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# **Global Financial Services Regulatory Guide**

Globally integrated financial services regulatory and enforcement advice

October 2021

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The financial services industry is undergoing sweeping changes driven by regulatory developments, rapidly advancing technology, ESG concerns and continued consolidation in the sector. The far-reaching impact of financial reforms, intricacies in their implementation, and conflicting regulations in different jurisdictions can expose businesses to increased regulatory risk.

Baker McKenzie's Financial Services Global Regulatory (FSR) Guide has been updated for 2021 to incorporate changes across the globe in this rapidly evolving regulatory environment. The Guide acts as a quick reference tool when distributing financial products into new markets, providing a comprehensive summary of regulations applicable to banks and other financial services companies around the world.

To discuss expansion into new markets, or to answer your questions, please do get in touch. Contact details for each country can be found at the end of the relevant chapter.



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# Argentina

## 1. Who regulates banking and financial services in Argentina?

The Argentine Central Bank (Banco Central de la República Argentina) is the governmental agency in charge of the regulation of banking activities in Argentina, and therefore of authorizing the registration of financial entities, as stated in Article 7 of Financial Entities Law No. 21,526. It exercises control and system monitoring through the Superintendence of Financial and Exchange Entities.

The Argentine Central Bank's main duties include the following:

- The regulation of the financial system
- The enactment of financial regulations
- The flow of funds and regulation of interest rates
- The authorization regarding the registration of foreign banks

In accordance with the principle of equal treatment between national and foreign capital, Argentine law sets no restrictions on the nationality of the investors who wish to participate in the local financial system nor on the operations that the entities in which they participate can perform.

In addition, the Argentine capital market is regulated by the Argentine Securities Commission (Comisión Nacional de Valores), which is the entity in charge of the regulation of public offerings, brokers and stock exchanges. Capital Market Law No. 26,831 regulates public and private offerings in Argentina.

The anti-money laundering regulator and supervisor for financial services firms is the Financial Information Unit (Unidad Financiera de Información) ("Unit"). According to the provisions of Law No. 25246, the Unit is in charge of the analysis, processing and transmission of information to prevent money laundering and terrorist financing crimes. To this end, it may request reports, documents, background information and any other element it deems useful.

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

The legal framework regarding banking and financial activities in Argentina is mainly provided by the following laws:

- Financial Entities Law No. 21,526: The objective of this law is to regulate the establishment and operation of entities providing financial services, whether private or public, state or mixed in nature. The Financial Entities Law regulates financial entities' organization, authorization and operational requirements as well as obligations, and their permitted and prohibited activities. It also establishes sanctions for non-compliance, which include warnings, fines, disqualifications, and revocation of the license to operate as a financial entity.
- Argentine Central Bank's Charter Law No. 24,144: This law provides for the general organization of the Argentine Central Bank, its functions, rights and duties. The law aims to promote monetary and financial stability, employment and economic development with social equity to the extent possible within the policy framework established by the national government.
- Argentine Central Bank's implementing regulations: The Argentine Central Bank issues several resolutions to further regulate and implement the financial system in Argentina. These relate to all aspects of banking and financial activities aimed to facilitate the understanding and monitoring of regulations.
- Capital Market Law No. 26,831: This regulates public and private offerings in Argentina and establishes the Argentine Securities Commission as the regulatory authority for the public market.
- Productive Financing Law No. 27,440: This regulates derivatives operations, among others, and establishes the Argentine Securities Commission as the regulatory authority for the derivative market.
- Argentine Securities Commission's implementing regulations: The Argentine Securities Commission is the official body responsible for the promotion, supervision and control of stock markets. The main purpose of this commission is safeguarding investors' and shareholders' interests.

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

Any banking or financial intermediation and/or solicitation of funds activities performed in Argentina requires registration and licensing with the Argentine Central Bank. However, registration and licensing would not apply if the banking activities were performed entirely from outside Argentina following certain guidelines. In addition, it is important to note that the Financial Entities Law distinguishes among different types of financial entities, which include, among others, commercial banks, investment banks, mortgage banks and financial entities.

In connection with capital markets, any public offering of securities is subject to the supervision and prior authorization of the Argentine Securities Commission.



In addition, stockbrokers and other agents acting in Argentina within the Argentine securities markets must also be registered with the Argentine Securities Commission.

From a corporate standpoint, there is a distinction between one off and others performed on a regular basis. Any legal entity performing activities on a regular basis in Argentina will need to establish a local presence (through either a local subsidiary or branch). When a legal entity performs one , no registration is required.

For cryptoassets and cryptocurrencies, Argentina has no specific off legislation. The applicable regulations are fragmented, since the main regulations have been issued by different government agencies, such as the Unit and the Argentine Central Bank, and those regulations do not represent a complete regulatory framework for commercial transactions related to said activity.

#### 4. How do Argentina's licensing requirements apply to cross-border business into Argentina?

Any financial intermediation activity in Argentina should be conducted by local legal entities duly registered and licensed by the Argentine Central Bank. As stated in Article 13 of the Financial Entities Law, any foreign financial entity willing to promote its banking services and products in Argentina must first request the Argentine Central Bank's authorization. Once the authorization is granted, the entity will be allowed to give advice, analyze and manage financing and guarantees, as well as to carry on any other business of the foreign entity. The representative may not perform specific banking activities, including any action that directly or indirectly enables the representative to intermediate or raise funds in the local market.

With regard to securities, prior registration is required to operate in the Argentine capital market. The request for authorization to operate as a broker or other type of agent must be submitted to the Argentine Securities Commission for its analysis and approval.

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

To become an authorized financial entity, an applicant must satisfy the requirements stated by the Argentine Central Bank.

In considering the application for authorization, the Argentine Central Bank shall evaluate the appropriateness of the initiative, the characteristics of the project, the general and specific conditions of the market, and the applicant's background, responsibility and experience in financial activities.

Requirements can vary depending on the particular regulated activities that the applicant intends to carry on. Broadly, however, the following conditions will need to be satisfied:

- a. Guarantee of performance:** All directors of a financial entity who may be subject to financial penalties under Article 41 of the Financial Entities Law must provide a guarantee of performance.

- b. Legal address:** The financial institution to be set up must establish a legal address in the city of Buenos Aires. This address will allow the Argentine Central Bank to litigate in the courts of the city, except in the case of bankruptcy or credit verifications.

- c. Shareholdings report:** Current and future shareholders must file a report with their participation in any other company (financial or not) in which they have holdings exceeding 5% of the corporate capital.

For the regulatory requirements regarding the process for obtaining authorization to conduct business as a financial entity or securities' broker, please refer to our answer under section 6.

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

To obtain authorization for banking activities, an applicant must go through a formal process, which involves the completion of required application forms and the submission of supporting information. The particular forms that must be completed for submission to the regulator will depend on the nature of the regulated activities being conducted and the type of financial entity to be registered (e.g., commercial bank, investment bank, financial entity).

The request for authorization must be signed by all founding partners, and a special domicile must be established in the city of Buenos Aires for the application procedure with the Superintendence of Financial and Exchange Institutions. Also, the amount of ARS 51,000 must be paid for the evaluation of the application.

The application form must include, among others, the following information/documentation:

- Name
- Type of institution
- Address
- Amount of capital contributed by each shareholder
- If any shareholder is a legal entity, the following additional information is required:
  - a.** A certified copy of the bylaws
  - b.** A copy of the balance sheet and information regarding creditors and debtors
  - c.** A list of members of the board of directors with personal information regarding each of them
  - d.** A list of shareholders
- A draft of the bylaws or constitutional documents of the entity
- Anti-Money Laundering/Terrorism Financing handbook
- IT systems to be installed
- Background information on the shareholder's responsibility and experience in financial activities; also, an affidavit signed by all shareholders stating that they do not fall within the scope of the incapacities established by Article 10 of the Financial Entities Law
- A certificate of judicial records for each shareholder
- A description of the administrative organization of the institution
- A proposed budget and business plan for the next five years

- Organizational chart
- Minimum capital: The minimum capital required is determined by the jurisdiction where the main activity of the entity is located, with declining levels of basic requirement for areas with less relative supply of financial services and the type of entity in question. Thus, the minimum capital requirement for banks is fixed between ARS 15 million and ARS 26 million. For other financial entities, the minimum capital required will vary depending on their type.

On the other hand, the requirements to become an agent to operate in the capital market vary depending on the type of registration and license required (e.g., custody agent, broker, negotiating agent, clearing and settlement agent).

Nevertheless, the application form must include, among others, the following information/documentation:

- Copy of the bylaws and shareholders registry
- Anti-Money Laundering/Terrorism Financing sworn statement
- Payroll and personal information of the board of directors and auditors
- Copy of financial statements
- Information about external auditors
- Tax ID
- Minimum net worth (e.g., ARS 18 million for clearing and settlement agents)
- Sworn statement certifying the truth and correctness of the information provided at the registration request by electronic means
- Shareholder resolution authorizing the registration as an agent
- Sworn statement subscribed by the managers and directors of the company certifying that they do not have any incompatibility according to the regulation issued by the Argentine Securities Commission

By means of Communication "A" 7146, the Argentine Central Bank extended the application of the provisions set forth in the Financial Institutions Law No. 21,526 to non-financial credit providers and non-financial companies issuing credit or purchase cards, with a scope limited only to the financing they grant.

## 7. What financial services "passporting" arrangements does Argentina have with other jurisdictions?

Argentina has no financial services "passporting" arrangements with any other jurisdiction.

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# Australia

## 1. Who regulates banking and financial services in Australia?

Australia has four key regulators with responsibility for the authorization and supervision of banks, insurers and other financial institutions. These are the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investment Commission (ASIC), the Reserve Bank of Australia (RBA), and the Australian Transaction Reports and Analysis Centre (AUSTRAC). The allocation of responsibilities between APRA, ASIC, the RBA and AUSTRAC are as follows:

- APRA develops and enforces prudential regulation of Authorised Deposit-taking Institutions (ADIs), general insurance companies and superannuation funds in order to ensure the stability, safety, efficiency, competition and contestability of the financial system.
- ASIC is the corporate, markets and financial services regulator responsible for promoting market integrity and consumer protection. As part of its responsibilities, ASIC oversees disclosure and market conduct of Australian companies, licenses providers of financial products and services, supervises real-time trading, and enforces laws against misconduct on Australian markets.
- The RBA is Australia's central bank and has a longstanding responsibility for the overall stability of the financial system, monetary policy and payment systems.
- AUSTRAC regulates anti-money laundering and counter-terrorism financing (AML/CTF), and it is Australia's financial intelligence unit, combatting tax evasion, money laundering, terrorism and other forms of organized crime.

Following the recommendations set out in Commissioner Hayne's Final Report to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, particularly recommendation 6.10, APRA and ASIC have committed to closer collaboration and information sharing. This has been reflected in an updated memorandum of understanding that was announced in November 2019 and has subsequently seen, in certain cases, APRA cede its investigation powers to ASIC. The roles and responsibilities of APRA and ASIC are likely to be subject to further ongoing consideration and possible change as additional recommendations are addressed.

The broad framework for the regulation of banking and financial services is determined by the Australian government. As an executive arm of the government, the Federal Treasury also plays a role in regulating banking and financial services in Australia by contributing to economic policy. For example, the Federal Treasury

advises the government on the stability of the financial system, policy processes, corporate practices, and the safeguarding of public interest in matters such as consumer protection and foreign investment.

In addition, the Australian Competition and Consumer Commission (ACCC) is responsible for competition policy and consumer protection, with a mandate that extends across the entire economy, including the banking and financial services sectors.

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

The Corporations Act 2001 (Cth) ("Corporations Act") serves as the main framework law in Australia for the regulation of corporations and financial services providers. ASIC is responsible for the administration of the Corporations Act.

Other key pieces of legislation include the Banking Act 1959 (Cth) ("**Banking Act**"), Banking Regulations 1966 (Cth), Reserve Bank Act 1959 (Cth), Australian Prudential Regulation Authority Act 1998 (Cth), Australian Securities and Investments Commission Act 2001 (Cth), Financial Services Reform Act 2001 (Cth), Financial Sector (Shareholdings) Act 1998 (Cth), National Consumer Credit Protection Act 2010 (Cth), Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), and state fair trading and consumer protection acts.

In addition to legislation, both ASIC and APRA issue regulatory and policy statements, as well as information sheets that provide guidance to regulated entities on how legislation applies and should be interpreted. In particular, ASIC focuses on the Corporations Act and gives frequent updates to provide practical guidance on its expectations and policy objectives with respect to compliance with the law.

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

There is an important distinction under Australian law between services that constitute the provision of banking services and services that constitute the provision of financial services. While there is often a degree of overlap in the services that regulated entities provide, the distinction is relevant for determining the nature and scope of any licenses or authorizations that may be required.

### **Banking business**

Any entity that wishes to carry on a “banking business” within Australia is required to be authorized by APRA as an ADI.

As defined in s 5(1) of the Banking Act, “banking business” means both the taking of money on deposit (other than as part payment for identified goods or services) and the making of advances of money or other financial activities prescribed by regulations. Both elements, or at least the intention to provide both elements, are necessary to establish a banking business.

The Banking Regulations 1966 (Cth) expanded the definition of “banking business” to include, in certain circumstances, the provision of a purchased payment facility and the activities of credit card acquiring and issuing.

Other banking activities include the acceptance and discounting of local bills of exchange, as well as foreign exchange dealings both in bills of exchange and in other financial instruments — though the lending of funds is typically characterized as a bank’s principal business.

### **Financial services**

Any person or entity that is carrying out a financial services business in Australia is required to hold an Australian Financial Services Licence (AFSL), which covers the provision of those financial services unless a relevant exemption applies. ASIC is the body responsible for issuing AFSLs and supervising the conduct of AFSL holders.

“Financial services” is defined in the Corporations Act and includes providing financial product advice, dealing in a financial product, making a market for a financial product, operating a registered managed investment scheme (i.e., collective investment vehicle), providing a custodial or depository service, and providing traditional trustee company services. “Financial product” is also defined within the Corporations Act as a facility through which a person makes a financial investment, manages financial risk or makes non-cash payments. Specific examples of things that will be deemed to be financial products for the purposes of the Corporations Act include securities, interests in a managed investment scheme, derivatives, debentures, bonds, foreign exchange contracts and margin lending facilities. ASIC has also released guidance through its updated information sheet (INFO 225) to provide greater clarity regarding its position with respect to initial coin offerings and crypto-assets compliance. A detailed case-by-case analysis is required to determine whether/how a specific crypto-asset may be regulated.

### **Credit activities**

Any person or entity that is carrying out activities relating to a type of credit or consumer lease to which the National Credit Code applies and that is an activity specified in the National Consumer Credit Protection Act 2010 (Cth) must obtain an Australian Credit Licence (ACL).

It is important to note that the National Credit Code only applies to circumstances where a debtor is a natural person or a strata corporation.

### **AML/CTF**

The registration requirements administered by AUSTRAC for AML/CTF purposes need to be considered separately to the question of whether or not a proposed service or product constitutes a banking business, a financial service or product, or a credit activity requiring licensing. Following the passage of the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 in December 2017, the application of Australia’s AML/CTF requirements were significantly expanded to also capture, among other activities, digital currency exchange

service providers. Care needs to be taken in this area as AUSTRAC registration may still be required even if the activities are not otherwise regulated.

There have been significant changes to the Australian AML/CTF framework in 2021, including important updates to the tipping off provisions relevant to multinational entities, new provisions for reliance on KYC carried out by third parties (including a safe harbor provision), and changes to the correspondent banking provisions (amongst other things).

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

### **Connection to Australia**

Australian licensing requirements (with respect to both banking and financial services) will generally be triggered by an overseas entity conducting regulated activities with a sufficient connection to Australia, such that it will be taken to be “carrying out a business” in Australia. Whether an entity is carrying out a business in Australia depends on the factual circumstances of each case. However, an entity will generally be deemed to be carrying out a business in Australia if it provides services with system, repetition and continuity. Key indicia of carrying out a business include having a place of business in Australia; establishing or using a share transfer office or share registration office in Australia; and administering, managing or otherwise dealing with property situated in Australia.

In addition, and with respect to financial services regulation, the Corporations Act provides that an entity will be deemed to be carrying out a financial services business in Australia where that entity engages in conduct that is intended to induce or is likely to induce, people in Australia to use the financial services provided by the entity. This is referred to as “Inducing Conduct,” and entities that engage in Inducing Conduct will be required to hold an AFSL covering the provision of such services (unless an exemption applies), despite the fact that the entity may not otherwise be strictly carrying out a business in Australia.

The two main regulators adopt the following approaches with respect to foreign entities providing services into Australia:

### **Banking business**

APRA will authorize branches of foreign banks to carry out banking business in Australia as “foreign ADIs.” Foreign ADIs are subject to a condition specifically restricting the acceptance of retail deposits from their Australian branches, as well as other limitations and restrictions. Foreign ADIs can, however, accept deposits and other funds in any amount from incorporated entities, non-residents and their employees.

Foreign banks operating as branches (and authorized as foreign ADIs) in Australia remain subject to the supervision of their own central bank, although APRA can still impose conditions or restrictions on such entities with respect to their Australian activities.

### **Financial services**

Generally, the financial services regulatory regime will apply equally to Australian entities and foreign-registered entities. There used to be two key exemptions that offered a simplified arrangement that foreign financial services providers (FFSPs) often relied upon to exempt them from the requirement to hold an AFSL and enter the Australian market. These arrangements





have been subject to significant changes in the last year and the options available to FFSPs are now more complicated and varied depending on whether they are a new market entrant or are a longstanding market participant.

### Passporting exemption

Prior to 1 April, 2020, ASIC had implemented and maintained a number of class orders (known collectively as the “foreign financial service provider” or “passporting” class orders), which relieved a foreign entity from AFSL requirements where the foreign entity was regulated by a specified foreign regulator (“Passporting Exemption”). ASIC has, among others, previously specified regulators from Germany, Hong Kong, Singapore, U.K. and the U.S.A. as operating regulatory regimes that are “sufficiently equivalent” to the regime in Australia for Passporting Exemption purposes. The Passporting Exemption is also commonly referred to as the “Sufficient Equivalence Exemption.”

### 2020 Revisions

A revised framework for FFSPs offering services to wholesale clients or professional investors in Australia was released in March 2020 in updated ASIC Regulatory Guide 176 (“RG 176”) which superseded the version released in June 2012. From 1 April 2020, subject to a transition arrangement of two years until March 2022 for entities already relying on its exemptive relief, the Passporting Exemption was discontinued and FFSPs were provided two new options from which to choose to be able to offer services to Australian clients after the transition period expired. Those were:

- apply for a new foreign Australian Financial Services (AFS) license; or
- apply for a standard AFS license.

### Current Status

In February 2021, as part of its budget measures, the Federal Treasury announced that it would be consulting on further changes to the licensing regime for FFSPs including the potential reinstatement of the previously available Passporting Exemption (“2021 Consultation”). The 2021 Consultation was released in July 2021 and following its commencement ASIC has now taken steps to:

- extend the transition period for those entities relying on the existing Sufficient Equivalence Exemption until 31 March 2023;
- suspend assessment of license applications lodged by FFSPs pending the outcome of the 2021 Consultation process, unless the applicant requests that ASIC continues with the assessment of the application; and
- confirmed that ASIC will consider new applications for individual temporary licensing relief or new standard or foreign AFS licenses applications from entities that cannot rely on the transitional relief.

### Limited connection exemption

ASIC has historically granted class order relief from the requirement to hold an AFSL to entities which provide financial services with a “limited connection” to Australia (“Limited Connection Exemption”). The Limited Connection Exemption has been available to be used by entities that are;

1. not conducting business within Australia;
2. only deemed to be carrying on a financial services business in Australia because of

inducing, or intending to induce (Inducing Conduct), a person in Australia to use their financial services; and

3. such services are provided to wholesale clients only.

### 2020 Revisions

Subject to an initial two-year extension period until 31 March 2022 for FFSPs which were already relying on the Limited Connection Exemption up to and including 31 March 2020, the exemption was discontinued from 1 April 2020 and was replaced with the Funds Management Relief pursuant to ASIC Corporations (Foreign Financial Services Providers - Funds Management Financial Services) Instrument 2020/199. This will apply for services to a narrower scope of potential clients and is intended to be available to the following:

- FFSPs who only carry out a financial services business because they engage in conduct that is intended to, or will likely, induce people in Australia to use the financial services the FFSP provides under s911D Corporations Act 2001 (Cth) (“Corporations Act”)
- FFSPs who engage in the provision of funds management financial services to a subset of professional investors (i.e., Eligible Australian Users).

Examples of Eligible Australian Users currently include a responsible entity of a registered scheme, a trustee of a wholesale trust who holds an AFSL (or would be required to hold an AFSL but for the ASIC Corporations (Wholesale Equity Schemes Trustees Instrument 2017/849)), and bodies regulated by the Australian Prudential Regulatory Authority. ASIC has indicated that FFSPs wishing to induce other types of professional investors can apply to ASIC to obtain additional approval.

Certain conditions will be imposed on an FFSP when relying on the Funds Management Relief, including the appointment of a local agent and that the FFSP has no place of business in Australia. To rely on the Funds Management Relief, the FFSP must lodge a written notice with ASIC.

### Current Status

Since the commencement of the 2021 Consultation, it has been confirmed that the Limited Connection Relief will now apply until 31 March 2023. From 1 April 2023, an FFSP will need to either be eligible for and rely upon the funds management relief or otherwise hold a foreign or standard AFSL to continue providing financial services to Australian wholesale clients if they are not otherwise eligible for other statutory exemptions. Further observation will be required to see if the Funds Management Relief forms part of the way forward following the 2021 Consultation.

### Foreign AFSL

The foreign AFSL regime for FFSPs, which commenced in 1 April 2020 involves FFSPs applying for a modified AFSL that:

- Maintains the Sufficient Equivalence designation for certain markets and enables FFSPs holding a relevant authorization from those markets to provide the services or products approved in ASIC Corporations (Foreign Financial Services Providers-Foreign AFS Licensees) Instrument 2020/198 or an individual relief instrument to wholesale clients in Australia
- Requires compliance with the general obligations under s912A (for example, to have adequate risk management systems and to do all things necessary to ensure that the financial services covered by the license are provided efficiently, honestly and fairly).





- Requires the FFSP to be subject to supervisory and enforcement provisions applicable to standard AFSL holders, including:
  - being directed to provide a written statement under s912C
  - breach reporting requirements under s912D
  - to give ASIC reasonable assistance during surveillance checks under s 912E
- Exempts FFSPs from specific provisions under Chapter 7 Corporations Act, where the relevant overseas regulator monitors and enforces the FFSP's compliance in relation to business activities in Australia and the regulatory regime in the FFSP's home jurisdiction produces similar regulatory outcomes to the Australian regime.
- Put in place tailored conditions on the FFSP, including the following:
  - The foreign AFS Licensee must carry on a business in the relevant jurisdiction. This condition is aimed at ensuring that the licensee is subject to overseas regulatory oversight in that jurisdiction.
  - Unless the foreign AFS Licensee is a company, it must have an agent appointed at the time it purports to rely on the relief and not fail to have an agent for any consecutive period of 10 business days.
  - The foreign AFS Licensee must reasonably believe that it would not contravene any laws of its home jurisdiction relating to the provision of financial services if it were to provide the wholesale financial service in its home jurisdiction.
- Require FFSPs to provide similar documentation when applying, as is required for an ordinary AFSL.

#### Standard AFSL

Where the FFSP is not eligible for Funds Management Relief or a foreign AFSL, or there is no other licensing exemption that applies, the FFSP must apply for a standard AFSL. The application process will include a range of proofs as part of an online application. If successful, the FFSP will ultimately be subject to the normal AFSL arrangements and obligations unless specific relief is granted by ASIC.

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

#### ADI authorization

An applicant for authorization from APRA must complete a formal process involving the completion of required application forms and the submission of supporting information to APRA. Locally incorporated ADIs and foreign ADIs will be required to submit different types of supporting information. APRA will only authorize applicants with the requisite capacity and commitment to conduct, on a continuing basis, banking business with integrity, prudence and competence.

The following are the minimum requirements that an applicant will need to meet for ADI authorization:

- **Capital:** Although no set amount of capital is required for an ADI, applicants seeking to operate as banks must have a minimum of AUD 50 million in Tier 1 capital. Applicants must satisfy APRA that they are able to comply with APRA's capital adequacy requirements from the commencement of their banking operations, and these

requirements will depend on the applicant's own circumstances.

- **Ownership:** Applicants must satisfy the requirements specified in the Financial Sector (Shareholdings) Act 1998 (Cth) regarding the ownership of ADIs. All substantial shareholders of an applicant are required to demonstrate to APRA that they are 'fit and proper' in the sense of being well-established and financially sound entities of standing and substance.
- **Governance:** Applicants must satisfy various prudential standards and requirements with respect to the composition and functioning of the board.
- **Risk management and internal controls systems:** Applicants must satisfy APRA that their proposed (or existing) risk management and internal control systems are adequate and appropriate for monitoring and limiting risk exposures in relation to domestic and, where relevant, offshore operations from the commencement of the ADI's banking operations. Foreign bank applicants must also demonstrate that its arrangements for reporting to the parent foreign bank or head office are adequate.
- **Compliance:** Applicants must satisfy APRA that their compliance processes and systems are adequate and appropriate for ensuring compliance with APRA's prudential standards and other Australian regulatory and legal requirements.
- **Information and accounting systems:** Applicants must satisfy APRA that their information and accounting systems are adequate for maintaining up-to-date records of all transactions and commitments undertaken by an ADI, so as to keep management continuously and accurately informed of the ADI's condition and the risks to which it is exposed.
- **External and internal audit arrangements:** Applicants must demonstrate to APRA that adequate arrangements have been established with external and internal auditors in accordance with the requirements set out in the relevant prudential standards.
- **Supervision by home supervisor:** Foreign applicants must have received consent from their home supervisor for the establishment of a banking operation in Australia. Only applicants that are authorized banks in their home country will be granted authority to operate foreign ADIs. Foreign bank applicants must satisfy APRA that they are subject to adequate prudential supervision in their home country.

#### RADI authorization

An applicant for an ADI authorization can first apply with APRA for a restricted authorized deposit taking (RADI) license if they meet the requisite criteria. This is an alternative to the direct route to an ADI authorization described above. A RADI license allows its holder to conduct limited banking business with adjusted prudential requirements while simultaneously building their capabilities, infrastructure and resources. A RADI license can only be held for a maximum of two years. A new distinction has been made creating a New ADI category.

#### AFSL

An applicant for an AFSL must satisfy the conditions and requirements set out in the Corporations Act, as well as ASIC regulatory guidance materials. The key requirements for an AFSL are as follows:

- **Good fame and character:** If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame and character. If the applicant is not a single natural person, ASIC must be satisfied that there is no reason to believe that any of the applicant's responsible officers, partners and/or trustees are not of good fame or character.





- **Competency:** The applicant must demonstrate its organizational competence for the financial services and products that the business is proposing to provide. Responsible managers must also have the necessary knowledge and skills to carry out their roles.
- **Compliance and conflicts management arrangements:** The applicant must demonstrate that adequate compliance measures are in place to meet relevant obligations.
- **Adequacy of resources:** The applicant must demonstrate that they have sufficient financial, human and technological resources to carry out the business that is being proposed.
- **Adequate risk management systems:** The applicant must demonstrate adequate risk management systems, tailored to the applicant's financial services business.
- **Dispute resolution -** If it has applied to provide financial services to retail clients, the applicant must demonstrate that it has an adequate dispute resolution system in place.
- **Compensation and insurance arrangements:** If it has applied to provide financial services to retail clients, the applicant will need to have arrangements in place for compensating those clients for losses they suffer if the applicant breaches its obligations under the Corporations Act.
- **Research and benefits:** If the applicant is seeking to provide financial services to retail clients, the applicant will need to demonstrate how it conducts product research and present its approved or recommended product list.
- **Other requirements:** The applicant must demonstrate its ability to meet other obligations as an AFS Licensee if ASIC grants the license.

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

### ADI authorization

The overall ADI licensing process can take anywhere from three months to 12 months.

The particular forms that must be completed for submission to APRA will depend on the nature of the regulated activities that are proposed. However, the general process for ADI authorization is as follows:

- **Initial consultation:** APRA will consult with the applicant to discuss the applicant's proposed business plan. This discussion will seek to identify any matters that might adversely impact the proposal, and allow the parties an opportunity to agree on the format and content of any formal application.
- **Submission:** The applicant will need to prepare a detailed submission to APRA, which covers the required criteria as well as other issues requested by APRA. Draft copies of the submission will often be lodged before the final version to allow APRA to comment or ask further questions.
- **APRA's review of the application:** This will include meetings with senior officers and other responsible persons of the applicant, as well as on-site prudential reviews

See also our comments in Section 5 "What are the requirements to obtain authorization in Australia?" regarding RADI authorizations.

### AFSL

An application to obtain an AFSL can take anywhere from three months to six months. However,

this will vary, depending on the quality of the information provided and on ASIC's analysis of the applicant's business and its proposed market.

To apply for an AFSL, the applicant must compile and submit an application consisting of an application form and several supporting core proof documents. There are four core proof documents, as follows:

- **A5 Business Description:** This is a description of the applicant's proposed business, including the financial services and products to be provided, how income will be generated, and projected business growth.
- **B1 Organizational Competence:** This is a description of the organizational competency of the applicant and includes information on the skills, qualifications and experience of each responsible manager that has been nominated by the applicant.
- **B5 Financial Statements and Financial Resources:** This is a description of the financial position and creditworthiness of the applicant.
- **People Proofs for each responsible manager:** This is a compilation of relevant supporting material and documentary evidence of a responsible manager's skills, qualifications and experience, including a Statement of Personal Information, qualification certificates, bankruptcy checks, national criminal history checks and two business references.

## 7. What financial services "passporting" arrangements does Australia have with other jurisdictions?

As set out above in Section 4, some foreign financial service providers are still temporarily able to rely upon the Passporting Exemption, but will, like new market entrants, need to make a decision whether to apply for the new foreign AFSL, satisfy the Funds Management Relief, or otherwise obtain a standard AFSL to continue providing services within Australia.

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# Austria

## 1. Who regulates banking and financial services in Austria?

In Austria, banking and other financial services are regulated by the Austrian Financial Market Authority (Finanzmarktaufsichtsbehörde or FMA), in cooperation with the Austrian National Bank (Oesterreichische Nationalbank or OeNB).

The FMA is responsible for the authorization and supervision of banks, providers of insurance services and other financial institutions to the extent such authority does not vest with the European Central Bank (ECB). In this regard, the FMA performs solvency supervision, market and conduct supervision as well as supervision of compliance with anti-money laundering provisions. The FMA is authorized to conduct on-site inspections at financial services providers. The FMA may pass legally binding regulations (Verordnungen) on the basis of existing laws. It also regularly issues rules and guidelines (Rundschreiben), which are not legally binding, but set out FMA's legal position on particular regulatory matters and should be observed by the supervised institutions.

The OeNB is responsible for the macro-economic supervision of the banking and financial services industries in Austria. As such, the OeNB in particular monitors and analyzes the Austrian financial market and is consulted by the FMA in many of the latter's proceedings.

The supervisory authorities of the European Union (i.e., the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pension Schemes Authority) play an important role in the supervision process, especially as they are responsible for issuing guidelines, recommendations and technical standards in relation to EU legislation.

Pursuant to the Single Supervisory Mechanism (SSM) introduced by Council Regulation (EU) No 1024/2013, the ECB is responsible for monitoring the financial stability of banks in the Eurozone (including Austria). Under the SSM, the ECB: in cooperation with the respective national supervisory authorities: directly supervises (groups of) so-called significant credit institutions, which are deemed to be relevant to the functioning of the Eurozone banking system. Seven Austrian banks qualify as significant institutions. All significant institutions are listed on the European Commission's website. The other credit institutions continue to be subject to supervision by the FMA and will only be indirectly supervised by the ECB.

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

The main sources of regulatory law in Austria are listed as follows:

- The provision of banking services is regulated by the Austrian Banking Act (Bankwesengesetz or BWG; implementing, inter alia, CRD IV) as well as the CRR.
- The activities of insurance companies are regulated by the Austrian Insurance Supervision Act (Versicherungsaufsichtsgesetz or VAG; implementing, inter alia, the Solvency II Directive).
- The provision of investment services is regulated by the Austrian Securities Supervision Act (Wertpapieraufsichtsgesetz 2018 or WAG 2018; implementing MiFID II).
- The provision of payment services is regulated by the Austrian Payment Services Act (Zahlungsdienstleistungsgesetz or ZaDiG; implementing the Payment Services Directive II).
- The issuance of e-money is regulated by the Austrian E-Money Act (E-Geldgesetz 2010 or E-GeldG; implementing the E-Money Directive).
- The public offering of securities and other investments is regulated by the Austrian Capital Market Act (Kapitalmarktgesetz 2019 or KMG 2019; implementing the Prospectus Regulation).
- The establishment, management and distribution of Undertakings for Investments in Transferable Securities (UCITS) is regulated by the Austrian Investment Fund Act (Investmentfondsgesetz or InvFG; implementing the UCITS Directives).
- The management of alternative investment funds (AIF), including the distribution of AIFs in Austria, is regulated by the Austrian Alternative Investment Fund Manager Act (Alternative Investmentfonds Manager-Gesetz or AIFMG; implementing the Alternative Investment Fund Managers Directive).
- In general, all supervised entities are subject to the AML and KYC provisions of the Federal Act on the Prevention of Money Laundering and Terrorist Financing in Financial Markets (Finanzmarkt-Geldwäschegesetz or FM-GwG; implementing the Anti Money Laundering Directive).

As in other EU member states, the majority of the applicable rules in Austria are based on EU directives and regulations.



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

The provision of financial services on a commercial scale in Austria generally constitutes a regulated business activity and is subject to Austrian licensing requirements. The following list includes examples of regulated financial services:

**a. Banking services that are subject to licensing requirements under the BWG, including the following:**

- The acceptance of funds for the purpose of administration or as deposits (deposit business)
- The provision of non-cash payment services, clearing services and current-account services (current account business)
- Lending (irrespective of whether loans are provided to consumers or businesses)
- The safeguarding and administration of securities (custody business)
- The issuance and administration of payment instruments
- The trading in securities or other investments on one's own account or on behalf of others
- The issuance of guarantees or the assumption of other forms of liability for third parties (guarantee business)
- Factoring
- The brokerage of certain banking services, including the deposit and the lending business, whereas for the brokerage of loans, a trade license as commercial asset advisor under the Austrian Trade Code (Gewerbeordnung) may also suffice

**b. Investment services that are subject to licensing requirements under the WAG 2018, including the following:**

- The provision of investment advice in relation to financial instruments
- Individual portfolio management
- The receipt and transmission of orders relating to financial instruments

**c.** Insurance services that are subject to licensing requirements under the VAG, and insurance distribution activities that are subject to licensing requirements under the Austrian Trade Code (licensing requirements set out in the EU Insurance Distribution Directive have, to date, not been transposed into the Austrian Trade Code.)

**d.** E-money services that are subject to licensing requirements under the E-GeldG, including the issuance of electronic money by means of a prepaid electronic payment product based on either a card or an account

**e.** Payment services that are subject to licensing requirements under the ZaDiG, including, inter alia, the operation of payment accounts and the execution of payment transactions, money remittance, payment card issuance and acquiring card transactions

**f.** Collective portfolio/UCITS management activities that are subject to licensing requirements under the InvFG, and the management of AIF subject to licensing requirements under the AIFMG

**g.** The provision of investment services subject to licensing requirements either under the WAG 2018 (if in relation to financial instruments) (see item (b) above) or under the

Austrian Trade Code (requiring a trade license as commercial asset advisor)

A particular license may also include the authorization to pursue activities regulated by other supervisory laws (e.g., an Austrian bank does not require a separate license under the WAG 2018 to provide investment services, but it is required to observe the respective provisions of the WAG 2018 when rendering investment services).

#### **Crypto assets**

A general definition of "crypto assets" does not exist in Austria. However, with the implementation of the AMLD5, the definition of "virtual currency," a digital representation of value that is not issued or guaranteed by a central bank or a public authority (for example, Bitcoin, Ether), has been introduced to the FM-GwG which requires so-called "providers in relation to virtual currencies" (i.e., a crypto exchange) to register with the FMA for AML purposes, if one of the following services is offered (exhaustive list):

- Services to safeguard private cryptographic keys, to hold, store and transfer virtual currencies on behalf of a customer (custodian wallet providers)
- Exchange of virtual currencies into fiat money and vice versa
- Exchange of one or more virtual currencies among each other
- Transfer of virtual currencies
- Provision of financial services for issuing and selling virtual currencies

Currently, the treatment of crypto assets other than virtual currencies (i.e., security tokens, e-money tokens) is not explicitly regulated under Austrian law. The FMA has published a brief guidance in this regard, stating that crypto-related payment services, banking activities, e-money activities, investment services, insurance activities or exchange services might be subject to additional authorization requirements under the above mentioned Austrian supervision regime. Additionally, obligations to publish a prospectus under the KMG could also arise if security tokens akin to shares or other investments are offered to the public (initial coin offering).

### 4. How do Austria's licensing requirements apply to cross-border business into Austria?

Austrian licensing requirements are triggered if a regulated service is rendered in or cross-border into Austria. The (financial) service provider will, therefore, need to consider whether it needs to comply with local Austrian licensing obligations (and/or local marketing rules, as applicable) prior to rendering and/or offering its services to Austrian domiciled customers.

Austrian law itself does not specify which criteria have to be fulfilled for services to qualify as services rendered in or cross-border into Austria, and no official FMA guidance has been published in this regard. The Austrian Supreme Court has found that the assessment of whether banking or other financial services are being rendered in or cross-border into Austria always has to take place on a case-by-case basis, considering, among other things, pre-contractual circumstances (such as the place where negotiations took place) and the contents of the contractual relationship.





Austrian laws and regulations can be applicable whenever a financial service provider domiciled outside of Austria actively solicits and/or provides services to customers located in Austria. Consequently, no Austrian licensing requirements apply under the following circumstances:

- The services themselves are not carried out in Austria (as for instance, the respective accounts/deposits are maintained outside of Austria).
- The foreign entity does not carry out any active solicitation in Austria and the business relationship was, thus, established outside of Austria or solely upon the customer's unsolicited request (reverse solicitation).

In this respect, reverse solicitation is always subject to the precondition that the request by the customer has not been solicited in any manner by prior marketing activities of the offeror targeting the Austrian market.

To avoid qualification as services rendered in or into Austria, it is further recommended that the relevant agreement with the customer be signed by both parties outside of Austria and that specific legal advice be sought before "tapping" into the Austrian market.

Marketing and communication activities are crucial for determining whether financial services are rendered in or into Austria. If an entity's marketing activities specifically target customers domiciled in Austria, such activities may trigger Austrian licensing requirements.

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

Generally, an Austrian license may only be obtained by an Austrian company (this means that in the case of foreign financial services providers, an Austrian subsidiary needs to be established). Under some laws, including the BWG, a license may also be granted to a non-EEA branch office of a foreign financial services provider. Note that EEA financial institutions may also passport their home-country license into Austria (see "Passporting" in question 7).

The licensing procedure itself will also depend on the license/activity in question. Typical requirements include the following:

- Location of place of establishment and head office in Austria
- Legal form of the entity (often a limited liability company or a stock company)
- Size, composition and qualification of management body, including residence and capabilities of directors
- Aptitude of qualified shareholders
- Appropriate resources, usually including minimum initial capital amounts and amounts at the management's free disposal
- A forward-looking business plan (that is usually the most complex document in the licensing procedure)
- Organizational (with regard to monitoring, controlling and limiting business risks and operational risks, establishment of a compliance organization) and staffing requirements (fitness, training and capabilities of certain officers)
- Appropriateness of articles of association/statute
- Availability of the entity for effective supervision by the FMA, meaning the absence of

impediments arising from the applicant's close relation to other natural or legal persons or the applicability of third-country regulations preventing the FMA from carrying out its monitoring duties

This list represents typical requirements only; specific requirements will depend on the type of license sought.

### Sanctions

The unauthorized provision of regulated services constitutes a punishable administrative offense and can constitute a criminal offense (such as fraud) punishable by the courts. The administrative fine for the unauthorized provision of regulated deposit or lending services amounts up to EUR 5 million or twice the amount of the benefit received from the breach.

The unauthorized provision of other banking, insurance or investment services may be subject to a fine of up to EUR 100,000.

In addition, whoever conducts a regulated financial activity without the necessary authorization may not be entitled to any consideration for such activity, such as, in particular, interest and commissions. Agreements to the contrary as well as sureties and guarantees relating to such unauthorized transactions would be without legal effect.

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

In order to obtain an Austrian license, the applicant must submit an application form together with the required documentation to the FMA. The FMA will then review the application and determine whether additional information need to be presented and/or whether the license can be granted. Austrian law generally does not stipulate a certain minimum or maximum assessment period for license applications. In practice, the process for obtaining a banking license takes at least one year.

The documentation requirements depend on the type of license and the nature of the regulated activities. The documentation requirements are typically dependent on, and linked to, the requirements of the relevant authorization (see question 5 above).

The FMA does not have discretion on whether to authorize an entity. If the (formal and material) requirements for an authorization are met, the FMA is required to provide the authorization to the applicant.

Appeals against decisions of the FMA can be filed with the Federal Administrative Court (Bundesverwaltungsgericht) and ultimately, subject to additional requirements, with the Supreme Administrative Court (Verwaltungsgerichtshof) and/or the Constitutional Court (Verfassungsgerichtshof).

In order to support ambitious new business models of fintechs, which might be discouraged by the rather formal licensing procedure described above, the FMA initiated a "regulatory sandbox" program in September 2020, under which obtaining a license is facilitated by close support and supervision of the FMA. The aim of this program is to help fintechs on their way to becoming licensed entities, rather than lowering supervisory standards. The first fintech joined the program in late January 2021.



## 7. What financial services “passporting” arrangements does Austria have with other jurisdictions?

As Austria is a member state of the EEA, EEA passporting rules apply into and out of Austria. An institution authorized to perform financial services in a member state under a local license may carry out regulated activities in other member states, including Austria. This enables the institution in question to provide cross-border services and establish a branch in the host member state.

An EEA financial institution intending to passport into Austria is required to file a notification and certain documentation with its home country regulator, which will forward the notification and documents to the FMA (being the competent regulatory authority within Austria). The institution may then be permitted to render their services in Austria through an Austrian branch (under the freedom of establishment passport) or cross-border into Austria (under the freedom of services passport) without being required to obtain an Austrian license.

Similarly, an institution authorized to perform financial services in Austria under an Austrian license may carry out business in other EEA member states by means of passporting. For this purpose, the institution must submit a notification together with any required documentation to the FMA, which will then be passed on to the regulatory authority of the respective host member state.

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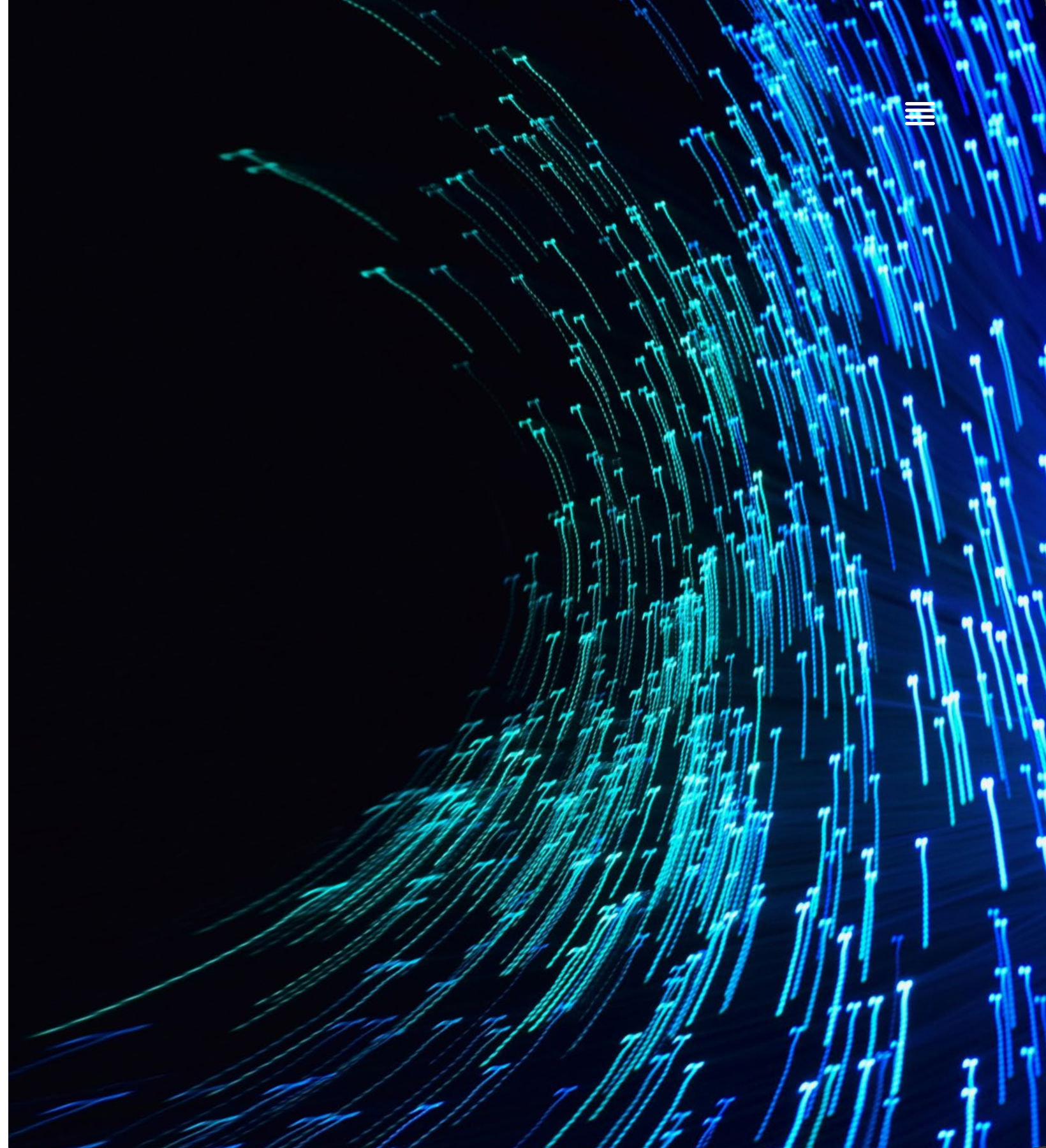
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# Belgium

## 1. Who regulates banking and financial services in Belgium?

On 1 April 2011, Belgium adopted a “twin peaks” model with two autonomous supervisors, each with specific tasks and competencies:

### a. The National Bank of Belgium (NBB):

- The NBB oversees individual financial institutions (microprudential supervision) and looks after the proper functioning of the financial system as a whole (macroprudential supervision). The NBB thus ensures the financial soundness of financial institutions under its control through requirements on solvency, liquidity and profitability.
- The NBB oversees payment systems and securities settlement systems, supervising their proper functioning and ensuring their efficiency and solidity.
- The NBB is the competent anti-money laundering (AML) supervisor for the financial institutions under its supervision.

### b. The Financial Services and Markets Authority (FSMA):

- The FSMA supervises the financial markets and listed companies; authorizes and supervises certain categories of financial institutions; is responsible for the “social supervision” of supplementary pensions; and supervises the unlawful offering of products and financial services.
- The FSMA monitors financial intermediaries for compliance with rules of conduct in order to guarantee the loyal, fair and professional treatment of clients.
- The FSMA contributes to the financial education of savers and investors.
- The FSMA is the competent AML supervisor for the financial institutions and financial intermediaries under its supervision.

Additionally, the following EU authorities are also relevant in Belgium:

- The European Supervisory Authorities (ESAs) - the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pension Schemes Authority (EIOPA)
  - The ESAs play an important role in issuing technical standards and guidelines. They have some limited supervisory powers over Belgian firms.

