretionary or not) where the beneficial owner is a US person as described above

The Guidance makes clear that the prongs of the US person definition are not exhaustive and that there may be circumstances not fully addressed by those prongs and situations where the Guidance does not “appropriately resolve whether a person should be included in the interpretation of the term ‘US person.'”

The Rule creates a new concept of "significant risk subsidiary" that replaces the "conduit affiliate" category, provides some additional guidance regarding permissible uses of guarantees, and streamlines some of the categories of US person.

With respect to margining and segregation of margin for uncleared swaps, the CFTC adopted a slightly different definition of “US person.” Accordingly, to the extent that a person engages in swaps transactions, careful analysis of both US person definitions should be conducted to determine the applicable substantive provisions of the swaps regulatory regime.

The SEC has also adopted a "security-based swap" regime for swaps that are deemed to be securities. The SEC swaps regime is similar, though not identical, to the CFTC swaps regime, and a separate analysis of US securities-based swaps activity is necessary.

**Insurance**

State laws in the United States applicable to insurance business will likely be invoked to the extent a foreign company’s conduct involves US persons or entities located within that state.

**Money transmission**

State laws in the United States applicable to money transmission and other money services business will likely be invoked to the extent a foreign company’s conduct involves US persons or entities located within that state. Most states will also have significant surety and bonding requirements. In addition, the federal definition of money transmission may also require registration with FinCEN.

# 5. What are the requirements to obtain authorization in your jurisdiction?

## What are the requirements to obtain authorization in your jurisdiction?

**Banking**

As indicated in previous questions, different licenses are available depending on the type of banking institution and the type of activities to be conducted by the institution that is seeking authorization. All banking licenses are obtained by filing an application with the appropriate federal and state regulatory agency. The applications are usually extensive and are required to demonstrate, among other things, that the banking institution is or will be adequately capitalized, well-managed and able to comply with applicable US laws and regulations and requests from the supervising regulatory agencies. Further, the federal and state banking regulators will expect licensees to have robust written compliance and supervisory procedures in place, which should address all relevant rules and regulations.

**Securities and investments**

Depending on the type of securities or investment activity to be conducted in the United States, the person or entity will be required to file an application with the applicable securities regulators to become appropriately licensed and registered. In addition, individual persons associated with or acting in a supervisory capacity with respect to the business will likely be required to file individual applications and pass any required qualification examinations.

Broker-dealers are subject to extensive regulation by the SEC, FINRA and state securities regulators, depending on their business model and must also ensure that they have adequate net capital and provide adequate protection to customers' funds and securities. Registered investment advisers are subject to oversight from the SEC or the state(s) where they are registered based on assets that they maintain under management.

Investment companies must register with the SEC by filing the appropriate application pursuant to the Investment Company Act. In addition, investment companies issuing securities that do not qualify for an exemption will have to publicly register their securities with the SEC and pay applicable registration fees. Generally, persons managing the portfolios of registered investment companies must be registered as investment advisers.

Finally, all registrants should have robust written compliance and supervisory procedures in place, which should address relevant SEC and/or FINRA rules and regulations, as appropriate.

**Derivatives**

Registration requirements vary, depending on the type of registrant. Futures commission merchants, introducing brokers and swap dealers are subject to minimum capital requirements, while commodity pool operators and commodity trading advisers currently do not have minimum capital requirements. All registrants should have robust written compliance and supervisory procedures in place, which should address relevant CFTC rules and regulations. Individual associated persons employed by the registrant will need to satisfy the proficiency requirements, which generally involve completion of required qualification examinations.

**Insurance**

Registration requirements vary, depending on the state in which the business will be conducted, but will typically require an application. Individual licensure as agents by persons involved in the activities of the insurance company will typically also be required. The state insurance regulators will expect licensees to have robust written compliance and supervisory procedures in place, which should address all relevant rules and regulations.

**Money transmission**

The registration and licensure requirements for businesses desiring to engage in a money transmission business will vary, depending on the type of activity to be conducted and the state in which the business will operate. An application will usually be required. In addition, appropriate policies and procedures should be in place to address all applicable rules and regulations. Finally, such businesses must generally register with FinCEN.

# 6. What is the process for becoming authorized in your jurisdiction?

## What is the process for becoming authorized in your jurisdiction?

**Banking**

A bank seeking licensure in the United States would have to follow the application process outlined by the appropriate bank supervisory authority(ies) responsible for the type of charter sought. All regulatory agencies will require a form of application to be completed, along with supporting documentation such as audited financial statements, business plan, fingerprints and background checks for senior management and directors; comprehensive policies and procedures; and required application fees. No banking business may be conducted until the application is approved by the appropriate bank regulatory agencies. In addition, if a holding company structure is utilized, an application to, and approval by, the Federal Reserve would also be required.

**Securities and investments**

Broker-dealers are required to submit a New Member Application to FINRA and submit a completed Form BD to the SEC in order to register with the SEC and FINRA. All materials are submitted online through FINRA, which operates the Central Registration Depositary to disseminate the required registration information for FINRA, the SEC and the appropriate states. Documents and information that are required to be submitted with the application can include audited financials, a business plan, written compliance and supervisory procedures, forms of customer agreements, fingerprint cards/background checks for individuals registering as associated persons or being listed as principals, and registration fees.

Depending on the amount of assets under management, investment advisers are required to submit a completed Form ADV to either the SEC or the state(s) in which the investment adviser will conduct business. Information set forth in the Form ADV will vary depending upon the nature of the contemplated business, but includes ownership information, proposed business activities and arrangements, background regarding principals, and disclosure and management of conflicts of interest.

Investment companies are required to submit an application to the SEC and, if securities will be issued, the company must follow the securities registration process required by the SEC.

**Derivatives**

In order to register with the CFTC, applicants must submit applications to the National Futures Association (NFA), which handles the registration process for the CFTC. Depending on the type of registrant, documents and information that are submitted can include applications, audited financials, written compliance and supervisory procedures, fingerprint cards/background checks for individuals registering as associated persons or being listed as principals, and registration fees.

**Insurance and money transmission**

Each state has its own process for becoming authorized in the insurance industry or money transmission industry, but typically licensing and registration will involve the submission of an application, registration fee, background and fingerprints for senior management, and details regarding the intended business.

# 7. What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

## What financial services passporting arrangements does your jurisdiction have with other jurisdiction?

**Banking**

The concept of passporting is not available under US banking laws and regulations.

**Securities and Investments**

The concept of passporting is not available under US securities laws and regulations.

**Derivatives**

The concept of passporting is largely not applicable under the US Commodity Exchange Act and Regulations. The CFTC permits certain regulated entities (e.g., swap dealers) that are domiciled outside of the United States to comply with local rules on margin and "entity-level" rules if local rules are comparable to the CFTC rules (i.e*.*, "substituted compliance"). However, "substituted compliance" is largely unavailable when such non-US entities deal directly with US persons.

**Insurance**

Although the appropriate state’s laws should be reviewed to confirm, the concept of passporting is likely not available under state insurance laws.

**Money Transmission**

Although the appropriate state’s laws should be reviewed to confirm, the concept of passporting is likely not available under state money transmission laws.  Because state laws differ, each state may take a different approach, although licensing will generally extend to those entities that have a place of business or customers or counterparties within a state.  Importantly, state laws also differ from the federal registration requirements under FinCEN.

# 8. Authors and Contact Information

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