- The European Central Bank (ECB)

- The ECB is the supervisor of Eurozone banks under the EU’s Single Supervisory Mechanism (SSM). Belgium is in the Eurozone and so Belgian banks are within the scope of the SSM and subject to supervision by the ECB.
- Different supervisory powers apply depending on whether the bank is significant or less significant.

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

Many relevant Belgian laws are derived from EU directives and regulations. In many respects, therefore, Belgian domestic legislation and rules simply give effect to pan-European legal requirements.

However, many EU directives set only minimum standards and provide member states with a certain degree of discretion to impose stricter or more lenient obligations. Therefore, their implementation can vary across the EU. In some instances, Belgium and other EU jurisdictions have introduced domestic laws that exceed European-level requirements.

EU rules have been implemented in various Belgian laws, such as the following:

- The Financial Supervisory Act
- The Anti-Money Laundering Act
- The Banking Act
- The Investment Firms Act
- The Securities Act
- The Collective Investment Undertakings Act
- The Alternative Investment Fund Managers Act
- The Financial Intermediaries Act
- The Insurance Act
- The Insurance and Reinsurance Undertakings Act
- The Act on Financial Planning
- The Payment Services Act

- Belgium's Economic Law Code
- Various other acts and royal decrees

Both the NBB and the FSMA issue various circulars and communications that apply to the firms they regulate. These rules and guidance are primarily applicable to Belgian-regulated or -supervised firms, but are also relevant in certain respects to non-Belgian firms.

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

Belgium regulates a broad range of activities. These include, among others, the offering of the following:

- Banking services and the intermediation in relation to such services: banking services (and other services that can be provided by banks) are any of the following services that are provided to a third party:
  - Acceptance of deposits and other repayable funds from the public
  - Lending, including, *inter alia*, consumer credit, mortgage credit, factoring with or without recourse, and financing of commercial transactions (including forfeiting)
  - Leasing
  - Payment services
  - Issuing and administering of means of payment other than payment services (e.g., travelers' cheques and bankers' drafts)
  - Guarantees and commitments
  - Trading for own account or for account of customers in: (i) money market instruments; (ii) foreign exchange; (iii) financial futures and options; (iv) swaps and similar financing instruments; and (v) securities
  - Participation in share issues and the provision of services related to such issues
  - Advice to undertakings on capital structure, industrial strategy and related questions, and advice and services relating to mergers and the acquisition of undertakings
  - Intermediation in the interbank market
  - Portfolio management or advice
  - Safekeeping and administration of securities
  - Rental of safes
  - Issuance of electronic money
- Investment services and the intermediation for the offering of such services: investment services are any of the following services or activities in relation to financial instruments:
  - Reception and transmission of orders in relation to one or more financial instruments, including bringing together two or more investors in a way that results in a possible transaction between these investors
  - Execution of orders on behalf of clients

- Dealing on own account
- Portfolio management
- Investment advice
- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis
- Placing of financial instruments without a firm commitment basis
- Operation of multilateral trading facilities
- Operation of organized trading facilities

- Money exchange services: these services are spot foreign currency buying or selling transactions in the form of cash or checks or through the use of a credit or charge card.
- Payment services and the intermediation for the offering of such services: payment services are any of the following services:
  - Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account
  - Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account
  - Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider (execution of direct debits, payment transactions through a payment instrument and credit transfers, including permanent payment orders)
  - Execution of payment transactions where the funds are covered by a credit line for a payment service user (execution of direct debits, payment transactions through a payment instrument and credit transfers, including permanent payment orders)
  - Issuing of payment instruments and/or acquiring of payment transactions
  - Money remittance
  - Payment initiation services
  - Account information services
- Issuance of electronic money: electronic money is a prepaid electronic payment product, which can be card- or account-based.
- Mortgage credits and the intermediation for the offering of such services: this covers mortgage credits used to finance the acquisition or the keeping of immovable rights in rem.
- Consumer credits and the intermediation for the offering of such services
- Insurance services and the distribution of insurance products (intermediation services): regulated insurance distribution activities consist of the following:
  - Advising on insurance contracts
  - Offering, proposing or carrying out preparatory work to the conclusion of insurance contracts
  - Concluding such contracts
  - Assisting in the management and performance of such contracts







- Providing information about insurance contracts based on criteria chosen by a customer via a website or other media, and drawing up a ranking list of insurance products, including a price and product comparison, or a discount on the premium of an insurance contract if the customer can enter into an insurance contract (in)directly through a website or other media
- Reinsurance activities: these activities consist of accepting risks ceded by an insurance undertaking or by another reinsurance undertaking.
- Occupational retirement schemes: institutions for occupational retirement provision providing retirement benefits in the context of an occupational activity are regulated.
- Alternative financing services (crowdfunding platforms): the offering of alternative financing services through electronic crowdfunding (or crowdlending) platforms is regulated.
- Financial planning: the provision or offering of advice on financial planning to non-professional clients is regulated.
- Virtual currency exchanges and custodian wallet providers: providers of services for exchanges between virtual currencies and fiduciary currencies and custodian wallet providers, if established on Belgian territory, are obliged to register with the FSMA and are subject to the AML framework.

## 4. How do Belgium's licensing requirements apply to cross-border business into Belgium?

Financial services generally require a license if offered in Belgium (either directly or on a cross-border basis). Whether the provision and marketing of financial services to Belgian clients trigger the applicability of Belgian law should be analyzed on a case-by-case basis.

According to the Belgian regulators, financial services are being offered in Belgium under either of the following circumstances:

1. The financial services are delivered/carried out in Belgium.
2. The financial institution actively solicits orders from customers in Belgium by means of remote sales and marketing techniques or advertising

The Belgian regulators hold the view that financial services are offered in Belgium not only when the actual service takes place on Belgian territory but also if the foreign financial institution solicits orders from Belgian customers in Belgium by means of remote sales techniques (e.g., cold calling or email), advertising, or visits of relationship managers soliciting "services" or "orders."

Performing financial services on Belgian territory on a purely cross-border basis will therefore trigger licensing requirements, even if carried out from locations outside the Belgian territory, except in the following cases:

1. Provision of financial services to existing Belgian clients, who were not actively solicited for such financial services in the past, if:

- a. The performance of financial services to existing Belgian clients takes place outside of Belgium (without prior active solicitation in Belgium). In particular, any execution of account-opening documents or agreements or any amendments thereof should take place outside of Belgium. Practically, the Belgian clients would have to come to the financial service provider without being solicited to sign such documents.
  - b. No documents other than periodic account statements are sent from the financial institution to Belgian clients.
  - c. If meetings do take place in Belgium or phone calls are made to clients in Belgium, such meetings and phone calls should be limited to the general strategy of the account (maintenance of an existing relationship established without active solicitation) and in no case relate to specific investment decisions that may be made in relation to the account or selling or offering of new financial services.
2. Marketing efforts with respect to financial services not targeting Belgian residents.
  3. Notoriety marketing, that is, general and non-specific advertisements.
  4. Acceptance of unsolicited calls from new Belgian clients and acceptance to serve such clients ("passive servicing" or "reverse solicitation"): this would require the relationship with the customer to be established outside Belgium and all account opening documents be executed outside Belgium. Belgian residents may also be approached outside of Belgium without triggering licensing requirements.
  5. Acceptance of deposits from consumers and/or corporate customers under the private placement exemption: to the extent the custody of cash by a foreign financial institution qualifies as the receipt of deposits or other repayable funds from Belgian residents, deposits or other repayable funds are only deemed received from the public, triggering licensing or registration requirements if:
    - a. Advertisements (defined very broadly) are used to announce or recommend the receipt of deposits and other repayable funds, and these advertisements are directed to more than 50 persons in Belgium.
    - b. Intermediaries are used.
    - c. More than 50 persons are contacted in Belgium by the company trying to receive deposits.
  6. Provision of brokerage and investment advisory services to "permitted investors" in Belgium (light-touch notification procedure to be complied with before the FSMA).

Please note that a different regime exists for the offer of insurance in Belgium since Belgian regulators generally rule that a non-Belgian insurance company will be considered to exercise insurance activities in Belgium as soon as it enters into an insurance contract with a Belgian resident, regardless of whether it actively or passively solicited orders for the subscription of insurance agreements in Belgium. Accordingly, non-EEA insurance undertakings cannot enter into insurance agreements with Belgian residents who are not expatriates without being duly licensed under Belgian law.

Even if financial services can be provided in Belgium, the applicability of Belgian product regulations should be assessed separately.

The public offering of investment instruments (such as stocks, bonds and options) or of foreign public open-end and closed-end investment funds (including UCITS and AIFs) may trigger a



registration and/or prospectus requirement, unless a private placement exemption is available.

Furthermore, persons issuing or disseminating investment research are subject to regulations and must comply with certain information obligations.

Also, the granting of payment services, consumer and mortgage credit is regulated.

Moreover, in case the financial institution would be deemed to be providing regulated financial services in Belgium, it might have to comply with applicable conduct of business rules.

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

To become authorized, an applicant must comply with certain regulatory requirements and submit a registration or authorization file to the relevant regulator.

The requirements vary, depending on the particular regulated activities that the applicant intends to carry out. Broadly, however, the following conditions need to be satisfied:

- a. Legal form:** the applicant should be established in a specific legal form, with the exception of the private limited liability company founded by a single person.
- b. Location of offices:** for Belgian incorporated companies, the head office must be located in Belgium.
- c. Initial capital:** applicants must possess a certain initial capital, which must be fully paid up.
- d. Adequacy of the shareholder structure:** the shareholders have to be adequate in order to guarantee a sound and prudent management of the institution.
- e. Professional and appropriate management:** management should be composed of natural persons only and have to possess the necessary professional trustworthiness and appropriate expertise ("fit and proper" requirements).
- f. Organization:** the applicant should have a management structure, administrative and accounting procedures, as well as internal control systems that are appropriate to the activities proposed.
- g. Specific conditions governing the pursuit of the business of credit institutions, insurance companies, payment institutions and investment firms:** these specific requirements relate to changes in the capital structure, general operating requirements, product requirements, conduct of business rules, special transactions, regulatory standards and obligations, periodic disclosure and accounting rules, recovery plans, and the structure of the pursued activities.
- h. Minimum capital requirements:** the applicant's own funds should never fall below the set initial capital amount.

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

To obtain authorization, an applicant must go through a formal process, which involves the completion of required application forms and the submission of supporting information.

In relation to timing, in most cases the regulator will have six months from receipt of a completed application to determine whether or not to approve the application. Where an application is deemed incomplete, the application must be resolved within 12 months.

The particular forms that must be completed for submission to the regulator depend on the nature of the regulated activities to be conducted.

Requests for authorization must be accompanied by an administrative file complying with the conditions laid down by the relevant regulator. In particular, a program of operations must be included in the administrative file, setting out, inter alia, the type and the volume of the business envisaged, the structural organization of the institution, and any close links the institution has with other persons. Applicants must provide all necessary information for the assessment of their request.

Individuals performing certain functions may be required to secure individual approval or registration with the relevant regulator, such as: (i) members of the board of directors of the regulated business; (ii) senior managers; and (iii) "customer-facing" personnel.

These individuals need to submit forms providing information about themselves that will enable the regulator to assess their suitability to perform their roles. An effect of individual registration is that the individual concerned could be subject to personal disciplinary proceedings if they are party to a breach of FSMA and NBB rules.

Unlike many other countries, Belgium does not have a regulatory sandbox for fintechs, nor are there currently any plans to introduce a sandbox in the near future. The NBB and the FSMA have, however, jointly set up a unique Fintech Contact Point, which allows fintechs to enter into contact with the supervisory authorities through a single point of entry.

## 7. What financial services "passporting" arrangements does Belgium have with other jurisdictions?

Once authorized in Belgium, a Belgian firm can passport its authorization into other EEA member states. Passporting permits the provision of cross-border services and also the establishment of a physical branch location within the EEA.

Passporting is, however, only available to firms established in Belgium and is not available to Belgian branches of third-country firms.



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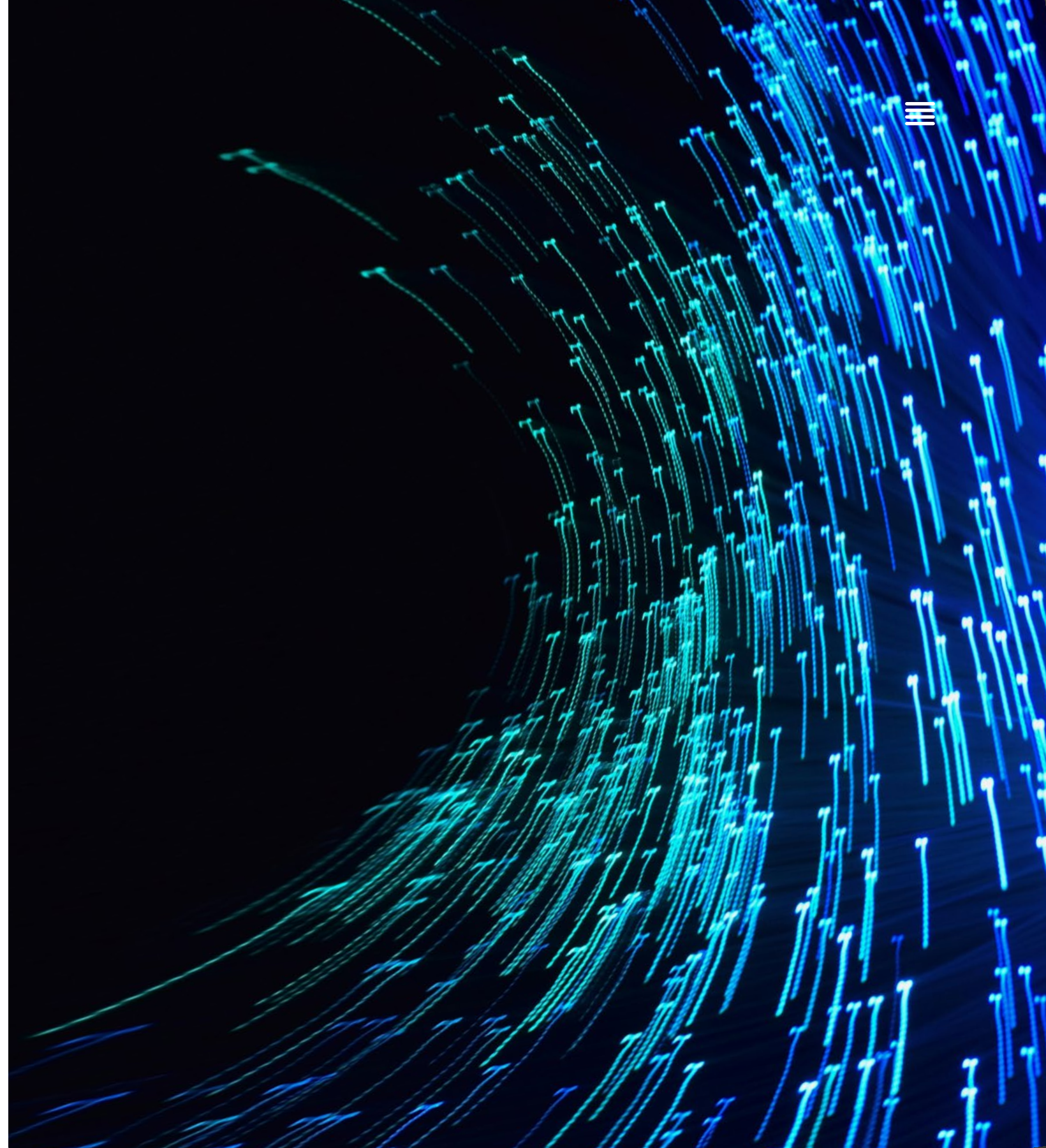
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# Brazil

## 1. Who regulates banking and financial services in Brazil?

The Brazilian Financial System is composed of the National Monetary Council (CMN), the Central Bank of Brazil (“**Central Bank**”), the National Bank for Economic and Social Development (BNDES), the public and private financial institutions, and payment institutions.

Insurance is also regulated but falls to be considered outside the Brazilian Financial System, i.e., it is not regulated by the Central Bank of Brazil.

Financial services is a broader concept that includes banking and finance activities as well as the capital markets. More recently, payment services have been regulated and are carried on by payment institutions, which may require a license from the Central Bank, depending on its size, role and systemic importance.

Banking activities and financial services are regulated by statutory and infra-statutory laws enacted by the Brazilian Congress and by the CMN, respectively. The CMN is an *ad hoc* regulatory body composed of the Ministry of Finance, the Ministry of Planning and the Central Bank president. Its main role is to issue regulations and guidelines to execute public policy concerning credit and currency affairs (including monetary and foreign exchange policies).

The Central Bank is responsible for implementing and enforcing the regulations and guidelines set forth by the CMN. The Central Bank’s main goal is to promote the stability and purchasing power of the Brazilian currency, as well as to strengthen the local monetary system and supervise the conduct of financial institutions.

The Central Bank is responsible for implementing monetary policies, as well as exercising control over foreign investments and inflow and outflow of capital in Brazil, as provided by Law No. 4,595/1964 and several other specific rules enacted by the CMN. The Central Bank is also competent to grant licenses to financial institutions, including securities brokers.

In respect of capital markets activities, the Securities and Exchange Commission (CVM) is the regulatory agency in charge of regulating public offerings of securities, registering listed companies, the trading of securities on public markets, custody of securities, and supervision of publicly-traded companies, among others.

Pursuant to Law No. 4,595/64, only a licensed financial institution may perform banking and finance activities such as the collection, intermediation and investment of its own or third parties’ funds (whether in national or foreign currency), as well as holding custody of third parties’ financial assets.

Insurance is also a regulated activity that requires authorization by the Brazilian Private Insurance Superintendence (SUSEP). However, insurance is not regarded as a financial activity under Brazilian laws but is another area of activity with its own set of regulations.

Anti-Money Laundering rules in Brazil are governed by Law No. 9.613 of 3 March 1998, as amended by Law No. 12.683 of 9 July 2012. Decree 9.663 of 1 January 2019 approved the new by-laws of the Brazilian Financial Activities Control Council (COAF), which is responsible for

receiving and analyzing information on financial transactions considered to be linked to money laundering. COAF may commence administrative proceedings against offenders and apply penalties ranging from the suspension to carry out business to fines.

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

Financial services are mainly regulated by Law 4,595/64 (which sets forth the rules applicable to banking, monetary and credit institutions, and created the CMN), Law 4,728/65 (which regulates the capital markets and established measures for its development), and Law 6,385/76 (which further regulated the capital markets and created the CVM).

Several other statutory laws regulating specific services, products and other banking, finance and capital markets activities. The CMN and CVM are competent to issue infra-legal regulations, and in this regard, there is also a large volume of secondary and delegated infra-legal regulations (e.g., resolutions, instructions and other normative instruments).

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

- a. Financial Institutions:** Federal Law No. 4,595 provides that a legal entity is considered a financial institution (“Financial Institution”) when its principal or ancillary activity is the collection, intermediation or investment of financial resources for its own account or for third parties, in domestic or foreign currency, as well as the custody of assets belonging to third parties. In light of this broad definition, certain activities that are somehow related to but do not constitute strict banking activities (e.g., capital markets transactions), have been considered as activities of Financial Institutions in Brazil. Therefore, the

Brazilian Financial System includes banking and non-banking entities.

1. The entities described below play a key political and financial role in the Brazilian Financial System and are considered Financial Institutions:
  - a. **Commercial banks (Bancos Comerciais):** Typical commercial banking transactions include the following:
    - b. Granting loans
    - c. Holding checking and investment accounts
    - d. Receiving cash deposits
    - e. Receiving and processing payments, and utility and private entities bills
    - f. Collecting of drafts and other credit instruments
  2. **Investment banks (Bancos de Investimento):** The main activities carried out by investment banks are the management of investment funds and the availability of medium- to long- term debt or equity financing. Investment banks may also obtain authorization to deal with foreign exchange transactions if they comply with certain legal requirements.
  3. **Savings banks (Sociedades de Poupança ou Empréstimos):** These banks, mostly state-owned institutions, play a similar role to that of commercial banks as they receive savings deposits from the public. Caixa Econômica Federal (CEF), a public financial institution controlled by the Brazilian government, is currently the major savings bank in Brazil and one of the largest Brazilian Financial Institutions. Most of the loans under the Federal Housing Credit Program are granted by CEF, which also manages the funds of the National Unemployment Compensation Fund (FGTS), the Social Integration Program (PIS/PASEP), as well as domestic lotteries.
  4. **Credit, financing and investment companies (Financeiras):** Their main business involves the following:
    - a. Financing consumer purchases of goods and services
    - b. Trading credit instruments such as promissory notes, bills of exchange, etc.
  5. **Brokerage firms (Corretoras):** Brokerage firms deal in authorized securities and other negotiable instruments at the Brazilian Exchange, under Law Nos. 4,728/65 and 6,385/76. These companies may be established as corporations or limited liability companies, and they operate as intermediary parties in transactions between the stock exchanges and investors. As such, they may carry out the following activities:
    - a. Organize, manage and participate in consortia for underwriting and managing securities offerings
    - b. Purchase and resell securities
    - c. distribute and place securities in the capital markets.

CMN Resolution No. 2,099/94, as amended, regulates the organization and operation of Corretoras and specifies all activities that such entities may perform.
  6. **Dealers (Distribuidora de Títulos de Valores Mobiliários or DTVM):** These entities are also subject to Laws No. 4,728/65 and 6,385/76. Their main business is to subscribe

securities issued for resale or distribution, thus acting as intermediaries in the placement of public offerings. Their business is similar to that of Corretoras, and according to the Joint Decision of CVM and CMN No. 17/2009, issued on 2 March 2009, DTVMs are now able to directly deal at the stock exchange. Such companies' organization and operation are set forth in CMN Resolutions No. 1,120/86, as amended, and 1,653/89. They may be organized as corporations or limited liability companies.

7. **Currency exchange brokerage companies (Corretoras de Câmbio):** These institutions, regulated by CMN Resolution No. 1,770/90, as amended from time to time, perform foreign currency exchange transactions. They may be organized as corporations or limited liability companies. Other Financial Institutions may be permitted by the Central Bank to deal with foreign currency exchange transactions.
8. **National Economic Development Bank ("Banco Nacional de Desenvolvimento Econômico e Social or BNDES"):** BNDES is a state-owned Financial Institution controlled by Brazil's government, which acts as an auxiliary agency to implement the federal government's credit and development policies. Its principal activities include financing industrial, agricultural and commercial equipment; production; and projects and economic activities in general.
9. **Banks with multiple portfolios or "multiservice banks" (Bancos Múltiplos):** Bancos Múltiplos were created in accordance with the rulings of the 1988 financial system reforms and are now regulated by CMN Resolution No. 2,099/94. This resolution also incorporates the Basel Framework rules and principles into Brazilian regulation. The main purpose of multiple banks is to enable a single financial institution to maintain different types of activities and portfolios (that is, allowing the performance of all activities pertaining to financial institutions), which in turn significantly increases the administrative efficiency among banking conglomerates.
10. **Leasing companies (Sociedades de Arrendamento Mercantil):** The main role of leasing companies is to perform financial leasing transactions.
  - b. **Payment Institutions:** Brazilian payment institutions are regulated by Law No. 12,865/2013, which grants authority to the CMN and the Central Bank to regulate those entities. Therefore, there are some CMN resolutions and Central Bank rulings that govern and detail the requirements and procedures for an entity to do business as a payment entity ("Payment Entity") in Brazil.

According to the Central Bank's ruling No. 3,683/2013, as amended, there are three different types of Payment Entities:

(i) an issuer of electronic currency; (ii) an issuer of post-paid payment instruments; and (iii) an enroller (Credenciador). A Payment Entity may be classified under one or more of these types.

"Issuer of electronic currency" is defined as a Payment Entity that: (i) manages a prepaid payment account of an end user; (ii) provides payment transactions based on electronic currency deposited in this account; and (iii) converts such proceeds into physical or script currency, or vice-versa.

"Issuer of post-paid payment instrument" is defined as a Payment Entity that: (i) manages post-paid payment accounts of a paying end user; and (ii) makes available payment transactions based on that account.





“Enroller” is a Payment Entity that, without managing payment accounts: (i) enrolls persons to accept payment instruments issued by Payment Entities or by financial institutions (banks) that participate in the same “payment arrangement”; and (ii) takes part in the payment transaction settlements as creditor before the issuer, pursuant to the rules set forth under the “payment arrangement.”

“Payment Arrangement” is a set of rules and procedures that govern the rendering to the general public of a given payment service, which is accepted by more than one payee, by means of direct access by the end users, payees and payers.

Regulation pertaining crypto-assets and crypto currencies are still object of discussion with the Brazilian Congress by means of Bill of Law No. PL 2303/2005 e PL 2060/2019. In the Senate the discussion are centered around two Bills of Law, namely 3825/2019, and 4207/2020.

- c. Investment Advisory Services and Asset Management:** Investment advisory services may be rendered by duly licensed financial institutions and also by asset management companies (“Asset Management Companies”).

Asset Management Companies are not financial institutions nor payment institutions and therefore do not need authorization from the Central Bank to operate. However, if their services involve the management of a portfolio of securities, the company will require the authorization of the CVM.

Asset Management Companies duly accredited by the CVM are allowed to manage securities portfolios for individuals, entities or investment funds (i.e., mutual investment funds, securities and financial assets managed portfolios). Please note, however, that Asset Management Companies may not trade securities directly on a stock exchange, but only by means of a duly authorized stock brokerage firm registered with the relevant stock exchange. They can, however, trade fixed-income securities directly.

Certain Brazilian Asset Management Companies also discharge services and perform activities that are ancillary to asset management activities, which may require additional licenses from the CVM.

## 4. How do Brazil’s licensing requirements apply to cross-border business into Brazil?

According to Law No. 4,595/64, some activities are “exclusive activities of financial institutions,” and as such may be performed only by licensed financial institutions in Brazil. The “exclusive activities of financial institutions” encompass the collection, intermediation or allocation of their own or third parties’ funds in the local or foreign currency (which generically encompasses all banking and financial services).

The custody of third party assets is also considered as an activity of financial institutions. Support services connected to the financial system but not associated with financial institutions may have less stringent licensing requirements.

Under local law, foreign financial institutions may only conduct activities in Brazil after making

application requesting the Central Bank’s authorization. However, cross-border business, such as cross-border loans made by foreign entities to persons domiciled in Brazil and foreign investment in Brazilian capital markets, do not depend on local licenses for foreign parties to enter into the transactions (e.g., the lending bank or the foreign investor). However, such cross-border business usually requires local registration, such as the so-called registration of financial transactions (ROF) in the case of cross-border loans, and enrollment with the taxpayers’ registry in the case of cross-border loans and investments in the capital markets.

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

The CMN is responsible for, among other things, regulating the incorporation, operation and supervision of financial institutions, pursuant to Law No. 4,595/64. The same controls and limits may apply to Brazil’s foreign banks as are applied by their regulatory agencies to Brazilian banks

either operating or desirous of operating in their country.

From the Central Bank’s perspective, the following information must be disclosed by those foreign entities who wish to incorporate a financial institution in Brazil:

- a.** Percentage of intended foreign capital participation
- b.** Relevance of the undertaking to the Brazilian economy, their relationship with other countries, the type of contribution expected for the improvement of the National Financial System (such as new safer technologies), as well as the products and services to be offered, technological developments, an incentive to competition, and others
- c.** Description by the legal entity domiciled abroad, as the case may be, of the transactions conceivably kept in Brazil, including those that are performed by companies belonging to the same economic group
- d.** Relevance of the endeavor in complementing the activities of the foreign entity or the economic group the latter belongs to, supporting investment and any other transactions in the country
- e.** Rating of a foreign company or the economic group it belongs to, granted by specialized agencies
- f.** Indication of the financial institutions, if any, directly or indirectly related by any means with the foreign institution
- g.** Listing of the supervisors and authorities that control the foreign institution and the financial institutions directly or indirectly related to it by any means
- h.** Other information considered relevant in defining the foreign participation envisioned and that is of interest to the Brazilian government

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

Before incorporating a financial institution in Brazil, the future shareholders must submit a preliminary set of documents to the Central Bank. Upon submission, the Central Bank will schedule a meeting with the applicant’s control group. Such interview may be waived by the Central Bank: if it understands that the information submitted in the preliminary documents are sufficient to understand the project’s proposal; if the future partners have demonstrated



necessary business and market know-how; or if the request for the authorization to operate is made by a financial institution or other institution already licensed by the Central Bank.

After the Central Bank analyzes and approves the documentation and information provided, the following requirements must be met:

- Presentation to the Central Bank and publication of a statement of purposes (Declaração de Propósito) by means of a simple form that must indicate the license envisaged and other general information regarding the financial institution to be incorporated
- Submission of a complete business plan, containing at least a five-year forecast regarding the financial market and operational plans (i.e., business plan and operational plan)
- Submission of drafts of the entity's acts of incorporation
- Demonstration of economic and financial capabilities, compatible with the size, nature and purposes of the project
- An absence of any restriction that may affect shareholders' reputation

Within 180 days from the Central Bank's approval of compliance with all documents listed above, the entity must obtain (i) formalization of the incorporation of the financial institution; (ii) implementation of the organizational structure; and (iii) submission of a request for the Central Bank's to verify the structure implemented. Upon filing such documents, the Central Bank will conduct an inspection of the incorporated entity to verify compliance with the implemented structure as envisaged in the approved business plan.

After the Central Bank confirms the adequacy of the organizational structure, the applicants will have 90 days to incorporate the financial institution and submit documentation regarding: (i) amendments to bylaws to make adjustments to capital requirements pursuant to the business plan; (ii) appointment of the entity's directors, officers and members of the governance bodies set forth in the entity's bylaws; and (iii) evidence of the origin/source of funds used to pay over the capital. Upon completion of the conditions above, the Central Bank will issue the financial institution's authorization to operate.

The application procedure is the same for the controllers of financial institutions that are Brazilian residents or foreign investors. However, the analysis process in the case of a foreign investor is slightly more extensive because, as mentioned above, after the Central Bank's approval, the application will be submitted to the CMN. Also, the Central Bank will request documents and information, such as bylaws and financial statements, from foreign applicants that intend to incorporate a financial institution in Brazil.

Furthermore, in cases where the direct controller of the financial institution which is to be incorporated in Brazil is not a financial institution or individual, it must have as its exclusive purpose the investment in financial institutions and other entities licensed by the Central Bank.

Central Bank Resolution No. 50 of 16 December 2020 sets the regulation for the establishment, execution, and related procedures of the Brazilian Central Bank Regulatory Sandbox for financial and payment innovations ("BCB Sandbox: Cycle 1"). Only the following type of entities can participate in the BCB Sandbox: Cycle 1: (i) notary and registration service providers; (ii) public companies, and (iii) semi-public companies. The interested entities have to provide products and services tailored to the needs, interests, and objectives of financial customers and users. Importantly, they must clearly communicate to their customers and users that the product/service is being developed within the BCB Sandbox.

The main strategic priorities are: solutions for the [foreign exchange market](#); fostering the capital market through synergy mechanisms with the credit market; fostering credit to micro entrepreneurs and small businesses; solutions for the Brazilian Open Banking environment; solutions for the [Brazilian Instant Scheme \(Pix\)](#); solutions for the [rural credit](#) market; solutions for increasing competition within the [National Financial System \(SFN\)](#) and the [Brazilian Payments System \(SPB\)](#); financial and payment solutions aiming at promoting financial inclusion; fostering [sustainable finance](#).

In order to participate, the interested parties must: present a proposal for the provision of products or services pursuant to the concept of an innovative project; demonstrate the origin of the resources to be used for developing the innovative project; prove the unblemished reputation of their controllers and administrators; Present an activities' discontinuity plan; designate a director or legal representative to be accountable for the participation in the BCB Sandbox.

The Strategic Management Committee of the Regulatory Sandbox (CESB) is in charge of selecting and ranking the submitted projects, as well as authorizing their participation in the BCB Sandbox: Cycle 1. The BCB Sandbox's summoning set out the requisites for participation: Application period - from 22 February to 19 March 2021, Selection and licensing - from 22 March to 23 September 2021, BCB will select 10 to 15 projects.

## 7. What financial services "passporting" arrangements does Brazil have with other jurisdictions?

Brazil does not have any financial services "passporting" arrangements with other countries.

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Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.



# Canada

## 1. Who regulates banking and financial services in Canada?

The federal and provincial governments share jurisdiction over various aspects of the financial services sector in Canada. While the federal government has sole jurisdiction over banks, the provinces regulate credit unions, mortgage brokers/dealers, loan and trust companies, securities dealers, mutual fund companies and distributors, credit unions and caisses populaires, and other financial services providers such as payday lenders. Both levels of government regulate insurance and trust and loan companies. The allocation of responsibilities is as follows:

- a.** The Bank of Canada is Canada's central bank. It is an independent Crown corporation with considerable autonomy to manage the country's financial system. The Bank of Canada is responsible for monetary policy in cooperation and consultation with the Department of Finance for central banking services, bank rates, currency, foreign exchange reserves and the administration of public debt. However, the Bank of Canada does not play any part in the regulation or daily administration of commercial banks in Canada.

In Canada, banks are federally regulated by the Bank Act and carry on business under the supervisory authority of the federal Office of the Superintendent of Financial Institutions (OSFI). Banks operating in Canada may be licensed as Schedule I (domestic Canadian banks), Schedule II (foreign bank subsidiaries in Canada) or Schedule III (foreign bank branches in Canada). A foreign bank that does not have a branch in Canada through which it conducts business may establish an approved representative office in Canada to promote services of the foreign bank in Canada and act as a liaison between the foreign bank and its customers and potential customers in Canada.

- b.** The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) is Canada's financial intelligence unit, an independent federal government agency that operates at arm's length from law enforcement agencies. FINTRAC's mandate is to analyze the information it collects from financial entities, intermediaries, and others to identify patterns of suspicious financial activity and to uncover associations among people and businesses linked to the patterns of suspected money laundering and terrorist financing. FINTRAC is responsible for registering money services businesses and their compliance with anti-money laundering and anti-terrorist financing requirements.
- c.** The Financial Consumer Agency of Canada (FCAC) is an independent body established by the federal government with a mandate to protect and inform consumers of financial products and services. The FCAC also oversees payment card network operators and their commercial practices.

- d.** Payments Canada (PC) is established under the Canadian Payments Act to establish, operate, and maintain systems for the clearing and settlement of payments among member financial institutions. It is Canada's main financial market infrastructure for payments. The Bank of Canada and all chartered banks operating in Canada are required to be members of PC. Trust and loan companies, credit union centrals, federations of caisses populaires and other deposit-taking institutions, life insurance companies, as well as securities dealers and money market mutual funds that meet certain requirements are also eligible to be members. PC develops, implements, and updates the rules and standards that govern the clearing and settlement of payments between member financial institutions, and facilitate the interaction of its systems with other national and international payment systems and allow for the development of new payment methods. The Payment Clearing and Settlement Act gives the Bank of Canada the responsibility to oversee clearing and settlement systems for the purpose of controlling systemic risk or payments system risk.

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

Financial services law in Canada is found in both federal and provincial laws and regulations, as well as in regulatory guidance from the financial regulators. Banks are federally regulated under the Bank Act, insurance companies are both federally and provincially regulated, and most other financial services are provincially regulated. Money laundering compliance is a matter of federal jurisdiction under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA). In June 2018, the Department of Finance announced proposed amendments to the PCMLTFA. The proposed amendments are expected to, among other things, update customer due-diligence requirements and beneficial ownership reporting requirements, allow the regulation of businesses dealing in virtual currency and update the foreign money service businesses regime. The Federal Interest Act includes certain rules regarding the charging of interest.

The insurance industry in Canada is highly regulated by both federal and provincial legislation. The federal government has jurisdiction over the licensing in Canada of foreign-incorporated insurance companies in Canada insuring risks, and it has paramouncy and exclusive jurisdiction over the financial stability and solvency matters relating to federally and foreign-incorporated insurance companies that insure risk in Canada. Provincial and territorial governments have jurisdiction over most other insurance matters, including the form and content of insurance contracts,





business and marketing practices, agent and broker licensing, and the handling of premium money. Provincial regulation extends to all companies intending to do business in a particular province, regardless of whether they are incorporated under federal, provincial or foreign legislation.

Securities law matters are generally governed by provincial or territorial laws. There is no national securities regulator or legislation in Canada, but there are certain harmonized securities rules that have been adopted by all provinces and territories in the form of national instruments.

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

A broad range of banking and financial activities require licensing or registration in Canada, either at the federal or provincial level, including the following:

- Accepting deposits
- Carrying on insurance business (life, property and casualty, etc.), including acting as an insurer, underwriter, agent or broker
- Providing investment, fund management and financial advice, and engaging in investment management activities
- Trading and distributing securities and other investments, including a broker or dealer
- Dealing in, trading in, and administering mortgages and mortgage lending, including acting as a mortgage agent, broker, administrator or lender
- Providing money services including dealing in foreign exchange; transferring funds from one individual or organization to another using an electronic funds transfer network or any other method; and cashing or selling money orders, traveler's checks or anything similar
- Providing payday loans as a lender or broker
- Providing credit reports
- Collecting debts on behalf of another

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

#### Banking

Foreign banks that are not approved under the Bank Act are prohibited from undertaking any business in Canada, directly or indirectly, except in certain limited and expressly identified ways. Furthermore, any prohibited activity carried out by an agent or nominee in Canada on behalf of a foreign bank constitutes an activity of the foreign bank.

However, a foreign bank and its financial agent are not within the regulatory control of OSFI if they do not establish any physical presence in Canada and their business is not conducted in Canada. From a banking law perspective, there are generally no restrictions on residents of Canada engaging in offshore banking and becoming clients of a foreign bank that is not licensed in Canada, provided the foreign bank conducts business on an offshore basis and is

not considered to be carrying on business in Canada. In order to avoid any Canadian banking regulatory compliance issues, the products and services of the foreign bank must be provided outside Canada, with no agent or representative of the foreign bank having a business presence in Canada or traveling to Canada to carry on business. Therefore, the value of utilizing an agent is limited in this context.

Generally, with respect to solicitation and marketing activities of a foreign bank in Canada, there is no law, regulation or other definitive guidance issued by OSFI or provided through jurisprudence to define precisely which activities, or combination of activities, would cause a foreign bank to be in contravention of the Bank Act in its dealings with Canadian residents. In its Ruling 2008-01, OSFI remarked that "in assessing whether a business is carried out in a jurisdiction, judicial decisions support the view that under the common law, promotional activities alone do not constitute carrying on business" and noted that the Bank Act "contains no provision that deems promotional activities to constitute the carrying on of business in Canada." The Bank Act does, however, permit a foreign bank to advertise within Canada in respect of its facilities outside Canada, provided the foreign bank does not carry on the business of banking in Canada.

Although the treatment of e-commerce transactions in Canadian banking law is not entirely clear, a foreign bank that is not approved under the Bank Act should be able to offer certain financial services to residents of Canada electronically, provided that it does not carry on business in Canada, which would mean that its employees, representatives, agents and servers are located offshore.

A foreign bank that is not approved under the Bank Act cannot engage local agents to offer or provide products or services to residents of Canada. Any activity carried out by a nominee or agent of the bank in Canada is deemed to have been carried out by the foreign bank directly.

#### Insurance

There is some ambiguity as to what it may mean to carry on the insurance business in Canada. Ultimately it is a fact-driven analysis to determine whether or not a foreign insurer is carrying on business in Canada or insuring in Canada. In general, the federal Insurance Companies Act has no application to foreign insurers that are neither carrying on business in Canada nor negotiating and concluding insurance policies in Canada, directly or indirectly.

Provincial insurance law generally provides more specific restrictions on the activities of foreign insurers and their agents engaged in business with Canadians. Provincial regulation extends to all companies that do business in a particular province, regardless of whether they are incorporated under federal, provincial or foreign legislation. Specifically, provincial insurance regulation includes the form and content of insurance contracts, business and marketing practices, agent and broker licensing and conduct, and the handling of premium money.

For example, the Insurance Act of Ontario regulates the business of insurance in Ontario and requires every insurer undertaking insurance in Ontario or carrying on business in Ontario to obtain and hold a license. It is restrictive in its approach to unlicensed foreign insurers and their agents and representatives marketing to residents of Ontario. The Act requires that unlicensed insurance is to be effected outside Ontario and without any solicitation whatsoever in Ontario, directly or indirectly, on the part of the insurer or an agent or representative of the insurer.

Even without a business presence in Ontario, a foreign insurer will be deemed to be carrying on business in Ontario within the meaning of the Insurance Act if such insurer, its employees,



agents or other representatives market or solicit insurance products in Ontario, issue or deliver a policy of insurance in Ontario, or collect or receive premiums in Ontario. Furthermore, a foreign insurer will be deemed to be undertaking insurance in Ontario if it maintains an action or proceeding in Ontario in respect of a contract of insurance.

### Securities

Generally, in Canada, entities in the business of dealing or transacting in securities are required to register in some capacity as a dealer unless an exemption from registration is available. Interpretation of Canadian securities laws takes a broad approach to the concepts of "trading," "securities," "advising" and "acting in furtherance of a trade," so most activities involving securities of a company are caught in one way or another, including on a cross-border basis. Often, international dealers and/or international advisers are able to benefit from the international dealer exemption and/or international adviser exemption, which is available across Canada, provided certain eligibility criteria are met.

### Other financial services

Other provincial financial services statutes that require licensing may apply regardless of the location of the financial services provider if the customer is located within the province. This is particularly true for consumer transactions.

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

The requirements to obtain a required license or registration vary according to the particular financial service in question and the type of license or registration sought.

In general, OSFI will assess a wide range of factors, including ownership and financial strength, business plan, structure, proposed activities, credit products and underwriting criteria, trading and investment strategy, information technology environment, risk management controls, internal audit practices, regulatory compliance management, and exit strategy in the event that the financial institution is unable to execute its business plan.

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

The incorporation of a bank or federally regulated trust and loan company involves a three-phase process:

- **Phase 1 (Pre-Application):** This involves initial discussions with OSFI, submission of preliminary information (ownership and financial strength, business plan, credit products and underwriting criteria, trading and investment strategy, information technology environment, etc.), business plan discussion with OSFI, and receipt of a letter from OSFI outlining its expectations regarding material risks or concerns and additional information requirements.
- **Phase 2 (Letters Patent):** This involves submission of a notice of intention to apply for Letters Patent (to inform the public) in a form approved by OSFI setting out the name, geographical location/jurisdiction of the applicant, proposed name of institution, and a brief description of proposed activities; submission of formal application including information about ownership and financial strength, including capitalization, business plan, management, risk management, board of directors and committees, internal audit,

regulatory compliance management, information technology, and other requirements such as proposed name, by-laws, non-refundable service charge, etc. The institution comes into existence on the date provided in the Letters Patent when issued.

- **Phase 3 (Order):** The institution may only commence business once an Order providing for the same is issued by the Superintendent. Once Letters Patent have been issued, and before an Order is made by the Superintendent, OSFI must be satisfied that the institution has the necessary systems, management structure, control processes and regulatory compliance systems in place. The Order may impose conditions or limitations on the business to address supervisory or regulatory concerns.

A similar approval process exists for a foreign bank intending to operate in Canada as a branch (full service or lending), consisting of a pre-notice period, a post-notice period and an order permitting a foreign bank to establish a branch in Canada. In the case of a full-service branch, the foreign bank will generally not be permitted to accept "retail" deposits, defined for this purpose as amounts less than CAD 150,000, and it is generally required to maintain assets on deposit with a Canadian financial institution approved by the Superintendent equal to at least 5% of branch liabilities or CAD 5 million, whichever is greater.

Some restrictions can be objective and set by the Superintendent as stipulations in return for a license. The application process for banking approval is heavily dependent on the intended purpose of the bank, the proposed structure, the benefit provided to the industry and the overall viability of the proposal.

## 7. What financial services "passporting" arrangements does Canada have with other jurisdictions?

Canada has no financial services "passporting" arrangements with any other jurisdiction. However, international securities dealers and advisers may be able to deal with certain Canadian-permitted clients as long as certain eligibility criteria are met and filing and fee payments are made.

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# Chile

## 1. Who regulates banking and financial services in Chile?

The Commission for the Financial Market (Comisión para el Mercado Financiero or CMF) exercises direct oversight over banking and financial institutions in Chile.

Further, the Central Bank of Chile issues regulations regarding financial services in Chile.

An independent public entity, the Financial Intelligence Unit (UAF), created by the Anti-Money Laundering Act (Law 19,913) supervises and monitors compliance with anti-money laundering laws and regulations.

The UAF requests, verifies and examines the information of reporting institutions subject to Law 19,913 and may apply fines in case of breach of compliance obligations. If the UAF detects suspicions of an actual money laundering offense, it must make a report to the criminal prosecutor which will have conduct of the corresponding criminal investigation.

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

The law in Chile covering financial services is broadly contained in the following laws:

- a. The General Banking Act dated 19 December 1997 (Decree with force of Law No. 3) (the “Banking Act”).
- b. CMF Updated Compilation of Regulations (Recopilación Actualizada de Normas).
- c. The Chilean Central Bank Compendium of Financial Regulations (Compendio de Normas de Cambios Internacionales).
- d. The Money Lending Act (Law No. 18,010).

In addition, depending on the type of financial services offered and the type of clients, financial services could be subject to the Consumer Protection Law (Law No. 19,496) and the Data Privacy Law (Law No. 19,628). Note that crypto assets and crypto currencies have not been regulated yet.

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

Core banking activity can only be carried out by banking institutions that have been duly authorized by the CMF. Core banking consists of receiving in a customary manner money or funds from the general public (e.g., saving accounts, current accounts, certificate of deposit) (the “Deposit Taking Activities”). The reason is that such activity seriously affects the confidence in and stability of the financial system.

## 4. How do Chile’s licensing requirements apply to cross-border business into Chile?

The Banking Act does not forbid foreign banks not licensed in Chile to grant loans in a low-key manner to specific clients, provided that such banks do not engage in Deposit Taking Activities (i.e., receiving in customary manner money or funds from the general public).

In order to perform promotional and marketing activities, foreign banks must establish representative offices. Pursuant to Article 33 of the Banking Act, foreign banks require the prior authorization of the CMF to establish representative offices in Chile. Such authorization allows representative offices to act as business agents for their main offices in order to market and promote their banking services. However, the representative offices do not have the right to perform activities reserved to banks licensed in Chile.

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

Generally, in order to become authorized, an applicant must provide the CMF with:

- a prospectus (prospecto);
- a business development plan for the first three years of operation;
- a guarantee in an amount equal to 10 percent of the bank’s projected capital.

In addition to this, the minimum paid-up capital of the bank must not be less than UF 800,000 (approximately USD 32,732,500). At the time of establishment of the bank, at least 50 percent of the capital should be paid up. There is no term for the payment of the remainder.



However, while the bank has not reached this minimum capital, the bank shall maintain an additional basic equity capital of 2 percent of its risk weighted assets, net of required provisions, over the minimum required by law of 4.5 percent plus the additional specific requirements contained in Title VII of the Banking Act. Such percentage may be reduced to one percent when the bank's shareholder's equity reaches UF 600,000 (approximately USD 24,549,375).

Capital requirements must be satisfied in Chile by the local branch or subsidiary. In addition, the banking regulations contain requirements in connection with the ratio between assets and shareholders' equity of banks; liquidity and cash and technical reserves.

The new bank's founding shareholders must also comply with certain solvency and integrity requirements, as follows:

- Solvency: Maintain permanently a consolidated equity equivalent to the bank's projected capital.
- Integrity: In broad terms, a shareholder must not have committed crimes, wrongdoings or questionable conducts that may endanger the stability of the bank and/or the safety of the depositors.

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

An applicant for authorization as a bank must basically complete three steps:

- File documents required for the granting of a provisional authorization, which enables the foreign bank to carry out all dealings leading to the authorization of existence within a term of 10 months.
- File documents for the granting of the definitive authorization and the legal incorporation/establishment of the bank.
- Finally, complete the process to obtain the CMFs verification of the minimum paid-up capital and compliance with the operational and regulatory requirements for the start up of the business

No laws have been approved yet regarding special procedures for FinTechs or "sandboxes" for technologically innovative new services.

## 7. What financial services "passporting" arrangements does Chile have with other jurisdictions?

Chile does not currently have any passporting arrangements for banking services.

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# China

## 1. Who regulates banking and financial services in China?

In the past, the supervision over the banking, securities and insurance industries was all carried out by the central bank of China, that is, the People's Bank of China (PBOC). With the establishment of the China Securities Regulatory Commission (CSRC) in 1992, the China Insurance Regulatory Commission (CIRC) in 1998 and the China Banking Regulatory Commission (CBRC) in 2003, the regulatory and supervisory functions of the three industries have been officially taken over from the PBOC and assumed by these respective authorities. In 2004, the CSRC, CIRC and CBRC entered into the Memorandum of the Three Financial Supervisory Commissions concerning the Division of and Cooperative Supervision over the Financial Industry, which clarified the division of the regulatory and supervisory functions of the three industries. In 2018 the CBRC and CIRC merged, and the China Banking and Insurance Regulatory Commission (CBIRC) was formed to regulate both banking and insurance industries.

China has a civil law legal system based largely on the continental model, which mainly includes: (a) laws at the state level; (b) regulations published by the State Council; (c) local regulations; and (d) rules published by the governmental agencies.

With few exceptions, foreign investors are generally required to obtain appropriate approvals from competent Chinese regulators before they can set up a business presence or carry on business or marketing activities in China.

China has two regulators responsible for the authorization and supervision of banks, insurers, securities firms and other financial institutions. The allocation of responsibilities between the CBIRC and the CSRC is as follows:

- The CBIRC is responsible for supervising banks, finance companies, trust companies, financial lease companies, financial assets management companies, consumer finance companies, auto finance companies, other deposit-taking financial institutions, insurance companies, and other insurance-related institutions in China.
- The CSRC is responsible for supervising securities products and services providers in China, such as listed companies, securities companies, securities investment fund management companies, and stock exchanges.

The PBOC also plays an important role in supervising the financial services, such as making the monetary policies and supervising the interbank bond market and interbank clearing system.

Non-financial institution payment service providers ("Payment Service Providers") in China are regulated and supervised by the PBOC. In 2010, the PBOC started to allow Payment Service Providers to operate upon securing a payment service permit. The PBOC is also responsible for regulating anti-money laundering and anti-terrorism financing activities in China. Financial institutions and Payment Service Providers are required to develop and implement robust and effective internal control policies against anti-money laundering and anti-terrorism financing activities and report any such cases to the PBOC. In case of any non-compliance, the PBOC may impose penalties (including warning and monetary fines).

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

The Chinese legislative regime includes the following:

- Laws that are promulgated by the National People's Congress or the Standing Committee of National People's Congress
- Administrative regulations that are published by the State Council
- Local regulations that are published by the local People's Congress or the Standing Committee of the local People's Congress
- Rules that are published by the ministries, commissions and other governmental authorities at the central level or the local government

The Supreme Court of the PRC may publish judicial interpretations on certain specific issues from time to time. Technically speaking, such judicial interpretations are not "laws" under the Legislation Law, per se, but are widely complied with by the governmental authorities and the courts hence from a practical point of view are usually considered as one of the sources of laws.

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

PRC regulators oversee a broad range of activities, as follows:

- Setting up a bank would require approval from the CBIRC.
- A bank would need to apply for a separate CBIRC approval for certain business activities, such as issuing bankcards, acting as custodian for securities investment funds, derivative business, electronic banking, foreign exchange business, and wealth management.



- Setting up an insurance company, insurance assets management company, insurance agency, and insurance brokerage would require approval from the CBIRC.
- Setting up a securities company, fund investment company, futures company and investment advisory institution would require approval from the CSRC.
- Setting up a non-financial institution payment service provider (including prepaid card issuance, bankcard acquiring, internet payment, etc.) would require approval from the PBOC.
- Setting up a bankcard clearing institution would require approval from the PBOC.

There is no established legal regime regulating cryptoassets and cryptocurrencies-related activities are relatively limited in China. However, as a long-standing view taken by PRC regulators, such activities are prohibited. We summarize the policies and guidance given by PRC regulators from time to time as follows:

- Financial institutions and Payment Service Providers are prohibited from undertaking any business in relation to Bitcoin.
- Initial coin (i.e., cryptoassets and cryptocurrencies) offering is prohibited.
- Online platforms of cryptoassets and cryptocurrencies are prohibited from providing services (including but not limited to trading services) in relation to such assets and currencies in China.

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

With a few exceptions (such as cross-border loans provided by foreign banks to Chinese companies), a foreign individual or financial institution is not allowed to carry on any “operational activities” in China that may be deemed as a regulated financial business if they do not have the appropriate business presence in China or approval from a competent Chinese regulator. Activities that involve soliciting business or clients for specific products or transactions that are only allowed to be provided by licensed financial institutions in China may be considered as carrying on such regulated business activities in China.

Generally, the supervisory power of PRC regulators would not extend to foreign individuals or institutions. Note, however, that any non-compliance with PRC law by a foreign individual or institution may leave a “bad record” with the authorities and may adversely affect future activities and local affiliates’ (if any) business operations in China.

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

The regulatory requirements for authorization differ depending on various factors, such as (i) type of investor; (ii) type of financial institution in China; and (iii) business activities that the financial institution in China intends to carry on.

In general, the requirements may involve the following:

- The financial institution in China would need to have a minimum registered capital (for

financial institutions, typically, the capital should be actual paid-in capital).

- The investor would need to be in the relevant financial industry (where the investor is foreign, it typically needs to be a financial institution in its home jurisdiction).
- The investor would need to satisfy certain qualification requirements, such as assets scale.
- Where the investor is foreign, there would need to be a certain memorandum of understanding between the competent regulator in its home jurisdiction and the relevant regulator in China.

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

In order for a financial institution to be set up in China and become authorized to carry on business activities, the investors will need to apply to the competent regulator (e.g., CBIRC for commercial banks) for approval. While the detailed requirements and procedures of the CBIRC and CSRC may differ, the application process, in general, will comprise two phases:

- Application for preparation - Once approved, the financial institution can be formally established.
- Application for commencement of operation - Once approved, the financial institution can then formally start with its business operations.

The whole approval and registration process for setting up a completely new financial institution in China may take around 18 months or even longer.

The legal regime regulating fintech is not yet well developed in China. There is no nationwide regulation on the licensing requirement. However, the PRC government recently started setting up a Fintech Innovation Working Group to encourage the development of innovative services adopting fintech in some pilot cities. However, detailed licensing and implementing regulations are still under development.

## 7. What financial services “passporting” arrangements does China have with other jurisdictions?

China has a foreign exchange control regime in place, and such foreign currency and exchange control is rigid. Foreign exchange control applies to the foreign exchange receipts and payments or business activities of organizations and individuals in China, foreign establishments in China, and expatriates in China. The State Administration of Foreign Exchange (SAFE) and its branches/sub-branches are the main regulator and are responsible for foreign exchange control in China.

Under the current foreign exchange control regime in China, cross-border fund transfer is divided into two categories: (a) current account items; and (b) capital account items. Depending on whether the relevant cross-border fund transfer is related to a current account or capital account items, cross-border fund transfers are subject to different administration and supervision treatments.

Current account items are usually of a recurrent nature, examples of which are payments for foreign trade, cross-border supply of services, and remittance of profits and dividends to



outside of China. Current account payments and currency conversion in relation to these payments may be made at any licensed foreign exchange bank against the presentment of the relevant supporting materials of the underlying transactions for which payments are to be made. Examples of these materials are purchase contracts and invoices. For current account item transactions, it is essential and a general principle that there should be: (a) genuine and legitimate underlying transaction and accordingly, genuine payment or receipt need; and (b) the amount paid or received should be consistent with the underlying transaction.

Capital account items, on the other hand, are generally related to investments or loans, including capital investments, foreign debts and securities investments. Unlike current account items, capital account payments usually require registration or filing with SAFE before these may be made.

It is now also permissible to make cross-border fund transfers in RMB. In general, the exchange control regime (such as the requirement of genuineness for current account item transactions) applies to cross-border fund transfers in RMB as well.

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Baker McKenzie and FenXun Partners established the Baker McKenzie FenXun (FTZ) Joint Operation Office. It is the first joint operation that has been approved by the Chinese authority. As one of the world's leading China legal platform, the Joint Operation provides clients with integrated international and China legal services.



# Colombia

## 1. Who regulates banking and financial services in Colombia?

Colombia has three main authorities responsible for supervising/regulating its financial, securities and capital market institutions.

First, the Ministry of Finance and Public Credit, through its financial regulation unit (URF) is responsible for preparing and adopting regulations on the requirements, restrictions and guidelines for the operation of the financial, insurance and securities markets in Colombia, within the limits set forth by the Constitution of Colombia and its framework laws. Under the Constitution, activities involving the collection, management, use and investment of resources collected from the public are activities of public interest and thus, subject to special supervision by the State.

The Constitution sets forth that the president of Colombia is the authority responsible for the supervision, surveillance and control of anyone carrying out financial activities or activities involving securities markets or insurance, as well as any other activity related to the management, use or investment of resources obtained from the public (Article 189.24, Colombian Constitution).

The Constitution also entitles the president of Colombia to intervene in financial, capital market and insurance activities and any other activity related to the management, use or investment of resources that come from the savings of third parties.

Law 35/1993 sets forth the objectives that the intervention in financial, securities market and insurance activities must have, which includes, among others: (i) the protection of the public interest and the rights of consumers; (ii) the safeness and transparency of contracts and markets; (iii) the promotion of free markets and efficiency among financial entities; (iv) the democratization of credit; (v) the avoidance of excessive risk concentration; and (vi) the promotion of solidary financial institutions.

Second, the office of the Financial Superintendent of Colombia (Superintendencia Financiera de Colombia or SFC) is the main public authority responsible for inspecting, supervising and, to an extent, regulating financial, insurance and securities institutions. The SFC is responsible for –among others–: the day-to-day supervision of regulated entities, authorizing those activities requiring financial license and enforcing violations of financial regulation and the law in general by regulated entities (and in some instances, by unregulated parties).

Third, the Colombian Central Bank (Banco de la República), as the monetary authority under the Constitution, is responsible for the macro-supervision of the banking industry. Although it is not a frontline regulator like the SFC, it does have a role under Articles 371 to 373 of the Constitution. In addition, the Central Bank is the main authority for foreign exchange regulation.

With respect to anti-money laundering, both the Ministry of Finance (through its financial intelligence unit) and the SFC are responsible for supervising financial services firms.

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

The relevant legislation in Colombia is composed of laws issued by the Congress of Colombia (either “framework” laws, or laws addressing specific matters), secondary legislation produced by the Ministry of Finance and Public Credit issued as presidential decrees, and resolutions and circulars of the SFC. Decrees issued as secondary legislation by the president are hierarchically below the laws produced by Congress. They thus are meant to implement such laws, without exceeding the scope and boundaries of such laws. In turn, the secondary legislation produced by the SFC implements in detail the rules set forth by presidential decrees without exceeding the limits provided by such decrees. SFC regulation may address general or specific matters.

The following is a list of the main statutes:

- a. Law 45/1990:** This law contains general rules and requirements applicable to regulated entities (such as banks, finance corporations, financing companies, finance lease companies, insurers and insurance intermediaries).
- b. Decree 663/1993:** While formally a decree, it has the authority of legislation approved by Congress. This decree is of paramount importance as it contains the Financial Systems Organic Statute (EOSF), which, among other matters: (i) sets forth the general structure of the Colombian intermediated financial system; (ii) describes the activities authorized to be carried on by regulated entities; (iii) sets forth in detail the creation, authorization, operation and liquidation of regulated entities; and (iv) sets forth in detail the powers of the SFC. This decree has been amended a number of times since its inception.
- c. Law 546/1999:** This law sets forth the rules on residential mortgage lending.
- d. Law 964/2005:** This is the framework law of the public securities market.



- e. **Law 1328/2009:** This law amends Decree 663/1993 and sets forth rules on financial consumer protection.

In order to implement these laws, the government has issued the following secondary legislation (either directly or through the SFC):

- a. **Decree 2555/2010:** This compiles in a single document secondary legislation applicable to financial intermediaries, insurance and, importantly, securities markets.
- b. **SFC's Basic Legal Circular:** This contains detailed rules and guidance.

While the above statutes and secondary legislation are applicable primarily to Colombian-regulated institutions, they are also relevant in certain respects to non-Colombian entities, particularly concerning the promotion of financial/capital-markets products (as further discussed in Section 3 below).

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

Based on constitutional mandates, Colombia regulates a broad range of activities, which require the SFC's authorization and often, the setting up of a local, regulated entity. Relevant examples are as follows:

- Banking activities involving accepting deposits (which covers banks in general and an array of other deposit-taking institutions)
- Lending in general, when the sums originate in funds collected from the public
- Carrying out insurance and reinsurance in general
- Carrying out insurance and reinsurance intermediation
- Intermediation of publicly traded securities (which covers, among others, broker-dealers, providing securities investment advice and providing activities ancillary to securities markets such as custody, registration of transactions, settlement and self-regulation)
- Infrastructure providers (which covers electronic payment services, rating agencies and delivery of detailed market information, among others)
- Trust services (which may collect funds from the public)
- Bonded warehouses
- Investment management (which may be carried out by an array of institutions, such as broker-dealers, pension funds and trust companies)
- Financial cooperatives
- Management of pension funds
- Promotion of non-Colombian financial/capital market services and products in Colombia

Note that proprietary sale and/or purchase of cryptoassets and cryptocurrencies is considered a non-regulated activity under current law. However, following a number of supervisory recommendations and opinions, financial institutions are mostly barred from investing in or trading with cryptoassets (except for exceptional situations under regulated and limited "sandboxing" scenarios).

### 4. How do Colombia's licensing requirements apply to cross-border business into Colombia?

Where a firm outside Colombia deals with a client or a counterparty located in Colombia, its activities will typically be considered promotion of financial/capital-market products, and thus will be subject to Colombian regulations on such activity. The service provider will need to consider whether they are triggering a local licensing obligation and also whether they comply with Colombian marketing rules.

A general restriction applies to any entity organized outside of Colombia whose corporate purpose is the offering of financial and/or securities-related services or products ("**Promotion Restriction**"). The law defines "promotion or advertising" as any communication or message made directly to a person or transmitted through any means of communication, which is aimed at, or has the actual effect of, initiating (directly or indirectly) the delivery of financial or capital-market activities.

Broadly, the Promotion Restriction prohibits foreign entities from advertising or promoting financial or capital market services/products in Colombia or specifically targeting residents of Colombia for such purposes. In particular, such entities are prohibited from the following:

- Sending employees, contractors, representatives or agents to Colombia or retaining the services of residents of Colombia for the purpose of carrying out promotion or advertising activities of the entity or its services/products
- Performing, directly or indirectly, any promotional or advertising activities in Colombia in connection with the foreign entity

Foreign entities may only promote or advertise their financial and/or capital-market services in Colombia or target individuals or companies in Colombia under either of the following circumstances:

- If they have set up a representative office (oficina de representación)
- If the Foreign Entity seeks to promote capital-market services/products, the foreign entity has signed a correspondent agreement (contrato de corresponsalía) with a local broker-dealer (sociedad comisionista de bolsa) or a financial corporation (corporación financiera)

Nonetheless, the Promotion Restriction does not apply under "reverse solicitation" scenarios, that is, when the Colombian client Authors and contact information the foreign entity, at its own initiative, and in the absence of any promotion or publicity by the foreign entity.

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

Separate authorization requirements must be considered, depending on whether the foreign entity wishes to carry out its activities offshore or onshore.

If offshore, the entity will need to file an application with the SFC for authorization to set up a local representative office or execute a correspondent agreement (as applicable). The process is set out in Section 6.

If onshore, the entity will need to file with the SFC an application to set up a local entity and

authorization to carry out operations locally. While the process may vary depending on the nature of the activity to be carried out locally, in most cases, the process set forth under Article 53 of the EOSF will apply ("**Article 53 Authorization**"). The process is set out in Section 6. For most types of local regulated entities, regulatory capital requirements also apply.

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

### a. Offshore activities/products: representative office/correspondent agreement authorization

An applicant wishing to obtain authorization for promoting financial and/or capital market products/services must complete a formal process involving the completion of required application forms and the submission of supporting information.

In relation to timing, while the law does not set forth limits, in most cases the regulator will take between three and six months from receipt of a completed application in which to determine whether or not to approve the application.

In general, the following documents will be required to be filed:

1. Certificate issued by the competent authority evidencing the: (i) legal existence; (ii) authorized representatives; and (iii) activities for which the entity is authorized in its own jurisdiction, as well as the initial and expiration dates of authorization (if applicable)
2. Articles of incorporation and bylaws
3. Authorization or consent issued by the competent authority for the promotion of services through a representative office
4. Business plan, which must contain a description of the main activities that will be conducted in Colombia, including a description of planned marketing activities
5. Documentation appointing an individual in Colombia as the representative of the office (issued by the corresponding corporate body or authority), together with such individual's CV (containing sufficient evidence enabling determination of such individual's moral character, knowledge and experience in the field)

### b. Onshore activities/products: Article 53 Authorization

If an applicant wishes to carry out onshore regulated activities, an Article 53 Authorization most often will apply.

An applicant must complete a formal process to obtain authorization, involving the completion of required application forms and the submission of supporting information.

In relation to timing, in most cases the regulator will have four months from receipt of a completed application in which to determine whether or not to approve the application (in practice, the filing process may take 12 months or more).

The requirements and complexity of an Article 53 Authorization may vary depending on the complexity of the activity to be carried out in Colombia and the nature of the entity to be set up. Nonetheless, the following three steps will generally apply:

<sup>1</sup> Must sufficiently reflect their character, responsibility and suitability.

### a. Request, SFC approval and publication

This initial filing must include the following documents:

1. Draft bylaws of the future company
2. Proposed capital and form of payment
3. CVs of the proposed shareholders (if individuals)<sup>1</sup>
4. CVs of the proposed company managers and directors
5. Business study confirming the feasibility of the company, which must describe:
  - technological and administrative infrastructure
  - internal control mechanisms
  - risk management plan
6. Copy of the authorization issued by the corresponding regulator for the setting-up of the entity (if applicable)
7. Any additional information as may be requested by the SFC

After filing all required documents in due form, the SFC will publish twice in a Colombian newspaper a notice indicating that a request has been made for the set-up of the entity and basic information on the filing (name of entity, proposed capital, etc.). The purpose of the notice is to allow third parties to present objections to the authorization (which any interested party must file within 10 days of each notice).

After the notices stage is terminated and all documents are complete, the SFC must decide on the requested authorization within four months. However, this term may be extended if the SFC asks further questions or complementary information. The SFC may deny authorization if it finds that the filing does not meet legal requirements or if it considers that the character, responsibility, suitability and capital solvency of the shareholders have not been satisfactorily proven.

### b. Incorporation

After the SFC issues its approval, the shareholders must incorporate the company (i.e., sign the corresponding public deed before a Colombian notary public and register the company in the corresponding chamber of commerce), within the term set forth by the SFC.

However, the entity may not yet start to operate.

### c. Authorization to operate

Finally, the newly created entity must provide evidence to the SFC of compliance with the following:

1. Due incorporation
2. Payment of regulatory capital
3. Readiness of technical and operational infrastructure





Upon confirmation, the SFC must issue the authorization certificate within the following five days. The company may not start business operations until after the SFC issues such certificate.

Note that under certain scenarios it is possible to offer innovative financial products/services through local “sandboxing” regulatory scenarios. Financial “sandboxing” is subject to its own set of rules, which, in general, limit the scope and time of experimental implementation of new products. The permanent offer of sandbox-tested products by financial entities will require final SFC approval (i.e., through an Article 53 regulated entity).

## 7. What financial services “passporting” arrangements does Colombia have with other jurisdictions?

Applicable law allows certain local securities intermediaries (e.g., broker-dealers) to distribute non-Colombian collective investment funds that meet certain conditions and criteria (regardless of their denomination), provided that the supervising authority in the place of incorporation of the fund has executed an information-sharing protocol or agreement with the SFC. For this mechanism to be viable, the fund must be subject to regulatory supervision.

The SFC has executed information-sharing agreements with a number of regulators, including CIMA (Cayman Islands), CONSAR (Mexico), NYME (US), SBIF (Chile) and OSFI (Canada).

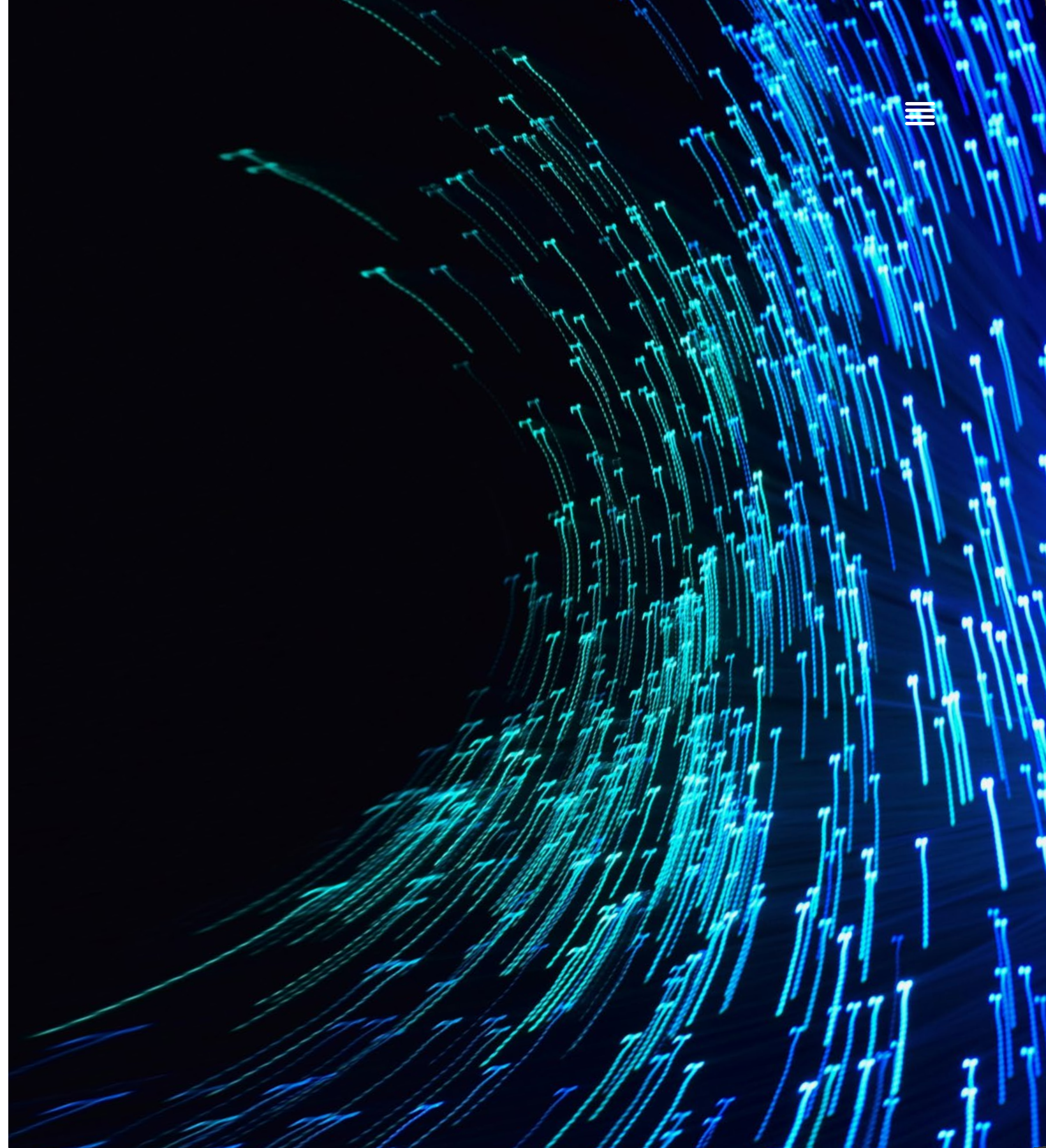
Under this distribution structure, the fund itself will not be subject to SFC supervision, but the local distributor will continue to be subject to local distribution rules and SFC supervision.

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# Czech Republic

## 1. Who regulates banking and financial services in the Czech Republic?

The Czech National Bank (CNB) is the Czech Republic's main regulator, with the responsibility to authorize or register, as applicable, and supervise banks, insurers and other financial institutions. The CNB regulates the following entities, among others:

- a.** Czech banks, Czech branches of foreign non-European Economic Area (non-EEA) banks, credit unions, and to a limited extent, foreign EEA banks operating in the Czech Republic on the basis of the EEA passport via a Czech branch
- b.** Czech insurance companies, Czech reinsurance companies, insurance intermediaries, independent loss adjusters, branches of foreign non-EEA insurance and reinsurance companies, and to a limited extent, foreign EEA insurance companies operating in the Czech Republic on the basis of the EEA passport (directly or via a Czech branch)
- c.** Czech Payment institutions, foreign EEA payment institutions operating in the Czech Republic based on the EEA single license, Czech small-scale payment service providers, operators of payment systems with settlement finality, Czech electronic money institutions, foreign EEA electronic money institutions operating in the Czech Republic based on the EEA passport, Czech small-scale electronic money issuers
- d.** Czech bank and non-bank investment firms (i.e., securities dealers), Czech branches of foreign non-EEA investment firms, investment intermediaries, tied agents of investment firms and investment intermediaries, and to a limited extent, foreign EEA investment firms operating in the Czech Republic based on the EEA passport (directly or via a Czech branch)
- e.** Securities issuers, the central depository (i.e., the main Czech securities depository), other entities keeping a register of investment instruments
- f.** Organizers of trading venues (i.e., regulated markets, multilateral trading facilities and organized trading facilities), operators of settlement systems with settlement finality, credit rating agencies
- g.** Investment companies and investment funds
- h.** Providers and intermediaries of consumer credit
- i.** Bureaux-de-change
- j.** Pension funds, pension companies and other entities active in supplementary pension savings, pension savings and private pension schemes pursuant to special legislation private pension schemes, supplementary pension savings and pension savings

Entities operating in the Czech Republic on the basis of the EEA passport are subjects to the regulations and supervision of the country in which their headquarters are located.

The CNB is also responsible for the macro-supervision of the banking and financial services industries and the supervision of the banks, credit unions, investment firms and insurance companies in financial conglomerates. In addition, it operates the only interbank payment system in the Czech Republic.

Certain powers of supervision are also vested in the Financial Analytical Office, for example, under the Act on Certain Measures Against the Legalisation of Proceeds from Criminal Activity and Financing of Terrorism. The Financial Analytical Office is entitled to suspend suspicious transactions which the obliged entities are required to report or freeze the assets in such transaction for a limited period. The Financial Analytical Office also deals with administrative offenses under the Act on Certain Measures Against the Legalisation of Proceeds from Criminal Activity and Financing of Terrorism and may impose substantial fines or bans on activities of the obliged entities.

The European Union (EU) Supervisory Authorities (the European Banking Authority, the European Securities and Markets Authority, and the European Insurance and Occupational Pension Schemes Authority) play an important role in issuing technical standards and in some limited respects have powers of supervision over Czech firms.

The European Central Bank (ECB) is the supervisor of Eurozone banks under the EU's Single Supervisory Mechanism (SSM). As the Czech Republic is not in the Eurozone, Czech banks are not within the scope of the SSM. However, Eurozone branches or subsidiaries of Czech banks are in some cases within the scope of the SSM and the supervision of the ECB.



## 2. What are the main sources of regulatory laws in the Czech Republic?

Much of the relevant law in the Czech Republic is derived from EU directives and regulations. In many respects, therefore, Czech domestic legislation and rules simply give effect to pan-European legal requirements. However, since many European directives only set minimum standards, the way in which directives have been implemented across Europe can vary. In other words, the Czech Republic and other European jurisdictions have introduced domestic laws that exceed European level requirements. Moreover, directives contain obligations and discretions at a member state level, and the Czech Republic also has various domestic rules.

Czech law governing the banking and financial services is contained in separate acts for each category of the services. Accordingly, the relevant regulatory laws in the Czech Republic include the following, among others:

- The Act on Banks (No. 21/1992 Coll.)
- The Act on Business Activities on the Capital Market (No. 256/2004 Coll.)
- The Act on Bonds (No. 190/2004 Coll.)
- The Act on Investment Companies and Investment Funds (No. 240/2013 Coll.)
- The Act on Insurance Industry (No. 277/2009 Coll.)
- The Act on Financial Conglomerates (No. 377/2005 Coll.)
- The Act on Distribution of Insurance and Reinsurance (No. 170/2018 Coll.)
- The Act on Payment Systems (No. 370/2017 Coll.)
- The Bureaux-de-Change Act (No. 277/2013 Coll.)
- The Advertising Act (No. 40/1995 Coll.)
- The Trade Licensing Act (No. 455/1991 Coll.)
- The Consumer Credit Act (No. 257/2016 Coll.)
- The Act on Certain Measure against the Legalisation of Proceeds from Criminal Activity and Financing of Terrorism (No. 253/2008 Coll.)

In addition to the above acts, the general rules applicable to the supervision by the CNB are contained in the Act on Czech National Bank (No. 6/1993 Coll.) and the Act on Supervision in the Capital Market Area (No. 15/1998 Coll.). General rules applicable to financial instruments (securities) are also contained in the Czech Civil Code (Act. No. 89/2012 Coll.) and the Business Corporations Act (Act. No. 90/2012 Coll.). There is also a large volume of secondary and delegated legislation. Additionally, the CNB issues rules and guidance, which apply to the entities that the CNB regulates.

The majority of the applicable regulatory laws (although not always up to date) are available in English at: [https://www.cnb.cz/en/supervision\\_financial\\_market/legislation/](https://www.cnb.cz/en/supervision_financial_market/legislation/)

Please be advised that these are English translations of the applicable Czech law and should be used solely for information purposes.

## 3. What types of activities require a license in the Czech Republic?

The Czech Republic regulates a broad range of activities, including the following:

- **Accepting deposits:** This covers typical retail banking activities involving the operation of current and deposit accounts.
- **Issuing electronic money:** Electronic money is a prepaid electronic payment product that can be card- or account-based.
- **Carrying on payment services:** This covers a broad range of activities involving matters such as money remittance, card issuance, acquiring card transactions and the operation of payment accounts.
- **Consumer lending:** This covers a broad range of subjects providing credit to consumers, both as a plain consumer credit and as a mortgage consumer credit.
- **Carrying on insurance business:** This involves effecting and carrying out contracts of both life and general insurance.
- **Trading in investment instruments as principal or as agent on the basis of client's instruments:** This predominantly covers entities such as investment firms.
- **Arranging transactions in investment instruments:** This activity predominantly covers the role of intermediaries and tied agents in transactions with investment instruments.
- Investment advice in relation to investment instruments and investment mediation (this does not include advice on capital structure, industrial strategy, and related matters and advice and services relating to mergers and the purchase of undertakings; provision of such advice and services does not require CNB license).
- **Insurance mediation activities:** Czech regulation covers various insurance brokering activities as well as the handling of claims on behalf of the insured.
- Investment management: Managing investment instruments on behalf of another person is a regulated activity. Specific permission is required where a person carries on this activity in relation to an investment fund.
- **Establishing, operating and winding up an investment fund:** These include collective investment funds and funds of qualified investors.
- **Providing custody (safeguarding and administration of investment instruments):** Providing custody services in relation to assets that include investment instruments is a regulated activity. Specific permission is required to act as the depositary of an investment fund.
- **Activities regarding crypto-assets and crypto-currencies:** Generally only a general trade license is required for activities regarding crypto-assets and crypto-currencies. However, in some cases a specific permission is required, e.g. operating a crypto-currency exchange may entail obligations under payment services laws and issuing e-money tokens or security tokens and other investments (such as derivatives) may require CNB authorisation.

## 4. How do the Czech Republic's licensing requirements apply to cross-border business into the Czech Republic?

Where an entity outside the Czech Republic deals with a client or a counterparty located in





the Czech Republic, those activities will typically be subject to Czech laws and regulations. The service provider will need to consider whether they are triggering local Czech licensing, registration or notification obligations, as applicable, and also whether they are complying with Czech marketing rules.

Until recently, European laws have not sought to harmonize the approach of member states to non-EEA entities. This has meant that access to the markets of member states has had to be considered on a case-by-case basis. However, the trend in European legislation is now towards harmonizing the approach across all member states to non-EEA entities. On the one hand, this approach is likely to create a barrier to entry to European markets. On the other hand, firms who become compliant with the new EU standards will be able to access the whole EEA market as opposed to having to consider the market on a country-by-country basis.

Under Czech law, offering and provision of financial and investment services or products (collectively "Services") in the Czech Republic may only be carried out by Czech-licensed entities (such as banks or investment firms), Czech-licensed branches of foreign non-EEA entities, or foreign EEA entities on the basis of the EEA single license, directly or via a Czech branch, as applicable. Czech investment intermediaries, tied agents and insurance intermediaries offering or providing financial or investment Services in the Czech Republic must be registered with the CNB.

Subject to exceptions, financial and investment Services are offered/provided in the Czech Republic in the following cases:

- a. Both the customer and an employee of the entity offering/providing the Services are physically present in the Czech Republic. This also generally applies where an intermediary of such entity, instead of its employee, is present in the Czech Republic.
- b. The offering of the Services by means of distance communication (e.g., over the internet, telephone, mail, email) is aimed at the Czech Republic and the Services may be used in the Czech Republic; the offering of the Services is aimed at the Czech Republic in case the Services are advertised in the Czech Republic with the intention to be provided in the Czech Republic, that is, advertised in Czech communication media over the internet, via directed mail, email, telephone calls, business introducers or intermediaries to customers in the Czech Republic.

However, if the customer independently and proactively Authors and contact information the foreign entity by means of distance communication (customer reverse solicitation), the financial and investment Services are not considered provided in the Czech Republic and thus are not subject to Czech laws.

Where foreign investment intermediaries, tied agents or insurance intermediaries engage in offering or providing financial or investment Services in the Czech Republic from outside the Czech Republic, they must be registered with the CNB, unless they provide such Services on an incidental basis only.

Additionally, any advertisement of financial and investment Services to persons in the Czech Republic must comply with the Czech rules on advertising. EEA entities operating in the Czech Republic under the EEA single license may freely advertise financial and investment Services to persons in the Czech Republic as long as they adhere to the applicable Czech rules. However, non-EEA entities operating in the Czech Republic (and EEA entities not complying with the EEA single license requirements) may advertise their financial and investment Services in the Czech

Republic without setting up a branch and obtaining a banking license from the CNB only if the advertising does not overlap into provision of financial or investment Services.

Please note that advertising and providing financial and investment Services on web pages where the Czech language is an option may be considered as advertising in the Czech Republic and thus be subject to Czech laws, regardless of where the company or the servers are situated.

As mentioned above, recent EU legislation limits the ability of foreign firms to do business in the Czech Republic, particularly as follows:

- The Alternative Investment Fund Managers Directive imposes limitations on non-EEA persons marketing fund interests to persons in the Czech Republic (and other European jurisdictions).
- MiFID II results in greater restrictions on non-EEA entities doing business in the Czech Republic.

## 5. What are the requirements to obtain authorization in the Czech Republic?

In order to become authorized, an applicant must satisfy the CNB that it meets the requirements set forth in the respective pieces of legislation applicable to the different categories of financial and investment Services. Under Czech law, providing financial and investment Services may be subject to a license, registration or mere notification to the regulatory authority.

These requirements can vary depending on the particular regulated activities that the applicant intends to carry on. Broadly, however, the following conditions will need to be satisfied in the case of corporates:

- a. **Location of offices:** The registered office must be located in the Czech Republic.
- b. **Effective supervision:** The CNB will consider whether there are any impediments to supervision of the applicant.
- c. **Appropriate financial resources:** Applicants must satisfy the CNB that they have adequate financial resources to carry on the relevant regulated activities and prove that the origin of the resources is transparent. The minimum registered capital must be paid up in full.
- d. **Appropriate human resources:** The executives of the applicant and persons in charge of its supervision must be, among others, trustworthy and sufficiently qualified and skilled. Management and control systems must be in place.
- e. **Appropriate technical and organizational resources:** The applicant must satisfy the CNB that it has in place appropriate technical and organizational resources to carry on the relevant regulated activities.
- f. **Business mode:** The CNB will examine the applicant's business model. These may also require submission of other plans and rules applicable to the applicant's activity.
- g. **Transparency of the applicant's group:** The CNB will require that the group to which the applicant pertains be transparent.

In certain cases, the CNB may also request supervisory authorities of other EEA countries to provide opinions with respect to the application.

Generally, individuals seeking to obtain authorization must, among others, meet the following criteria:

- Be 18 years old
- Have full legal capacity
- Be trustworthy
- Not be previously declared insolvent
- Be appropriately educated, qualified and/or skilled
- Be suitable to be granted authorization/for registration

Certain authorizations may be granted only to corporates. These include the banking license, the license to provide Services as an investment firm, and the license to carry out business activity as an insurance company. On the other hand, other activities such as investment intermediation or insurance intermediation may be carried out by both corporates and individuals.

## 6. What is the process for becoming authorized in the Czech Republic?

To obtain authorization, an applicant must go through a formal process, which involves the completion of required application forms and the submission of supporting information.

In most cases the CNB will have six months from receipt of a completed application by which to determine whether to approve the application.

The forms that must be completed for submission to the regulator and the supporting information to be attached thereto will depend on the nature of the regulated activities to be conducted.

Generally, the documents that the applicant must submit in addition to the application may include the applicant's business plan, constitutional documents, financial statements, documents evidencing the origin of its financial resources, list of management personnel and documents relating thereto, proposals of management and control system, and organizational structure. Details about persons/entities who control or exert influence over the firm must also be submitted.

## 7. What financial services "passporting" arrangements does the Czech Republic have with other jurisdictions?

Once authorized in the Czech Republic, a Czech firm can passport its authorization into other EEA member states. This passport is, however, only available to firms established in the Czech Republic and will not be available to Czech branches of non-EEA firms. Passporting permits the provision of cross-border services as well as the establishment of a physical branch location.

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# France

## 1. Who regulates banking and financial services in France?

France has two regulators responsible for the authorization and supervision of banks, insurers and other financial institutions. These are the *Autorité de Contrôle Prudentiel et de Résolution* (ACPR) and the *Autorité des Marchés Financiers* (AMF). The AMF and the ACPR are further the authorities supervising financial institutions with regards to their AML/CFT duties. The authority to which suspicious transactions must be reported to is TRACFIN (*Traitement du renseignement et action contre les circuits financiers clandestins*). The allocation of responsibilities between the ACPR and the AMF is as follows:

- a. The ACPR regulates the banking and insurance sectors in France. It is charged with preserving the stability of the financial system and protecting the customers, insurance policyholders, members and beneficiaries of the persons that it supervises. It supervises the institutions with regards to their AML/CFT compliance duties.
- b. The AMF regulates participants and products in France's financial markets. It approves the rules applicable to financial markets and market infrastructures, approves the corporate finance transactions of listed companies, and authorizes financial services professionals and the collective investment products under its supervision. It supervises these institutions with regards to their AML/CFT compliance duties.
- c. Investment Services Providers (ISPs) are regulated by the AMF and the ACPR. The AMF issues opinions or makes observations on the programs of operations of the ISP, and the ACPR is charged with the enforcement of prudential rules. The ACPR is the authority supervising ISPs' AML/CFT compliance.

Even if it is not a frontline regulator, the Banque de France (BdF) has three missions linked to banking and financial services in France:

- Ensuring the security of cashless means of payment and the relevance of the standards applicable in this area
- Ensuring the smooth operation and security of payment systems
- Ensuring the security of financial instrument clearing and settlement systems

The *Haut Conseil de stabilité financière* (HCSF) is also not a frontline regulator. The HCSF is tasked with supervising the financial system as a whole, with the aim of safeguarding its stability and ensuring a sustainable contribution of the financial sector to economic growth.

The European Central Bank (ECB) has recently become the supervisor of Eurozone banks under the EU's Single Supervisory Mechanism (SSM). Therefore, the ECB directly supervises significant banks, and less significant banks indirectly through the ACPR.

The European Union's supervisory authorities (the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pension Schemes Authority) play an important role in issuing technical standards and in some limited respects, have powers of supervision over French firms.

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

Much of the relevant law in France is derived from European Union directives and regulations. In many respects, therefore, French domestic legislation and rules simply give effect to pan-European legal requirements. However, since many European directives only set minimum standards, the way in which directives have been implemented across Europe can vary. In other words, the French and other European jurisdictions have introduced domestic laws that exceed European level requirements. Moreover, directives may contain obligations and discretions at a member state level and France also has various domestic rules.

The main regulatory laws can be found in the Monetary and Financial Code. There are further legal and regulatory texts that are not regrouped in a code.

The AMF has regulatory powers of an administrative nature by editing its rulebook that financial services providers need to comply with. Both the ACPR and the AMF issue rules and guidance, which apply to the firms they supervise. It is also necessary to take into account technical standards and guidance published by the European Union's supervisory authorities and the European Central Bank.



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

In France, the ACPR is the competent authority that grants authorization for credit institutions — legal entities that carry out banking operations as their regular business (reception of repayable funds from the public, credit operations and payment banking services). However, if the credit institution is significant according to the European Union regulation, the ECB is the competent authority. Broadly, an entity must ask the ACPR for a specific license depending on its activity, as follows:

- **Bank:** All banking operations
- **Mutual or cooperative bank:** All banking operations Municipal credit bank: reception of funds from the public, provision of means of payment, loans secured by pledges, and if the authorization allows, other types of credit to individuals, local public establishments and associations
- **Financing company:** May only carry out credit operations resulting from their authorization or from specific legislative or regulatory provisions, but may not receive deposits from the public repayable on demand Specialized financing institution: Credit institutions to which the state has entrusted a permanent public interest mission.

The ACPR is also competent to grant authorization to payment institutions that operate the following activities:

- Services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account
- Services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account
- Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider
- Execution of payment transactions where the funds are covered by a credit line for a payment service user
- Issuing and/or acquiring of payment instruments
- Money remittance
- Payment initiation services
- Account information services.

The ACPR is the French authority competent to grant authorization to electronic money institutions, which are legal entities that issue electronic money and provide payment services.

The ACPR and the AMF are jointly responsible for delivering authorization to investment firms (excluding portfolio management companies), which are legal entities other than a credit institution providing investment services as a regular business. This category covers the following activities:

- Receiving and transmitting orders for third parties
- Executing orders for third parties
- Trading for own account
- Portfolio management for third parties

- Financial investment advice
- Underwriting
- Placing of financial instruments with or without a firm commitment basis
- Operation of multilateral trading facilities.

The AMF authorizes and monitors asset management companies. These are companies whose main activity is discretionary portfolio management or exercising a collective management activity.

- Portfolio management for third parties (or discretionary management) consists of managing individual portfolios of financial instruments on behalf of clients, whether retail or institutional investors.
- Collective management or management of collective investments (particularly UCITS or AIFs) broadly consists of managing collective portfolios. A collective investment scheme comprises sums pooled by investors and managed on their behalf by a portfolio manager. The latter manages the sums raised in accordance with an investment policy, investing these in assets, such as financial investments (shares or bonds). Shares or units are issued, representing a portion of the assets pooled together, in return for the sums paid into the collective investment.

Finally, certain activities also need to be registered. For instance, the intermediaries in banking transactions and payment services or payment service providers should be registered and respect the proper regulation.

The same holds true for crowdfunding platforms in lending or financial instruments. They need to register as a crowdfunding intermediary and comply with all relevant rules.

Since 2019 some digital asset service providers must also mandatorily register with the AMF. This is the case for custodian wallet providers, crypto-fiat or crypto-crypto exchange service providers and operators of trading platforms. These intermediaries as well as some further intermediaries on crypto assets can further opt for a voluntary license which enables them to directly solicit customers and grants them an almost certain access to a bank account.

### 4. How do France's licensing requirements apply to cross-border business into France?

A firm outside of France offering financial products or services to a client or a counterparty located in France might trigger the application of French laws and regulations. The service provider will need to consider whether the activity triggers French licensing obligations.

The regulation applicable to a financial services provider doing business in France depends on its country of origin and the way it operates in France. A distinction needs to be made between service providers licensed in another EU country and third country service providers. **European Union service providers**

The following procedures (passporting) are applicable when a European Union service provider intends to open an establishment or exercise the freedom to provide services across the European Union, including in France.





If the financial services provider has already been authorized in a European Union country for a financial service harmonized at the level of the EU, it will only need to contact the competent regulatory authority in the country of origin of the service provider (home state regulator) and inform it of its intention to provide the same services in other EU countries. Obviously, the service provider can only offer the services for which it has been authorized by its home state regulator. The home state regulator then informs the host state regulator and informs it of the service provider's intention to provide services in the host state. The host state regulator can, under certain limited circumstances object. The whole procedure of passporting can take up to two months.

If the service provider exercises its freedom of establishment it still needs to establish a branch or agency in the host country before it starts business.

For services that are not harmonized at the EU level, cross-border services as such are not available. Such service providers must open at least a branch in France or create a regulated subsidiary.

### Third-country service providers

A foreign service provider authorized outside the European Union can decide between opening a representative office, an establishment or a subsidiary in France. Each possibility requires a special authorization or notification, depending on the level of services provided.

Thus, if the service provider intends to open:

- an office in order to exercise the activities of information, liaison and representation, the French competent authority must be notified of the project. It is important to underline that a representative office is not allowed to do global marketing for its services;
- an establishment, an authorization is required from the French competent authority. The conditions to deliver the agreement are close to those applicable to opening a subsidiary;
- a subsidiary, an authorization is required from the French competent authority. The subsidiary will have to fulfil the same requirements as any other French service provider as it is a French legal person.

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

In order to obtain an authorization, an applicant must satisfy the relevant conditions applicable to its activities.

The conditions can vary depending on the particular regulated activities that the applicant intends to carry out in France. Broadly, however, the following conditions will need to be satisfied:

- a. Legal form - The regulator will examine if the applicant's legal form is appropriate for the activities.
- b. Business model - The regulator will examine the program of operations as well as the human, technical and financial resources.
- c. Shareholders - The regulator will examine the identity and suitability of contributors of capital and, where applicable, their guarantors.

- d. Executives - Everyday management of activities shall be entrusted to at least two effective directors, having the power to represent and engage the company and who are fit & proper (respectability, competence and experience).
- e. Location of offices - The applicant's headquarters have to be located and registered office shall be located in France.
- f. Effective Supervision - The applicant must be capable of being effectively supervised. The regulator could reject an agreement when its mission may be hampered by a foreign non-European Union regulation or by certain capital links.
- g. Appropriate resources - applicants must satisfy the regulator that they have adequate resources to carry on the relevant regulated activities. The regulator will check if the minimum required capital is paid up, as well as the quality of the contributors of capital.

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

When an applicant seeks authorization, the regulator recommends that the applicant asks for an informal meeting to discuss its project and the timeline. Subsequently, an application form corresponding to the regulated activities must be completed and submitted to the regulator with all the relevant supporting documents.

The regulator will examine the application and may ask for further information or additional documents according to specific features of the project.

The procedural timeline depends on the authorization sought. It can vary between three months and 12 months, depending on the regulated activities.

There are no particular sandboxes available for FinTechs but the AMF and ACPR created internal FinTech departments and try to accommodate these companies within the boundaries of the existing legal framework.

## 7. What financial services "passporting" arrangements does France have with other jurisdictions?

A service provider authorized in France that intends to do business in another European Union country must notify the French regulator before starting its activities. Depending on the intent to create an establishment or to exercise the freedom to provide services across the European Union area, a specific notification form must be sent to the regulator. The regulator will inform the host regulator who has a limited possibility to object. The authorization process can last up to two months.

If the French service provider exercises its freedom of establishment it must open a branch in the host country before it can start business. Moreover, the French service provider has to appoint a senior manager for the new European branch. Before the appointment can be effective, the French authority must be notified in order to give its approval.

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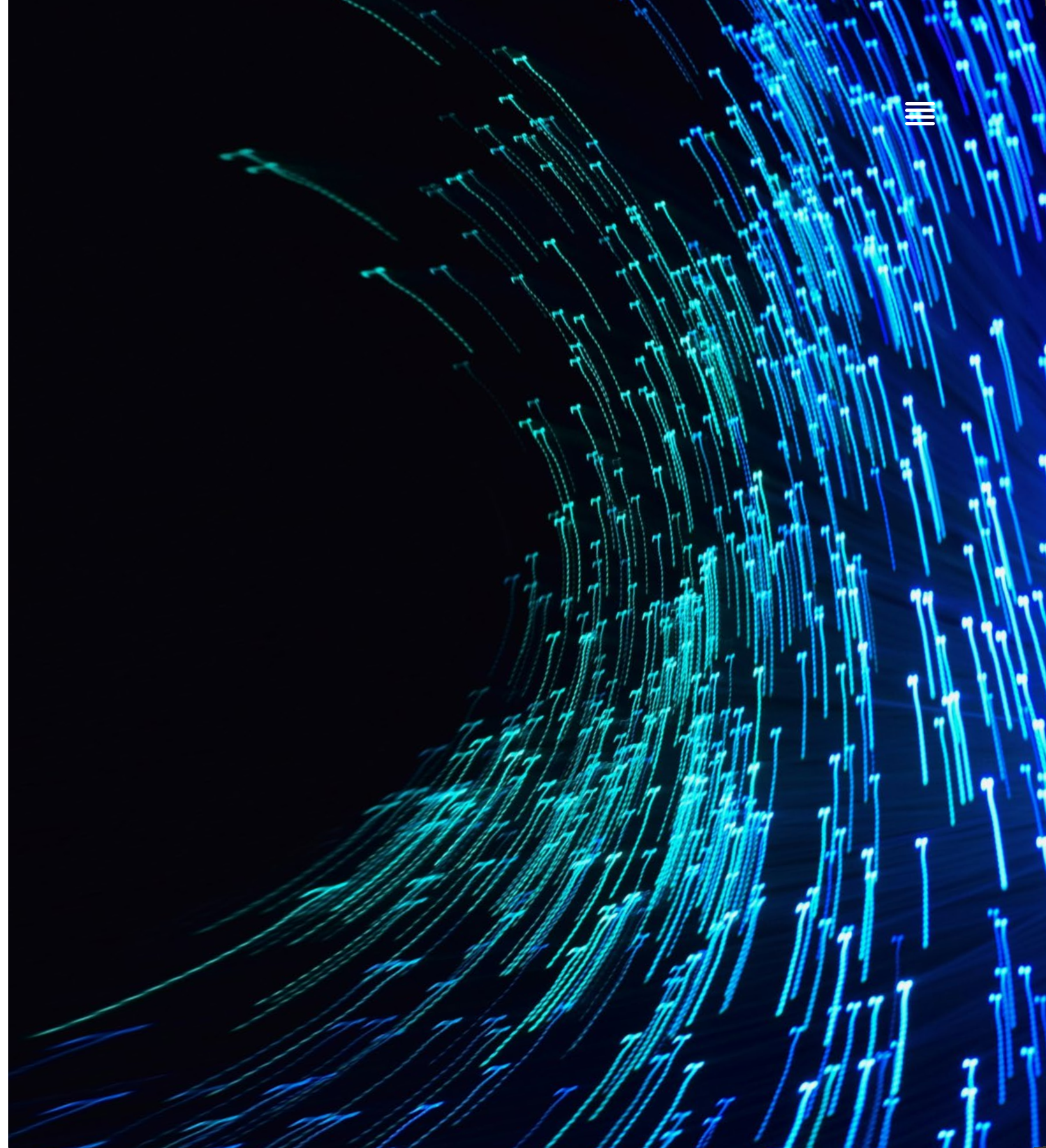
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# Germany

## 1. Who regulates banking and financial services in Germany?

Germany has two national regulators that are responsible for authorizing and supervising banks, insurers and certain other financial sector companies: the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) and the German Federal Bank ("*Deutsche Bundesbank*").

The BaFin and the Deutsche Bundesbank share supervisory responsibility, but not as a "twin peak" model. Pursuant to section 6 (1) of the Banking Act (Kreditwesengesetz or KWG) and section 5 (1) of the Securities Institutions Act (Wertpapierinstitutsgesetz or WpIG), the BaFin is the administrative authority responsible for the supervision of credit institutions and financial services institutions (under the KWG) and investment firms (under the WpIG). The Deutsche Bundesbank merely assists the BaFin in the supervision of these institutions. The cooperation of the BaFin and the Deutsche Bundesbank in the institutions' ongoing supervision is governed by section 7 (1) of the KWG and section 9 (1) of the WpIG, which stipulate that, among other things, the Deutsche Bundesbank shall, as part of the ongoing supervision process, analyze the reports and returns that institutions have to submit on a regular basis and assess whether their capital and their risk management procedures are adequate. Ongoing monitoring of institutions by the Deutsche Bundesbank is normally carried out by its local head offices. In simplified terms, the Deutsche Bundesbank serves as the "eyes and ears" of the BaFin, but the Deutsche Bundesbank also provides input to the decision-making of the BaFin, even if the BaFin retains ultimate responsibility.

Under the EU's Single Supervisory Mechanism Regulation (SSM), the European Central Bank (ECB) carries out clearly defined supervisory tasks to protect the stability of the European financial system, together with the National Competent Authorities (NCAs) of participating member states. The SSM Regulation and the SSM Framework Regulation provide the legal basis for the operational arrangements related to the prudential tasks of the SSM.

The ECB is currently responsible for the direct supervision of approximately 20 German credit institutions representing the most important banks in the country and, as such, replaces the BaFin and the Deutsche Bundesbank under the relevant German supervisory laws. However, the two German regulators still form an important part of the regulatory institutions and participate in the supervision within the framework of the so-called Joint Supervisory Teams.

The ECB's responsibility extends to the following matters:

- Licensing (grant and revocation)
- Significant shareholdings ("ownership control")
- Capital requirements
- Leverage ratio and liquidity requirements
- Governance
- Audits and stress testing
- Consolidated supervision
- Recovery plans, early intervention in case of breach of supervisory requirements

For the remaining lesser important credit institutions, the ECB has more limited supervisory powers but is directly responsible for the granting and withdrawal of licenses and the decisions on the ownership control procedure. In all cases, the decision will be prepared by the BaFin, but final decision-making takes place at the level of the ECB. In addition, the ECB has a step-in right in order to ensure consistent application of the rulebook (in consultation with the BaFin) and can also step in at the request of the BaFin.

Financial services institutions (not qualifying as credit institutions under the KWG) and investment firms (not qualifying as credit institutions) are under the supervision of BaFin and Bundesbank in all respects.

In relation to recovery and resolution of banks under the rules implementing the EU Recovery and Resolution Directive (RRD), the responsible regulator is the Single Resolution Board (for the significant institutions that are under the direct supervision of the ECB) or BaFin (for the other German institutions).

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

### Banking regulation

The main sources of regulatory laws applicable to credit institutions are the KWG, the Solvency Regulation (Solvabilitätsverordnung or "SolV"), the Liquidity Regulation (Liquiditätsverordnung or "LiqV") and the Large Exposures and Million Credits Regulation (Groß- und Millionenkreditverordnung or "GroMiKV").



The KWG has implemented, among other things, the EU Capital Requirements Directive V (CRD V). The impact of the SolvV, the LiqV and the GromiKV has been drastically reduced as a result of the enactment of the EU Capital Requirements Regulation (CRR I and II). The CRR is directly applicable, i.e., it does not have to be implemented. The SolvV, the LiqV and the GromiKV now only provide limited supplementary regulation on top of the CRR.

Further major banking regulations include the Ownership Control Regulation (Inhaberkontrollverordnung), which covers the ownership control procedure, and the Institutions Remuneration Regulation (Insitutsvergütungsverordnung), which deals with the regulation of variable compensation systems.

Under several provisions of the KWG, the BaFin may issue regulations, guidelines or orders that apply to those it regulates. Such (written) communications (other than those addressed to individual institutions) are disclosed on the BaFin or the Bundesbank website. Moreover, the BaFin provides guidance on its regulatory practice in circulars, guidance notices and interpretative letters.

Banking regulation for certain special banks is also contained in the Building Societies Act (Bausparkassengesetz) and the Mortgage-Covered Bond Act (Pfandbriefgesetz), which requires an additional license for banks that want to issue mortgage-covered bonds.

Savings and loan institutions (Sparkassen) are also regulated under the laws of the federal states since most such institutions are incorporated under public (state) law.

The BRRD (I and II) has been implemented in Germany in separate legislation, the Recovery and Resolution Act (Sanierungs- und Abwicklungsgesetz or SAG).

### Regulation of financial services

The KWG also regulates financial services providers (that qualify neither as credit institutions nor as investment firms), such as financial leasing companies and factoring companies. These services are not MiFID II investment services but are regulated under German law (i.e., the KWG).

### Regulation of investment services

Until 26 June 2021, investment services were not regulated separately but as an integral part of the KWG. With the entry into force of the WpIG on 26 June 2021, a new regulatory regime is applicable to investment firms that do not at the same time qualify as credit institutions under the provisions of the KWG; these investment firms are now being referred to as “securities institutions” (Wertpapierinstitute), but which we will refer to as investment firms to keep the terminology consistent with the EU law. The WpIG has implemented Directive (EU) 2019/2034 (Investment Firm Directive or IFD) and goes along with Regulation (EU) 2019/2033 (Investment Firm Regulation or IFR).

The WpIG applies to all institutions providing investment services with the exception of those that qualify as CRR credit institutions under CRR (cf. section 32 (1) sentence 2 KWG) (so-called class 1a firms under the IFR) because they are deemed systematically important due to their business model and risk profiles being similar to those of significant credit institutions.

Also, large investment firms that meet certain size requirements that do not qualify as class 1a firms but whose size and activities present some risk to financial stability (so-called class

1b firms under IFR) are captured by the WpIG (and not the KWG) in principle but will remain subject to the CRR and CRD (and not the own prudential requirements of the IFR/WpIG) although not qualifying as credit institutions (as the class 1a firms do).

The remaining medium-sized investment firms (so-called class 2 firms) and small-sized investment firms (so-called class 3 firms) will be governed by the WpIG, including the prudential regime of the IFR.

The conduct of business supervision of investment firms continues to be based under the provisions of the Securities Trading Act (Wertpapierhandelsgesetz “WpHG”), which implements MiFID II.

### Payment services regulation

Payment services and e-money are regulated under the Payment Services Supervision Act (Zahlungsdienstenaufsichtsgesetz or ZAG). Payment services institutions and e-money institutions are subject to supervision by BaFin and Bundesbank (the same cooperation principles apply as outlined above).

### Fund manager and fund regulation

Fund management companies and investment funds are regulated by the German Capital Investment Code (Kapitalanlagegesetzbuch or KAGB). The KAGB implements the UCITS Directive and the Alternative Investment Fund Managers (AIFM) Directive, but it also contains fund regulation for open- and closed-end investment funds marketed with the general public as well as regulation of institutional funds (so-called special funds). Fund management companies are subject to supervision by BaFin.

### Money laundering regulation

An essential additional regulation applicable to all banks, financial services providers, investment firms, fund managers and payment services providers is contained in the Money Laundering Act (Geldwäschegesetz or GwG).

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

### Banking

Pursuant to section 1 (1) of the KWG, credit institutions are undertakings that conduct banking activities commercially or on a scale that requires a commercially organized business undertaking. Banking activities are as follows:

1. The acceptance of funds from others as deposits or of other repayable funds from the public, unless the claim to repayment is securitized in the form of bearer or order debt certificates, irrespective of whether or not interest is paid (deposit business)
2. The business specified in section 1 (1), sentence 2 of the Pfandbrief Act (Pfandbriefgesetz) (Pfandbrief business)
3. The granting of money loans and acceptance credits (lending business)
4. The purchase of bills of exchange and checks (discount business)
5. The purchase and sale of financial instruments in the credit institution’s own name for the account of others (principal brokerage)





6. The safe custody and administration of securities for the account of others (security deposit business)
7. The activities as central securities depository (central securities depository business)
8. The obligation to repurchase previously sold loan receivables prior to their maturity (loan repurchase business)
9. The assumption of sureties, guarantees and other warranties on behalf of others (guarantee business)
10. The execution of a cashless collection of checks (check collection business), collection of bills of exchange (bill of exchange collection business) and the issue of traveler's checks (traveler's check business)
11. The purchase of financial instruments at the bank's own risk in connection with the placement of such instruments in the market or the assumption of equivalent guarantees (underwriting business)
12. Any activity as a central counterparty within the meaning of Regulation (EU) No 648/2012 (EMIR) (central counterparty business)

Business is performed commercially if the operation is intended to continue for a certain period and is conducted with the intention of generating profits. Alternatively, the criterion that requires a commercially organized business undertaking applies. This criterion does not hinge on whether a commercially organized business undertaking exists but solely on whether the scale of the business objectively requires a commercially organized business undertaking.

#### Financial services pursuant to KWG

The definition of financial services is laid down in section 1 (1a) sentence 2 numbers 1 to 12 and section 1 (1a) sentence 3 of the KWG. Accordingly, financial services comprise:

1. The brokerage of transactions involving the purchase and sale of financial instruments (investment brokerage)
2. The provision of personal recommendations regarding transactions in specified financial instruments to customers or their representatives, provided that such recommendations are based on an examination of the investor's personal circumstances or presented as being suitable for the investor and are not exclusively announced through information distribution channels or to the public (investment advice)
3. The operation of a multilateral system that brings together the interests of a large number of persons in the sale and purchase of financial instruments within that system according to specified rules in a way that results in agreements on the purchase of such instruments being entered into (operation of a multilateral trading system)The placing of financial instruments without a firm commitment basis (placement business)
4. The operation of a multilateral system that is not an organized market or a multilateral trading system and that brings together the interests of a large number of third parties in the purchase and sale of debt securities, structured finance products, emission allowances or derivatives within the system in a manner consistent with a contract for the purchase of these financial instruments (operation of an organized trading system)
5. The sale and purchase of financial instruments in the name of and for the account of others (contract brokerage)
6. The management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management)
7. Proprietary trading by accomplishing any of the following:

- a. Continuous offering of financial instruments for purchase or sale on an organized market or on a multilateral trading facility at prices quoted by the institution
- b. Organized and systematic trading on a frequent basis for the own account outside an organized market or a multilateral or organized trading facility by offering a system that is accessible to third parties to conclude transactions with them (systematic internalization)
- c. Purchase or sale of financial instruments for the own account as a service provided to others
- d. Purchase or sale of financial instruments for own account as a direct or indirect participant in an organized domestic market or a multilateral or organized trading facility via a high-frequency, algorithmic trading scheme characterized by the use of infrastructures intended to minimize latencies by system determination, generating, routing or execution without human intervention for individual transactions or orders and by high message intra-day rates that constitute orders, quotes or cancellations, even if a service is not provided to others (high-frequency trading)

8. The brokering of a deposit business with enterprises domiciled in a non-EEA state (non-EEA deposit brokerage)
9. The custody, administration and safe-keeping of crypto assets or private cryptographic keys that serve to hold, store or transfer crypto assets for others (crypto custody business)
10. Dealing in foreign notes and coins (foreign currency dealing)
11. Keeping a crypto securities register
12. The continuous purchase of receivables on the basis of framework agreements with or without recourse (factoring)
13. Entering into financial lease agreements as lessor and the administration of property companies within the meaning of sec. 2 (6) sentence 1 no. 17 outside the management of an investment fund within the meaning of sec. 1 (1) KAGB (financial leasing)
14. The purchase and sale of financial instruments outside the management of an investment fund within the meaning of sec. 1 (1) KAGB, for a syndicate of investors, who are natural persons, with a scope of decision making as regards the selection of financial instruments, provided that this is a focal point of the offered product and provided that it serves the purpose of the investors participating in the performance of the purchased financial instruments (investment administration)
15. The safe custody and administration of securities exclusively for alternative investment funds (AIF) within the meaning of sec. 1 (3) KAGB (limited custody business)

Moreover, proprietary trading is considered a licensable financial service if the entity is not otherwise regulated and operates the business with a view to generating profits or at a scale that requires a commercially organized undertaking, and is part of a group of institutions, financial holding group, mixed financial holding group or financial conglomerate that includes at least one CRR credit institution. This rule is a consequence of the bank separation rule introduced in German law effective 1 July 2016, by which CRR credit institutions that exceed a certain size must segregate their proprietary trading activities and conduct such activities via a so-called trading institution. Financial instruments are defined in section 1(11) of the KWG and now also explicitly include crypto assets (as defined in section 1(11), sentence 4 of the KWG).

Banking services and financial services listed in the KWG that relate to financial instruments constitute, at the same time, investment services under the WpIG. This creates a very confusing

overlap of regulation. In simplified terms: Entities that only provide such investment services (as well as ancillary investment services) and no other regulated services that subject them to banking regulation under the KWG qualify as investment firms that are subject to the WpIG (provided that they do not qualify as class 1a firm, in which case the KWG will apply).

### Investment services

The investment services definition is set out in section 2 (2), sentence 1, numbers 1 to 10 of the WpIG (which refers to MiFID II).

**13.** Accordingly, investment services comprise:

- 1.** The brokerage of transactions involving the purchase and sale of financial instruments (investment brokerage)
- 2.** The purchase of financial instruments at the investment firm's own risk in connection with the placement of such instruments in the market or the assumption of equivalent guarantees (underwriting business)
- 3.** The brokerage of transactions involving the sale and purchase of financial instruments (investment brokerage)
- 4.** The provision of personal recommendations regarding transactions in specified financial instruments to customers or their representatives, provided that such recommendations are based on an examination of the investor's personal circumstances or presented as being suitable for the investor and are not exclusively announced through information distribution channels or to the public (investment advice)
- 5.** The sale and purchase of financial instruments in the name of and for the account of others (contract brokerage)
- 6.** The operation of a multilateral system that brings together the interests of a large number of persons in the sale and purchase of financial instruments within that system, according to specified rules in a way that results in agreements on the purchase of such instruments being entered into (operation of a multilateral trading system)
- 7.** The operation of a multilateral system that is not an organised market or a multilateral trading system and that brings together the interests of a large number of third parties in the purchase and sale of debt securities, structured finance products, emission allowances, or derivatives within the system in a manner consistent with a contract for the purchase of these financial instruments (operation of an organized trading system)
- 8.** The placing of financial instruments without a firm commitment basis (placement business)
- 9.** The management of individual portfolios of financial instruments for others on a discretionary basis (portfolio management)
- 10.** Proprietary trading by accomplishing any of the following:
  - a.** Continuous offering of financial instruments for purchase or sale on an organized market or on a multilateral trading facility at prices quoted by the institution (market-making)
  - b.** Organized and systematic trading on a frequent basis for the own account outside an organized market or a multilateral or organized trading facility by offering a system that is accessible to third parties to conclude transactions with them (systematic internalization)

- c.** Purchase or sale of financial instruments for the own account as a service provided to others
- d.** Purchase or sale of financial instruments for own account as a direct or indirect participant in a domestic organized market or a multilateral or organized trading facility via a high-frequency, algorithmic trading scheme characterized by the use of infrastructures intended to minimize latencies by system determination, generating, routing or execution without human intervention for individual transactions or orders and by high message intra-day rates that constitute orders, quotes or cancellations, even if a service is not provided to others (high-frequency trading)
- e.** There is a slight difference between the list of regulated investment services under the WpIG and the KWG. In particular, crypto custody business and keeping a crypto securities register is a regulated investment service under the KWG and is not licensable under the WpIG.

**14.** Ancillary investment services pursuant to § 2 (3) WpIG include:

- a.** The custody and administration of financial instruments with the exception of units of account and crypto assets for others, including custody and associated services such as cash management or the administration of collateral with the exception of the provision and management of securities accounts at the highest level (central account management);
- b.** The granting of loans or other credit to others for the performance of security services, provided that the company granting the credit or loan is involved in these transactions;
- c.** Advising companies on their capital structure, industrial strategy and advising and offering services on company acquisitions and mergers;
- d.** Foreign exchange transactions if these are related to the provision of investment services;
- e.** The preparation or dissemination of recommendations or proposals for investment strategies or of investment recommendations;
- f.** Services related to the underwriting business and services that relate to an underlying asset and are related to investment services or ancillary investment services.

Financial instruments are defined in section 2 (5) of the WpIG and now also explicitly include crypto assets as well.

### Payment services

Under the ZAG, the following activities require a payment services license, unless the payment services provider is a bank or an e-money issuer:

- 1.** Services enabling cash to be placed on a payment account or enabling cash withdrawals from a payment account, as well as all the operations required for operating a payment account (pay-in and pay-out business)
- 2.** Execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider by:
  - a.** execution of direct debits, including one-off direct debits (direct debit business)
  - b.** execution of payment transactions through a payment card or a similar device





(payment card business)

- c. execution without grant of credit (payment business)
- 3. Execution of payment transactions as described in number 2 above where a credit line covers the funds for a payment service user (payment business with a grant of credit)
- 4. Issuance of payment instruments and/or acceptance and settlement of payment transactions (acquiring business)
- 5. A service where funds are received from a payer, without any payment accounts being created in the name of the payer or the payee, for the sole purpose of transferring a corresponding amount to a payee or to another payment service provider acting on behalf of the payee, and/or where such funds are received on behalf of and made available to the payee (money remittance business)
- 6. A service to initiate a payment order at the request of the payment service user with respect to a payment account held at another payment service provider (payment initiation services)
- 7. An online service for communicating consolidated information about a payment account or accounts of the payment service user to one or more other payment service providers (account information services)

#### **E-money**

The ZAG also requires a license for the issuance of “e-money”, which is defined as electronically, including magnetically, stored monetary value as represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions and accepted by a natural or legal person other than the electronic money issuer.

#### **Fund management**

The KAGB requires a license for capital management companies (Kapitalverwaltungsgesellschaft), which are companies domiciled in Germany that manage domestic investment funds. Such is the case where the companies render at least portfolio management services or risk management for one or several investment funds. The license requirement also applies to internally managed investment fund companies.

Certain fund managers are exempt from regulation and merely require registration with the BaFin. Most importantly, this is the case for fund managers of special funds (i.e., not marketed to the general public) whose aggregate assets under management do not exceed EUR 500 million (unleveraged) or EUR 100 million (leveraged).

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

*Trigger points for license*

#### **Banking, financial services and investment services**

Where a bank, financial service provider or investment services provider outside Germany deals with a client or a counterparty located in Germany, its activities will typically be subject to German laws and regulations. The bank or service provider will need to consider whether they are triggering a local German licensing obligation. The BaFin issued a guidance note in 2005,

clarifying the conditions under which cross-border activities of banks and financial services providers require a license in Germany. This guidance in our view, also applies to investment services as well as payment services and e-money services. The guidance note distinguishes between offering services in a “directed” or “target-oriented way” (which requires a license), and providing services passively, that is, on the initiative of German residents (which does not require a license). This distinction may be difficult to apply but in general, a foreign institution that does not solicit clients in Germany may, without being licensed, offer banking services, financial services or investment services to German residents upon their initiative and request.

In order to be able to rely on this “passive freedom of services exemption,” it is advisable for the foreign institution to document that a transaction was made solely based upon the customer’s initiative. It is also advisable to rely on the passive freedom of services exemption only in isolated instances; reliance on the exemption for a multitude of transactions would arouse the suspicion of the BaFin. Furthermore, a general solicitation effort by the foreign institution would terminate the exemption.

It is important to note that the guidance note does not contain a “sophisticated investor” exemption. Providing cross-border services to a sophisticated person or institution is treated the same way as providing services to a retail customer although in practice, it is easier to rely on and prove facts for a passive sale exemption in the case of institutional clients and very difficult in the context of retail customers.

In general, according to the guidance note, foreign institutions are required to obtain a license in order to offer, on a cross-border basis, banking services, financial services or investment services to customers in Germany where they cannot rely on the passive freedom of services exemption. Except where the EU passport rules discussed below apply, a license requires a permanent establishment (headquarters or branch offices in Germany).

#### **Payment services**

Pursuant to section 10 (1) of the ZAG, an institution wishing to provide payment services as a payment institution in Germany, commercially or on a scale that requires a commercially organized business undertaking, needs written authorization from the BaFin.

While the BaFin has not issued any specific guidance as to when exactly the license requirement is triggered for foreign providers serving German customers, it can be safely assumed that the same principles apply as with banks and financial services providers and investment services providers, that is, any form of solicitation by any means addressed to German residents will trigger the license requirement.

#### **Fund managers**

For fund managers, regulation of funds is primarily exercised through the regulation of managers. It requires that the manager be either fully licensed or registered with the BaFin under the KAGB.

The triggering point for the license requirement would be the management of a fund set up under the KAGB, as funds set up under the KAGB may only be managed by a duly licensed or registered fund manager.

Non-EEA funds marketed in Germany do not necessarily have to have a fund manager duly licensed in Germany but would be subject to different rules for obtaining a registration for marketing in Germany under the KAGB.

At present, fund managers that are not domiciled in Germany cannot obtain a license under the KAGB.

### **Exemptions from the license requirement**

Banks, financial service providers and investment services providers

Pursuant to section 2(5) of the KWG, foreign banks and financial service providers may be exempted from the license requirement. An exemption may be granted by the BaFin on a case-by-case review if “the enterprise does not require supervision, given the nature of the business it conducts.” Such an exemption from the license requirement can only be considered for limited business operations. In principle, it is only granted to entities that the BaFin can assume will not require additional supervision in Germany due to the effective supervision in their home country. Foreign institutions may be exempted for transactions involving interbank business and transactions with institutional investors, such as the German federal government, the states, local authorities and their institutions and credit institutions, financial services institutions and investment services institutions, insurance companies as well as certain major corporations. It is not entirely clear whether this exemption also applies to the provision of investment services by foreign investment firms (given that this exemption is in the KWG, but there is no parallel provision in the WpIG) but we believe the better arguments support the view that it is. At the moment, the BaFin is extremely reluctant to grant such exemptions to third-country firms.

Exemptions may also be granted where a foreign entity is a member of a group of an institution licensed in Germany. In particular, an exemption may be granted where a German licensed institution transfers customers to its foreign parent/subsidiary/affiliate. However, an exemption will only be granted if the entity is effectively supervised in its home country by the competent authority according to international standards, and the competent authority of the home state cooperates with the BaFin. Furthermore, the applicant must submit a certificate from the authority of the home country which confirms that the foreign institution has a license in its home country, that the intended cross-border activities do not raise any supervisory concerns, and that any future concerns will be reported to the BaFin. Again, it is not entirely clear whether this applies to foreign investment services providers but we believe the better view is that it should.

Moreover, the foreign institution must nominate an authorized agent for serving documents in Germany.

An institution that is fully licensed in Germany must act as an intermediary if the institution intends to serve retail customers.

For Swiss banks, no intermediary needs to be used for contacting retail customers under a special regime agreed on with the Swiss FINMA subject to an obligation by the Swiss bank to comply with certain conduct of business rules based on MiFID II and compliance with German anti-money laundering rules.

In relation to certain limited activities relating to financial instruments (investment advice and investment brokerage), an exemption is available for intermediation between customers and domestic or “passport” banks and financial and investment services providers or fund managers if the instruments are limited to fund interests (other than hedge funds) registered for distribution in Germany, or certain alternative investments, and such intermediaries or advisers are not holding client assets. However, in such a case, a license requirement for financial intermediaries may arise under the German Trade Regulation (Gewerbeordnung). This exemption is also provided explicitly in the WpIG in the context of the provision of investment services.

### **Payment services providers and e-money issuers**

No specific exemptions for foreign payment services providers or e-money issuers apply, other than for activities that are generally exempt from the definition of payment services.

### **Fund managers**

No specific exemptions for foreign fund managers apply, except that non-EEA-based funds managed by them may be marketed into Germany if they have been duly registered. In theory, marketing to retail investors is also possible, but in such cases, the requirements for registration are so onerous (including a full prospectus requirement) that there have not been many practical cases. Therefore, foreign fund managers will normally limit any marketing of their funds to professional investors. Still, the costs for obtaining a registration for marketing and ongoing compliance obligations are so high that it is not common practice for non-EEA-based fund managers to register their funds for marketing in Germany.

A reverse solicitation exemption applies to sales of fund interests to German residents, but for all practical purposes, this exemption can only be used with professional or semi-professional investors. Great care should therefore be taken to document the reverse inquiry. Under no circumstances should non-EEA fund managers rely on the reverse solicitation exemption as a strategic option to sell fund interests in Germany.

Pre-marketing, i.e., the provision of information or communication on investment strategies or investment ideas to potential investors, has become regulated in 2021. Such pre-marketing now requires prior notification to the BaFin and excludes relying on reverse solicitation for 18 months thereafter with respect to those investors to which the relevant funds were pre-marketed.

It should be noted that there is no option for foreign small fund managers to opt for registration instead of a license if assets under management do not exceed EUR 500 million (unleveraged) or EUR 100 million (leveraged), except that EEA and non-EEA funds managed by such foreign small fund managers registered in another member state of the EEA may be registered for marketing in Germany under simplified conditions as set out in section 330a of the KAGB.

### **Legal consequences of acting without a required license**

According to section 54(1)(no. 2) of the KWG and § 82 WpIG a person who is conducting a banking, financial service or investment service without a license may be punished with imprisonment for up to five years or with a monetary fine. In the case of a company, the responsible officer may be punished. Moreover, according to section 37(1) of the KWG, the BaFin may order the immediate discontinuation of the business as well as its liquidation, and it may appoint a liquidator for that purpose. In addition, it may publish its intervention against such types of business. The purpose behind this is to prevent potential customers and business partners from concluding further business with the foreign institution concerned.

The same also applies to payment services providers or e-money issuers acting without a license. Under section 63 of the ZAG, the managers of these parties are subject to criminal sanctions; under section 7 of the ZAG, the BaFin may order the immediate discontinuation of such activities and the winding down of an existing business, and it may appoint a liquidator for such purpose.

Transactions concluded with an unlicensed party are not automatically invalid, but customers may have a claim in tort against such party with the remedy of “natural restitution,” that is, they can raise a claim to be put back in the same position as if the prohibited transaction or





relationship had not been entered into.

Likewise, it is a criminal act to engage in fund management activities without the necessary license (section 339 of the KAGB). The BaFin can take all appropriate measures and issue administrative orders necessary to enforce the KAGB. While not explicitly mentioned, such authority likely includes issuing an order to immediately discontinue any activities conducted without a license and to stop the marketing and sale of fund interests.

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

### Banks and financial services providers

Authorizations may only be granted if certain requirements are met, such as under the following circumstances:

- a. When an institution is being established, it has to demonstrate that it is endowed with a minimum amount of initial capital, which will depend on the nature of its intended business. For investment banks, for example, the initial capital required is at least EUR 730,000, while for CRR credit institutions it is at least EUR 5 million. It is also possible for a non-German institution to apply for a license for a branch established in Germany. In this case, the minimum capital must be provided in the form of "dotation capital," which is a sum of money put at the disposal of the branch in the same manner as equity capital.
- b. Credit institutions, financial services institutions and investment firms that in the course of providing banking, financial and investment services are authorized to obtain ownership or possession of funds or securities of customers must have at least two senior managers (executive directors) who must be "fit and proper persons." Being a "fit" person means that the persons concerned have acquired during their professional careers sufficient theoretical knowledge and practical experience to enable them to carry out their new jobs properly. The BaFin consults the Federal Central Register (Bundeszentralregister) for criminal offenses and the Central Trade Register (Gewerbezentralregister) for business offenses in order to verify whether they are "proper" (i.e., reliable) persons.
- c. The applicant must also declare any holders of significant participating interests (10% or more) in the proposed institution and the size of any such interests. Any such persons must also be "proper" persons. If they are not, or if they fail to meet the standards required in the interest of sound and prudent management of the institution for any other reasons, the BaFin may refuse to grant the license.
- d. In addition, the authorization application must contain a viable business plan indicating the nature of the proposed business, the organizational structure, and the proposed internal control systems. The BaFin checks whether the applicant is ready and able to take the necessary organizational measures to conduct their business in a proper manner.

### Payment services and e-money issuers

As part of the licensing procedure, both groups of institutions are required to submit a business model, a business plan with a forecast P&L and balance sheets for the first three financial years, a description of the measures required to fulfill the segregation requirements in relation to client monies of sec. 10 of the ZAG in case of payment services firms and section 11a of the ZAG in the case of e-money issuers, as well as a description of the internal organizational structure necessary to ensure compliance with the applicable laws, a description of intended outsourcings, the use of agents and branch offices, and the participation in national and international payment systems.

As in the case of banks, financial services providers and investment firms, there are certain minimum initial capital requirements, which are between EUR 20,000 and EUR 125,000 for payment services providers (depending on the type of business) and EUR 350,000 for e-money issuers.

There are also "fit and proper" requirements for managers and owners of significant participating interest. In addition, the applicant must submit copies of constitutional documents and register excerpts as well as the name of its external audit firm.

### Fund managers

The licensing procedure is a fully-fledged authorization process with requirements equivalent to the requirements for granting permission under article 8 AIFMD or article 6 of the UCITS Directive. The licensing procedure checks requirements, such as sufficient initial capital or own funds, fit and proper requirements for the directors, reliability of shareholders, and a proper organizational structure for the manager.

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

Before the formal submission of a license application, the applicant will usually request a meeting with the competent BaFin officials to present the project and the intended business model, introduce the managers, and generally discuss the licensing process. This helps identify problematic points, establish trust, and clarify a possible timeline for the authorization process.

The formal process starts with the submission of a written application (for which no form is required) as well as the submission of the necessary documents (see section 5).

The BaFin will examine the documents and flag any items that are missing. Also, the BaFin will typically ask for clarifications or for the removal of deficiencies in the documents.

There is a maximum period of review in which the BaFin must decide on the application. Such a review period only starts once complete documents have been submitted, and it is the BaFin who will decide when the submission is complete.

For banks, financial services providers and investment services providers, the review period is six months. The BaFins (or the ECBs) decision is not discretionary, that is, if all requirements have been met, the license must be granted. However, the competent regulator will, in practice, always find a reason to declare that the requirements have not been met. While a denial of a license can be challenged before the courts, this is usually not done as it will be too time-consuming and it is usually easier to address the BaFins or ECBs concerns.

For payment services providers and e-money issuers, the review period is three months from the date of submission of a complete document package.

For fund managers, the review period is six months for UCITS and three months for managers of AIFs.



## 7. What financial services passporting arrangements does Germany have with other jurisdictions?

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

The single European passport is a system that allows credit institutions, certain financial services providers and investment firms legally established in one EU/EEA member state to establish/provide their services in another member state without further authorization requirements.

A CRR credit institution or an investment firm authorized to conduct business in a member state of the EEA may do so in another member state by providing cross-border services (for investment services also through a tied agent domiciled in the home member state of such institution) or by establishing a branch in such other member state or through a tied agent domiciled and registered in such other member state. A tied agent can only provide investment brokerage services, investment advice and placement services, and it exclusively acts for the account and under the "liability umbrella" of a CRR credit institution or an EEA investment firm.

No passport is available for banks that are not CRR credit institutions (i.e., special banks that do not take deposits) or financial services providers that are not investment firms under MiFID / WpIG, such as financial leasing or factoring companies.

### **Banks and investment firms**

As a general rule, the process starts by notifying the competent home member state authority and then following the rules set out in the relevant legislation and rules of the home member state, which are based on the relevant passporting provisions of the applicable EU directive (CRD V, MiFID II, PSD II, UCITS Directive or AIFMD).

Once the submission has been reviewed by the home member state authority, it will be transmitted to the BaFin, which essentially has no further task or right to reject the notification.

### **Freedom of establishment passport**

If the notifying bank or investment firm intends to establish a branch office, the BaFin must communicate within two months after receipt of documents what filing and notification requirements apply in Germany and what legal provisions of German law must be observed. As soon as such communication has been received, or at the latest after the end of a two-month period, the branch office can be established and business can be commenced.

Under the SSM, a slightly modified procedure applies: If a significant institution (credit institution) that is directly supervised by the ECB wishes to establish a branch within the territory of another participating member state via passporting procedures, it has to notify the NCA of the participating member state where it has its head office and provide the necessary documentation. On receipt of this notification, the NCA immediately informs the ECBs Authorization Division, which then assesses the adequacy of the administrative structure in light of the activities envisaged. Where no decision to the contrary is taken by the ECB within two months of receipt of the credit institution's notification, the significant credit institution may establish the branch and commence its activities. A similar procedure applies for a significant credit institution that is from a non-participating member state, but whether or not ECB is competent will depend on the size of the branch. If it meets the size criteria for a significant credit institution, it will be (co-)supervised by ECB and ECB will take steps accordingly;

otherwise, normal passporting happens, that is, the branch will be (co-)supervised by the BaFin.

### **Freedom of services passport**

If the relevant institution merely wants to render services across the border into Germany without establishing a branch, the procedure is slightly simpler. Again, the institution will notify the competent authority of its home member state, which will review the notification and pass it on to the BaFin. While the BaFin again has two months to communicate applicable German law provisions to the institution, the business may be commenced immediately after the BaFin has received the notification. The names of tied agents domiciled in the home member state of the relevant institution that the institution plans to use to provide cross-border services is published by the BaFin.

Under the SSM, any significant supervised entity (credit institution) wishing to exercise the freedom to provide services by carrying out its activities within Germany for the first time shall notify the NCA of the participating member state, where the significant supervised entity has its head office, of its intention. The NCA shall immediately inform the ECB and the BaFin upon receipt of this notification.

If the relevant institution plans to provide services in Germany through a tied agent domiciled in Germany, the institution has to ensure that the tied agent is registered as such with the BaFin.

### **Payment services providers and e-money issuers**

The passport system applies for payment services providers and e-money issuers from another EU/EEA member state in a similar manner as for banks and investment firms, except that there is no two-month waiting period for the establishment of a branch office, and that BaFin has taken the position that tied agents can only be used for providing payment services in Germany if they are located in Germany. The passporting system also allows services rendered via payment services agents or e-money distributors.

As such entities do not fall under the SSM, no special rules involving the ECB will apply.

### **Fund managers**

A passport (cross-border services or branch establishment) is available for UCITS managers or AIFMs from other EEA member states.

For UCITS managers, a two-month waiting period as in the case of banks will apply in the case of establishment of a branch in Germany. As in the case of banks, there is no waiting period for a cross-border passport.

For AIFMs, the procedure is slightly different insofar as the competent home member state authority must have submitted the following documents to the BaFin: (i) a certificate confirming the due licensing of the AIFM in its home state; (ii) the notification of the intention to provide cross-border services; and (iii) a business plan that shows which special domestic AIF the AIFM intends to manage in Germany or which ancillary services shall be rendered. In the case of establishment of a branch, the BaFin must have received, in addition, information on the organizational structure of the branch, a domestic address where documents can be requested, and the name and contact details of the branch managers.

For the passporting of an AIFM, no concept of tied agents exists.





### Ongoing supervision by the BaFin

The BaFin generally has only limited competencies for supervising the passported entities and primarily needs to contact the home member state authority if it suspects a breach of local law.

Generally, branches of foreign institutions must observe a large part of German anti-money laundering law.

Moreover, certain local regulations, such as liquidity rules, rules on million credits, automated access by the BaFin to bank account information, and certain information rights and emergency powers of the BaFin, apply to branch offices.

Branches of foreign investment firms must observe German conduct of business rules (but remain exclusively subject to the prudential rules of their home member state).

For branches of payment services providers and e-money institutions, money laundering law obligations apply, as well as certain information rights and emergency powers of the BaFin.

Branches of fund managers are subject to certain obligations to provide their services honestly, with the requisite skills and due care, and to act in the best interest of the investors and avoid conflicts of interest. Also, the branch must observe the German rules on the marketing of its funds. Additionally, if ancillary services that fall under MiFID are rendered, certain German conduct of business rules will apply.

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# Hong Kong SAR

## 1. Who regulates banking and financial services in Hong Kong?

Hong Kong's financial services regulatory regime is industry-based, and there is no single super-regulator. The regulatory status of an institution (bank, financial intermediary or insurance company) determines which regulator will have primary responsibility for overseeing its activities from both a prudential and a business conduct perspective. Notwithstanding increasing integration among the banking and financial services markets in recent years and more efficient coordination among the financial regulators on relevant cross-sectoral regulatory matters, an entity may still be subject to supervision by more than one regulator.

The principal regulators for each sector are as follows:

- Securities and Futures Commission (SFC): The SFC is responsible for regulating the securities and futures markets in Hong Kong, and it is the principal supervisor of intermediaries (e.g., brokers, investment advisers and fund managers), which carry out regulated activities under the Securities and Futures Ordinance (SFO). Within this framework, the SFC also has regulatory oversight of the Hong Kong Exchanges and Clearing Limited (HKEx) and oversees the performance of the Stock Exchange of Hong Kong Limited (SEHK) as the frontline regulator of listing matters. The SFC also currently regulates virtual asset trading platforms which opt to be regulated by having at least one security available on their platforms.
- Hong Kong Monetary Authority (HKMA): The HKMA is the principal prudential regulator and supervisor of banks and deposit-taking institutions (including virtual banks) in Hong Kong, pursuant to the Banking Ordinance (BO). Where such institutions also conduct SFO-regulated activities in Hong Kong, they must, in most cases, also be registered with the SFC. Where an institution has dual registration, the HKMA will be the lead regulator responsible for overseeing compliance with statutory and regulatory requirements. In addition to banks and deposit-taking institutions, the HKMA also regulates money brokers. Following the implementation of the Payment Systems and Stored Value Facilities Ordinance ("Payment Systems and SVF Ordinance"), it now also regulates issuers of certain stored value facilities, as well as operators and settlement institutions of certain payment systems. The HKMA is also Hong Kong's de facto central bank and is responsible for maintaining monetary and banking stability.
- Insurance Authority (IA): The IA is the regulator of the Insurance Ordinance, which is the legislation governing the operation of insurance companies and

insurance intermediaries. The IA is an independent statutory body established under the Insurance Ordinance.

- Mandatory Provident Fund Schemes Authority (MPFA): The MPFA regulates the operations of mandatory provident fund (MPF) schemes and occupational retirement schemes in Hong Kong. The MPFA is also the authority that administers the registration, prescribes conduct requirements, and imposes disciplinary sanctions for registered MPF Intermediaries. The HKMA, IA and SFC remain the frontline regulators for the supervision and investigation of registered MPF intermediaries whose respective core businesses are in the banking, insurance and securities sectors.
- Customs and Excise Department (CED): The CED regulates the operation of money-changing (currency exchange) services and/or cross-border money remittance services in Hong Kong, pursuant to a Money Service Operators (MSO) license issued under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance ("AML Ordinance").

## 2. What are the main sources of regulatory laws in Hong Kong?

- Securities and Futures Ordinance: The SFO (along with its subsidiary legislation) is the principal legislative instrument that governs the securities and futures markets and the non-bank leveraged foreign exchange market in Hong Kong. The SFO also defines and governs the powers, roles and responsibilities of the SFC to administer the legal and regulatory framework within which intermediaries should operate. This includes making rules (in the form of subsidiary legislation) and issuing codes and guidelines (which are non-statutory in nature) across a wide range of areas.
- Companies (Winding Up and Miscellaneous Provisions) Ordinance and the Companies Ordinance (CO): The CO is the principal legislation governing companies. It also provides for the SFC to authorize prospectuses of share/debenture offerings by companies (whether incorporated in or outside of Hong Kong) to the Hong Kong public.
- Banking Ordinance: The BO (along with its subsidiary legislation) provides the legal framework for banking supervision in Hong Kong. In addition, there is a large body of HKMA-issued regulatory guidelines and circulars and a number of HKMA-endorsed non-statutory codes published by industry bodies. The development of the regulatory framework for the Hong Kong banking sector is guided by international standards, such as those recommended by the Basel Committee on Banking Supervision.



- **Payment Systems and Stored Value Facilities Ordinance:** The Payment Systems and SVF Ordinance empowers the HKMA to designate certain payment systems and their operators and/or settlement institutions for HKMA supervision. Initially applied only to large-value clearing and settlement systems for securities and bank payments, the Payment Systems and SVF Ordinance now also empowers the HKMA to regulate retail payment systems. It also regulates the issuing and facilitation of certain stored value facilities.
- **Insurance Ordinance:** The Insurance Ordinance (along with its subsidiary legislation) governs the regulation of insurance companies and insurance intermediaries, and it provides for the authorization and prudential supervision by the IA of insurers carrying out insurance business in, or from, Hong Kong. The IA is empowered by the Insurance Ordinance to supervise and regulate authorized insurers and licensed insurance intermediaries.
- **Mandatory Provident Fund Schemes Ordinance (MPFSO):** The MPFSO (along with its subsidiary legislation) is the principal legislation that governs the administration and management of MPF schemes. The MPFSO also provides for the approval of persons as trustees of MPF schemes and the control of such approved trustees, as well as the regulation of sales and marketing activities in relation to MPF schemes. The MPFA is a statutory body established under the MPFSO to perform the above functions. The MPFA also acts as Registrar of Occupational Retirement Schemes, which is another type of retirement scheme that can be set up voluntarily by employers to provide retirement benefits for their employees.

### 3. What types of activities require a license in Hong Kong?

Hong Kong regulates a broad range of activities, including the following:

- **Financial services “regulated activities”:** The SFC supervises 10 types<sup>1</sup> of regulated activities (RAs) in Hong Kong. Companies (such as securities brokers and fund managers), individuals and authorized institutions that intend to carry out a business in RAs in Hong Kong must generally be licensed or registered under the SFO to carry out the relevant type of RA. The types of RAs are as follows:
  - **Type 1:** Dealing in securities
  - **Type 2:** Dealing in futures contracts
  - **Type 3:** Leveraged foreign exchange trading
  - **Type 4:** Advising on securities
  - **Type 5:** Advising on futures contracts
  - **Type 6:** Advising on corporate finance
  - **Type 7:** Providing automated trading services
  - **Type 8:** Securities margin financing
  - **Type 9:** Asset management
  - **Type 10:** Providing credit rating services

Exemptions from the licensing requirements for certain RAs may be available in some circumstances. For example, the performance of RAs (such as Type 4 - advising on securities, Type 6 - advising on corporate finance, and/or Type 9 - asset management) that are wholly incidental to the carrying out of another RA for which a person is already licensed (such as Type 1 - dealing in securities) does not require additional licenses to be obtained.

While the SFC does not currently regulate virtual asset activities directly unless the virtual asset constitutes a security or a futures contract under the SFO, it announced new rules in 2019 to allow certain virtual asset trading platforms to apply to operate licensed trading platforms, provided that they offer at least one security on their platforms. As part of this opt-in licensing scheme (“Opt-in Regime”), trading platforms may only serve professional investors and must maintain insurance to protect client assets. At this stage, the SFC will focus its efforts on trading platforms that provide trading, clearing and settlement services for virtual assets with an additional single security offering and which have control over investors’ assets.

Consultations on proposals to enhance anti-money laundering and counter-terrorist financing (AML/CTF) regulation in Hong Kong under the AML Ordinance commenced in November 2020. The key proposed enhancements, which are aimed to be submitted to the Legislative Council in the 2021-22 legislative session, include a new licensing regime for virtual asset services providers (VASPs) which will be regulated by the SFC. A new regulated activity (Regulated VA Activity) will cover the following operations of a trading platform (VA Exchange):

- If it is operated for the purpose of allowing an offer or invitation to be made to buy or sell any virtual assets (VA) in exchange for any money or any VA
- If it comes into custody, control, power or possession of, or over, any money or any VA at any point in time during its course of business Licensing requirements are proposed to apply in either of the following circumstances:
  - Conducting the Regulated VA Activity in Hong Kong
  - Actively marketing (whether in Hong Kong or from elsewhere) to the public of Hong Kong a Regulated VA Activity or a similar activity elsewhere (i.e., services associated with a VA Exchange)

Consistent with the Opt-in Regime, at the initial stage of the new licensing regime, the services of a VA Exchange will be confined to professional investors only. The government and the regulator will continue to monitor the evolving landscape and review the position as the market becomes more mature in the future. The proposed changes will have wide implications for businesses that are not currently regulated and will require ongoing observation as they continue to develop.

- **Banking and deposit-taking** –This covers typical retail and wholesale banking activities involving the operation of current and deposit accounts. Engaging in such business activities in Hong Kong requires authorization by the HKMA under the BO. Hong Kong operates a three-tiered authorization regime, which covers licensed banks, restricted

<sup>1</sup> As part of the new regime to regulate OTC derivative transactions in Hong Kong, two new regulated activities (being Type 11 (dealing in OTC derivative products or advising on OTC derivative products) and Type 12 (providing client clearing services for OTC derivative transactions)) will be introduced. There is currently no indication as to when this will become effective.





license banks and deposit-taking companies (collectively known as authorized institutions (AIs)).

This regime also covers “virtual banks,” which the HKMA defines as banks that primarily deliver retail banking services through the internet or other forms of electronic channels instead of physical branches. Under new guidelines for the authorization of virtual banks adopted by the HKMA in May 2018, a virtual bank must be incorporated in Hong Kong.

Local representative offices: The establishment and operation of a Hong Kong representative office by a foreign bank or deposit-taking institution that is not an authorized institution requires prior HKMA approval under the BO. Such offices can only engage in limited marketing, representation and liaison activities, but not in substantive business activities (such as receiving or holding funds, making loans, exchanging currencies and money remittances).

- Money broking: Intermediaries who broker certain currency trading and deposit agreements between parties that are (or include) authorized institutions require HKMA approval under the BO. The money broker approval regime applies to voice-broking and online/electronic broking.
- Issuing (or facilitating the issuing) of certain stored value facilities: Stored value facilities are prepaid payment facilities. The stored value facility licensing regime under the Payment Systems and SVF Ordinance applies, with certain exemptions, to card and account-based stored value facilities in physical and other forms, which continue to be regulated by the HKMA.
- Retail payment systems and their system operators and settlement institutions: The Payment Systems and SVF Ordinance enables the HKMA to regulate retail payment systems. The retail payment system designation regime is intended to cover, in particular, the larger payment card schemes, merchant acquirers, payment gateways and mobile infrastructure (e.g., the infrastructure of the trusted service manager (TSM) of NFC mobile payment services).
- Operation of a money service: This covers the operation of a money-changing (currency exchange) service and/or a cross-border money remittance service in Hong Kong. Persons providing these services in Hong Kong require a license from the CED under the AML Ordinance (formerly known as Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance). There are some limited exceptions to this requirement, which apply, for example, to AIs and similarly regulated institutions.
- Providing a trust and company service: This covers the provision of trust or company services as a business in Hong Kong (e.g., a service of acting or arranging for another person to act as a trustee of an express trust or a similar legal arrangement). Pursuant to amendments to the AML Ordinance, which took effect in March 2018, subject to certain exceptions (e.g., for AIs), persons carrying out such business in Hong Kong require a license from the Registrar of Companies under the AML Ordinance.
- Lending: Hong Kong retains “old-style” money lenders legislation that, while aimed primarily at preventing “loan sharking,” is capable of catching genuine non-bank commercial lending activities. Where applicable, Hong Kong’s Money Lenders Ordinance (MLO) imposes licensing and other compliance obligations on consumer and non-consumer lenders. The MLO provides for various exemptions, but only AIs are wholly exempted from the MLO.

- Operating an insurance business: In general, any person who wishes to carry out insurance business in or from Hong Kong will need to apply to the IA for authorization to do so. Authorization to carry out insurance business in or from Hong Kong will only be granted to those insurers who meet the authorization requirements prescribed under the Insurance Ordinance and other conditions that the IA may impose.

The IA took over the supervision of authorized insurers and licensed insurance intermediaries in 2017 and 2019, respectively. A concept of “regulated activity” for insurance intermediaries was introduced. The regulatory regime for insurance intermediaries is currently activity-based. The IA regulates five different types of licensed insurance intermediaries under the IO, as follows:

1. Licensed Insurance Agency (Insurance Agency License)
2. Licensed Individual Insurance Agent (Individual Insurance Agent License)
3. Licensed Technical Representative (Agent) (Technical Representative (Agent) License)
4. Licensed Insurance Broker Company (Insurance Broker Company License)
5. Licensed Technical Representative (Broker) (Technical Representative (Broker) License)

The regime prohibits a person from carrying on or holding himself out as carrying on a regulated activity in the course of the person’s business or employment or for reward unless the person is a licensed insurance intermediary. Under the new regime, a regulated activity includes the carrying out of activities such as negotiating or arranging a contract of insurance or inviting or inducing another person to enter into a contract of insurance. The IA also monitors compliance by licensed insurance intermediaries who are also registered with Mandatory Provident Fund Schemes Authority as Mandatory Provident Fund Intermediaries

MPF sales and marketing activities: In general, a person will be regarded as carrying out a regulated activity under the MPFSO if such person: (a) invites or induces, or attempts to invite or induce another person to make a specified MPF decision (e.g., joining an MPF scheme or making/transferring MPF contributions); or (b) gives advice to another person concerning a specified MPF decision. Persons wishing to conduct such regulated activities in Hong Kong generally must be registered as MPF intermediaries under the MPFSO. Accordingly, if a person engages in MPF sales and marketing activities that may influence a prospective/existing participant of an MPF scheme in making a decision that affects such participants benefits in an MPF scheme, such person is required to be registered with the MPFA as an MPF intermediary.

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

Dealings with customers or counterparties in Hong Kong by a firm from outside of Hong Kong may be subject to Hong Kong laws and regulations, which may include the application of Hong Kong licensing/authorization requirements. The overseas firm will also need to consider Hong Kong marketing regulations.

The SFO requires any person that carries out a business in an RA in Hong Kong to be licensed by the SFC. There are no express territorial criteria that trigger the application of the licensing requirement, but it is generally understood to apply to an activity conducted in Hong Kong, or where there is otherwise a sufficient nexus to Hong Kong.



The SFO also extends the licensing requirement to situations where the carrying out of the business in an RA by a person is conducted from outside Hong Kong, but there is active marketing to the public in Hong Kong of such services. Therefore, even if no nexus with Hong Kong can be established, the second line of inquiry regarding the marketing activities by an overseas person will nevertheless need to be considered as it can separately trigger the licensing requirements.

Whilst any analysis will depend on the relevant facts and circumstances of each case, the key question is whether an overseas person has actively marketed its RA services to the Hong Kong public. Examples of this may include frequently calling upon Hong Kong investors and marketing the services (including offering products), running a mass media program targeting the investing public in Hong Kong, and conducting internet activities specifically targeting Hong Kong investors. A particularly important consideration is whether the relevant services are sought out by the customers on their own initiative, and the intermediary has acted passively throughout the marketing process. Note, however, that these factors are not definitive and any cross-border activities targeted at Hong Kong persons must be structured with care to ensure compliance with the licensing requirements.

In certain circumstances, the SFC may grant a temporary license to a corporation or individual who is regulated by a relevant overseas regulatory body in order to carry out an RA in Hong Kong, which is equivalent to that being carried out principally outside Hong Kong, for a short period of time. Temporary licenses are not valid for more than three months, and the same entity or person will not be granted temporary licenses for more than six months within any two-year period. One of the key

considerations in granting a temporary license is whether the overseas regulator concerned performs a function similar to the functions of the SFC and is empowered to investigate, and where applicable, to take disciplinary action for the conduct of the applicant in Hong Kong.

The authorization and approval requirements for authorized institutions and local representative offices under the BO and the stored value facility licensing requirements under the Payment Systems and SVF Ordinance generally apply only if the relevant activities are carried out in Hong Kong. For example, the receipt and holding of deposits outside Hong Kong would not normally constitute carrying out a deposit-taking business in Hong Kong. On the other hand, the money broker approval requirement does not necessarily require that the money broker carries out business in Hong Kong if the money broking service is provided from outside Hong Kong to persons in Hong Kong. Cross-border marketing activities in Hong Kong may be subject to restrictions under the BO or Payment Systems and SVF Ordinance. By way of example, there are mandatory disclosure requirements for invitations to place offshore deposits with a non-authorized institution that targets the Hong Kong public. There are also strict prohibitions on non-authorized institutions representing themselves (expressly or impliedly) as conducting business as an authorized institution in Hong Kong. This includes restrictions on the use of the word “bank” and derivatives thereof (e.g., banking) by persons other than HKMA-licensed banks or recognized central banks.

[All financial institutions that are regulated and licensed in Hong Kong must comply with the AML Ordinance, or in the case of licensed money lenders, with equivalent AML/CFT guidelines issued by the Companies Registry. The Hong Kong regulators have each issued guidance setting out their expectations regarding how the AML Ordinance applies to specific business activities.<sup>2</sup>

2 Taken from Fintech Chapter.

## 5. What are the requirements to obtain authorization in Hong Kong?

The basic approval criteria for obtaining authorization will vary, depending on the regulator and the type of business activity for which authorization is sought.

### SFC licensing requirements

- **Fit and proper:** These are the fundamental criteria that the SFC will consider for each and every license or registration application, not just with respect to the applicant but also to its substantial shareholders and officers. They include the applicants financial status or solvency, its relevant educational or other qualifications, its general ability to act competently and honestly, and its reputation and financial integrity.
- **Incorporation:** Companies seeking a license must be incorporated in Hong Kong, or if they are a non-Hong Kong company, registered with the Companies Registry of Hong Kong (i.e., a branch).
- **Competence:** Companies have to satisfy the SFC that they have a proper business structure, good internal control systems and qualified personnel to ensure that relevant risks can be properly managed. Individuals seeking a license will need to demonstrate that they have the appropriate skills, knowledge and experience to properly manage and supervise the carrying out of RAs by their firm.
- **Responsible officers:** Companies must appoint at least two responsible officers (with at least one acting as an executive director) to actively participate in or directly supervise the carrying out of each RA by the business. All executive directors will need to obtain the SFCs approval as responsible officers of the corporation, which includes demonstrating that they have relevant academic/industry qualifications and have passed the local regulatory framework paper. The SFC generally expects that the Managers-in-Charge of the Overall Management Oversight function and the Key Business Line function should seek the SFCs approval as responsible officers in respect of the RA they oversee.
- **Financial resources:** Depending on the type of RA applied for, companies are required to maintain no less than a specified amount of paid-up share capital and liquid capital at all times.
- **Similar role overseas:** Where a firm wants to apply for a temporary license, it must demonstrate that it is carrying out a business principally outside Hong Kong in an activity that, if carried out in

Hong Kong, would constitute an RA. The license will relate solely to the carrying out in Hong Kong of that particular activity. Such firms will also need to be authorized by a relevant regulatory organization in their home jurisdiction to carry out the relevant activity or business.

### HKMA authorization requirements

In order to be recognized as an authorized institution, an applicant must satisfy the HKMA that it fulfills certain minimum authorization criteria. Many of these criteria apply equally to all authorized institutions, regardless of the place where the authorized institution is incorporated and its type of authorization (i.e., authorization as a licensed bank, restricted license bank or deposit-taking company). The minimum authorization criteria include the following:

- **Adequate financial resources:** Applicants must have adequate financial resources to carry





out the relevant regulated activities. This includes, among other things, compliance with a prescribed minimum paid-up share capital requirements (which differ, depending on the type of authorization sought).

- **Adequate liquidity:** Applicants must maintain adequate liquidity to meet their obligations as they will or may fall due (including compliance with statutory liquidity ratio requirements).
- **Adequate provisions:** Applicants must maintain adequate provisions for depreciation or diminution in value of their assets for potential liabilities and losses.
- **Adequate accounting and control systems:** Applicants must satisfy the HKMA that they have adequate accounting systems and systems of control.
- **Integrity, prudence and competence:** Applicants are required to conduct all their business activities with integrity, prudence and competence so as not to be detrimental to the interests of actual or potential depositors.
- **Fitness and propriety:** The HKMA must be satisfied that the AIs senior executives and controllers are fit and proper to hold their positions. In some cases, this requires formal HKMA approval.

Money brokers are subject to similar (if somewhat less extensive) approval criteria. Similarly, the Payment Systems and SVF Ordinance sets out extensive licensing criteria for licensed stored value facility issuers and facilitators.

In view of the limits on their permitted activities, the approval criteria for local representative offices of foreign banks and deposit-taking institutions are much less burdensome.

The HKMA has wide discretion to attach further conditions to authorizations, approvals and licenses granted under the BO and the Payment Systems and SVF Ordinance.

#### **IA authorization requirements**

- **Incorporation:** Companies interested in applying to the IA for authorization to carry out insurance business in or from Hong Kong can be either incorporated in Hong Kong or a non-Hong Kong company registered with the Companies Registry of Hong Kong (i.e., a branch).
- **Fitness and properness of management and shareholders:** The Insurance Ordinance requires that any person who is a director or “controller” or key persons of the control functions of an insurer must be “fit and proper” to hold such position. Prior approval of the IA is required for the appointment of their controllers. In applying the fit and proper test, the IA will take into account, among other things, the character, qualifications and experience of the directors or “controllers” or “key persons of the control functions” of the applicant company.
- **Financial resources:** The minimum paid-up capital is currently HKD 10 million, or HKD 20 million for a composite insurer (i.e., carrying on both general and long-term business) or for an insurer wishing to carry out statutory classes of insurance business. However, in practice, the IA would require a capital amount that is commensurate with the business plan of the applicant. Also, no further composite insurer license will be issued.
- **Solvency requirement:** An insurer shall maintain an excess of assets over liabilities of not less than a required solvency margin. The objective is to provide a reasonable safeguard against the risk that the insurer’s assets may be inadequate to meet its liabilities arising from unpredictable events, such as adverse fluctuations in its operating result or the value of its assets and liabilities. There are separate provisions for a general business insurer, a

long-term business insurer and a captive insurer regarding the solvency requirements.

- **Adequacy of reinsurance arrangements:** The IA requires that there must be adequate arrangements for the reinsurance of risks of those classes of insurance that are to be carried out by the insurer.

#### **MPFA authorization requirements**

There are two types of MPF intermediaries, namely, principal intermediary and subsidiary intermediary, both of which must be registered with the MPFA.

- **Principal intermediary:** The MPFA may register any of the following business entities as a principal intermediary for carrying out regulated activities:
  1. An authorized financial institution (e.g., a licensed bank) registered or a corporation licensed under the SFO for Type 1 (dealing in securities) and/or Type 4 (advising on securities) RAs
  2. An insurer authorized under the IO to carry out long-term insurance business
  3. An authorized long-term insurance broker under the IO
- **Subsidiary intermediary:** A subsidiary intermediary generally refers to a person who is registered as an intermediary for carrying out regulated activities on behalf of the principal intermediary to which the person is attached. A subsidiary intermediary needs to fulfill certain qualification requirements (e.g., examination and training requirements).

Both principal intermediaries and subsidiary intermediaries must be regulated by an industry regulator (e.g., HKMA, IA and SFC in the banking, insurance and securities sectors, respectively) and be of good standing.

**Responsible officer:** A principal intermediary must have at least one responsible officer who is from a subsidiary intermediary attached to it. The responsible officer must ensure that the principal intermediary has established and maintains proper controls and procedures for securing compliance with the MPFSO. A principal intermediary must ensure that the responsible officer has sufficient authority, resources and support within the principal intermediary for carrying out its specified responsibilities.

## **6. What is the process for becoming authorized in Hong Kong?**

The formal processes for obtaining authorization will also vary according to the regulator and type of business activity being conducted.

#### **SFC licensing process**

- **General:** To lodge a license application, applicants will need to complete certain prescribed licensing forms and supplements and pay an application fee. The application includes relevant information describing the following key areas:
  - **Proposed business activities:** The applicant must provide information on its business profile and internal control summary in relation to the types of proposed regulated activities to be undertaken. The SFC will consider the activities and the suitability of the RAs to be included in the license.

- Corporate structure: This will include information in relation to the structure of the corporation, its directors and its shareholders. All the directors (executive and non-executive) will therefore need to complete SFC application forms. Individual substantial shareholders and executive directors of the intermediate and ultimate holding companies who are substantial shareholders are also required to complete and submit forms for vetting.
  - Individual forms: As each regulated activity must be supervised by at least two responsible officers, each individual to be appointed as a responsible officer must complete prescribed forms and provide supporting documents to enable the SFC to assess their fitness and propriety to perform their functions.
- The applicant may be asked to complete other supplements and provide additional information to the SFC where appropriate.

The SFC has indicated that the processing of an application submitted by a new industry participant normally takes approximately 15 weeks from official acceptance of the application.

#### HKMA authorization process

- Before submitting an application: The HKMA generally encourages applicants to meet or discuss their plans with the HKMA first before an application is submitted. Although the HKMA maintains standard lists of required licensing materials, it is generally advisable to ask for a list on a case-by-case basis.
  - Application materials: An application for authorization as an AI will typically need, as a minimum, to be composed of the following materials:
  - Application letter setting out the reasons for the application and the applicant's background, and describing how the relevant authorization criteria will be met
  - Certified copies of the applicant's audited annual reports for the last three years and certified copies of certain corporate documents (e.g., the board resolution approving the application and the applicant's constitutional documents)
  - Business plan and financial projections (including projected balance sheet, capital and liquidity ratios and profitability) for the first three years of the proposed Hong Kong operation
  - Organizational chart, staffing plan and details of proposed internal control systems for the proposed Hong Kong operation
  - Questionnaires for certain senior executives of the Hong Kong operation (e.g., chief executive, alternate chief executive) and controllers
  - In the case of a foreign applicant, a letter from its home regulator confirming its consent to the applicant's Hong Kong plans

The HKMA has wide discretion to ask for additional information (which it will nearly always exercise).

Prescribed time periods apply only to the processing of applications for HKMA consent to the appointment of certain senior executives and (where required) controllers of an AI. The HKMA is generally required to approve or deny such applications within three months of receiving the completed application. However, the actual processing period is often longer because the "clock stops running" if the HKMA raises further information requests and until the requested information is provided to the HKMA.

The BO does not prescribe the time period within which the HKMA must process an application for authorization as an AI, and its processing may, depending on the circumstances, take substantially longer.

#### IA authorization process

- Preliminary meeting with IA: A preliminary meeting with the IA will usually be arranged before the application form is completed. Documents such as the market feasibility study report, background of the applicant and its group (if applicable) — including a corporate structure chart and the latest financial statements of the applicant and its group (if applicable) — as well as an overview of its business plan may need to be submitted to the IA for prior consideration. The meeting will enable both the applicant and the IA to understand each other better as well as enable the IA to give its informal views.
- Draft application: The applicant may proceed to prepare the application after it has discussed its proposal with the IA and it is considered acceptable to the IA. The application is normally submitted in draft form, and the IA will consider the information in detail and revert to the applicant on outstanding issues or deficiencies if necessary. As part of the draft application, the applicant will also need to submit documents such as corporate and proposed organizational charts, prescribed forms for individual and corporate controllers of the applicant, financial projections (prepared based on different assumptions), copies of reinsurance treaties, policies or manuals on internal control, underwriting, claims handling and reserving, reinsurance, investment, and AML policies.
- Formal application: As soon as the applicant receives positive notification of the IA's initial assessment, it may proceed to make a formal application to the IA.
- Decision on the application: Provided that the formal application has been properly prepared and contains all the relevant information and documents adequate for the IA to make a decision, the IA will advise the applicant of its decision on the application after a certain period. If authorization can be given, the IA will give its approval-in-principle to the applicant and at the same time advise it of the requirements that should be complied with before formal authorization will be given.
- On-site inspection: The applicant may need to arrange a site visit to its office by the IA when it has made all the preparations necessary to commence business. During the visit, the applicant will need to satisfy the IA that all operational systems and staff are in place to enable the applicant to commence business immediately.
- Formal authorization: If the IA is satisfied that the applicant has fulfilled all the requisite requirements, a formal authorization will be issued.

#### MPFA authorization process

For a corporation seeking to be a principal intermediary, it must complete an application form for registration as a principal intermediary. There should be at least an accompanying application for registration as a subsidiary intermediary (an individual) who will act as a responsible officer of the principal intermediary. The individual must complete an application form for registration as a subsidiary intermediary and approval of attachment of a subsidiary intermediary to a principal intermediary.

Principal intermediaries with a large number of subsidiary intermediaries attached to it are encouraged to have more than one responsible officer to oversee the regulated activities. This will minimize the risk of the principal intermediary and subsidiary intermediaries not being able to carry out regulated activities if the approval of the only responsible officer is revoked or suspended.



As soon as practicable after the MPFA has registered a principal intermediary and/or subsidiary intermediary, the MPFA will assign an industry regulator as the frontline regulator (i.e., HKMA, IA and SFC in the banking, insurance and securities sectors, respectively) of such intermediary.

## 7. What financial services passporting arrangements does Hong Kong have with other jurisdictions?

While many of the Hong Kong regulators are involved in a number of international and regional financial cooperation initiatives, none of these arrangements enable a financial services provider to operate in Hong Kong or undertake a regulated activity without directly holding the relevant license or alternatively operating through a licensed financial institution.

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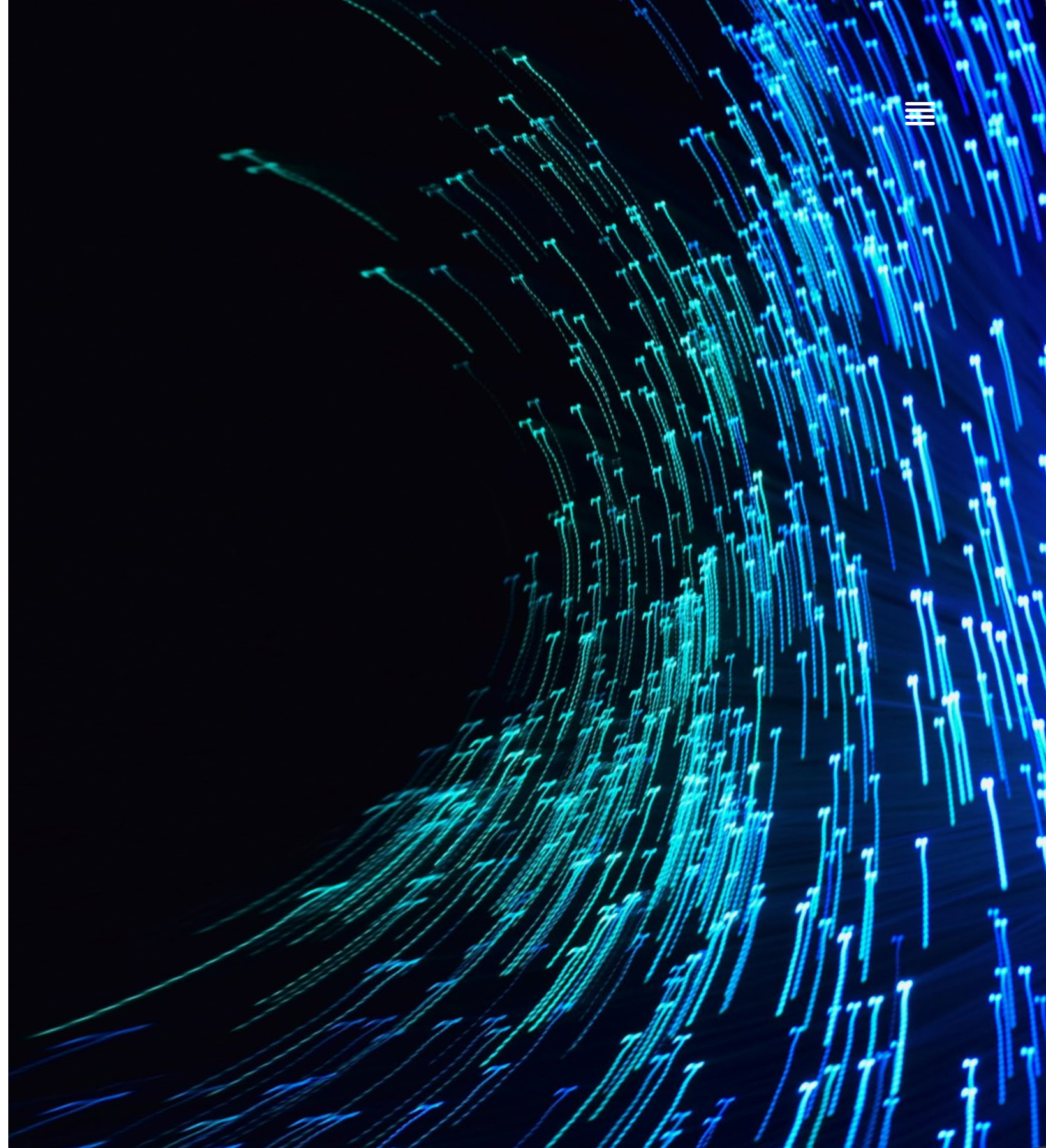
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# Indonesia

## 1. Who regulates banking and financial services in Indonesia?

In Indonesia, two regulators have responsibility for the authorization and supervision of banks, insurers and other financial institutions: Bank Indonesia (BI) and the Financial Services Authority (Otoritas Jasa Keuangan or OJK).

The OJK was established in 2011 to take over the role of BI in supervising and regulating banks and protecting consumers in the financial services industry and of Bapepam-LK in supervising and regulating non-bank financial institutions and the capital market. BI is responsible for the macro-supervision of the banking and financial services industries.

The allocation of responsibilities between BI and the OJK is as follows:

- BI regulates the macro-supervision of the banking and financial services industries. BI is also responsible for regulating monetary and payment system services for prudential and conduct purposes. BI is also the main regulatory authority for money remittances and payment system services providers such as Visa and MasterCard.
- The OJK regulates banks, insurers and large investment firms (i.e., investment banks) for prudential and for conduct purposes, including in relation to regulatory capital requirements. Firms that the OJK regulates include banks, asset managers, brokers, financial advisers, pension funds, insurance companies and multi-finance companies. The OJK has also regulated financial technology companies operating in the financial services space (e.g., P2P lending platform operators).

In addition, financial services and payments companies/firms are required to file reports (on a periodic basis or if triggered by certain types of transactions) to the Centre for Reporting and Analysis of Financial Transactions (PPATK). The analysis results produced by the PPATK would serve as recommendations for the other authorities (including the OJK and BI) in deciding whether to pursue further investigations or actions into the financial services or payments company/firm.

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

Aside from legislation issued by the government and the House of Representatives, much of the relevant law in Indonesia is derived from regulations and decrees issued by BI and OJK.

OJK regulations are the main legal framework in Indonesia for the banking, financial services and insurance industries. There is also a large volume of secondary and delegated legislation. BI regulations are the main regulatory framework for monetary and payment system services and also for macro-supervision of the banking and finance industry.

Both BI and OJK issue rules and guidance, which apply to the firms that they regulate. BI and OJK publish a handbook that contains detailed rules and guidance. These rules and guidance are applicable primarily to Indonesian regulated or supervised firms but are also relevant in certain respects for non-Indonesian firms.

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

Indonesia regulates a broad range of activities, including the following:

- Accepting deposits: This covers typical retail banking activities involving the operation of current and deposit accounts.
- Issuing and processing electronic money: Electronic money is a prepaid electronic payment product, which can be card or server-based.
- Providing payment services: This covers a broad range of activities involving matters such as money remittance, debit or credit card issuance, electronic wallet services, acquiring card transactions (including payment gateway services) and the operation of payment accounts.
- Consumer lending: This covers both lending to consumers and activities such as credit brokerage and debt collection on behalf of third parties, including operating P2P lending platforms that connect and match lenders with borrowers.
- Carrying out insurance business: This involves effecting and carrying out insurance contracts, both life and general.



- Insurance brokerage and agency activities: Indonesian regulations cover various insurance broking activities and the handling of claims on behalf of the insured.
- Providing investment advice: Providing advice on most categories of investment is a regulated activity in Indonesia. This activity covers the provision of advice on the merits of acquiring or disposing of particular investments.
- Trading in or brokering securities: This covers brokerage of securities for one's interest or the interest of other parties.
- Arranging transactions in investments: This activity covers the role of intermediaries in investment transactions. It is very broad and covers infrastructure providers, including electronic communication networks that route orders for execution.
- Providing finance leases or other types of financing: This activity is conducted primarily by multi-finance companies.
- Underwriting the sale of securities: This includes underwriting shares in a public offering for the issuer's interest with or without the obligation to buy the unsold/remaining securities.
- Establishing, operating and winding up a collective investment scheme: Most types of funds will be regarded as collective investment schemes under Indonesian law. This will extend to open-ended corporate bodies and partnerships.
- Providing custody (safeguarding and administration of investments): Providing custody services in relation to assets that include investment is a regulated activity.
- Facilitating the trading/exchange of cryptocurrencies and digital assets: Cryptocurrencies and digital assets are recognized as commodities in Indonesia but not as a form of currency.

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

Foreign parties who intend to conduct business collecting funds or establishing a financial services company in Indonesia will generally be subject to Indonesian laws and regulations. Indonesian financial services companies should obtain a business license from the relevant Indonesian authorities. The licensing or approval requirements from the relevant authorities also apply to some financial services products, such as collective investment contracts or banking products. However, it is not necessary for foreign parties as the lender to be licensed in Indonesia in international financing transactions.

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

To establish an Indonesian financial services company, the applicant typically should apply for an in-principle and business license based on the relevant laws and regulations depending on the specific sectors. For some financial services businesses such as banking, insurance and financing companies, the following conditions will need to be fulfilled:

##### **Legal form and ownership**

Generally, a financial services company established under Indonesia's law can be in the form of a limited liability company. The law requires at least two shareholders, which could be Indonesian citizens and/or Indonesian legal entities and foreign citizens and/or foreign legal entities, to establish and maintain a limited liability company. However, as mentioned above, foreign parties should consider any foreign shareholding limitation in the relevant sectors.

##### **Fit and proper test**

Primary parties of financial services companies in certain sectors are generally required to pass the fit and proper test by the OJK. The parties who are obliged to undertake the fit and proper test include members of the board of directors and board of commissioners, as well as the controlling shareholders. The fit and proper test is conducted by way of (a) administrative research, which consists of the research of required documents, track record and financial reputation; and (b) interviews with candidates who have completed the administrative research.

##### **Capital requirement**

The minimum capital requirement will vary depending on the specific sector. For instance, a newly established commercial bank doing conventional banking must have a minimum capital of IDR 3 trillion. The capital must be paid up by the shareholders before the deed of establishment is submitted to the Minister of Law and Human Rights (MOLHR).

##### **Business plan**

The applicant should be able to provide the regulator with the business plan of the relevant financial services, including feasibility studies on market and economic potential, business activities, and projected balance sheet.

##### **MOLHR approvals**

A limited liability company must be established before obtaining a particular business license for the relevant financial service. This requires executing the deed of the establishment before a public notary, injecting the issued and paid-up capital into the company, and obtaining MOLHR approval for the deed of establishment.

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

In obtaining a business license, an applicant must complete the administrative process, which involves the submission of required documents. The documents that must be submitted to the regulator will depend on the nature of the activities. How long the application process will take will depend on the laws and regulations relevant to the financial services. For example, the approval of an application for a banking business license should, in theory, be issued 60 business days at the latest after all of the required documents have been submitted to the relevant authority and deemed complete. The approval of a business license for an insurance company should be issued 30 business days at the latest after all required documents are submitted. In practice, however, the entire process would typically take at least six months.

For some financial services, such as banking and insurance companies, the documents required for a license application include the following:

- Deed of establishment
- Shareholders', the board of directors' and board of commissioners' data



- Evidence of capital injection
- Business plan, risk management and organization structure

There are two regulatory sandbox regimes in Indonesia for financial technology companies that operate in the financial services and payments sectors. These two sandbox regimes are facilitated by the OJK and BI. Upon the registration of the financial technology company, BI or the OJK may decide to place the company in its respective regulatory sandbox. A regulatory sandbox in Indonesia is essentially a program where BI or the OJK will closely monitor and evaluate the financial technology company's business to determine its reliability and sustainability. During the regulatory sandbox, BI or the OJK may also conduct site visits.

## 7. What financial services passporting arrangements does Indonesia have with other jurisdictions?

Indonesia does not have any financial services "passporting" arrangements with any other country.

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# Italy

## 1. Who regulates banking and financial services in Italy?

Italy has three main regulators with responsibility for the authorization and supervision of banks, insurers and other financial institutions. These are the Bank of Italy, the Istituto per la Vigilanza sulle Assicurazioni (IVASS) and the Commissione Nazionale per le Società e la Borsa (“Consob”). The allocation of responsibilities among the above authorities may be summarized as follows:

- a. The Bank of Italy oversees the activity of banks and financial intermediaries in the banking market, which is mostly governed by Legislative Decree no. 385 of 1 September 1993, as amended, and by secondary regulations issued by the Bank of Italy. More in particular, the Bank of Italy issues general regulations and specific recommendations and is in charge of setting the risk control and the capital adequacy requirements of said intermediaries and of ensuring the stability of the domestic financial system. It should, however, be considered that the European Central Bank (ECB) has become the supervisor of Eurozone banks under the EUs Single Supervisory Mechanism (SSM), thereby taking over certain supervisory powers over the most relevant Italian banks. The Bank of Italy is also the supervisory authority competent for the payment services market (including supervision overpayment institutions and electronic money institutions), which is governed by Legislative Decree no. 385 of 1 September 1993 and by secondary regulations issued by the Bank of Italy as well. Furthermore, the Bank of Italy is the supervisory authority responsible for the anti-money laundering regulations which apply to banking and financial institutions, which are set forth by Legislative Decree no. 231 of 21 November 2007, as amended, and by secondary implementing regulations issued by the Bank of Italy. For this purpose, the Unità di Informazione Finanziaria (the Italian financial intelligence unit, UIF) is the dedicated division established within the Bank of Italy.
- b. The Consob oversees the activity of the securities markets and the investment firms, which are mostly governed by Legislative Decree no. 58 of 24 February 1998, as amended, and by secondary regulations issued by the Consob (sometimes in agreement with the Bank of Italy). More in particular, the Consob is in charge of ensuring the transparency of the markets and the fairness and transparent conduct of intermediaries and issuers. Together with the Bank of Italy, the Consob oversees the Undertakings for Collective Investments (UCIs) and their managing entities.
- c. The IVASS is the official body that controls and supervises the insurance and reinsurance business and insurance and reinsurance mediation. It is mostly governed by Legislative Decree no. 209 of 7 September 2005, as amended, and by secondary regulations issued by the IVASS.

The Bank of Italy, the Consob and the IVASS have formal, reciprocal cooperation protocols in place in an effort to facilitate achievement of their respective goals.

In addition to the above, an important role in the Italian banking and securities market is played by the Italian Ministry of Finance (Ministero dell’Economia e delle Finanze), which has cross-area competencies, ranging from the collective portfolio management industry (as the Ministry of Finance is the authority that defines the mandatory requirements that Italian investment funds must satisfy in order to be authorized) to the investment services sector (such as the power to identify new types of “financial instruments”).

Finally, the European Union’s supervisory authorities (the European Banking Authority or EBA, the European Securities and Markets Authority, and the European Insurance and Occupational Pension Schemes Authority) play an important role by issuing technical standards in the financial and insurance sector. The ECB closely cooperates with the European Union supervisory authorities, especially the EBA. In particular, the ECB is involved in the EBAs work and contributes significantly to supervisory convergence by integrating supervision across jurisdictions.

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

A substantial part of the relevant law in Italy is derived from or has been harmonized to adjust to, European Union directives and regulations. In many respects, therefore, Italian domestic legislation and rules simply give effect to pan-European legal requirements. However, since many European directives only set minimum standards, the way in which directives have been implemented across Europe can vary. In other words, Italy and other European jurisdictions have introduced domestic laws that exceed European-level requirements. Directives also contain obligations and discretions at a member state level, and Italy also has various domestic rules.

The main domestic sources of the Italian regulatory framework are essentially as follows (each of which is further detailed by secondary regulations issued by the competent authorities):

- Legislative Decree no. 385 of 1 September 1993, as amended (the Consolidated Banking Act or CBA), for the banking sector
- Legislative Decree no. 58 of 24 February 1998, as amended (the Consolidated Financial Act or CFA), for the securities sector
- Legislative Decree no. 209 of 7 September 2005, as amended, for the insurance sector





### 3. What types of activities that require a license in Italy?

Italy regulates a broad range of financial activities. These include, among others, the following:

- **Accepting deposits:** This covers the acquisition of funds with a repayment obligation in the form of deposits or in any other form.
- **Issuing electronic money:** Electronic money is a prepaid electronic payment product that can be a card- or account-based.
- **Carrying out payment services:** This covers a broad range of activities involving matters such as execution of credit transfers, operating a payment account, execution of payment transactions, transfer of funds and the execution of direct debits.
- **Granting of financing:** This covers the granting of financing, in any form, to the public and includes loans, finance leases, factoring, and issuance of guarantees and performance bonds.
- **Investment consultancy:** This activity covers the provision of advice on the merits of acquiring or disposing of particular investments.
- **Reception and transmission of orders:** This covers both the reception and the transmission of orders by the client regarding the subscription and the buying and selling of financial instruments.

Although Italy was one of the first EU Member States to regulate crypto currencies for anti-money laundering purposes in 2017, no sector-specific regulations have been adopted yet by the competent supervisory authorities to regulate the various applications of crypto-assets and crypto currencies in the financial system. As a consequence, based on the characteristics of a specific crypto-asset or crypto currency, this may in principle be characterized either as a financial instrument, a financial product (a domestic category of regulated products), electronic money or as a crypto currency whose related services may trigger anti-money laundering obligations under Italian law.

### 4. How the licensing requirements apply to cross-border business in Italy?

Where a firm located outside Italy deals with a client or a counterparty located in Italy, those activities will typically be considered to be subject to Italian laws and regulations, unless it is clear that the firm was contacted by the Italian counterparty without any solicitation. Foreign service providers will need to consider whether they are triggering a local licensing requirement and whether they are complying with Italian marketing rules.

The marketing of financial/banking services to Italian residents will most likely constitute financial promotions, which would not be allowed if the foreign entity were not authorized to provide such services in Italy. Hence, no similar offers/solicitation directed to Italian residents should be made through any means within Italy, including any form of mass communication with the public or with groups of prospective investors, such as customers of a particular bank or any other financial institution. Marketing activities should generally be restricted to prospective clients residing in Italy that are believed to be “qualified investors,” as defined under the securities laws of Italy, but in any case at their unsolicited request. In this respect, however, since the Italian authorities have not released any official paper/guideline on the so-called

reverse solicitation scheme (i.e., unsolicited investments of Italian residents), any similar scheme should be carefully evaluated on case-by-case basis, having regard to factual scenario. Note that the unauthorized performance of regulated financial activities constitutes a crime; criminal courts may have, and in the past often had, a different and stricter view than that of regulatory authorities of what can and cannot be done without possessing a license.

Under European law, firms established outside the European Economic Area (EEA) are called “Third Country Firms” (TCFs). Until recently, European laws have not sought to harmonize the approach of member states to TCFs. This meant that access to the markets of member states had to be considered on a case-by-case basis. However, the trend in European legislation is now toward harmonizing the approach across all member states to TCFs. On the one hand, this approach is likely to create a barrier to entry into European markets. On the other hand, firms that become compliant with new EU standards will be able to access the whole EEA market as opposed to having to consider the market on a country-by-country basis.

Recent EU legislation, the following in particular, may limit the ability of foreign firms to do business in Italy:

- The Alternative Investment Fund Managers Directive imposes limitations on non-EEA persons marketing fund interests to persons in Italy (and other European jurisdictions).
- MiFID II (comprising a recast of the Markets in Financial Instruments Directive and a European regulation) results in greater restrictions on TCFs doing business in Italy.

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

In order to obtain authorization, an applicant must satisfy the conditions set forth in the applicable Italian regulations.

The conditions can vary, depending on the particular regulated activities that the applicant intends to carry out and, in particular, whether the applicant is to be authorized by the Bank of Italy, the Consob, the ECB or the IVASS. Broadly, however, the following conditions will usually need to be satisfied:

- a. Location of offices:** For Italian incorporated companies, both the head and registered office must be located in Italy.
- b. Business model:** The regulator will examine the applicant’s business model. In particular, specific business models are required in order to carry out certain activities.
- c. Capital requirement:** Certain capital requirements will need to be met, depending on the authorization sought.
- d. Independence and integrity requirements:** The corporate officers (i.e., those performing administrative, management or control functions) must meet certain experience, independence and integrity requirements.
- e. Shareholders’ requirements:** The substantial shareholders must satisfy certain integrity requirements.
- f. Corporate plan:** The applicant must submit a plan concerning the initial activity, together with the articles of incorporation and the bylaws. The plan is necessary in order to evaluate the business projects of the applicant.
- g. Structure of the group:** The applicant must not have a group structure that may impede the supervision activity by the relevant authorities.



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

An applicant must complete a formal process to obtain authorization. The documents to be attached to the authorization application as well as the timing for obtaining the relevant authorization vary, depending on the type of authorization request.

On 2 July 2021, the Decree of the Ministry of Economy and Finance No. 100 of 30 April 2021 (the “MEF Implementing Decree”) was published on the Official Journal of the Republic of Italy (Gazzetta Ufficiale). The MEF Implementing Decree provides the technicalities for the implementation of Article 36, paragraphs from 2-bis to 2-octies of the Legislative Decree No. 34 of 30 April 2019, as amended by Law No. 58 of 28 June 2019 (the “Growth Decree”) in relation to the introduction of a FinTech regulatory sandbox in the Italian financial system. The MEF Implementing Decree (i) regulates the tasks attributed to the newly-established FinTech Committee, its functioning and composition, and (ii) provides a comprehensive framework for the FinTech experimentation, including setting out the requirements for participating to the Sandbox, the operational perimeter during the participation, and the regime for the termination of the experimentation.

The MEF Implementing Decree entered into force on 17 July 2021.

On a related note, in 2019 it was established an Italian FinTech regulatory sandbox. This regulatory sandbox allows FinTech and InsurTech start-ups to enjoy a simplified regulatory regime for the purpose of developing innovative financial/insurance solutions based on the application of new technologies, assuming certain conditions are met. The firms participating in the regulatory sandbox cannot perform any regulated activity outside the experimentation perimeter, although at the end of such a period the competent regulatory authorities could temporarily authorize the same firms to operate in the market. The technicalities for the participation to the Italian FinTech regulatory sandbox will be provided by a regulation of the Ministry of Finance, which has been postponed due to the outbreak of the Covid-19 pandemic.

## 7. What financial services “passporting” arrangements does Italy have with other jurisdictions?

Once authorized in Italy, an Italian firm can passport its authorization into other EEA member states. This passport, however, is only available to firms established in Italy and will not be available to Italian branches of TCFs. Passporting permits the provision of cross-border services and also the establishment of a physical branch location in other EEA member states.

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# Japan

## 1. Who regulates banking and financial services in Japan?

The Financial Services Agency of Japan (JFSA) is the regulator responsible for the authorization and supervision of financial institutions, including banks, trust banks, trust companies, funds transfer/settlement-related service providers, insurers, securities firms, investment advisors, asset managers and funds. This responsibility includes seamless off-site and on-site monitoring by the Supervisory Bureau of the JFSA. The JFSA established: (i) a dedicated fintech support desk in 2015 to provide a single point of contact for inquiries relating to fintech matters; and (ii) a new Financial Markets Entry Office in 2021 to provide global asset managers who wish to enter the Japanese financial markets for the first time with pre-application consultation, registration and supervision services in English. In addition, the Ministry of Economy, Trade and Industry (METI) regulates credit card services in Japan.

The Bank of Japan (BOJ) is responsible for the macro supervision of the banking and financial services industries to maintain a safe and sound financial system. The BOJ is not a regulatory authority under the Banking Act, but it does conduct on-site examinations based on bilateral agreements with financial institutions with current accounts with the BOJ under the Bank of Japan Act. The BOJ also conducts examinations of banks' overseas branches and off-site monitoring of such financial institutions. The BOJ's on-site examinations and off-site monitoring cover both Japanese financial institutions and foreign banks in Japan.

There are also self-regulatory industry organizations (SROs) for each type of financial institution. Such as the Japanese Bankers Association, the Japan Securities Dealers Association, the Japan Payment Service Association, and the Japan Virtual and Crypto Assets Exchange Association, which prepare guidelines to share best practices within the industry. These SRO guidelines are considered quasi-regulations in the industry.

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

Under the Japanese regulatory framework for financial services, each type of financial service has its own specified regulation, including the following:

- **Banking Act:** This is the primary legislation for the banking industry and covers licensing, supervision, bank-holding companies, the scope of businesses for banks and bank-holding companies and their subsidiaries, foreign bank agency services, bank agency services, accounting, capital adequacy

requirements, major shareholders, and branches of foreign banks.

- **Deposit Insurance Act:** This covers Japan's deposit insurance system.
- **Money Lending Business Act (MLBA):** This regulates companies engaging in money-lending business (including agents or brokers for money lending) and covers licensing, supervision and consumer protection.
- **Payment Services Act (PSA):** This regulates companies that engage in: (i) small funds transfer business (funds transfers of JPY 1 million or less); (ii) prepaid cards/instruments business; and (iii) crypto-assets-related business, including crypto asset exchanges, crypto asset dealing and brokerage businesses, and crypto asset custodians. In principle, to engage in funds transfer business in Japan, a company must obtain a banking license. However, a small funds transfer business is exempted from this requirement under this Act. The PSA covers licensing, supervision, security deposits, consumer protection, foreign funds transfer service providers, and clearing for funds transfers. Certain amendments to the PSA were promulgated in 2020 and will come into effect in 2021. These amendments create: (i) new operational requirements for all funds transfer business operators (FTBO); and (ii) new categories of FTBO, depending on the maximum amount of transferred funds per transaction.
- **Financial Instruments and Exchange Act (FIEA):** This comprehensive legislation regulates various securities and other financial investment products (including derivatives) and related business. Businesses covered by the FIEA include underwriting, securities dealing and brokerage, investment advice, investment management, asset management and funds management. The FIEA covers licensing, supervision, disclosure requirements, take-over bids, insider trading, business scope, major shareholders, foreign securities firms, accounting, exchanges, clearing, self-regulatory functions and customer protection.
- **Financial Instruments Sales Act:** This covers consumer protection in connection with the sale of financial products.
- **Trust Business Act (TBA):** This regulates companies that engage in trust-related services (such as acting as a trustee and agents under a trust agreement). The TBA covers licensing, supervision, scope of business, accounting, consumer protection, major shareholders and foreign trust companies.
- **Law Concerning Concurrent Business, etc., of Trust Business by Financial Institutions:** This regulates banks that engage in trust business concurrently with their banking business.
- **Insurance Business Act (IBA):** This regulates companies that provide insurance services, such as insurance companies and insurance brokers. The IBA



covers licensing, supervision, scope of business, accounting, consumer protection, major shareholders, subsidiaries of insurance companies and foreign insurance companies.

- **Installment Sales Act (ISA):** This provides consumer protection in connection with credit cards and other types of installment sales. The ISA also establishes a registration system for credit card companies.
- **Foreign Exchange and Trade Act:** This regulates foreign exchange transactions and other international transactions undertaken by financial services providers.

The Act for the Prevention of Transfer of Criminal Proceeds is Japan's comprehensive anti-money laundering legislation for financial institutions and provides: (i) statutory KYC procedures; and (ii) a reporting system for suspicious transactions.

There is also a large volume of secondary and delegated legislation as well as guidelines prepared by SROs.

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

Japan regulates a broad range of activities relating to financial services, including the following:

- Accepting deposits - Typical banking activities involving the operation of current and deposit accounts
- Lending or brokerage of lending - Lending to consumers and corporations
- Debt collection on behalf of third parties - Generally handled by licensed lawyers, but as an exception may be handled by a debt collection service provider in a limited range of services by obtaining a license
- Providing payment and funds transfer related services - Matters such as money remittance and the operation of payment accounts
- Providing electronic payment services: (i) Instructing banks to transfer funds at the request of a client who holds a deposit account by way of using electronic data processing systems (payment initiation service providers); or (ii) providing account information obtained from banks to a client who holds a deposit account by way of using electronic data processing systems (account information service providers)
- Issuing prepaid cards or other prepaid payment instruments - Electronic and non-electronic payment methods, either card-based or account-based
- Providing credit for installment sales - Credit card services
- Conducting credit card-acquiring business
- Providing crypto asset exchange services
- Arranging or underwriting an initial coin offering (ICO) - Activities to raise funds from the public using a digital token issued by a company or an individual, which may fall within the scope of the PSA and/or the FIEA depending on the structure and characteristics of the token
- Underwriting or handling the issue of securities
- Trading in securities and other financial instruments as a principal, agent, intermediary or broker
- Providing advice on financial investments -The provision of advice on the value of securities and/or investment decisions

- Investment management - Managing assets with securities investments or derivatives on behalf of another person
- Establishing, operating or distributing funds (including collective investment schemes)
- Operating an exchange or proprietary trading system
- Providing custody services (safeguarding and administration of investments)
- Operating an insurance or insurance brokerage business
- Providing trustee services, or agency or brokerage services for trust agreements/beneficial interests

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

### 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., through remote communications, such as an internet site, telephone, fax or email), regardless of the residency or nationality, or the status of the targeted clients. 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

There is no clear provision in the Banking Act covering funds transfer 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 funds transfers, it will trigger the licensing requirements under the Banking Act.

Furthermore, the PSA clearly states that a foreign funds transfer service provider 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:

#### a. 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:

1. No computer operation other than viewing the advertisement should be necessary for reading and understanding the disclaimer.
2. The disclaimer must be written in a language reasonably likely to be readable and understandable by investors in Japan who access the website.

#### b. 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:

- c. 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.
- d. 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.

- e. 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

The IBA has an express license framework for foreign insurance companies.

### Trust-related business

The TBA has a license and a registration framework for foreign trust business operators. The TBA, however, 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 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 PSA clearly states that a foreign prepaid instrument issuer may not solicit residents of Japan to purchase prepaid instruments issued outside Japan.

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

In order to obtain a license, authorization or registration in Japan, the applicant must satisfy the applicable requirements for the particular regulated activities under the relevant regulations. Detailed requirements differ, depending on the specific license, authorization or registration. Broadly, the following factors should be examined:



- The type of applicant: In most cases, the applicant must be a corporation.
- Location of offices: In most cases, the applicant must be located in Japan. A foreign entity must have a presence in Japan and at least one person who is domiciled in Japan as its representative. Further, the requirement in relation to the “appropriate resources,” as explained below, means that certain key senior management personnel may be required to be residents of Japan, and a proper administrative center will also need to be located in Japan.
- Capital and net asset requirement: In most cases, the applicant must have stated capital and net assets are exceeding the specified minimum amount.
- Appropriate resources: The applicant must satisfy the regulator that it has adequate resources to carry out the relevant regulated activities. Resources include financial as well as human resources (including management with the required skills) and infrastructure. With respect to human resources, the applicant must deploy personnel who have the knowledge and experience to carry out the regulated business appropriately, fairly and efficiently, and who have sufficient social credibility.
- Compliance: The applicant must have a system in place to ensure its compliance with applicable laws and its internal rules.
- No association with anti-social forces: Neither the applicant nor its senior management should be associated with any anti-social forces (i.e., organized crime (boryokudan) or any other individual or organization whose activities purposefully disrupt normal, legal and moral business and social conduct, including any group companies of such organization, and any organization or individual that has a strong relationship therewith).
- Record of senior management: Certain members of the applicant’s senior management are required to: (i) have legal capacity; and (ii) not have been or be bankrupt. The criminal and administrative records of senior management will be examined.
- Major shareholders: In most cases, the applicant’s major shareholders must be suited to the regulated business.
- Other businesses: The applicant’s businesses — other than the regulated business for which the applicant will obtain the license, authorization or registration — must not be contrary to public interest and must not interfere with the proper and reliable operations of the regulated business.
- Business model and plan: The regulators will examine the applicant’s business model as well as the economic aspects of the business. Regard will be given to matters such as the impact of the model on consumers and on the stability of the Japanese financial system.

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

An applicant applying for a license, authorization or registration in Japan must undergo a formal process. This involves the completion of required application forms and the submission of supporting information.

In relation to timing, each regulation has a specified standard processing period (depending on the case, typically between two weeks and four months). However, this period does not include the time necessary for pre-application consultation with the regulator, amendment of the application to reflect the regulator’s concerns, responding to the regulator’s questions, and/or the submission of additional material for further explanation.

In practice, it often takes six months to one-and-a-half years to obtain a financial services business license after the start of the pre-application consultation process.

Furthermore, for certain licenses, the applicable laws provide for a formal preliminary examination procedure that an applicant may use, on a voluntary basis, to assess whether it can obtain the license.

The particular forms and annexes must be completed for submission to the regulator depending on the applicable laws and the type of regulated activity to be conducted. However, broadly speaking, the following items should be included:

- The application form containing basic information regarding the applicant and its business
- The articles of incorporation and other constitutional documents of the applicant
- An explanation of its corporate governance features
- All relevant internal rules
- Financial statements
- Résumés of the members of senior management (including their respective track records and capabilities)
- Details of major shareholders and corporate groups
- Certain undertakings, and representations and warranties

## 7. What financial services passporting arrangements does Japan have with other jurisdictions?

Japan is one of five countries participating in the Asia Region Funds Passport (ARFP), a cross-border funds passporting program that enables cross-border offerings of managed funds to retail investors, and at the same time maintains appropriate investor protections. The other countries currently participating in the ARFP are Thailand, Australia, New Zealand and South Korea.



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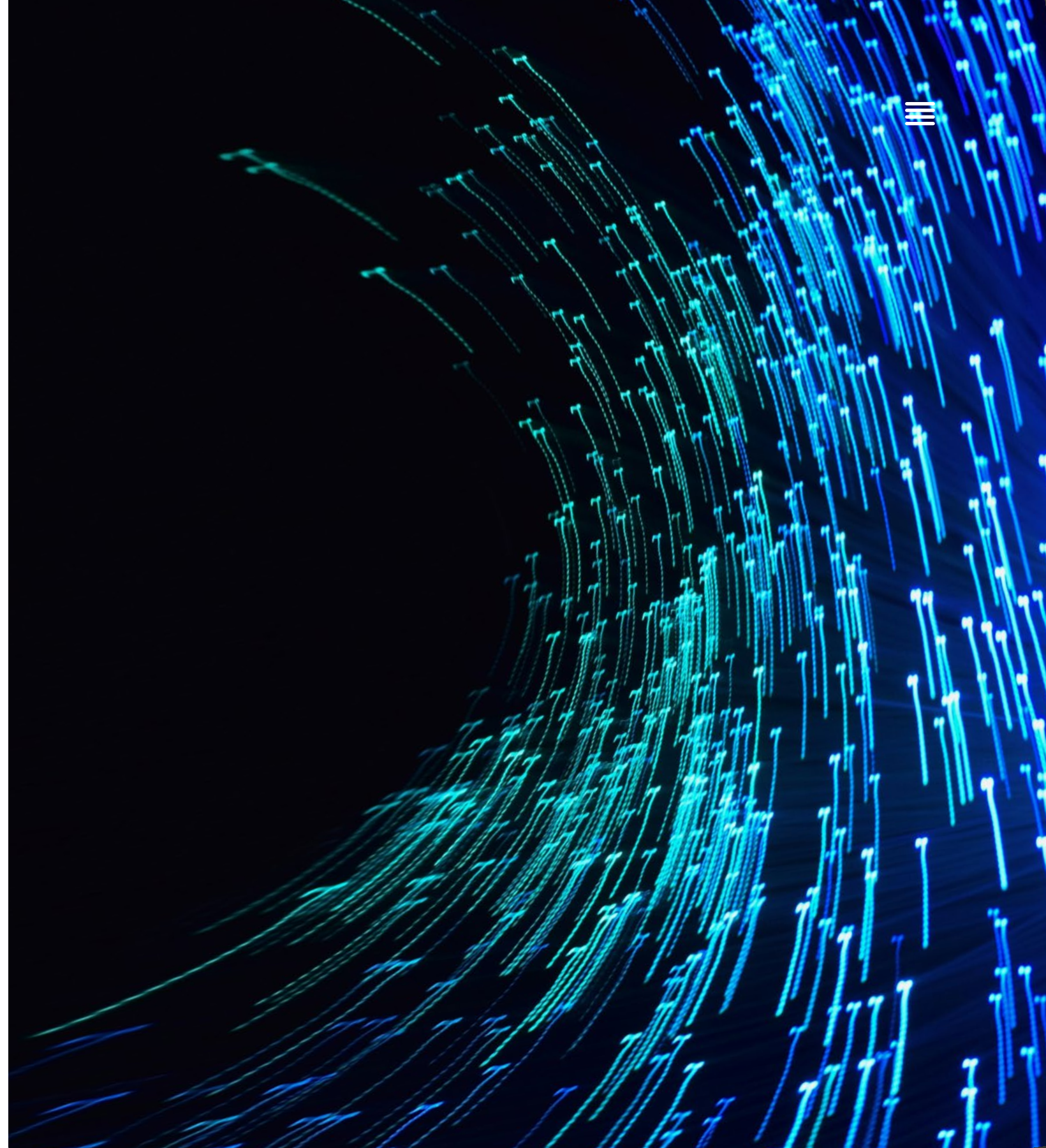
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# Luxembourg

## 1. Who regulates banking and financial services in Luxembourg?

In Luxembourg, the Commission de Surveillance du Secteur Financier (CSSF) is responsible for the prudential supervision of credit institutions; professionals of the financial sector (PFS); undertakings for collective investment (UCI); UCI management companies, including alternative investment fund managers; authorized securitization undertakings; fiduciary representatives having dealings with securitization undertakings; regulated markets and their operators; multilateral trading facilities; payment institutions; and electronic money institutions. It also supervises the securities markets, including their operators.

The CSSF is also the competent authority for monitoring compliance with professional obligations relating to the fight against money laundering and terrorist financing by all persons subject to its supervision.

In this respect, the CSSF has all the supervisory and investigatory powers provided for in the Law of 12 November 2004 on the fight against money laundering and terrorist financing ("**AML/CTF Law**") and in various sectorial laws for the purpose of carrying out its duties.

The prudential supervision exercised by the Banque Centrale du Luxembourg has two components: (i) supervision of the global liquidity situation as well as the supervision of the individual situation of the liquidity of each operator; and (ii) oversight of payment and settlement infrastructures.

The European system set up for the supervision of the finance sector consists of three European Supervisory Authorities (ESAs): the European Securities and Markets Authority (ESMA), the European Banking Authority, and the European Insurance and Occupational Pensions Authority.

Meanwhile, the CSSF as national supervisory authority remains in charge of supervising the individual financial institutions. The objective of the ESAs is to improve the functioning of the internal market by ensuring appropriate, efficient and harmonized European regulation and supervision.

Luxembourg is part of the Eurozone and, as such, the European Central Bank has become the supervisor of Luxembourg banks under the EU's Single Supervisory Mechanism.

The Commissariat aux Assurances (CAA) is the public institution supervising

insurance and reinsurance companies, insurance intermediaries and professionals of the insurance sector. The CAA also has supervision over three main types of regulated pension funds in Luxembourg: (i) pension savings companies with variable capital (sociétés d'épargne-pension à capital variable or SEPCAVs); (ii) pension savings associations (associations d'épargne-pension or ASSEPs); and (iii) other regulated pension funds (CAA pension funds).

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

Much of the relevant law in Luxembourg is derived from EU directives and regulations. In many respects, therefore, Luxembourg's domestic legislation and rules simply give effect to pan-European legal requirements. However, since many European directives are "minimum harmonizing" directives, the way in which they are implemented across Europe can vary. Directives contain obligations and discretions at member state level, while Luxembourg also has various domestic rules.

The Law of 5 April 1993 on the Financial Sector, as amended ("**Law on the Financial Sector**"), is the main framework law for banking and financial services in Luxembourg. The core regulation for insurance business in Luxembourg is set out by the Law of 7 December 2015 on the Insurance Sector, as amended. With regard to electronic money institutions and payment services, the Law of 10 November 2009 on Payment Services, as amended, lays down the specific rules for these financial service providers. A large number of Grand-ducal Regulations and CSSF and CAA Regulations complete the regulatory framework of financial services in Luxembourg.

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

Luxembourg regulates a broad range of activities, including:

- Banking, custody
- **Activities of credit institutions:** Receiving deposits or other repayable funds from the public and granting credits for their own account; such activity would be considered as an activity of a credit institution. Eligible credit institutions that act as custodian banks





holding the underlying assets of Luxembourg life insurance contracts or pension funds require approval from the CAA.

- **Providing custody:** Safeguarding and settlement of transactions and other related administration in relation to assets that include investments is a regulated activity.

#### ■ Electronic money and payment services

- **Issuing, distributing and redeeming electronic money:** Electronic money is a prepaid electronic payment product that can be card- or account-based.
- **Carrying on payment services:** This covers a broad range of activities involving matters such as money remittance, card issuance, acquiring card transactions and the operation of payment accounts.

#### ■ Investment and other financial services

- Luxembourg law requires that companies engaged in financial services, other than banking, payment or e-money services, adopt a regulated status as PFS, of which there are three types:
- **Investment firms:** Luxembourg law recognizes 10 different types of investment firms, including companies active in the business of providing financial advice, investment and brokerage services, market making, and the distribution of financial products.
- **Specialized PFS:** Specialized PFS are financial professionals that conduct activities outside the scope of investment firms as defined in the European directives. Luxembourg law recognizes 14 different types of specialized PFS, such as corporate domiciliation agents, registrar agents, professional depositaries, Family Offices, and professionals performing securities lending.
- **Support PFS:** A support PFS is a company that enters into an outsourcing arrangement with a credit institution, payment institution, investment fund, pension fund, insurance/reinsurance undertaking or another PFS to provide services that require access to confidential data. These services fall under six categories: client communication agents, administrative agents, primary IT systems operators, secondary IT systems, dematerialization service providers and conservation service providers. By virtue of their PFS status, these companies operate under the same regulatory regime as the financial institutions themselves.
- Portfolio management, administration and marketing of an undertaking for collective investment (UCI): All management companies domiciled in Luxembourg, whether UCITS or non-UCITS, must be duly licensed by the CSSF.

#### ■ Virtual assets services

- Following the implementation of the Laws of 25 March 2020 ("March 2020 Laws") virtual asset service providers (VASPs) have to register with the CSSF in order to provide one or more of the following services: (i) exchange between virtual assets and fiat currencies, including the exchange between virtual currencies and fiat currencies; (ii) exchange between one or more forms of virtual assets; (iii) transfer of virtual assets; (iv) safekeeping and/or administration

of virtual assets or instruments enabling control over virtual assets, including custodian wallet services; and (v) participation in and provision of financial services related to an issuer's offer and/or sale of virtual assets. Once registered, VASPs need to comply with the professional obligations described in the AML/CFT Law as from 30 March 2020.

#### ■ Insurance

- Conducting direct insurance and reinsurance activities in Luxembourg
- Insurance and reinsurance mediation activities: Luxembourg regulations cover various mediation activities like presenting and proposing (re)insurance contracts, carrying out preparatory works to their conclusion, as well as contributing to the execution of (re)insurance contracts, notably the handling of claims on behalf of the insured.

## 4. How do Luxembourg's licensing requirements apply to cross-border business into Luxembourg?

Financial services providers that are authorized in another EEA member state may carry on their activities and provide their services in Luxembourg through the establishment of a branch, provided that their activities are covered by their authorization. They may provide ancillary services in Luxembourg only if offered together with their core service activity. The exercise of their activities is not subject to any additional authorization by the Luxembourg authorities.

Credit institutions, investment firms, electronic money institutions and payment service providers that are not established in another EEA member state ("**Third Country Firms**") and any PFS other than investment firms, whether established inside or outside the EEA, wishing to establish a branch in Luxembourg shall be subject to the same authorization rules as those applying to financial services providers governed by Luxembourg law.

Where a firm outside of Luxembourg has a client or a counterparty domiciled in Luxembourg, this does not mean that it performs ipso facto regulated activities within the Luxembourg territory. Whether those activities trigger a local licensing obligation will depend on the specific activities and physical travel of agents to Luxembourg. Activities such as simple canvassing of clients or the advertising and organization of a "road show" are exempted from the need for a Luxembourg license. The same applies to mere introductory visits to Luxembourg-based clients. However, if agents of Third Country Firms travel occasionally and temporarily to Luxembourg, notably to collect deposits or other payable funds from the public and to provide any other financial service that is covered by the Law on the Financial Sector, a local authorization would be required.

By way of example, the following activities are regarded as being carried on outside of Luxembourg and therefore not subject to Luxembourg regulation:

- The activity of accepting deposits is regarded as being carried out where deposit funds are accepted. Where a Luxembourg resident credits funds to a bank account held outside Luxembourg, the foreign bank where the individual holds his account will not be regarded as accepting deposits in Luxembourg. A Third Country bank or a non-passported EEA

bank can therefore hold an account for a Luxembourg resident without contravening Luxembourg laws.

- Direct insurance activities would generally be considered as having been conducted in Luxembourg if the solicitation of Luxembourg resident policyholders and the conclusion and execution of the insurance contract took place in Luxembourg. However, a Third Country insurance undertaking is not deemed to be performing insurance activities in Luxembourg when the policyholder took the initiative to enter into the contract without having been contacted by the insurance undertaking beforehand.

In other cases, the activities might be deemed to be carried out in Luxembourg and subject to Luxembourg laws. For example, advice is regarded as being given where the recipient of the advice is located, so that where a foreign firm is advising a client in Luxembourg, the firm will be regarded as carrying out the activity of advising in Luxembourg. The same analysis applies in relation to the activity of dealing, so that where a counterparty to a transaction is located in Luxembourg, the activity of dealing will be regarded as being carried out in Luxembourg.

An exclusion to this could apply if the Luxembourg client approached the financial service provider in his home country solely upon his own initiative and without having been previously solicited by the service provider (i.e., reverse solicitation).

Recent EU legislation and developments that will have an impact on doing business in Luxembourg in particular are as follows:

- **Brexit:** The EU-UK Trade and Cooperation Agreement (TCA), applicable from 1 January 2021, does not provide a substitute for the EU market access that was available to UK firms through passporting rights prior to the end of the Brexit transition period (and which were terminated when the UK departed the EU). In order to access the single market, UK-based financial services firms now have to either comply with the regulatory requirements for market access set at the level of individual member states or rely on the possibility of equivalence decisions that, even if concluded, will not cover the same range of financial activities as passporting and can be unilaterally revoked.
- **AIFMD II (the revised Alternative Investment Fund Managers Directive):** Brexit seems to have been the main reason for the delay in adopting a clear position for third-country passporting and regulatory equivalent approvals provided within AIFMD I. Following the public consultation that closed in January 2021, the European Commission plans to publish a proposal for a directive and adopt it by the fourth quarter of 2021.
- **MiFID II (comprising a recast of the Markets in Financial Instruments Directive and a European regulation):** MiFID II harmonizes the ability of Third Country Firms to access the EU market. Under the MiFID II regime, Third Country Firms are able to apply to ESMA for status as permitted Third Country Firm, which allows them to provide investment services or perform activities directly to specific counterparties and clients (excluding retail clients) across the EU without first establishing a branch.
- **IDD (the Insurance Distribution Directive, recasting the Insurance Mediation Directive):** The IDD extends the supervisory control to all distribution channels of (re) insurance contracts, including direct sales by (re)insurance undertakings, ancillary insurance intermediaries and certain activities by insurance aggregator or price and product comparison websites. At the same time, IDD contains important new or slightly reworded carve-outs excluding certain activities from regulation.

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

Depending on the financial institutions' activity and the risks they are likely to face, the intensity of the rules applicable to them will vary.

Broadly, however, the following conditions will need to be satisfied:

- **Shareholder structure:** The applicant must be capable of being effectively supervised. The regulator will also consider the transparency of the firm's structure, that is, whether there are any impediments to supervision of the applicant, including the group structure and any relevant laws restricting access to information.
- **Contemplated activities:** The authorization requested by the entity seeking authorization must correspond to the contemplated activities, and the entity must actually carry out the activities covered by the license. The activities must also include the required anti-money laundering and "know your customer" (KYC) procedures. The application for authorization shall not be examined in terms of the economic needs of the Luxembourg market.
- **Central administration:** The registered office and the central administrations must be located in Luxembourg. This emphasizes the need for firms to have a substantive presence in Luxembourg that is accessible to the regulator and enables the regulator to supervise the firm.
- **Appropriate infrastructure and resources:** Applicants must satisfy the regulator that they have adequate resources to carry out the relevant regulated activities, including qualified management of the firm in a healthy and prudent manner. Resources include financial resources as well as human resources (including the composition and qualification of the board of directors and key functions holder's suitability) and infrastructure comprising the appropriate accounting and IT system.
- **External auditing:** The annual accounts must be audited by an external auditor who must be an established Luxembourg réviseur d'entreprise agréé (approved statutory auditor) and have adequate professional experience.

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

Authorization as financial service provider requires an application to the Ministry of Finance. Authorization will be granted after seeking advice from the CSSF.

An applicant must complete a formal process to obtain authorization, which involves the completion of required application forms and the submission of supporting information.

In relation to timing, in most cases the regulator will have six months from receipt of a completed application in which to determine whether or not to approve the application. The application must be decided on within 12 months after the receipt of the application. The absence of a decision within 12 months shall be deemed to constitute rejection of the application.

The documents that have to be provided for submission to the regulator will depend on the





nature of the regulated activities to be conducted.

The application file will vary from one license to the other. However, it must generally include:

- Main application form: This form is the core document that must be completed. The five sections within this form include details about the applicant, information on the shareholder structure, the contemplated activities and the central administration, the infrastructure, and the internal governance of the firm
- Articles (or draft articles) of incorporation, together with an extract from the Trade and Companies Register in Luxembourg if the entity has already been incorporated
- Detailed memorandum describing the contemplated activities
- Supporting documents with regard to the identification of the group head shareholder, the beneficial owner, the direct shareholders having a qualifying holding, and shareholders' agreement (where applicable)
- Annual report and accounts for the previous three years (if the entity has already been incorporated)
- Organization chart of the company
- Names, curriculum vitae, criminal records in each country where the person has lived for the past five years and in the country/countries of their nationality/nationalities (issued within the last three months), and personal declaration of honor of natural persons and of each board member and each supervisory board member, as well as of the people who will be responsible for the day-to-day management of the entity
- Engagement letter of the external auditor
- Name and curriculum vitae of the compliance officer and of the internal auditor
- Provisional budget for each of the three upcoming years
- Details of the human, technical and material resources to be employed in Luxembourg
- AML and KYC procedures
- Description of the IT infrastructure
- Description of the compliance and risk management function
- Information on the membership in an authorized investor compensation scheme

Luxembourg has adopted a technology-neutral strategy in relation to fintech; there is no "regulatory sandbox." The legal qualification of each project presented to the CSSF is assessed on the basis of the services effectively provided, regardless of the technology used, with a risk-based approach, to assess the way the chosen technology is implemented. However, the CSSF has created an Innovation Hub, consisting of a dedicated point of contact for market players to contact it in order to present an innovative project, request information on the regulatory framework applicable to a project, or to initiate a dialogue regarding new technologies or regulations that may impact the financial sector.

## 7. What financial services "passporting" arrangements does Luxembourg have with other jurisdictions?

A European "passport" permits the provision of cross-border services and the establishment of a physical branch location.

In Luxembourg, only credit institutions, payment institutions and electronic money institutions, and PFS belonging to the category of investment firms within the meaning of MIFID II, can be passported. Specialized and support PFS as mentioned above cannot benefit from the passport within the EU single market. Passporting means that in accordance with the required notification procedure of the CSSF, relevant financial service providers can exercise in other EEA member states the specific investment services and ancillary services that are covered by their authorization in Luxembourg.

Ancillary services, however, only benefit from a European passport if they are provided together with an investment service and/or investment activity. As a general principle, a European passport is only available to firms having their head office established in Luxembourg or another EU jurisdiction and will not be available to branches of Third Country Firms.

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# Malaysia

## 1. Who regulates banking and financial services in Malaysia?

The banking and financial services sector falls within the purview of the Malaysian Minister of Finance (MOF). As the primary regulator, the MOF acts on the regulatory bodies' recommendations that supervise financial institutions and capital market intermediaries.

In Malaysia, the two regulatory bodies responsible for the licensing, approval or registration, regulation and supervision of banks, insurers, capital market intermediaries and other financial institutions are the Central Bank of Malaysia (CBM) (also known as Bank Negara Malaysia) and the Securities Commission Malaysia (SC).

The CBM regulates financial institutions, such as banks, insurers, payment system operators, insurance brokers, money brokers, financial advisers and adjusters. It also acts as a banker and an adviser to the government of Malaysia.

The SC regulates capital market activities and specifically, capital market intermediaries, such as fund managers, corporate finance advisors, investment advisors, financial planners and persons who deal in securities, derivatives and private retirement schemes.

Money laundering and terrorism financing in Malaysia is primarily governed by the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFA). The CBM, as the appointed competent authority, has oversight of the general administration of the AMLATFA and has wide enforcement powers to, among others, investigate and seize properties. The CBM and the SC, as the respective supervising authorities of prescribed financial institutions and capital market intermediaries that are reporting institutions under the AMLATFA, also have oversight of the regulatees' compliance with their respective guidelines issued pursuant to the AMLATFA.

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

The regulatory regime for financial services in Malaysia is governed by the Financial Services Act 2013 (FSA), the Islamic Financial Services Act 2013 (IFSA), and the Capital

Markets and Services Act 2007 (CMSA). Rules, orders and regulations promulgated under the respective legislation are also applicable. The CBM administers the FSA and the IFSA, whereas the SC administers the CMSA.

In addition, the CBM and the SC have extensive powers to issue guidelines, handbooks, circulars and standards from time to time. Such guidelines, handbooks, circulars and standards set out, among others, the prudential and operational requirements that must be complied with by the relevant financial institutions and capital market intermediaries. For example, the CBM issued a framework setting out the prudential requirements applicable to banks and insurers. The SC issued a licensing handbook setting out the licensing and operational requirements applicable to capital market intermediaries.

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

Under the FSA and the IFSA, activities that require either a license or approval from the CBM, or a registration with the CBM (collectively, "FSA/IFSA Activities"), are as follows:

- Banking and investment banking activities, which include accepting deposits, dealing with checks, providing financial services (i.e., consumer and retail lending, leasing, factoring, purchase of instruments such as promissory notes, and providing guarantees) or carrying out regulated activities under the CMSA
- Insurance business and reinsurance business by way of effecting and carrying out contracts of insurance and reinsurance, both life and general
- Operation of a payment system or issuance of a designated payment instrument, which covers a broad range of activities, such as the remittance of funds or securities and issuance of electronic money (including the provision of merchant- acquiring services)
- Insurance broking business, which entails facilitating transactions for the entry into, or renewal of, contracts of insurance and reinsurance on behalf of clients
- Money broking business, which entails facilitating transactions in the money market or foreign exchange market (but does not include transactions for the sale and purchase of currencies)
- Financial advisory activities by way of arranging for contracts of insurance based on the individual needs of clients
- Adjusting activities in respect of investigations of losses under insurance claims

Under the CMSA, entities carrying out the following regulated activities (collectively,





"CMSA Activities") require a capital markets services license (CMSL), and individuals employed to undertake the regulated activities require a capital markets services representative's license (CMSRL) from the SC:

- Dealing in securities and derivatives by inducing or potentially inducing clients to enter into transactions involving securities or derivatives
- Fund management of a portfolio of securities, derivatives or assets
- Advising on corporate finance, which covers advising on takeovers and mergers, issuance of securities, raising of funds and providing advice to listed companies
- Providing investment advice on securities or derivatives
- Financial planning for clients by analyzing their financial circumstances and introducing investment plans
- Dealing in private retirement schemes by inducing or potentially inducing clients to acquire or dispose of interests in, or contribute to, a private retirement scheme
- Clearing for securities or derivatives by assuming obligations for the delivery and payment of a person's transaction relating to listed securities or derivatives

Trustees of unit trust schemes and debenture holders must also be registered and approved by the SC.

Cryptocurrencies and cryptoassets (i.e., digital currency and digital tokens) are not recognized as legal tender in Malaysia. That said, cryptocurrencies and crypto-assets that satisfy certain prescribed requirements are regulated as securities under the CMSA.

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

The licensing requirements under the FSA, IFSA and CMSA do not generally apply if the licensable activities are carried out wholly from a place outside of Malaysia. If the licensable services are carried out within Malaysia or from a cross-border basis into Malaysia, the licensing requirements will apply unless there are applicable exceptions.

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

In assessing the written application for a license, approval or registration to carry out FSA/IFSA Activities, the CBM will consider the factors set out in Schedule 5 of the FSA and the IFSA, as well as other matters that the CBM considers relevant. These include the following:

- Reputation and experience - The applicant should have a reputation that is consistent with the standards of good governance and integrity, and the business record and experience of the applicant will also be taken into account.
- Detrimental effect - The business must not be detrimental to the interests of its future depositors, policy owners, participants, users or the public generally.
- Business plan - The applicant must convince the CBM that its business plans for the business' future conduct and development s are sound.

- Financial Resources - The applicant must be able to demonstrate sufficient financial resources as a source of continuing financial support. There may also be minimum paid-up capital requirements.
- National interest - Whether the application will be in Malaysia's best interest, with regard to, among others, the contribution of the business to the Malaysian financial ecosystem, the economy and Malaysia's relationship with other countries, should be determined.
- Effective supervision - Whether the nature, scale and activities of the applicants' corporate group will impede effective regulation and supervision, having considered the nature and degree of regulation and supervision of any financial institution within that corporate group, should be considered.

The applicant must be considered "fit and proper" by the SC to apply for a CMSL to carry out the CMSA Activities. In assessing whether an applicant is fit and proper, the SC will consider the following:

- Organizational requirements - The applicant should have a properly established business with clear lines of responsibility and authority, as well as the necessary infrastructure, policies and processes. The SC also mandates certain positions of authority; Bumiputera (i.e., the indigenous people of Malaysia) participation requirements apply to directors, CMSRL holders and employees, and job functions. The requirements for each would depend on the type of CMSA Activities undertaken.
- Shareholding composition - There are generally no prescribed shareholding requirements unless the applicant intends to carry out investment banking or undertake portfolio management in connection with fund management.
- Financial Resources - The applicant must fulfill minimum paid-up capital and shareholders' funds requirements.
- Competency of CMSRL holders - The applicants representatives must comply with prescribed qualification, experience, academic and licensing examination requirements.
- National interest - Whether the application will be in Malaysia's best interest, having regard to, among others, the expertise that can contribute to the Malaysian capital market and economy and the ability to develop strategic sectors will also be considered.

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

In order to be licensed, approved or registered, an applicant must submit an application letter together with the prescribed application forms (if any) and the supporting information to the CBM or the SC, as the case may be. The prescribed application forms must be completed for submission to the regulator depending on the nature of the regulated activities undertaken. The CBM and the SC may reject or approve the application, with or without conditions, at their discretion.

From the date of receipt of a completed application, the regulator will generally take approximately three to six months to review the application and provide a response to such application.

Note that as a matter of policy, the MOF does not generally grant new licenses to operate a banking business at present. That said, BNM introduced a licensing framework for digital banks and indicated that it might issue up to five digital bank licenses. Eligible interested persons were

required to submit an application for a digital bank license to BNM by 30 June 2021.

Moreover, financial institutions and fintech companies that are seeking to provide services (whether on their own or in collaboration with financial institutions) that are or are likely to be regulated by CBM may submit an application to participate in the Financial Technology Regulatory Sandbox ("Sandbox"). Only genuinely innovative products with clear potential will be accepted into the Sandbox.

## 7. What financial services passporting arrangements does Malaysia have with other jurisdictions?

As part of the initiative of the ASEAN Capital Markets Forum (ACMF) to facilitate the mobility of professionals in carrying out investment advice activities among ASEAN countries, professionals may apply for an ACMF Pass to be a Recognized Representative under the ASEAN Capital Market Professional Mobility Framework.

An individual licensed, recognized, approved or authorized by their home regulator in a Recognized ACMF member country (i.e., Thailand, Singapore and the Philippines) may apply to undertake a regulated activity, including but not limited to "investment advice" under the CMSA in Malaysia, provided that the individual satisfies the relevant criteria stipulated by the SC.

As the ACMF Pass is country-specific, an individual needs to apply for an ACMF Pass at each Recognized ACMF member country if they wish to undertake the regulated activities specified in the framework.

However, there is currently no means for a Malaysian licensed, approved or registered person to passport into the European Economic Area member states.

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# Mexico

## 1. Who regulates banking and financial services in Mexico?

Mexico has six regulators responsible for the authorization and supervision of banks, insurers and other financial institutions. The regulators, and the allocation of their responsibilities, are as follows:

- Ministry of Treasury and Public Finance (*Secretaría de Hacienda y Crédito Público* or SHCP): It is responsible for designing and conducting the policies of the federal government of Mexico on financial, tax, expenses, income and public debt. Within its responsibilities is the regulation of the organization and operation of banks and development banks, as well as the issuance of rules applicable to representative offices of foreign financial entities and the establishment of credit institutions and commercial bank affiliates.
- Additionally, the SHCP, through the Financial Intelligence Unit (Unidad de Inteligencia Financiera), is in charge of regulating banks and other financial entities in connection with anti-money laundering matters (however, compliance with these regulations is within the scope of authority of the CNBV, as such term is defined below).
- National Banking and Securities Commission (Comisión Nacional Bancaria y de Valores or CNBV): It is an agency ascribed to the SHCP. Within its several functions, the CNBV is responsible for overseeing and regulating the organization, operation and regulatory compliance of banks, sociedades financieras de objeto múltiple (SOFOMs) and financial technology institutions.
- National Insurance and Bonding Commission (Comisión Nacional de Seguros y Fianzas or CNSF): It is responsible for the operation, organization and supervision of activities of insurance and bonding companies. It also acts as an advisor to the SHCP in all matters concerning insurance and bonding activities.
- Central Bank of Mexico (Banco de México or Banxico): It is, by constitutional mandate, the government's advisor in matters concerning economic and financial policy. Its principal function is to provide domestic currency to the Mexican economy, and its main priority is to ensure the stability of the domestic currency's purchasing power. It also aims to promote both the sound development of the financial system and the optimal functioning of the payment systems. Its responsibilities include the issuance of specific rules for certain banking and financial operations, as well as regulation and oversight of the services and operations performed by credit institutions.
- Institute for the Protection of Banking Savings (Instituto para la Protección al Ahorro Bancario or IPAB): It is a decentralized entity responsible for the administration of the system for the protection of banking savings (insurance

of deposits) of the general public. Therefore, it assumes and pays, on a subsidiary basis, the secured obligations (i.e., deposits, loans and credits) undertaken by credit institutions. It also undertakes obligations and funds programs for the benefit of credit institutions and companies in which the IPAB participates. The IPAB acts as the liquidator of banks in Mexico.

- National Commission for the Protection of Users of Financial Services (Comisión Nacional para la Protección y Defensa de los Usuarios de los Servicios Financieros or CONDUSEF): It is responsible for the protection and defense of users of the services provided by banks and other financial institutions. In this respect, CONDUSEF reviews queries and complaints of users of financial services, conducts conciliatory and arbitration proceedings on disputes among users and financial institutions, and serves as legal advisor of users of financial services in the event of litigation against financial institutions.

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

In Mexico, all laws are drafted, discussed and approved by the legislative branch of government (Mexican Congress) and issued and published by the Federal Official Gazette (DOF) executive branch. Meanwhile, the SHCP, Banxico, the CNBV, the CNSF and the IPAB are the governmental entities in charge of issuing secondary and delegated legislation that provides specific financial rules, guidelines and regulations to establish the legal framework for each financial activity. The federal government has issued a number of structural reforms in order to modernize the legal framework of the main economic industries in Mexico in order to adapt to global standards. In this regard, the Financial Reform was published in the DOF on 10 January 2014. The purpose of the Financial Reform is to allow the Mexican banking and financial sectors to support Mexico's economic growth by increasing competition within the financial sector obtaining lower costs, better services and wider coverage of the credit facilities in Mexico. The Financial Reform impacted the main framework laws in the Mexican financial sector, including reforms to the banking, financial services and insurance industries.

The principal laws governing the financial sector in Mexico are as follows:

- The Credit Institutions Law (*Ley de Instituciones de Crédito*) which, among others, sets forth the general framework governing credit institutions (*instituciones de crédito*) including their incorporation and authorization,



governance, ownership, mergers, spin-offs, business activities, insolvency and resolution, and which also establishes the scope of authority of the different governmental entities that regulate and supervise banks and their activities

- The Bank Savings Protection Law (*Ley de Protección al Ahorro Bancario*), which governs the bank savings protection system
- The Financial Services User Protection and Defense Law (*Ley de Protección y Defensa al Usuario de Servicios Financieros*), which sets forth the general framework for the protection and defense of financial service users
- The Insurance and Bonding Companies Law (*Ley de Instituciones de Seguros y de Fianzas*), which focuses on the regulatory aspects of insurers, reinsurers and bonding companies
- The Law that regulates Financial Technology Institutions (*Ley para regular las Instituciones de Tecnología Financiera*), covers financial technology institutions in Mexico, such as crowdfunding institutions, institutions engaged in electronic fund payments and sandboxes regime.

With respect to anti-money laundering laws and regulations, there are two general regulatory frameworks — the AML Law for Financial Entities, which is applicable to financial institutions<sup>1</sup> (i.e., banks, non-bank banks, warehouses, money transmitters, investment companies, credit unions, Fintech Entities<sup>2</sup>, etc.). Secondly, the Federal Law for the Prevention and Identification of Transactions with Funds from Illegal Sources, otherwise known as the AML Law, which regulates individuals or entities engaged in non-financial “vulnerable activities.” The purpose of the regulation is to protect the financial system and the national economy by establishing measures and procedures to prevent and detect acts or operations involving illegal resources.

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

Mexico regulates a broad range of activities, including the following:

- Receiving deposits by credit institutions and foreign financial entities: This covers typical retail banking activities involving the operation of current and deposit accounts.
- Accepting loans and credits by credit institutions
- Issuing electronic money on foreign currency: Electronic money is a prepaid electronic payment product in the foreign currency that can be card- or account-based.
- Performing payment services: This covers a broad range of activities involving matters such as money remittance, card issuance, acquisition of card transactions, issuance of checks, and the operation of payment accounts.
- Consumer lending
- Carrying out insurance and bonding activities (effecting and carrying out contracts of insurance and bonds)
- Investment advisory services (engaging in a habitual and professional manner in the rendering of portfolio management and investment advisory)
- Managing financial intermediaries trading in investments securities: Trading in securities and other investments as principal or as agent; this covers brokers as well as most firms engaged in proprietary trading.

- Arranging transactions in investments: This activity covers the role of intermediaries in investment transactions.
- Facilitating insurance activities (insurance brokerage activities)
- Providing investment management: Managing investments on behalf of another person is a regulated activity.
- Providing custodial services of cash and securities
- Entities engaged in crowdfunding activities.
- E-money entities that will issue, manage, transfer and redeem e-money through electronic applications, interfaces, websites or any other electronic or digital means of communication Electronic Payment Institution (EPI)

There is still no regulation in Mexico that establishes the obligation to request authorization from a government agency to operate with virtual assets. However, in accordance with the Law that Regulates Financial Technology Institutions, Banxico will publish a list of the virtual assets accepted in Mexico. Once the list is published, and if an entity wants to operate with any of the virtual assets contained in the list, it must request and obtain authorization from the CNBV to operate as an EPI. Moreover, engaging in virtual assets is considered a “vulnerable activity,” and as such certain obligations related to money laundering under the AML Law will apply.

### 4. How do Mexico’s licensing requirements apply to cross-border business into Mexico?

Mexican law is territorial and thus, all transactions/business done within Mexican territory are subject to Mexican law.

If a firm outside Mexico deals with a client or a counterparty located in Mexico those activities will typically be subject to Mexican laws and regulations. The service provider will need to consider whether they are triggering a Mexican licensing obligation and complying with Mexican marketing rules.

Mexican financial laws and regulations prohibit, in general, non-licensed financial institutions engaging in any solicitation activities tending to or promoting the offering of financial services or products within Mexico. Meetings with prospective clients in Mexico, cold calls to Mexican residents, distribution of promotional materials, and the organization of seminars and presentations in Mexico with the purpose of selling the products or services would be considered as solicitation activities by Mexican authorities.

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

In general, governmental authorization must be secured in order to become authorized.

#### Banking and credit activities

The Mexican Law of Credit Institutions (*Ley de Instituciones de Crédito* or LIC) provides that

<sup>1</sup> Please bear in mind that within the AML Regulation for Financial Entities, the SHCP has issued specific regulation per type of financial institution.

<sup>2</sup> According to the Fintech Law, fintech entities are: a) crowdfunding institutions (*instituciones de financiamiento colectivo*); and electronic funds payments institutions (*instituciones de fondos de pago electrónico*).





only Mexican banks authorized by the federal government, through the CNBV by means of the previous resolution of its governing board and the favorable opinion of Banxico, are authorized to engage in banking and credit activities in Mexico. This authorization is non-transferable.

In general, Mexican financial laws and regulations prohibit foreign financial institutions from engaging in solicitation activities of any form, from obtaining funds from the public, whether in the form of bank deposits, securities, or through mutual funds and from offering offshore investments to the public in Mexico.

#### **Representative office of foreign financial institutions**

Article 7 of the LIC provides that the CNBV, by means of the previous resolution of its governing board, is entitled to authorize foreign financial entities to establish a representative office in the national territory. This type of office shall not carry out any financial intermediation activity in the national market that requires authorization from the federal government and it cannot participate, directly or through a third party, in transactions to receive funds from the public, either for themselves or for a third party.

However, such representative offices are allowed to provide, upon their clients' request, information regarding transactions performed by the foreign financial entity in its country of origin, on the understanding that such representative offices cannot disseminate publicity or advertise to the general public regarding passive transactions.

#### **Securities brokerage houses and securities brokerage activities**

The Mexican Securities Market Law (Ley del Mercado de Valores or LMV) states that to operate as a securities brokerage house, the CNBV must grant its authorization by means of the previous resolution of its governing board.

Pursuant to Article 113 of the LMV, financial entities authorized to conduct securities brokerage activities in Mexico are duly licensed broker/dealers, banks, mutual fund managing companies (sociedades operadoras de sociedades de inversión), pension fund managers, and distributors of shares issued by mutual funds (sociedades distribuidoras de acciones de sociedades de inversión).

No other individuals or entities are authorized under Mexican law to engage in solicitation activities or brokerage activities within Mexican territory, except in certain specific cases (i.e., private offering of certain securities).

#### **Investment advisory services**

The rendering of investment advisory services in Mexico is also governed by the LMV, which sets forth under its Article 225 that investment advisors may engage in the habitual and professional rendering of the following securities services:

- a. Portfolio management:** making investment decisions on behalf of third parties
- b. Investment advisory:** conducting analysis and issuing investment recommendations

The foregoing services are not deemed securities brokerage activities.

Only Mexican corporations may act as investment advisors and they must be registered with the CNBV.

#### **Investment funds**

Pursuant to the Mexican Investment Funds Law (Ley de Fondos de Inversión or LFI), prior authorization of the CNBV (no previous resolution of its governing board) is required for the incorporation and operation of investment funds, which must be organized as Mexican stock companies (sociedades anónimas).

#### **Organization of management, distributor and appraisal companies**

Pursuant to Article 33 of the LFI, the prior authorization of the CNBV is required for the incorporation and operation of the following entities, all of which must be organized as Mexican stock companies:

- a.** Management companies of investment companies (sociedades operadoras de fondos de inversión), which provide asset management services to investment funds
- b.** Distributor companies of investment fund shares (sociedades distribuidoras de acciones de fondos de inversión), which engage in promotional, advisory, purchase and sale services to the investors in connection with the purchase of investment fund shares
- c.** Appraisal companies of investment fund shares (sociedades valuadoras de acciones de fondos de inversión), which determine the price of investment fund shares

#### **Establishment of a Mexican insurer**

Pursuant to the Insurance Law (Ley de Instituciones de Seguros y Fianzas), to establish a Mexican insurer, authorization from the federal government must be obtained through the CNBV by means of the previous resolution of its governing board.

#### **Establishment of an insurance broker**

The incorporation and operation of insurance brokers in Mexico require the obtainment of specific authorization from the CNSF, which is non-transferable. The CNSF is entitled to revoke the authorization granted to insurance brokers or suspend said authorization for a period of up to two years in case of violation or failure to comply with the provisions of the Insurance Law, the regulations, or circulars issued by the CNSF.

Only duly authorized, Mexican insurance brokers or intermediaries incorporated pursuant to the Insurance Law are permitted to offer, within national territory, insurance products issued by Mexican insurers. Thus, no individual or entity is permitted to offer or intermediate within national territory in the sale of insurance products issued by foreign insurance companies.

#### **Establishment of an EPI and/or crowdfunding institutions (jointly referred to as FTIs)**

With the prior approval of the Interinstitutional Committee (composed of two members of the CNBV, two members of Banxico, and two members of the SHCP), FTIs must obtain authorization from the CNBV in order to operate in Mexico.

FTIs must provide, among other requirements, the following information to the CNBV as part of their authorization process: (i) draft by-laws; (ii) business plan; (iii) corporate governance rules; (iv) account segregation policies; (v) risk disclosure policies; (vi) anti-money laundering manual; (vii) information of the shareholders that directly or indirectly will have participation in the FTI; (viii) Appointment of Compliance Officer and its certification issued by the CNBV; (ix) Appointment of IT Compliance Officer; (x) Operational Manual; Internal; (xi) Manual for the Risks Administration; and (xii) Manual for the Use of Electronic Media or Channels of Instruction.

Once the application is submitted, the CNBV may provide comments to the application, and as the case may be, changes must be implemented. Once the fintech authorization has been obtained from



the CNBV, additional steps must be followed, such as: (i) request and obtain from the CNBV the necessary codes for electronic filings reports; and (ii) coordinate its registration before the different registries of the CONDUSEF, such as the Financial Services Providers Registry (SIPRES), the Registry of Commissions (RECO), the Registry of Specialized Units (REUNE), the Financial Institutions Bureau (Buró de Entidades Financieras), and the Adhesion Contract Registry (RECA).

Once the above steps are completed, FTI will be duly authorized and ready to operate from a regulatory perspective.

### Sandbox

Fintech Law provides for the regulation of a mechanism based on UK regulatory sandboxes, which grants a trial period for innovative companies to operate and provide new technology financial services to a limited number of clients within a certain geographic area and subject to the prior approval of the government authority whose rules will be affected by the innovative model (i.e., the CNBV for the banking industry rules). During this period, which is limited to an initial term of up to two years and may be renewed for an additional year, innovative companies will be able to implement their business models and innovations, with the understanding that they will also be preparing to meet all the necessary requirements to obtain a permanent authorization to operate.

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

To obtain authorization, an applicant must undergo a formal process, which involves completing required application forms and submitting supporting information.

In relation to timing, in most cases, the regulator will have three to six months from receipt of a completed application to determine whether or not to approve the application.

The particular forms that must be completed for submission to the corresponding regulator will depend on the regulated activities nature.

In general terms, regulators request the following information:

- Draft bylaws
- Information of the shareholders
- Information of relevant officers
- Operational plan
- Manual of conduct
- Anti-Money Laundering Manual
- Financial viability study
- In the case of banks, a deposit in guarantee, and in the case of FTIs, a minimum capital must be included as equity.

## 7. What financial services “passporting” arrangements does Mexico have with other jurisdictions?

Mexico does not have any financial services “passporting” arrangements with any other country.

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# Netherlands

## 1. Who regulates banking and financial services in the Netherlands?

Like certain other EU countries, financial supervision in the Netherlands is based on the so-called twin peaks model. The first peak is formed by prudential supervision consisting of supervising the liquidity and solidity of financial companies. This supervision is exercised by the Dutch Central Bank (*“De Nederlandsche Bank or DNB”*). The DNB carries out its supervision of banks as an ancillary supervisor to the European Central Bank (ECB). As supervisors, the DNB’s and the ECB’s aim is to ensure the solidity of the Dutch financial system as a whole by, for example, regulating access to financial markets and supervising compliance with capital requirements.

The second peak is formed by market conduct supervision, which supervision is exercised by the Netherlands Authority for the Financial Markets (*“Autoriteit Financiële Markten or AFM”*). Market conduct supervision is aimed at regulating the way in which market participants conduct their operations. The AFM aims to promote orderly and transparent market processes, proper treatment of consumers and fair relationships between financial undertakings.

These twin peaks also correlate with what is generally recognized as the functions of financial supervision: (i) systemic supervision; (ii) commercial supervision; and (iii) conduct supervision. As a result, responsibilities are not centralized but allocated between the different supervisors:

- a. The DNB regulates banks, insurance companies and companies active in the payment and clearing industry. It does so by regulating market access through the provision of licenses — except for banks requiring a license from the ECB — and various other systemic and prudential tasks, such as supervising compliance with capital requirements and granting approval to certain take-overs.
- b. The AFM supervises market conduct for all financial undertakings and provides licenses for companies engaging in various activities, such as offering financial services, providing investment services and managing regulated investment funds. The AFM is also responsible for supervising and enforcing the rules and regulations surrounding transparency, market abuse and prospectus supervision.
- c. The ECB, in cooperation with the DNB, is the Eurozone bank supervisor under the Single Supervisory Mechanism. The ECB provides licenses for Dutch banks and is directly responsible for the prudential and systemic supervision of large Dutch banks.

The European Supervisory Authorities (ESAs) — the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pension Schemes Authority — have limited supervisory powers in the Netherlands. However, they play an important role in drafting and issuing technical standards and preparing guidance relating to various European directives and regulations. The ESAs aim to accomplish efficient and harmonized financial supervision across the EU.

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

Much of the regulatory laws in the Netherlands are derived from European directives and regulations. European regulations are directly applicable in the Netherlands and do not require national implementation. European directives generally do require national implementation. As directives sometimes only set certain minimum or maximum standards — and often offer optional provisions to be implemented at a member state’s own discretion — the laws implementing a particular directive can vary widely across EU member states.

The introduction of the Dutch functional model of supervision in 2002 (described in question 1 above) brought with it an extensive reorganization of Dutch financial regulations. This eventually led to the adoption of the Dutch Financial Supervision Act (*“Wet op het financieel toezicht or DFSA”*) on 1 January 2007. The DFSA (including lower regulations and decrees) is the primary source of financial regulations in the Netherlands.

Aside from the DFSA, various other laws contain financial regulatory provisions. For example, pension funds are also subject to the requirements set forth in the Dutch Pension Act (*“Pensioenwet”*) and the DFSA. Another example is trust offices, which must comply with the Dutch Act on the Supervision of Trust Offices (*“Wet toezicht trustkantoren”*).

In addition, the provisions of the Fourth ((EU) 2015/849) and Fifth ((EU) 2018/843) Anti-Money Laundering Directives have been implemented in the Dutch Act on the prevention of money laundering and terrorism financing (*“Wet ter voorkoming van witwassen en financieren terrorisme or Wwft”*). The Wwft imposes certain know-your-customer requirements relevant to most financial undertakings operating in the Netherlands.

### 3. What types of activities require a license in the Netherlands?

A broad range of financial activities are subject to supervision in the Netherlands. Many undertakings operating in the financial sector require either a license or are under an obligation to notify the relevant supervisor of their intent to carry out their business in the Netherlands. These undertakings include the following:

- a. Banks:** Banks (or more specifically, credit institutions) are entities whose business is to receive repayable funds, beyond a restricted circle, from parties other than professional market operators and which grant credits for their own account. There is a general prohibition on accepting repayable funds (such as deposits) in the Netherlands without being appropriately licensed or otherwise authorized.
- b. Insurers:** This includes life, non-life, funeral expenses and benefits in kind insurers as well as reinsurers.
- c. Payment service providers:** Regulated payment services include a broad range of activities, such as executing payment transactions, money remittance, issuing and/or acquiring payment instruments, account information services and payment initiation services.
- d. Trust offices:** A trust office is a legal entity, partnership or natural person that provides one or more trust services on a commercial basis, including acting as director, providing an address or correspondence, acting as trustee, etc.
- e. Clearing institutions:** Clearing institutions settle transactions relating to financial instruments through a central counterparty, thereby guaranteeing the commitments of the traders on whose behalf they act.
- f. Electronic money institutions:** Electronic money institutions issue “electronic money” in exchange for legal currency. Electronic money is a prepaid electronic payment product, which can be card- or account-based and is represented as a balance in an electronic wallet or on a physical card.
- g. Pension funds:** “Ordinary” pension funds are required to notify the DNB of their establishment. “Premium” pension funds — a new form of pension administrator — are subject to licensing requirements and may operate on a cross-border basis.
- h. Money transactions offices:** This covers institutions that pursue the business of performing exchange transactions consisting of currency exchange transactions or the payment of notes and coins upon presentation of credit card or a check.
- 1.** Collective investment schemes and their managers: Collective investment schemes cover undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs). Regulations relating to AIFs and UCITS are mainly addressed to the fund’s manager, rather than the fund itself.
- i. Settlement agents:** Settlement agents provide services aimed at relaying requests that relate to the approval of payment orders, approving such orders on behalf of payment service providers, or certain particular netting services.
- j. Investment firms:** This includes undertakings offering investment advice, asset management services or execution- only services in relation to financial instrument trading. In addition, certain firms engaging in own account trading in financial instruments may also qualify as investment firms.
- k. Financial service providers:** “Financial service providers” refers to a broad range of

undertakings and includes undertakings that — for example — offer certain financial products, provide advisory services, or act as an intermediary.

Please note that in the Wwft, an additional registration requirement has been introduced for providers of crypto wallets and crypto exchange services. While this is not a license obligation, registration does require quite a detailed application form and requirements, including screening of (co)policyholders by the DNB.

### 4. How do the Netherlands’ licensing requirements apply to cross-border business into the Netherlands?

Dutch licensing requirements generally apply to firms that offer services or perform acts “in the Netherlands”. Offering services “in” the Netherlands also includes offering online services in a different EU member state through a Dutch company or through a Dutch branch of a company with its registered seat in a non-EU member state.

When services are provided to cross-border Dutch clients, it can be difficult to assess whether these services are being provided “in the Netherlands.”

As a rule of thumb, where Dutch clients are actively solicited by the foreign institution, that foreign institution will be subject to Dutch financial regulations. Specific territorial scope rules have been formulated for certain financial institutions, such as non-life insurance companies.

Dutch law recognizes the concept of reverse solicitation for certain financial institutions: if an undertaking enters into a business relationship with a Dutch client as a result of reverse solicitation, this generally will not trigger any Dutch licensing or authorization requirements. “Reverse solicitation” refers to the situation where a client decides to approach a foreign undertaking at its exclusive initiative, without being approached by that particular undertaking.

The reverse solicitation exemption only has a statutory basis (and requirements) for investment services (based on the MiFID II Directive (EU) 2014/65). For other financial services, Dutch regulators have issued very little guidance with regard to the exact scope of the reverse solicitation exemption. In general, it is clear though, that, the scope of the reverse solicitation exemption must be interpreted quite narrowly. Based on case law and the limited guidance available, a number of factors will help determine whether a foreign financial undertaking has actively marketed its services to Dutch clients. These include the following:

- a.** Not using disclaimers and/or selling restrictions (if applicable), or poorly enforcing them
- b.** Making use of media for promotional purposes that include the Netherlands in their coverage area
- c.** Using Dutch language on a website or in promotional and/or informational materials
- d.** Having Dutch customers referred to by an intermediary
- e.** Providing information on Dutch tax regimes
- f.** Directly addressing potential customers based in the Netherlands (for example, via email)
- g.** Referencing or providing information on Dutch law

Please note that reverse solicitation has been explicitly recognized to be applicable to investment firms





(based on MiFID II as set out above) and alternative investment fund managers. Reverse solicitation has not been recognized to apply to every category of financial undertaking. There is, therefore, some ambiguity as to whether other types of financial undertakings can rely on reverse solicitation.

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

The exact requirements to obtain authorization differ, depending on the type of undertaking. Most of the overlapping requirements can be grouped as follows:

- a. Integrity and suitability requirements:** Managing directors and supervisory board members of financial institutions must be trustworthy and suitable. Therefore, the relevant supervisor will screen potential candidates for integrity and suitability. Candidates will have to submit their personal details, diplomas, references and a curriculum vitae, as well as disclose possible antecedents ranging from criminal to tax law, and disclose certain qualified holdings.
- b. Ethical business operations requirements:** Financial undertakings are required to implement adequate policies to ensure ethical operational requirements, such as in relation to conflicts of interest, systemic risk, and the management of integrity risks.
- c. Sound business operations:** Business processes and risks have to be appropriately managed. Financial undertakings need to have a clear, balanced and adequate organizational structure, division of duties, powers and responsibilities. They need to keep adequate records, reporting lines and communications channels. Some types of financial undertakings are also required to have a certain number of natural persons as managing directors or supervisory board members.
- d. Outsourcing requirements:** The DFSA provides for a number of requirements relating to outsourcing.
- e. Minimum own funds, solvency and liquidity provisions.:** A number of financial undertakings, such as banks, insurers and investment firms, are subject to solvency and liquidity requirements.
- f. Anti-money laundering:** Most financial undertakings are required to implement policies and procedures to combat money laundering pertaining to, inter alia, client due diligence, reporting "unusual" transactions, and internal anti-money laundering compliance.

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

The application's actual process depends on a number of factors, such as the type of license or authorization being applied for. However, most application processes take the form set out below.

The application process starts with the submission of the relevant forms and other essential documents. When these have been received in good order, the relevant supervisor will evaluate the firm's compliance with the applicable requirements, as set out in question 5 above. In general, the DNB and the AFM have 13 weeks to decide on an application for a license. Different consideration periods may apply for specific licenses (for example, the AFM has 26 weeks to

decide on the application for a license as alternative investment fund manager). However, the actual consideration period depends on many factors, and this consideration period may be extended. This is often due to an inadequate or incomplete application, or due to the submitted documents giving rise to further information requests.

In addition to the relevant license application forms, the following forms and documents have to be submitted by most undertakings:

- a.** Forms, including supporting documents, regarding the suitability and integrity of managing directors and supervisory board members
- b.** A business plan that contains at least the names and titles of the employees, the way in which customers are solicited, potential cooperation agreements with other companies, remuneration policies, turnover for each financial product and/or service for the coming three years, and an overview of costs for the coming three years
- c.** A description of business processes, including governance manuals, compliance manuals, internal controls, anti-money laundering policies, remuneration policies, etc.
- d.** An organizational chart that includes the majority shareholders and the names of all managing directors
- e.** A recent extract from the trade register
- f.** A form disclosing that all day-to-day policymakers and/or supervisors who are not subject to the aforementioned suitability and integrity requirements have taken a "banker's oath" or will do so within three months

## 7. What financial services "passporting" arrangements does the Netherlands have with other jurisdictions?

Most undertakings holding a Dutch license may rely on the European "passporting" regime to provide their services within the EU. This passport allows the undertaking to provide cross-border services and/or establish a branch in an EU member state without having to apply for a separate license. These firms must generally notify the relevant Dutch supervisor of their intention to provide their services in that particular member state.

Undertakings with a license under the DFSA that is not based on harmonized EU legislation generally do not have passport rights. For example, financial service providers that have a license for providing consumer credit typically cannot passport such a license to other EU member states.



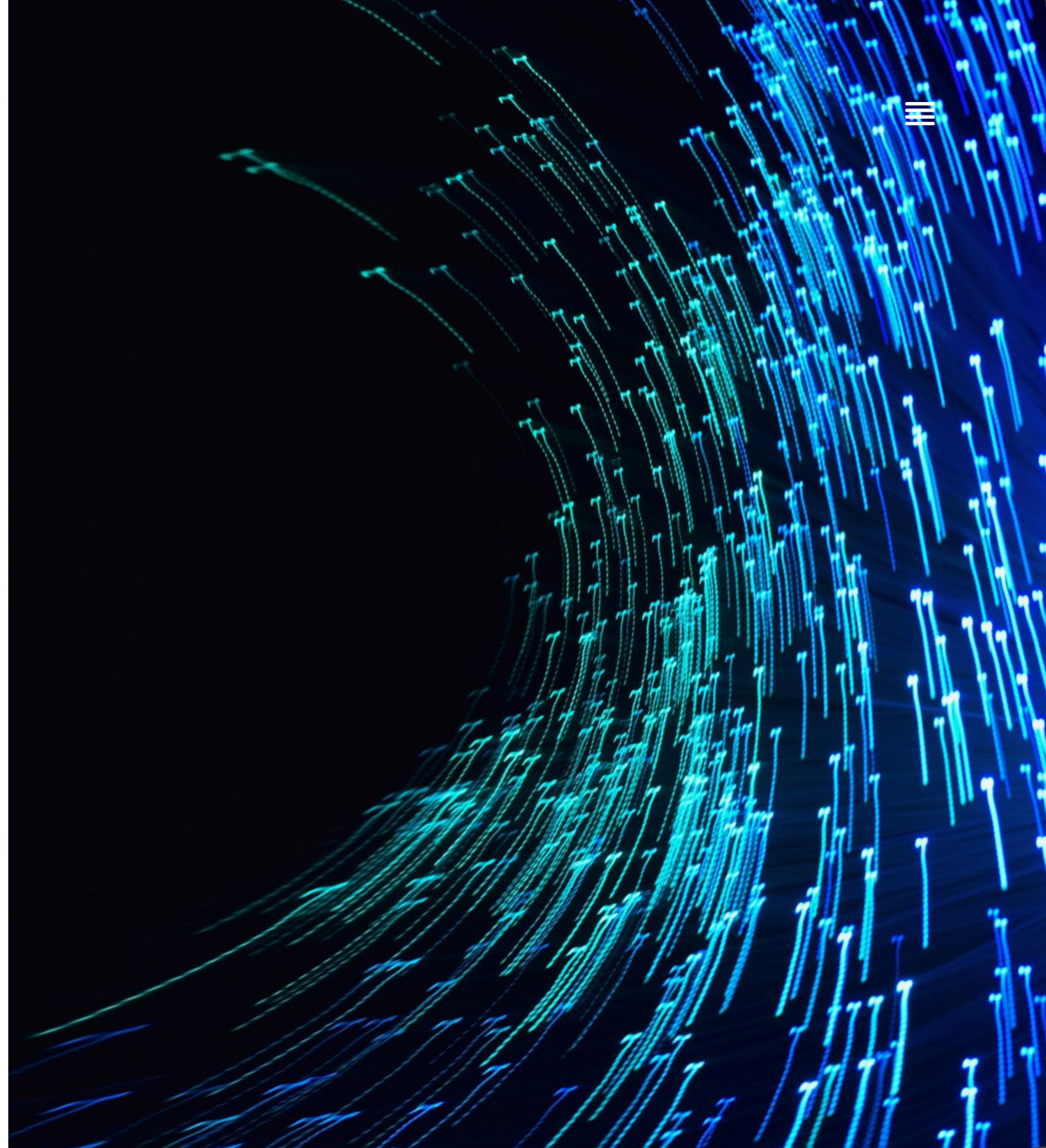
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# Peru

## 1. Who regulates banking and financial services in Peru?

The Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones (SBS) is responsible for regulating all financial institutions (including commercial banks and investment banks), insurance companies and pension funds administrators in Peru.

The SBS is also responsible for the implementation and enforcement of the Ley General del Sistema Financiero y del Sistema de Seguros y Orgánica de la Superintendencia de Banca y Seguros ("Peruvian Banking Law") and the rules and regulations enacted thereunder.

The primary purposes of the SBS are the following:

- a.** Protecting the public interest
- b.** Safeguarding the financial stability of the institutions over which it has authority
- c.** Penalizing violations of the Peruvian Banking Law and the rules and regulations thereunder
- d.** Leading and supervising the anti-money laundering system

The responsibilities of the SBS include the following:

- a.** Reviewing and approving, with the assistance of the Peruvian Central Bank (Banco Central de Reserva del Perú), the establishment, organization and operations of the institutions it regulates and their subsidiaries
- b.** Overseeing mergers, dissolutions and reorganization of banks, financial institutions and insurance companies
- c.** Supervising financial, insurance and related companies from which information on an individual or consolidated basis is required through changes in ownership and management control
- d.** Reviewing the bylaws and related amendments of these companies
- e.** Setting forth criteria governing the transfer of bank shares, when permitted by law, valuing assets and liabilities for purposes of establishing minimum capital requirements
- f.** Controlling the Bank Risk Assessment Center (Central de Riesgos), to which all regulated financial institutions are legally required to provide information regarding all business and individuals with whom they deal, regardless of the credit risk (The information provided is made available to all banks and other

regulated institutions to allow them to monitor individual borrowers' overall exposure to Peru's financial system.)

- g.** Supervising the anti-money laundering system through the Unidad de Inteligencia Financiera - Perú

The SBS enforces the Peruvian Banking Law through periodic resolutions. The Peruvian Banking Law provides for strict loan loss reserve standards, aligns asset risk weighting with the Basel Committee on Banking Supervision guidelines, and includes the supervision of holding companies of financial institutions by the SBS.

The SBS also conducts an annual on-site examination to ensure compliance with the Peruvian Banking Law and the rules and regulations thereunder.

The SBS has the power to impose administrative sanctions on institutions subject to its supervision, including their directors and employees, for any violation of the Peruvian financial system rules. Sanctions vary, from monetary fines to revoking licenses. The SBS may also sanction members of the board and other officers of the institutions subject to its supervision for breaching SBS regulations.

Note that the offer, sale, marketing and transfer of securities in Peru fall under the scope of the Ley del Mercado de Valores and is subject to the regulatory authority of the Superintendencia del Mercado de Valores.

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

The main body of law that regulates banking activities in Peru is the Peruvian Banking Law and the regulations enacted by the SBS. The Peruvian Banking Law establishes the regulatory and supervisory framework for companies that operate in the Peruvian financial and insurance system and those that carry out activities linked or complementary to the corporate purpose of said companies.

There is also a large volume of secondary and delegated legislation applicable to financial institutions, insurance companies and pension funds.

Banking regulations on capital adequacy in Peru take into account the recommendations of the Basel Committee on Banking Supervision. The SBS has adopted the principles and guidelines of Basel II and is adopting Basel III recommendations.



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

According to the Peruvian Banking Law, any person conducting intermediation banking activities within Peruvian territory requires the prior authorization of the SBS. Therefore, from a regulatory perspective, financial entities not authorized to operate in Peru by the SBS are not allowed by Peruvian law to perform financial intermediation. The term “financial intermediation” is described as “the collection of funds, in any way, and its placement through any of the transactions allowed by the law,” and the SBS has discretion in the interpretation of the scope of this provision. Article 11 of the Peruvian Banking Law sets forth a series of commercial activities that may only be conducted in Peru by entities previously authorized by the SBS, such as engaging in the business of financial system entities, and primarily, collecting or receiving money in a habitual or any other form from third parties as deposits, and then allocating in a habitual form such resources as loans, investments or allotments of funds, under any contractual arrangement. Once authorized, entities performing these activities will be subject to the SBSs supervision. Likewise, companies wishing to offer insurance in Peru must obtain prior permission from the SBS.

In addition, no person may, without prior authorization from the SBS, advertise or publicize announcements asserting or suggesting the execution of transactions or services that require a license in Peru or publicize services in such way that may lead someone to believe that it is licensed to offer products and services that may only be carried out with a license from the SBS.

The following activities are reserved for entities licensed by the SBS:

- Activities similar to the corporate purpose of licensed entities of the Peruvian financial system, and in particular, regularly receiving money from the public, by way of deposits, loans or any other form, and regularly using those funds for loans, investments or to somehow provide availability of such funds, under any contractual form
- Advertising or publishing announcements asserting or suggesting the execution of transactions or services reserved for licensed entities of the Peruvian financial system
- Using in its corporate name, in business forms or in any other means of publicity, any term that may lead someone to believe that it is licensed to offer products and services that may only be carried out with a license from the SBS

Accordingly, any action similar to those described above that is being pursued without a license from the SBS may be considered “Illegal Banking.” Pursuant to the Peruvian Banking Law, a legal presumption of engaging in Illegal Banking activities will apply to a person or entity that, from a fixed place of business, invites the public to deposit their funds under any agreement or contractual arrangement, or in general makes any publicity thereof, without a license from the SBS.

Nevertheless, there are no restrictions on granting loans to Peruvian residents. Also, foreign financial institutions may serve Peruvian clients in the normal course, provided such activities are conducted outside of Peru.

The scope of the Peruvian Banking Law and the regulations enacted thereunder is limited to banking activities conducted within Peruvian territory. Any banking activity conducted outside Peru targeted towards clients or potential clients in Peru does not require a license. As a result, a foreign financial institution may serve clients in Peru in the normal course, provided such activities are conducted outside of Peru. If there are activities to be conducted by the foreign

financial institution in Peru, such activities should be strictly limited to providing financial advisory services, referring clients or prospects to specific employees abroad, or distribution of marketing materials. Market practice is to conduct such activities on a one-on-one basis.

As mentioned, the foreign financial institution may not provide financial advisory services if such services are conducted: (i) for the purpose of receiving or depositing money from the public; or (ii) as a means of selling its products. As a result, the foreign financial institution may freely provide financial advisory activities in Peru on a one-on-one basis, provided such activities do not violate or contravene items (i) and (ii) above.

Regarding activities conducted by Fintech companies, there are currently no special laws and regulations in place designed for the Fintech sector, and such companies are not subject to regulation provided they do not perform activities for which a license is required. Activities that may require a license are those referred to as financial leasing (*arrendamiento financiero*) and factoring provided companies performing such activities met certain requirements provided in the regulations enacted by the SBS. In addition, Fintech companies, depending on their activity, shall register with the SBS as provided in anti-money laundering and counter-terrorism financing regulations.

With respect to crowdfunding activities, such activities can be performed by companies that have obtained a license from the securities market regulator (*Superintendencia del Mercado de Valores* or SMV) to act as a *Sociedad Administradora de Plataforma de Financiamiento Participativo Financiero* or other companies licensed and supervised by the SMV or the SBS.

Peru has not yet created a specific legal and regulatory regime for cryptocurrencies or other cryptoassets. To date, there is no specific legal regulation for its registration and supervision. However, the SMV has issued press releases warning the general public of the existence of Initial Coin Offerings, pointing out that the companies that perform these offerings are not supervised by any governmental entity and that investors should become adequately informed regarding the risks involved before investing their money in such assets. Also, the SBS has issued bulletins referring to multi-scheme fraud cases using cryptocurrencies. Also, the Peruvian Central Bank published an article on its website referring to the risks related to cryptocurrencies.

However, in the press releases, bulletins and articles published by Peruvian regulators, such entities have pointed out that there are no specific regulations in Peru that cover the offer and/or promotion of cryptocurrencies or tokens, so companies that make such offers and/or promotions are not under their supervision. Such entities have only warned the public through communications and other mass media about the risks of investing in unsupervised assets, such as the aforementioned cryptocurrencies, which have been used on some occasions for crimes of fraud.

### 4. How do Peru’s licensing requirements apply to cross-border business into Peru?

Currently, no rule in Peru prohibits or restricts the granting of credit by persons not domiciled in the country. Accordingly, both the non-domiciled lender and the borrower have the flexibility to agree on the terms and conditions under which credit will be granted.

However, please note that there is an important difference between lending activities carried





out by licensed banks and those carried out by any other entities or individuals (including foreign banks and multilateral development institutions not authorized by the SBS). Such difference is related to interest rates. Any lending activities performed by individuals and entities not authorized by the SBS to carry out banking activities in Peru, pursuant to credit agreements under Peruvian law, are subject to an interest rate ceiling that is established by the Peruvian Central Bank. Entities licensed by the SBS to engage in banking activities may freely establish interest rates without any regulatory ceiling.

In credit agreements, the parties may agree on the choice of foreign laws. They may agree to refer to a foreign court or arbitration, whether local or international, to settle disputes between them.

With regard to income tax applicable to financing granted by legal persons not domiciled in Peru, the interest payable on foreign loans is subject to a withholding tax at a rate of 4.99%, as long as they comply with the requirements specified in the income tax law. In case of non compliance with the requirements, or if economic ties exist between the parties, interest payments will be subject to a withholding tax rate of 30%.

For purposes of the Peruvian tax law, expenses, commissions, bonuses and any other additional amount paid to foreign beneficiaries beyond the interest agreed will be considered as interest.

In addition, interest payments to non-banking, non-financial or non-credit entities will be subject to VAT at a rate of 18%.

As for guarantees to ensure compliance with the obligations assumed by the borrower, the parties may agree on the creation of personal and real guarantees, such as sureties, endorsements, mortgages, securities, guarantees on cash flows, mortgages on infrastructure concessions, and letters of credit. It is also possible to provide more complex guarantees, as in the case of trusts.

Foreign investors can establish a bank, a branch or a representative office in Peru. Banks must be established under the form of a corporation or as branches of foreign banks.

Representative offices are established by foreign financial companies to do business with companies of a similar nature operating in Peru, in order to facilitate foreign trade and provide foreign financing and other services. Representatives of financial companies cannot raise funds from the public or perform operations and provide services specific to their principal's activity.

Foreign investors may establish an insurance company in Peru or designate an intermediary, insurance or reinsurance broker. Insurance companies must be organized under the form of a corporation and may freely determine the terms and conditions of insurance stipulated in their policies, fees and commissions.

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

In order to obtain a full license as a financial entity, a licensing process that comprises two successive approval procedures must be followed:

### Organization licensing

The first approval procedure is organization licensing, which comprises a screening of the shareholders and organizers of the financial entity to be incorporated, as well as an analysis

of the business plan of such financial entity. This screening and analysis is carried out through the review of a series of documents by the SBS and the Peruvian Central Bank, and through meetings with the SBS. The first approval procedure ends with granting the organization license by the SBS, which authorizes the beginning of the second approval procedure.

### Operating licensing

The second approval procedure, which ends in granting the business license by the SBS, focuses on the operational aspects of the future financial entity. During this stage, the SBS will evaluate: (i) the operational capacity of the future financial entity; and (ii) the credentials of the directors and principal officers. Accordingly, before filing, the future financial entity should have retained its principal officers, implemented the necessary infrastructure, and completed the policy and operational manuals. Once the business license has been obtained, the financial entity may start operating.

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

An applicant for authorization must complete a formal process, which involves completing required application forms and submitting supporting information. As described in Section 5 above, such process comprises two stages: (i) the organization licensing; and (ii) the operating licensing.

The procedure established by the Peruvian Banking Law to obtain an organization license takes approximately 220 calendar days to complete, pursuant to the following stages:

Organization License Procedure		
Stage	Requirement	Term
1st. Request	The organizers must file an organization license request.	
2nd. Publication	Publications (2) to inform the public regarding certain information about the future financial entity must be issued. Any interested person will have the right to object to the incorporation of the future financial entity.	Immediately after presenting the request for the organization license
3rd. SBS evaluation	If no one objects or objection is declared unjustified, the SBS will evaluate the organization's license request. For this, the SBS will meet with the organizers and officers of the future financial entity.	
4th. Central Bank evaluation	After the SBS finishes its evaluation, it will inform the Central Bank about the organization's license request.	Within 30 calendar days after being notified by the SBS
5th. Resolution	After receiving the Central Bank's opinion, the SBS will notify the organizers of the approval or denial of the organization's license request.  Along with the resolution of approval, the SBS will issue the organization license certificate. Within 90 calendar days after being notified of the Central Bank's opinion	Within 90 calendar days after being notified of the Central Bank's opinion



Organization License Procedure		
Stage	Requirement	Term
6th. Publication	The organization license certificate will be published.	Within 30 calendar days of the certificate's issuance

The procedure established by the Peruvian Banking Law to obtain the business license takes approximately 180 calendar days to complete, pursuant to the following stages:

Business License Procedure		
Stage	Requirement	Term
1st. Request	The organizers shall file a business license request with the SBS, containing all the documentation required.	
2nd. Evaluation	The SBS will evaluate the business license request.	
3rd. Resolution	The SBS will notify the organizers of the approval or denial of the organizations license request.  Along with the resolution of approval, the SBS will issue the business license certificate.	30 calendar days after the evaluation's conclusion
4th. Publication	Publication of the business license certificate	
5th. Listing of securities	The financial entity must list its equity shares on the Lima Stock Exchange (LSE) prior to commencing operations. This applies only to banks, financial companies (financieras) and financial leasing companies.	
6th. Commencement of operations	The company must initiate its operations, making this event public knowledge through a medium of mass communication.	Within three months after the issuance of the business license certificate

## 7. What financial services "passporting" arrangements does Peru have with other jurisdictions?

Together with Chile, Colombia and Mexico, Peru is a signatory to the Pacific Alliance, which is an initiative promoting regional economic and commercial integration. To date, however, there have been no financial services passporting arrangements implemented. Nevertheless, each member country must treat a foreign financial institution in the same way it regards a local financial institution for regulatory purposes.

In addition, Peru, together with Chile, Colombia and Mexico, have integrated their stock exchanges through the formation of the Latin America Integrated Market (MILA). Although the MILA has not been expressly contemplated in the Pacific Alliance Additional Protocol, country members of the Pacific Alliance have shown great interest and commitment to boost the MILA and tackle the main legal as well as operational challenges that may be undermining its development. In connection to MILA, some improvements have recently been made, as MILA countries have authorized the launch of secondary public offerings of securities (including equity and debt instruments) in all MILA countries, provided that the public offering has been previously registered or approved in one MILA country without the need to register it in another MILA country. In addition, recently drafted regulations published by the Peruvian Capital Markets Superintendency would allow the conduct of initial public offerings simultaneously in all MILA countries, but limiting the registration to one of the MILA countries.

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# Philippines

## 1. Who regulates banking and financial services in the Philippines?

The Bangko Sentral ng Pilipinas (BSP) (or the Philippine Central Bank) is the central monetary authority in charge of regulating money, banking and credit in the Philippines. The BSP is an independent government-owned corporation with the primary responsibility of supervising and regulating finance companies bank operations, non-bank financial institutions performing quasi-banking functions, and other institutions performing similar functions. The primary objective of the BSP is to promote and preserve monetary stability and the convertibility of the national currency (Philippine peso).

The BSP is governed by the Monetary Board, composed of seven members appointed by the president of the Philippines, with the governor as its chair. Through the Monetary Board, the BSP issues rules and regulations in the exercise of its regulatory powers and directs the management, operations and administration of the BSP.

Under the New Central Bank Act, the BSP performs the following functions, all of which relate to its status as the Philippines' central monetary authority:

- **Liquidity management:** The BSP formulates and implements monetary policy aimed at influencing money supply consistent with its primary objective to maintain price stability.
- **Currency issue:** The BSP has the exclusive power to issue the national currency. All notes and coins issued by the BSP are fully guaranteed by the government and are considered legal tender for all private and public debts.
- **Lender of last resort:** The BSP extends discounts, loans and advances to banking institutions for liquidity purposes.
- **Financial supervision:** The BSP supervises banks and exercises regulatory powers over non-bank institutions performing quasi-banking functions.
- **Management of foreign currency reserves:** The BSP seeks to maintain sufficient international reserves to meet any foreseeable net demands for foreign currencies in order to preserve the international stability and convertibility of the Philippine peso.
- **Determination of exchange rate policy:** The BSP determines the exchange rate policy of the Philippines. Currently, the BSP adheres to a market-oriented foreign exchange rate policy, principally to ensure orderly conditions in the market.

- **Other activities:** The BSP functions as the banker, financial advisor and official depository of the government, its political subdivisions and instrumentalities, and of government-owned and -controlled corporations.

The Philippine Deposit Insurance Corporation (PDIC) has the power to conduct examination of banks with the prior approval of the Monetary Board and within terms and conditions determined by law. All banks are obligated to insure deposit liabilities with the PDIC up to a maximum amount of PHP 500,000 or its foreign equivalent.

The Anti-Money Laundering Council has the power to conduct investigations of money laundering and other violations of Republic Act No. 9160 or the Anti-Money Laundering Act for the protection of the integrity and confidentiality of bank accounts and to prevent the Philippines from being used as money laundering site for the proceeds of any unlawful activity. It monitors and receives covered or suspicious transaction reports from covered institutions under the law, investigates suspicious transactions and covered transactions deemed suspicious after an investigation, applies before the Court of Appeals, ex parte, for the freezing of any monetary instrument/property alleged to be proceeds of any unlawful activity, and implements such measures as may be necessary and justified to counteract money laundering.

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

The Philippine main framework of regulatory laws is Republic Act No. 8791 ("**General Banking Law of 2000**" or GBL). The GBL sets the general standards and guidelines in banking and finance in the Philippines. It governs and defines the classification of banks (universal, commercial, thrift); the authority of the BSP; and the organization, management and administration of banks, quasi-banks and trust entities in the Philippines. The GBL also regulates deposits, loans and other banking operations, including foreign operations, conservatorship, cessation of banking business, and trust operations. Secondary and delegated legislation supplement and enhance the GBL's basic framework.

On the other hand, the Thrift Banks Act, the Rural Banks Act, the Philippine Cooperative Code and the Charter of Al-Amanah Islamic Investment Bank of the Philippines govern the general conduct of thrift banks, rural banks and cooperative banks on matters not covered by the GBL.



On a micro level, the BSP Manual of Regulations for Banks (MORB) is implementing the GBL law, which outlines the more specific rules and regulations that all financial institutions doing business in the Philippines should comply with. The MORB serves as a complete manual for local and foreign exchange transactions. The BSP periodically issues various regulations, circulars and guidelines to update and enhance the MORB and to be abreast with the market and economic developments.

Both the GBL and MORB provide guidance to general regulatory laws in the Philippines. Other banking laws are embodied in numerous presidential decrees and republic acts promulgated by the president.

### 3. What types of activities require a license in the Philippines?

No person or entity shall engage in banking operations or quasi-banking functions in the Philippines without authority from the BSP. A financial institution that has been given authority to engage in universal or commercial bank activities is also authorized to engage in quasi-banking activities.

The following banking or quasi-banking activities are regulated in the Philippines:

- **Maintaining adequate risk-based capital:** The Monetary Board prescribes the minimum ratio that the net worth of a bank must bear to its total risk assets, which may include contingent accounts. The minimum capital requirements of banks are found in the MORB.
- **Accepting demand deposits:** A bank other than a universal or commercial bank cannot accept or create demand deposits except upon prior approval of, and subject to such conditions and rules as may be prescribed by the Monetary Board.
- **Granting loans or credit accommodations:** Regulation covers credit exposure, use of loan proceeds, interest and other charges, and disclosure requirements in the grant of secured or unsecured loans. Among other guidelines, the BSP imposes the Single Borrower's Limit and regulates credit accommodations granted by banks to its directors, officers, stockholders and their related interests.
- **Issuing foreign letters of credit and pay/accept/negotiate import and export drafts/bills of exchange:** For non-universal or non-commercial banks, prior approval of the BSP is required before engaging in these activities.
- **Establishing a subsidiary, regional or operating headquarters, or local branch in the Philippines by a foreign bank:** No bank operating in the Philippines shall establish branches, extension offices or other banking offices, or transact business outside the premises of its duly authorized principal office or head office without the prior approval of the Monetary Board.
- **Selling or relocating banks, closing banks and conservatorships:** The BSP regulates and/or approves any change in ownership, location or status of a bank or any other financial institution.
- **Disclosing confidential information or credit data:** Philippine law promotes secrecy of bank deposits (both local and foreign), but subject to exceptions such as those contained in the Anti-Money Laundering Act.
- **Insuring deposits:** All banks and financial institutions are required to coordinate with the

Philippine Deposit Insurance Corporation in insuring its deposits.

- **Borrowing from the BSP or other agencies of the government:** There is an application procedure that must be followed when a BSP-registered bank or non-bank financial institution borrows (including emergency loans and advances) from the BSP or the government.
- **Foreign exchange transactions:** There are regulations for foreign exchange transactions including, among others, current accounts, deposits, forwards and swaps, foreign merchandise trade transactions (import and export), loans and guarantees, foreign investments, offshore banking, foreign currency deposit units and expanded foreign currency deposit units, and transactions with representative offices of foreign banks.
- **Reporting requirements:** Banks and financial institutions are required to regularly report certain transactions to the BSP. Minimum auditing standards must be complied with.

The BSP also regulates virtual asset service providers. Under BSP regulations, "virtual asset" refers to any type of digital unit that can be digitally traded, or transferred, and can be used for payment or investment purposes. BSP regulations cover virtual asset service providers or entities that offer services or engages in activities that provide facility for the transfer or exchange of virtual assets. A virtual asset provider must secure a Certificate of Authority to operate and register with the BSP.

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

Foreign exchange transactions by financial institutions domiciled in the Philippines (including subsidiaries, affiliates, branches and offshore banking units of foreign corporations) are regulated by the BSP. Some transactions require prior BSP approval, while other transactions need no approval but are subject to reporting requirements. The following are regulated and/or closely monitored by the BSP: (i) sales of foreign exchange; (ii) cross-border transfers of local and foreign currencies; (iii) buying and selling of gold; (iv) import trade transactions with banking transactions; (v) foreign and foreign currency loans; (vi) foreign investments; (vii) activities of offshore banking units (such as a foreign banking corporation that is duly authorized by the BSP to engage in banking transactions in foreign currencies involving the receipt of funds principally from external sources), representative offices and foreign currency deposit units (unit of a local bank or of a local branch of a foreign bank authorized by the BSP to engage in foreign-currency-denominated transactions) of foreign banks; and (viii) forwards, swaps and open foreign exchange positions of banks. The MORB and the Manual of Regulations on Foreign Exchange Transactions contain a complete general framework regarding the licensing requirements for these transactions.

Pursuant to its commitment and support of the global fight against money laundering, the BSP closely monitors cross-border transfers of local and foreign currencies. All commercial, universal and thrift banks are required to submit a quarterly report on their cross-border financial positions. These will need to include claims from and financial liabilities to non-residents and multilateral agencies, according to the sector of their non-resident counterparty (the other party that participates in a financial transaction) within a country.<sup>1</sup> Late and/or erroneous reporting are subject to penalties prescribed in the MORB.

<sup>1</sup> BSP Circular 850, September 2014.





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

The Monetary Board of the BSP determines whether a person or entity shall perform banking or quasi-banking functions. The GBL requires banks and other financial institutions to be stock corporations with funds obtained from the public (equivalent to deposits/investments of at least 20 persons). There are minimum capital requirements that must be met. In granting authorization/license, the Monetary Board shall take into consideration an entity's capability in terms of its financial resources, technical expertise and integrity.

Once authorized, the powers and scope of authority of banks shall be based on its classification (i.e., universal bank, commercial bank, thrift banks,<sup>2</sup> rural banks, cooperative banks, Islamic banks and quasi-banks<sup>3</sup>). In addition to the powers authorized for a commercial bank in Section 29 of the GBL, a universal bank generally has the authority to exercise the powers of an investment house, as provided in existing laws, and the power to invest in non-allied enterprises. Commercial banks possess general powers incident to corporations and all such powers as may be necessary to carry out the business of commercial banking.<sup>4</sup>

An investment company that is engaged solely in investing, reinvesting or trading in securities is not engaged in banking and need not comply with the requirements of the General Banking Law.<sup>5</sup>

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

An entity desiring to do banking transactions in the Philippines must follow the BSPs application process.

First, the applicant must accomplish an Application for Authority to Establish a Bank (standard form provided by the BSP) in triplicate. The original copy and duplicate copy shall be submitted to the Central Applications and Licensing Group (CALG) of the BSP. The third copy shall be retained by the applicant.

Second, the applicant shall be required to submit papers/documents and information in support of the application, some of which must be in the format supplied by the BSP. Among these are the Agreement to Organize a Bank; biodata of each of the incorporators, proposed directors and officers, and subscribers; their Statement of Assets and Liabilities<sup>6</sup>; Statement of Income and Expense<sup>7</sup>; and other financial documents as may be required, as well as their clearances from the National Bureau of Investigation and Bureau of Internal Revenue. For corporate subscribers and foreign bank subscribers, the BSP requires relevant corporate papers and audited financial

statements for the last two years prior to the application, among others. Applicants must also submit a Detailed Plan of Operation and Economic Justification for establishing the bank.

Third, the applicant must comply with the minimum capital requirements (ranging from PHP 10 million<sup>8</sup> to PHP 3 billion<sup>9</sup>). The application shall be processed on a first-come, first-served basis, provided that all the required documents are complete and properly accomplished.

Fourth, the incorporators/subscribers, proposed directors and officers of the bank shall be subject to qualifications, grounds for disqualification, and other requirements of existing laws, rules and regulations of the BSP.

Fifth, there is a procedure to be followed for the issuance of an Authority to Operate. Once the Monetary Board/governor of the BSP approves the application for Authority to Establish a bank, the applicant shall be required to submit additional supporting documents and thereafter effect the filing and registration of said documents with the Securities and Exchange Commission. The applicant will then be given a period to complete additional requirements, if there are any.

Following the above procedure, the applicant may begin operating the bank, and within five banking days after the start of operations: (a) inform the BSP of the first day of operation and the banking hours and days; and (b) submit a statement of condition as of the first day of operation.

The authority to establish a bank shall be automatically revoked if the bank is not organized and opened for business within one year after receipt by the organizers of the notice of approval by the Monetary Board of their application.

The establishment of non-bank financial institutions performing quasi-banking functions is governed by the Manual of Regulations for Non-Bank Financial Institutions and its implementing rules and regulations.

There are no laws, rules or regulations in the Philippines governing the establishment or conduct of regulatory sandboxes for the fintech industry. However, both the SEC and the BSP maintain a relatively open approach to new players in the industry seeking to conduct pilot testing of fintech products and services that are not regulated under prevailing legislation. As there are no official guidelines on the establishment or operation of regulatory sandboxes, fintech industry participants proposing to engage in the delivery of fintech services or the conduct of fintech activities that are not otherwise specifically regulated under existing regulations may consider approaching or engaging with the SEC or the BSP directly.

<sup>2</sup> Further classified into: (a) savings and mortgage banks; (b) stock savings and loan associations; and (c) private development banks.

<sup>3</sup> Quasi-banks are entities engaged in the borrowing of funds through the issuance, endorsement or assignment, with recourse or acceptance of deposit substitutes, for purposes of relending or purchasing of receivables and other obligations.

<sup>4</sup> These include accepting drafts and issuing letters of credit; discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt; accepting or creating demand deposits; receiving other types of deposits and deposit substitutes; buying and selling foreign exchange and gold or silver bullion; acquiring marketable bonds and other debt securities; and extending credit, subject to such rules as the Monetary Board may promulgate. These rules may include the determination of bonds and other debt securities eligible for investment, and the maturities and aggregate amount of such invest

<sup>5</sup> *Banas vs. Asia Pacific Finance Corporation*, G.R. No. 128703, 18 October 2000.

<sup>6</sup> The statement must be sworn to by the subscriber themselves and duly notarized or certified by a certified public accountant, with schedules detailing cash in banks, securities, real estate, accounts receivable and accounts payable of the subscriber as of a date not earlier than 90 days prior to the filing of application of each of the subscribers.

<sup>7</sup> The statement must be sworn to by the subscriber themselves and duly notarized or certified by a certified public accountant.

<sup>8</sup> This is the minimum capital requirement for cooperative banks.

<sup>9</sup> This is the minimum capital requirement for universal banks. The Monetary Board has different requirements for specialized banks, such as those engaged in micro-finance.

## 7. What financial services passporting arrangements does the Philippines have with other jurisdictions?

Once authorized or licensed in the Philippines, the financial institution can transact across Europe and other countries, subject to regulations on cross-border transactions and foreign exchange transactions. The Manual of Regulations on Foreign Exchange Transactions, together with other BSP issuances, consolidates all foreign exchange transactions regulations.

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# Poland

## 1. Who regulates banking and financial services in Poland?

The Polish Financial Supervision Authority KNF (Urząd Komisji Nadzoru Finansowego) (KNF)KNF, together with its board and chair, is responsible for state supervision over the Polish financial market and capital market in Poland. The KNF exercises supervision over the following:

- The financial market (including banking supervision)
- The capital market (including but not limited to collective investment funds in transferable securities and investment firms)
- The insurance market (including but not limited to KID under Regulation 1286/2014)
- The pension market
- Supplementary supervision of credit institutions, insurance undertakings, reinsurance undertakings and investment firms in a financial conglomerate
- Payment institutions, payment service offices, electronic money institutions and branches of foreign money institutions
- Rating agencies
- Credit unions and the National Association of Credit Unions
- Mortgage credit intermediaries and their agents

The types of cases for which the KNF is the only competent body that may issue rulings and recommendations are, amongst others: authorization to carry on regulated activities on the financial market (e.g., payment institutions), administrative sanctions, and other issues that are essential for the proper functioning of the financial market and capital market, especially regarding its practical aspects (sanctions for disseminating misleading information under EU Market Abuse Regulation).

Together with the KNF, the European Union's Supervisory Authorities (the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pension Schemes Authority) play an important role in issuing technical standards and in some limited respects have powers of direct supervision over Polish firms.

The European Central Bank supervises Eurozone banks under the EU's Single Supervisory Mechanism (SSM). As Poland is not in the Eurozone, Polish banks are not within the scope of the SSM. However, branches or subsidiaries of Polish banks located in the Eurozone are under the SSM and are supervised by the European Central Bank.

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

Much of the relevant laws concerning Poland's financial and capital markets are derived from EU directives and regulations. In many respects, therefore, Polish domestic legislation and rules give effect to pan-European legal requirements (also by copy-out implementation). However, since many European directives only set minimum standards, the way in which directives are implemented across Europe can considerably vary. In other words, Poland and other European jurisdictions have introduced domestic laws that exceed European level requirements (gold plating at national level). Directives also contain obligations and discretions at the member state level, and Poland also has various domestic rules that must be applied together with EU laws. In case of conflict of rules between domestic rules and EU rules, EU rules take precedence over domestic rules.

The Financial Market Supervision Act of 21 July 2006 (unified text: Journal of Laws of 2020, item 2059, as amended; the "FMS") is the main law in Poland regarding supervision of the financial market. The FMS defines the KNF's scope of supervision, KNF competencies and rules of proceedingsKNF. Furthermore, the Capital Market Supervision Act of 29 July 2005 (unified text: Journal of Laws of 2020, item 1400, as amended) contains specific regulations regarding supervision of the capital market. These are, in particular, rules for the exchange of information between nationals and European financial supervisory authorities, as well as rules for the execution of obligations resulting from the European regulations by national competent supervisory authorities.

The laws considered to be crucial to the substantial regulation of financial services are as follows:

- The Banking Law Act of 29 August 1997 (unified text: Journal of Laws of 2020, item 1896, as amended; the "Banking Law Act") sets out, among other things, the principles for conducting banking activities; establishing and organizing banks, branch offices and representative offices of foreign banks, and branch offices of credit institutions; the principles for exercising banking supervision resolution framework; and the winding up and bankruptcy of banks.
- The Law Act of 11 September 2015 on the insurance and reinsurance activities (unified text: Journal of Laws of 2020, item 865, as amended; the "Insurance Law Act") sets out, among other things, the principles for conducting insurance and reinsurance activities; establishing and organizing insurance and reinsurance entities, branch offices and representative offices of foreign insurance entities and branch offices of foreign reinsurance entities; the

principles for exercising insurance supervision; and the winding up and bankruptcy of insurance and reinsurance entities.

- The Financial Instruments Trading Act of 29 July 2005 (unified text: Journal of Laws of 2021, item 328, as amended; the "FIT Act") governs the principles, procedures and conditions for the taking up and pursuit of the business relating to the trading in financial instruments; and the rights and duties of entities participating in such trading, as well as their supervision.
- The Payment Services Act of 19 August 2011 (unified text: Journal of Laws of 2020, item 794, as amended; the "Payment Services Act") sets out the principles for providing payment services and issuing and re-purchasing of electronic money, and principles regarding the position of consumers. The Payment Services Act also sets out basic market principles for domestic payment card transactions.

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

A broad range of activities is regulated by the Banking Law Act, the Insurance Law Act, the FIT Act and the Payment Services Act.

According to the Banking Law Act, the general rule is that only banks can carry on regulated banking activities (for example, entering into a regulated credit agreement as lender). The Banking Law Act defines a bank as a legal entity established in accordance with the provisions of applicable laws, acting on the basis of a license authorizing it to carry on regulated banking activities.

Regulated banking activities include the following:

- Accepting cash deposits payable on demand or on a specified date and operating the related accounts for such deposits
- Operating other bank accounts
- Lending money under credit agreement as lender
- Granting and confirming bank guarantees, and opening and confirming letters of credit
- Issuing bank securities
- Performing bank monetary settlements
- Performing other operations reserved solely for a bank under separate acts of law

Under the Insurance Law Act, the performance of insurance or reinsurance activities shall require obtaining permission from the supervision authority. Insurance activities shall be performed by an insurance undertaking operating as an insurance undertaking or an insurance and reinsurance undertaking.

An insurance undertaking may perform insurance activities solely in the form of a joint-stock company, a mutual insurance company or a *societas Europaea* as defined in Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, as amended; OJ Special edition in Polish, Chapter 6, vol. 4, p. 251).

A reinsurance undertaking may perform reinsurance activities solely in the form of a joint-stock company, a mutual reinsurance company, or a *societas Europaea*.

An insurance undertaking operating in the form of a joint-stock company shall have the obligation and sole right to use the phrases "insurance company", "insurance undertaking", "insurance and reinsurance company", or "insurance and reinsurance undertaking" in its company name. It shall be permissible to use, accordingly, the abbreviations "IC", "IU", "I&RC", or "I&RU".

"Insurance activities" shall be understood as the performance of insurance activities connected with offering and granting coverage against the risk of consequences of random events.

The insurance activities referred to in paragraph 1 shall be as follows:

1. Entering into insurance contracts, insurance guarantee contracts, or ordering authorized insurance intermediaries within the meaning of the Insurance Distribution Act to enter into such contracts, as well as the performance thereof
2. Entering into reinsurance contracts or ordering reinsurance brokers within the meaning of the Insurance Distribution Act to enter into such contracts, as well as the performance thereof, in the scope of assigning the risk from insurance contracts or insurance guarantee contracts (outward reinsurance)
3. Submitting declarations of intent with regard to claims for compensation or other benefits due under the contracts referred to in 1) and 2) above
4. Determining premiums and commissions due under the contracts referred to in 1) and 2) above
5. Establishing, by way of civil and legal activities, property or personal collaterals if they are directly connected with entering into the contracts referred to in 1) and 2) above

The following shall also be considered insurance activities:

1. Assessment of risk in personal insurance and property insurance, as well as in insurance guarantee contracts;
2. Payment of compensations and other benefits due under the contracts referred to above
3. Taking over and selling objects or rights acquired by an insurance undertaking in connection with the performance of an insurance contract or an insurance guarantee contract
4. Inspecting whether the policyholders or insured parties comply with the obligations and security principles specified in the contract or general insurance terms and conditions with regard to the items covered by insurance protection
5. Conducting recourse proceedings and collection proceedings connected with the performance of the following:
  - a. Insurance contracts and insurance guarantee contracts
  - b. Reinsurance contracts in the scope of assigning the risk under insurance contracts and insurance guarantee contracts
6. Investing funds of an insurance undertaking
7. Performing other activities envisaged for an insurance undertaking in separate acts

The following shall also be considered insurance activities if they are performed by an insurance undertaking:







1. Determining the causes and circumstances of random events
2. Determining the amounts of losses and the extent of compensation and other benefits due to persons authorized under insurance contracts or insurance guarantee contracts
3. Determining the value of the insured object
4. Preventing or reducing the consequences of random events and financing such activities from the preventive fund

An insurance undertaking may not conduct other activities, except for those in the scope of insurance and directly connected with insurance. "Reinsurance activities" shall be understood as the performance of activities connected with accepting the risk assigned by an insurance undertaking or reinsurance undertaking and further assignment of the adopted risk, particularly the following:

1. Entering into and performing reinsurance acceptance contracts and retrocession contracts, or ordering entry into retrocession contracts to reinsurance brokers within the meaning of the Act of 15 December 2017 on Insurance Distribution (Dziennik Ustaw 2019, item 1881) (the Insurance Distribution Act), as well as performing these contracts
2. Submitting declarations of intent with regard to claims for compensation or other benefits due under the contracts referred to above
3. Determining premiums and commissions due under the contracts referred to above
4. Inspecting whether the assignors comply with the terms and conditions of the contracts referred to above

A reinsurance undertaking may not conduct other activities except for those in the scope of reinsurance and activities directly connected with reinsurance. Activities directly connected with reinsurance shall be, in particular, activities performed in the field of statistical consultancy, actuarial consultancy, risk analysis, research for clients, investing funds of the reinsurance undertaking, as well as activities in connection with preventing or reducing the effects of insured accidents or financing such activities from the preventive fund.

Under the FIT Act, an entity that intends to perform brokerage activities must obtain a license from the KNF prior to commencement of operation. Brokerage activities include the following:

- Reception and transmission of orders for the acquisition or disposal of financial instruments
- Execution of the abovementioned orders for the account of the investors from whom those orders originate
- Acquisition or disposal of financial instruments for own account
- Portfolio management, where such portfolios include one or more financial instruments
- Investment advice
- Offering financial instruments
- Services provided under firm commitment underwriting agreements and standby underwriting agreements, or the conclusion or performance of other agreements of similar nature, in relation to financial instruments
- Organization of an MTF (a multilateral system operated outside the regulated market that matches financial instruments acquisition and disposal offers in a manner resulting in transactions concluded within the system in accordance with the specific rules and in a non-discretionary manner)

- Organization of an OTF (a multilateral system that matches, on a discretionary basis, offers for the acquisition or disposal submitted by third parties with regard to bonds, structured finance products, emission allowances, derivative instruments, or energy products constituting the object of wholesale trade that have to be effected by way of delivery, without being a regulated market or an MTF)

The Payment Services Act does not require an entity to directly obtain a license (except for two instances as described below), but sets limitations within which entities are allowed to provide payment services. These entities are as follows:

- Domestic banks
- Credit institutions and branches of credit institutions
- Branches of foreign banks
- Electronic money institutions
- Payment institutions
- The European Central Bank, National Bank of Poland, central banks
- Public administration bodies
- Cash Savings and Credit Society (SKOK)
- Payment services offices
- Branches of authorized entities from the EU
- Small payment institutions
- Service providers performing only informational duties on a payment account

The entities listed above are either public or strictly regulated bodies, i.e., banks, with those highlighted in bold aimed at providing payment services and requiring either a license (in the case of payment institutions as referred to in Article 60 (1) Payment Services Act) or entry into the payment services offices' register (the in case of payment services offices as referred to in Article 119 (1) Payment Services Act).

The Payment Services Act defines "payment services" as activities that include the following:

- Placement and withdrawal of cash / operating a payment account
- Execution of payment transactions: direct debits, payment transactions through a payment card, transfer orders
- Issuance of payment instruments
- Entering into agreements with suppliers of goods and services for accepting payment transactions executed using payment instruments
- Money remittance
- Initiation of the payment transaction and account information service providers in relation to a payment account

## 4. How do Poland's licensing requirements apply to cross-border business into Poland?

### Background

Cross-border activities mean activities actively performed by a financial institution within the territory of the Republic of Poland or by a domestic financial institution in the territory of a host state, if conducted by the financial institution without the participation of a branch.

The main factor in establishing whether a financial operation with Polish clients is conducted within the territory of the Republic of Poland is the place of performance and if it is considered to be conducted in the territory of the Republic of Poland.

According to Polish civil law, the agreement is conducted in the place that: (a) is directly specified in the agreement; or (b) is derived from the essential features of the obligation. If (a) and (b) are not applicable, the agreement is considered to be conducted: (i) for in-kind performances, in the place where the debtor has its domicile or seat; and (ii) for pecuniary performances, in the place of the creditor's domicile or seat.

It is important to note that, pursuant to international law, the interpretation of the agreement and the performance made on its basis should always be done in accordance with Polish law as to whether a financial institution's services are deemed "cross-border activities". This is because the issue is subject to the norms of Polish public law, which the parties cannot make contractually inapplicable.

### Performing banking operations

In relation to performing banking operations, cross-border activities may be conducted in Poland only by a credit institution.

"Credit institution" is defined in the Banking Law Act with reference to the Regulations (EU) no 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 ("Regulation 575/2013") as an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits from its own account, having its seat outside the Republic of Poland in one of the EU member states. This regulation also applies to European Economic Area (EEA) member states ("Member State").

The definition of "credit institution" under Polish law leads to the conclusion that a bank having its seat outside the Republic of Poland, in a state that is not a member of the EU or the EEA (being defined in the Banking Law Act as a "foreign bank"), may not engage in carrying on cross-border regulated banking activities in Poland.

### Performing insurance/reinsurance activity

Cross-border insurance/reinsurance activities may be conducted in Poland only by foreign insurance/reinsurance entities.

### Performing brokerage activity

Cross-border brokerage activities may be conducted in Poland only by foreign investment firms.

"Foreign investment firm" is defined in the FIT Act as a legal person (or an organizational unit without legal personality), having its registered office or its head office in another Member

State, or a natural person with its place of residence in another Member State, performing investment services and activities under a license granted by the national competent supervisory authority in another Member State, or a foreign credit institution.

It is worth noting that reverse solicitation may be used by non-EU investment firms to access Polish clients without triggering licensing requirements. Reverse solicitation may happen only if a client at its own exclusive initiative takes steps to start a business relationship with a non-EU investment firm (now including UK firms). Another important caveat is that even though an initial contract has been initiated by a client, another contract that expands the scope of the first is not legally possible under reverse solicitation if it was proposed by the non-EU investment firm. This means that offering further services to the ones asked by the client at its own exclusive initiative is prohibited under reverse solicitation. The KNF has not yet issued any ruling as to its approach to reverse solicitation as it is a relatively contentious issue and a fragile safe harbor in other EU member states.

In turn, "foreign credit institution" means a credit institution as defined in Regulation 575/2013 that performs brokerage activity within the territory of another Member State on the basis of an authorization of a national competent supervision authority or an institution that records on the basis of an authorization of a competent supervisory authority accounts in which securities admitted to trading on a foreign regulated market are registered.

The above definitions lead to the conclusion that only entities that are already entitled to perform brokerage activities in a Member State may conduct cross-border brokerage activities in the Republic of Poland.

### Performing payment services

Cross-border payment services may be conducted in the Republic of Poland only by an EU payment institution.

"EU payment institution" is defined in the Payment Services Act as a legal entity granted a license by the national competent supervisory authority to carry on payment services.

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

In relation to performing banking activities, the KNF has to be informed by the national competent supervisory authorities of a home Member State about the types of operations to be performed by a credit institution. Information about types of operations is not limited to banking operations but includes all other activities that are planned to be performed.

In relation to performing insurance/reinsurance activities, the KNF has to be informed by the national competent supervisory authorities of a home Member State about the types of operations to be performed by an insurance/reinsurance entity. Information about types of operations is not limited to insurance operations but includes all other activities that are planned to be performed.

Brokerage activities may be commenced by a foreign investment firm in the Republic of Poland after the KNF has been notified of the planned commencement of such activities by the national competent supervisory authority that granted the investment firm a license to





perform brokerage activities. Where brokerage activities are to be performed without setting up a branch office, such activities may be commenced after the KNF has received the relevant notification from the national competent supervisory authority.

In cases where a foreign investment firm is going to perform brokerage activities in the Republic of Poland through its tied agents, the KNF may apply to the competent foreign supervisory authority for information about the tied agents. Moreover, the KNF is obliged to inform a foreign investment firm about the terms and conditions for the performance of brokerage activities in the Republic of Poland, i.e., principles defined in the provisions of the FIT Act, implementing regulations issued on the basis thereof, and directly applied provisions of law of the EU applicable to the activities performed by a particular foreign investment firm.

An EU payment institution may commence cross-border activities in the Republic of Poland after the competent supervisory authorities of the home Member State have provided the KNF with the specified information listed in the Payment Services Act. An EU payment institution may perform payment services within the territory of the Republic of Poland in the area covered by the authorization issued by the national competent supervisory authorities.

In addition, it is worth mentioning the initiatives undertaken by the KNF to encourage financial innovation (such as Hub Programme). These initiatives permit supervised entities seeking out authorization to carry on regulated activities, including but not limited to fintech start-ups, in a testing environment where there is no risk of regulatory actions taken by the KNF for lack of compliance. A testing environment (like the Virtual Sandbox, which was set up by KNF in 2020 helps develop a keen understanding of new products based of advances in technology, or helps answer questions like how to drive internal compliance of firms with IT requirements, such as risks stemming from cyber threats. Services that have been reportedly tested in Virtual Sandbox are Payment Initiation Service (PIS), Account Information Service (AIS) and Confirmation of Availability of Funds (CAF). These services are mostly regulated by the Payment Services Act.

Access to both the Innovation Hub Programme and the testing environment is free and voluntary. The Virtual Sandbox is open to supervised entities, entities seeking KNF authorization to carry on regulated activities, and start-ups.

The Virtual Sandbox aims to support the development of the Polish fintech market and represents the performance of the tasks listed in the FMS. It is also the first step in the development of the KNF offer of technological support for fintech businesses in the form of field-specific virtual sandboxes. Another step that is being currently considered by the KNF focuses on testing a distributed ledger technology (like blockchain network for smart contracts and tokenization of securities).

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

As requirements to obtain authorization to carry on regulated activities are limited to receiving the abovementioned information, the process of becoming an authorized entity in Poland is governed by the provisions of the Polish Act on Banking Law (in the case of banks), the Polish Insurance Law Act (in the case of insurance/reinsurance entities) the Payment Services Act (in the case of payment institutions or payment services offices) and the FIT Act (in the case of brokerage firms).

The authorization process is complex in nature and based on the evaluation of all areas and aspects of the banking activities involved (i.e., in the case of seeking out a banking license, the capital adequacy requirements, organization, people and technology involved).

## 7. What financial services “passporting” arrangements does Poland have with other jurisdictions?

Once established in the Republic of Poland, a Polish firm can passport its authorization into other European member states. Passporting permits the provision of cross-border services and the establishment of a physical branch location.

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# Saudi Arabia

## 1. Who regulates banking and financial services in Saudi Arabia?

The Kingdom of Saudi Arabia has two regulators responsible for the authorization and supervision of banks, insurance companies and other financial institutions. These are the Saudi Central Bank (previously known as the Saudi Arabian Monetary Agency but retaining the acronym "SAMA") and the Capital Market Authority (CMA). The allocation of responsibilities between the SAMA and the CMA is as follows:

- The SAMA regulates the following entities:
  - Conventional banks (deposit takers)
  - Insurance companies that engage in any insurance and re-insurance activities, including general insurance, health insurance and protection and savings insurance
  - Finance companies that engage in real estate finance, production asset finance, small and medium enterprise finance, financial lease services, credit card finance, consumer finance, micro finance, and any other financial activity approved by the SAMA

Given that the above entities are regulated by the SAMA, no banking business, insurance or re-insurance activity or finance activity may be conducted in Saudi Arabia without obtaining a license from the SAMA. Carrying out any of the activities listed above without obtaining a license from the SAMA is strictly prohibited.

- The CMA regulates financial institutions that conduct securities business ("Capital Market Institutions"), including investment banks, asset managers, brokers, custodians and financial advisers. (For more details on what constitutes securities business, please see Section 3 below.)

Conducting any securities activity in Saudi Arabia without obtaining a license from the CMA is strictly prohibited.

## 2. What are the main sources of regulatory laws in Saudi Arabia?

The paramount body of law in Saudi Arabia is The Shariah (Islamic Law). The Shariah is derived from the Holy Quran and the Sunna (words and deeds) of the Prophet

Mohammed, as interpreted by influential scholars of Islamic jurisprudence. The Shariah consists of precepts that are often expressed as general principles. This leaves a Saudi Arabian court (or other adjudicatory authority) with considerable discretion regarding how to apply such precepts. Moreover, there are different schools of Islamic jurisprudence and they construe certain precepts differently. The Hanbali school of Islamic jurisprudence is followed in Saudi Arabia, and within the Hanbali school, there are majority and minority views on various issues, either of which may be applied in any particular case. In addition, there are certain instances in which precepts of other schools of Islamic jurisprudence have been applied by the courts where such application was deemed by such courts to be appropriate in the interests of justice and fairness with respect to the particular matter in question. In general, Saudi courts and other adjudicatory authorities do not report their decisions and previous decisions. Such decisions are not considered to establish a binding precedent for the decision of later cases.

The secular authorities are permitted to supplement the Shariah. The Saudi government does so through the issuance of statutes, regulations, decrees and circulars, as well as the adoption of policy positions, all of which can be, and frequently are, changed from time to time to adapt to changed circumstances or to take into account other considerations. However, royal decrees, ministerial decisions and resolutions, departmental circulars and other pronouncements of official bodies of Saudi Arabia having the force of law are not generally or consistently indexed and collected in a central place or made available as a matter of public record.

### SAMA rules and regulations

Conventional banking, insurance and re-insurance, and finance activities in Saudi Arabia are governed and regulated through the following main laws:

- The Banking Control Law promulgated by Royal Decree No. M/5 dated 22/02/1386H (corresponding to 12/06/1966G): The SAMA has also issued a number of secondary implementing regulations that further govern banks in Saudi Arabia.
- The Finance Company Control Law promulgated by Royal Decree No. M/51 dated 13/08/1433H (corresponding to 03/07/2012G): The SAMA has also issued a number of secondary implementing regulations that further govern finance companies in Saudi Arabia.
- The Cooperative Insurance Companies Control Law promulgated by Royal Decree No. M/32 dated 02/06/1424H (corresponding to 31/07/2003G): The SAMA has also issued a number of secondary implementing regulations that further govern insurance companies in Saudi Arabia.

### CMA rules and regulations

The Capital Market Law promulgated by Royal Decree No. No. M/30 dated



02/06/1424H (corresponding to 31/07/2003G) as amended by the Royal Decree no. M/16 dated 19/01/1441H (corresponding to 18/09/2019G) is the main law that regulates the investment banking sector in Saudi Arabia.

The CMA has also issued a number of secondary implementing regulations that provide further governance rules for the capital markets regime and regulation of other securities activities in Saudi Arabia, such as the Securities Business Regulations issued by the CMA board resolution no. 2-83-2005 dated 21/05/1426H (corresponding to 28 June 2005G) and as amended by the CMA board resolution no. 2-75-2020 dated 22/12/1441H (corresponding to 12/8/2020G) and the Capital Market Institutions Regulations issued by the CMA board resolution no. 1-83-2005 dated 21/05/1426H (corresponding to 28 June 2005G) and as amended by the CMA board resolution no. 3-85-2017 dated 27/12/1438H (corresponding to 18/09/2017G) and resolution no. 2-75-2020 22/12/1441H (corresponding to 12/8/2020G).

Both the SAMA and the CMA have also issued a number of circulars that offer guidance to all banks, insurance companies, finance companies and financial institutions operating in Saudi Arabia. However, not all of these circulars are publicly available.

### 3. What types of activities require a license in Saudi Arabia?

The SAMA regulates a range of activities. These include licensing and regulating the following:

- Banks that carry out conventional banking activities, such as accepting money on current or fixed deposit accounts, the opening of current accounts, opening letters of credit (L/C), issuing letters of guarantee, payment and collection of cheques, orders and similar other papers of value, discounting of bills, promissory notes and other commercial papers
- Entities carrying out foreign exchange business
- Insurance companies carrying on insurance business (effecting and carrying out contracts of insurance)
- Finance companies that provide real estate financing solutions, financial lease services, credit cards, and financing and leasing of equipment and machinery

The CMA regulates financial institutions carrying out the following securities business:

- Dealing: This covers a person dealing in security as principal or as an agent, and dealing includes selling, buying and managing the subscription of or underwriting securities.
- Arranging: This involves a person introducing parties in relation to securities business or arrangement of its underwriting or advising on corporate finance business.
- Managing: This means a person managing security belonging to another person in the circumstances involving the exercise of discretion or a person operating investment funds.
- Advising: This involves a person advising another person in relation to a security, which includes advising on the merits of that person dealing in security, exercising any right to deal conferred by security, or financial planning and wealth management in security.
- Custody: This covers a person safeguarding assets belonging to another person, including security, or arranging for another person to do so, and custody includes taking the necessary administrative measures.

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

Any firm outside Saudi Arabia wishing to act for or deal with a client or counterparty located in Saudi Arabia would typically be subject to Saudi laws and regulations. The service provider will need to consider whether they are triggering a local licensing obligation and complying with local marketing rules.

### SAMA licensing requirements

Foreign banks that are not licensed by the SAMA to operate in Saudi Arabia are not permitted to carry on any banking business or to engage in cross-border electronic banking activities in the Saudi market. The same restriction applies to insurance and financing activities where such activities may not be conducted in Saudi Arabia without being authorized or licensed by the SAMA. Insurance activities may only be conducted by a public joint-stock company listed in the Saudi Stock Exchange, which means that other than SAMA rules and regulations, insurance companies are also subject to CMA rules and regulations.

In relation to marketing, the Banking Control Law prohibits any entity not licensed by the SAMA from conducting any banking business in Saudi Arabia. Advertising, marketing, contacting of clients and offering of any banking products may fall under the definition of "banking business" under the "other banking business" category, as the Banking Control Law defines "banking business" as "the business of receiving money on the current or fixed deposit account, the opening of current accounts, the opening of letters of credit, issuance of letters of guarantee, payment and collection of cheques, payment orders, promissory notes and similar other papers of value, discounting of bills, bills of exchange and other commercial papers, foreign exchange transactions and other banking business." Any aggressive marketing, advertising, or offering of banking products and contact with clients in Saudi Arabia is likely to result in investigations and/or penalization by the relevant authorities. It should be noted that the use of the word "bank" by any entity not licensed by the SAMA is also prohibited.

In relation to exemptions from the SAMA authorization to conduct banking business in Saudi Arabia, the Banking Control Law prohibits any unlicensed person, natural or juristic, from carrying on any banking business. However, the Banking Control Law excludes juristic persons licensed in accordance with another law or special decree to carry on banking business as such persons may practice such business within the limits of their intended purposes, and licensed moneychangers may practice the exchange of currency in the form of notes and coins, but no other banking business.

### CMA licensing requirements

The CMA strictly prohibits any person from conducting securities business in Saudi Arabia or for a person in Saudi Arabia without authorization and licensing from the CMA.

In relation to marketing, the Securities Business Regulations regulate the issuance of securities advertisements, which is defined as any form of verbal, electronic, broadcast or written communication made in the course of business to invite or induce a person to engage in securities activity. Given that the definition of a securities advertisement is so broad, most forms of communications with counterparties or clients located in Saudi Arabia will most likely constitute securities advertisement. A securities advertisement is made or communicated to a person in Saudi Arabia if it is available to persons in Saudi Arabia, including advertisements made via the internet. Various exclusions exist in relation to both the need to be authorized and in relation to marketing to persons in Saudi Arabia.



The Securities Business Regulations provide various exclusions from authorization regarding conducting securities activities in Saudi Arabia and authorize the CMA to exempt any other person from the authorization requirement. These exclusions vary depending on the type of securities business the unauthorized person wishes to conduct and the client that the services are being provided to.

By way of example, the Securities Business Regulations provide that the activities of arranging, managing, advising and custody are excluded from the authorization requirement where the service provider is a member of a group and the services in question are provided for a member of the same group, or the person is or proposes to become a participator in a joint enterprise and the services in question are provided for the participant in the joint enterprise. The activity of dealing is excluded from the authorization requirement if the transaction is between two persons acting as principals who are members of the same group or propose to be or are participants in a joint enterprise (provided that the transaction is for the purpose of the joint enterprise). There are a number of other exclusions listed in the Securities Business Regulations.

In addition to the exemptions listed in the Securities Business Regulations, there are two further exemptions from obtaining prior authorization to engage in the securities business in Saudi Arabia.

The first applies when engaging in securities activities in Saudi Arabia with or for certain Saudi Arabian government entities and bodies. This exemption is derived from a CMA resolution dated 19/05/1434H (corresponding to 31/03/2013G), which entitles the unauthorized foreign investment bank to provide services to each of the Ministry of Finance (Public Investment Fund), the SAMA, the General Organization of Social Insurance, the Public Pension Agency and the Saudi Arabian Investment Company (Sanabil Investments).

The second is set out in a CMA resolution dated 23/05/1437H (corresponding to 3 March 2016), which exempts foreign financial institutions from its authorization requirement when dealing with certain clients who have initiated contact on a reverse inquiry basis. The exemption applies where the client is either: (i) an "institution" (defined in the CMA regulations as an entity or group with net assets to a value of at least SAR 10 million); or (ii) an individual whose total investments exceed SAR 50 million or who owns not less than SAR 50 million worth of net assets, provided that the reverse inquiry request was initiated by the client and was not as a result of the foreign financial institution marketing its activities in Saudi Arabia, and that further the relevant transactions concern securities that are not issued or listed in Saudi Arabia.

As explained above, certain exclusions are available under Saudi law, which enables unauthorized financial institutions and persons inside and outside Saudi Arabia to deal with Saudi-based clients. This is on the basis that the activities in question will be regarded as being carried on based on a specific exemption that covers the relevant activities.

## 5. What are the requirements to obtain authorization in Saudi Arabia?

In order to obtain a license to conduct banking, insurance, financial leasing or securities activities, an applicant must satisfy the relevant regulator that it meets the conditions set out by the regulator.

The threshold conditions can vary depending on the particular regulated activities that the applicant intends to carry on and, in particular, whether the applicant will be CMA- or SAMA-authorized. Broadly, however, the following conditions will need to be satisfied:

- **Location of offices:** For Saudi-incorporated companies, both the management and head office must be located in Saudi Arabia. This can have implications for the composition of the board of directors so that a majority of the board will need to be resident in Saudi Arabia and the administrative center will also need to be located in Saudi Arabia.
- **Effective Supervision:** The applicant must be capable of being effectively supervised. This emphasizes the need for firms to have a substantive presence in Saudi Arabia that is accessible to the Saudi Arabian regulators and enables the regulator to supervise the firm. The regulator will also consider whether there are any impediments to the supervision of the applicant, including the group structure and any relevant laws restricting access to information.
- **Appropriate resources:** Applicants must satisfy the regulator that they have adequate resources to carry on the relevant regulated activities. Resources include financial resources as well as human resources (including management with the required skills, qualifications and integrity) and infrastructure.
- **Suitability:** The requirement is that applicants must be fit and proper to be authorized, having regard to all the circumstances.
- **Business model:** The regulator will examine the applicant's business model. In addition to understanding the economic aspects of the business, the impact of the model on consumers and on the Saudi economy will also be considered.

## 6. What is the process for becoming authorized in Saudi Arabia?

To obtain authorization, an applicant must complete a formal process, which involves the completion of required application forms and the submission of supporting information.

### **CMA authorization process**

In relation to timing, the CMA will notify the applicant of receipt of the completed application and all required documents and information, and it will have 30 days from the date of the notice to determine whether or not to approve the application. In practice, it could take several months (if not longer) for the CMA to process an application and license a Capital Market Institution.

The particular forms that must be completed for submission to the CMA will depend on the nature of the regulated activities to be conducted. In general, the following forms<sup>1</sup> will be required to be completed:

- **Application form:** This is the main licensing application form, which sets out factual background information relating to the applicant. Whilst the applicant will complete this form and submit it as part of its hard documents submission, the CMA requires the application form to be completed online.
- **Controllers:** Details must be submitted about identity, ownership (if applicable), integrity, regulatory status, business record and financial position of each proposed controller



persons/entities who control or exert influence over the firm.

- Close links: Details about all persons who have, or are proposed to have, close links with the applicant must be submitted, and details of the identity, ownership (if applicable), integrity, regulatory status, business record and financial position of each such person must be provided.
- Governing body resolution: The applicant must submit to the CMA a resolution in the form prescribed by the CMA, approving the application and its contents and certifying the accuracy and completeness of the accompanying information and documents.
- Business profile: The applicant must submit a proposed business profile, including full details of all services the applicant proposes to provide for each securities activity that it is applying to carry on.
- Business plan: The applicant must submit a business plan, setting out a detailed description of the securities business activities that the applicant proposes to undertake during, at least, the first 12 months after authorization, as well as a description of the nature of the proposed clients of the applicant, and a list of any exchanges, clearing houses or depositaries of which the applicant is or intends to become a member.
- Financial statements: The applicant must submit audited financial statements in accordance with the standards issued by the Saudi Organization for Chartered and Professional Accountants and presented in the format prescribed by the CMA. Also, an applicant must submit projected financial statements that state the expected financial position 12 months after the promised date of commencement.
- Registered person form: The applicant must submit a list of each person who is to be a registered person (as required under the Authorized Persons Regulations) and an application form for registration for each such person in the format prescribed by the CMA, including details of their qualifications and experience.
- Systems and controls: The applicant must submit systems and controls documentation, such as risk management policies and systems, anti-money laundering and anti-terrorism financing procedures, compliance manual, compliance monitoring program, and code of conduct.
- Operations manual: The applicant must submit an operational procedures manual detailing the procedures and systems to be employed in relation to all material business and administrative operations.
- Terms of business: The applicant must submit a copy of the proposed terms of business and of proposed forms.
- Fees: The applicant must submit a list of proposed fees, commissions, charges and other expenses payable by clients.
- Contracts: The applicant must submit any agreements, arrangements and understandings with third parties to provide any material services or operations.
- Insurance: The applicant must submit details of professional indemnity insurance policies in accordance with the requirements prescribed by the CMA.
- Incorporation documents: The applicant must submit a copy of its proposed articles of association and/or by-laws.
- Structure chart: The applicant must submit an ownership structure chart showing the group of which the applicant forms part, including each controller and each person with whom the applicant has close links.
- Organization chart: The applicant must submit an organization chart identifying the applicant's governing body, the CEO and senior management, the compliance officer,

and the MLRO. The chart must outline the reporting lines of each department within the business.

- Business continuity plan: The applicant must submit a copy of the applicant's business continuity plan.

#### **SAMA authorization process**

All applications will be processed within a reasonable time, considering the particular circumstances applicable to each application, including the completeness of information and documents submitted to the SAMA. Applicants should expect to receive written acknowledgment (by email) of receipt of their application from SAMA along with confirmation of their case officer/s name within 15 business days. The preliminary approval expires within six months from its issuance. An applicant must establish the entity as a joint-stock company within that period in order to obtain a license. Approval does not constitute a license. In most cases, the processing largely depends on the SAMAs discretion, though it is generally a lengthy process.

The particular forms that must be completed for submission to the SAMA will depend on the nature of the regulated activities to be conducted.

In general, the following forms will be required to be completed:

- Application form: The applicant must submit a completed application form.
- Acknowledgment letter: The applicant must submit an acknowledgment letter in the form prescribed by the SAMA, whereby the applicant certifies that the shared information is accurate and correct.
- Incorporation documents: The applicant must submit draft articles of association and by-laws.
- Organization structure: The applicant must submit a description of the bank's organizational structure, including all departments and necessary positions, as well as the main focus of each.
- Founding shareholders: The applicant must submit a list of the founding shareholders, setting out the number and percentage of shares of each founding shareholder.
- Financial statements: The applicant must submit the latest financial statements of any proposed owners.
- Business plan: The applicant must submit a business plan covering at least the background of the applicant, the opportunities identified in the Kingdom of Saudi Arabia, and the business planning (e.g., products and services, target markets, type of clients, three-year financial projections, marketing approach, innovative products and services).
- Risk management and control framework: The applicant must submit any proposed management plan or manual covering how the applicant or applicant's parent (for foreign branch applications) will evaluate and mitigate key risk areas.
- Management/control and outsourcing: The applicant must submit a chart on the allocation of responsibilities and reporting lines, a job description for compliance oversight function, a chart on reporting lines for compliance functions, a compliance manual, a policy on complaints handling, a document on business continuity procedures, and a staff handbook.
- Financial crime and anti-money laundering (AML): The applicant must submit AML policies and procedures, as well as the job description of the AML officer.



- Human and IT resources: The applicant must submit the organization chart of the back office operations function and the information security policy.
- Fit and proper forms: The applicant must submit the fit and proper form for founding shareholders signed by each founding shareholder and for each candidate for board membership and signed by each candidate of board membership.
- Bank guarantee: The applicant must submit an irrevocable bank guarantee that is at a minimum equal to the minimum capital of the financing activities to be licensed, to be issued by any local bank for the benefit of the SAMA, and automatically renewable until such date the capital is paid in full.
- Contracts: The applicant must submit draft agreements and contracts with third parties, especially those with related parties or external service providers.
- Additional documents: The applicant must submit any other documents or information that the SAMA may request.

<sup>1</sup>Certain amendments to Annex 3.1 of the new Capital Market Institutions Regulations provide that these requirements are removed altogether for applicants whose activities will be limited to 'Managing Investments', 'Arranging' and 'Advising'.

## 7. What financial services passporting arrangements does Saudi Arabia have with other jurisdictions?

Authorization in Saudi Arabia does not permit locally licensed banks or financial institutions to passport their authorization into European Economic Area member states. Saudi Arabia does not have any financial services passporting arrangements with any other country. In order to provide financial services/securities activities in Saudi Arabia, an entity must be licensed by the relevant Saudi authority.

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# Singapore

## 1. Who regulates banking and financial services in Singapore?

The Monetary Authority of Singapore (MAS) is the integrated supervisor overseeing and supervising all financial institutions in Singapore, including banks, insurers, capital market intermediaries, financial advisors and market operators. The MAS has enforcement powers and oversees the compliance of all financial institutions in various areas, including in relation to Anti-money laundering and countering the financing of terrorism (AML/CFT). The MAS is also tasked with promoting and developing Singapore as an internationally competitive financial center.

In addition to the MAS, the Commercial Affairs Department (CAD) of the Singapore Police Force is the principal white-collar crime investigation agency in Singapore. Among others, the CAD investigates AML/CFT and fraud involving employees of financial institutions. The MAS and CAD jointly investigate all capital markets and financial advisory offenses as well to improve effectiveness in market misconduct offenses.

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

The main sources of regulatory laws in Singapore are found in primary legislation, such as the following:

- The Banking Act (Cap. 19)
- The Financial Advisers Act (Cap. 110)
- The Insurance Act (Cap. 142)
- The Securities and Futures Act (Cap. 289)
- The Payment Services Act (PSA).

The various acts provide the MAS with authority to prescribe subsidiary legislation, make regulations and issue directions. The subsidiary legislation, regulations and directions set out in greater detail the requirements that financial institutions have to comply with, and they detail the criteria that the regulated entities must meet when applying for the necessary licenses. Compliance is mandatory, and contravention of subsidiary legislation, regulations or directions is a criminal offense.

The MAS also issues guidelines that set out the best practices that govern the following, among others:

- The conduct of financial institutions on various issues, including on risk management
- AML/CFT practices to adhere to MASs supervisory regime

While the guidelines are not legally binding, the degree of observance with the guidelines may impact the MASs overall risk assessment of a financial institution. Codes are also sometimes used to set out a system of rules governing the conduct of certain specific activities. Failure to abide by a code does not in itself amount to a criminal offense but may have other consequences, including sanctions like a private reprimand or public censure. The MAS also regularly issues practice notes and circulars to a specific or specific class of financial institutions in order to provide guidance or information.

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

Singapore regulates a broad range of financial activities, including the following:

- Banking business: This covers the business of receiving money on a current or deposit account, paying and collecting checks drawn by or paid in by customers, and the making of advances to customers.
- Dealing in capital markets products: This includes marketing or dealing in and introducing broker activity in relation to capital markets products, which includes securities, debentures, units of CIS, exchange-traded derivatives, over-the-counter derivatives, and spot foreign exchange contracts for the purpose of leveraged foreign exchange trading.
- Financial advisory services: This covers advising others concerning any investment products (including securities, debentures, units of CIS, exchange-traded derivatives, over-the-counter derivatives, spot foreign exchange contracts and life policies), issuing or promulgating research analyses or research reports concerning any investment products, and arranging life policies.
- Fund management: This covers undertaking on behalf of customers (whether on a discretionary authority or otherwise) the management of a portfolio of capital markets products for the purpose of managing customers' funds.
- Insurance or insurance broking business: The insurance business includes insurance businesses concerned with life and non-life policies. Insurance



brokers are persons who carry out insurance business as agents for the insured.

- Issuing credit and charge cards: Credit and charge card refers to any article, whether in physical or electronic form, intended for use in purchasing goods or services on credit.
- Payment services - The following payment services are regulated:
  - Money -changing
  - Account issuance
  - Domestic money transfer
  - Cross -border money transfer
  - Merchant acquisition
  - Digital payment token (not currency-denominated)
  - E-money issuance (denominated in currency)

The PSA will license payment service providers as follows:

- Money-changing licensee - money-changing service
- Standard Payment Institution licensee
  - money-changing service
  - any payment account (account issuance, domestic money transfer, cross-border money transfer, merchant acquisition, digital payment token) where the monthly transactions amount to less than SGD 3 million for any one service or less than SGD 6 million for any two or more services
  - E-money issuance service where the average daily stored value is less than SGD 5 million or the average daily value of specified e-money issued is less than SGD 5 million
- Major Payment Institution licensee
  - money-changing service
  - any payment account (account issuance, domestic money transfer, cross-border money transfer, merchant acquisition, digital payment token) where the monthly transactions amount to more than SGD 3 million for any one service or more than SGD 6 million for any two or more services
  - E-money issuance service where the average daily stored value is more than SGD 5 million or the average daily value of specified e-money issued is more than SGD 5 million
- Designated payment systems - Operators and settlement institutions of designated payment systems (generally, a funds transfer system or another system that facilitates the circulation of money and includes any instruments and procedures that relate to the system that the MAS has designated under the PSA) will be subject to regulations under the PSA
- Other capital markets intermediaries: This includes advising on corporate finance, real estate investment trust management, product financing, and provision of credit rating services.
- Providing custodial services: This includes having custody of specified products (including securities, specified securities-based derivatives contracts or units in a CIS) and carrying out functions such as the settlement of transactions, collecting or distributing dividends,

paying tax or costs associated with the securities, exercising rights attached to securities, and others necessary or incidental to the safeguarding or administration of the specified products.

- Operating an organized market - This includes a market for being a place or facility where offers or invitations to exchange, sell or purchase derivatives contracts, securities or units of CIS are regularly made on a centralized basis, and where such offers or invitations are intended or may reasonably be expected to result, whether directly or indirectly, in the acceptance or making of offers to sell or purchase such products, whether through that place or facility or otherwise.
- Others - Clearing houses, trade repositories and financial benchmarks, moneylenders, and spot commodity brokers/financial advisers/pool operators are subject to licensing and regulations as well.
- Prospectus requirements/selling restrictions - The offer of securities, debentures and units in CIS may also trigger prospectus requirements unless exemptions can be relied on.

For each of these activities, certain exemptions from the requirement to be licensed, registered, authorized or recognized may apply.

The specific nature and functions of crypto-assets and crypto-currencies need to be assessed to determine how they are regulated in Singapore. Generally, crypto-assets such as security tokens that satisfy the definition of capital markets products would be regulated under the securities and capital markets regulatory regime under the Securities and Futures Act. Crypto-currencies such as Bitcoin and Ether are regulated as digital payment tokens under the Payments Services Act. Stable coins, on the other hand, depending on their specific features, may potentially be considered to be e-money, regulated under the Payment Services Act, or digital payment tokens. At the moment, payment token derivatives that are not issued on an approved exchange in Singapore are not regulated. Utility tokens that do not fall within the scope of local regulation would also not be regulated.

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

A firm outside Singapore that deals with a client or counterparty located in Singapore is subject to Singapore laws and regulations if it conducts activities or transacts business in Singapore or targets persons in Singapore.

Where a firm conducts its activities wholly outside Singapore, it may still be subject to Singapore laws and regulations, depending on whether the applicable statute governing that activity has extraterritorial jurisdiction. For example, under the Banking Act, no person, whether in Singapore or elsewhere, shall accept any deposit from any person in Singapore or accept or receive in Singapore any application for a credit card or charge card. Under the Securities and Futures Act (which generally regulates capital markets activities) and the Insurance Act (which regulates insurance and insurance broking business), acts done wholly outside Singapore will be subject to regulation if they have a substantial and foreseeable effect in Singapore. Under the Financial Advisers Act (which regulates financial advisory services), a person is regarded as carrying out financial advisory business in Singapore if they engage in any activity or conduct intended to or likely to induce the public in Singapore to use any financial advisory service provided by them.





Certain exemptions do apply. For example, it is not the MAS policy intent to regulate activities conducted wholly outside Singapore where the foreign entity is responding to unsolicited inquiries or applications from persons in Singapore; the foreign entity is servicing a client previously resident overseas who has subsequently become a resident in Singapore; or when the foreign entity purchases the services of, or provides services to, a regulated person. Exemption from licensing requirements may also apply for certain specific activities where the foreign firm is related to an entity regulated in Singapore.

A firm based outside Singapore should also be cautious of regulatory requirements in Singapore when conducting non-regulated activities in Singapore. Under Singapore law, any person carrying out business or having a place of business in Singapore must register the business or company in Singapore. Firms should also not transact business in Singapore under the name "bank"; carry out business in Singapore under the name "insurance," "insurance broker" or "financial advisor"; or display the title or description "securities exchange," "futures exchange," "securities clearing house" or "futures clearing house" in Singapore, unless they are authorized to do so by the MAS.

There is no restriction on foreign ownership of entities carrying out regulated activities in Singapore. However, in some cases, such as fund management, dealing in capital markets products, providing financial advisory services, and payment services, the MAS will require that a company be incorporated in Singapore to obtain the license for providing such regulated services.

Where a firm is authorized to carry out regulated activities such as fund management, trading, provision of custodial services, or provision of financial advisory services, it may be required to register individuals acting on its behalf in the public register of representatives maintained by the MAS. To cater to situations where individuals ordinarily based outside Singapore may carry out regulated activities in Singapore on behalf of their firms, an individual may be appointed as a temporary representative. A temporary representative is not required to comply with certain minimum examination requirements but may not carry out regulated activities in Singapore for more than six months in any 24-month period.

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

In order to become authorized, recognized, licensed or registered to carry out regulated activities in Singapore, an applicant for authorization must satisfy the relevant regulator that it meets certain requirements. The requirements, which may be set out in primary or subsidiary legislation, notices, directions or guidelines, vary, depending on the type of activity the applicant intends to carry out.

Broadly, however, the following conditions will need to be satisfied:

- **Location of offices** - Companies seeking a license to carry out capital markets services or financial advisory services must establish and operate out of a Singapore office. In addition, such companies may be required to appoint a chief executive officer and/or a director who is a resident in Singapore.
- **Adequate resources** - Generally, the MAS will prescribe a minimum capital or financial

requirement for financial institutions applying to carry out regulated activities in Singapore. For some activities, professional indemnity insurance is either required or strongly encouraged.

- **Suitability** - The MAS will consider whether the applicant, its officers, directors and shareholders are fit and proper to carry out regulated activities in Singapore. The criteria for considering whether they are fit and proper include, but are not limited to: honesty, integrity and reputation; competence and capability; and financial soundness.
- **Experience** - The MAS may also consider the applicant's track record and whether its directors and representatives have relevant experience. Where the applicant is a foreign company, the MAS will also consider whether it is subject to proper supervision by a recognized home regulatory authority.

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

Generally, an applicant must undergo a formal process involving the completion of required application forms and the submission of supporting information. There is no time frame in which the MAS must consider and decide on an application. The particular forms that must be completed for submission to the MAS will depend on the nature of the regulated activities to be conducted. The requisite forms (if any) may be found on MAS' website.

For a license to carry out capital markets services or financial advisory services, the following forms are broadly required:

- **License Application Form:** This form sets out information about the applicant, its proposed business activities, organizational structure, shareholders and directors.
- **Individual Forms:** An applicant will also have to submit forms providing information about individuals to be appointed as representatives, chief executive officer and directors. The applicant will have to certify that it is satisfied that such individuals are fit and proper.
- **Supporting documents:** Various documents, such as business plans, organization charts and recent audited financial statements must be submitted with the forms set out above.
- **Letter of responsibility or undertaking:** In some cases, the MAS may require the applicant to procure a letter of responsibility or undertaking from its parent company, which commits the parent company to maintaining adequate oversight over the applicant or to undertaking liability if the applicant fails to maintain certain liquidity or financial requirements.

The MAS has the FinTech Regulatory Sandbox which enables financial institution and FinTech players to experiment with innovative financial products or services in a live environment but within a well-defined space and duration. There could therefore be already licensed financial institutions expanding the scope of their activities or new market entrants looking at obtaining a license. Depending on the experiment, MAS will provide the appropriate regulatory support by relaxing specific legal and regulatory requirements prescribed by MAS, which the sandbox entity will otherwise be subject to, for the duration of the sandbox. The sandbox will include appropriate safeguards to contain the consequences of failure and maintain the overall safety and soundness of the financial system. Upon successful experimentation and on exiting the sandbox, the sandbox entity must fully comply with the relevant legal and regulatory requirements. There are two sandbox options: (i) sandbox for more complex business models

where customization is required to balance the risks and benefits of the experiment; and (ii) fast track approvals for activities where the risks are low and well understood by the market. It is also possible for FinTech players to apply for the relevant licenses under the standard license application process without having to go into the sandbox if there is no intention to test products within the sandbox.

## 7. What financial services passporting arrangements does Singapore have with other jurisdictions?

To take advantage of investor interest in the growing economies and sophistication of the financial markets in the Asia Pacific region, a number of Asian economies have collaborated to initiate Asia-centric fund passport schemes. Two schemes involving Singapore are as follows:

- The Association of Southeast Asian Nations Collective Investment Schemes Framework for Cross Border Offering of Funds ("ASEAN CIS Framework")
- The Asia-Pacific Economic Cooperation (APEC) Asia Region Funds Passport

### ASEAN CIS Framework

In October 2013, the securities regulators and capital market authorities of Singapore, Malaysia and Thailand signed a memorandum of understanding to establish the ASEAN CIS Framework for the cross-border offering of collective investment schemes (CIS).

The objective of the ASEAN CIS Framework is to allow a qualifying fund manager to offer units of an ASEAN CIS authorized in its home jurisdiction to retail investors in other host jurisdictions with minimal regulatory hurdles. The participating countries adopt uniform Standards of Qualifying CIS set out the minimum qualifications required for the CIS operator and its management and personnel, relevant investment restrictions, and the obligations of the CIS operator.

At the time of writing, there have been at least 10 funds registered under the SFA and approved as Qualifying CIS under the ASEAN CIS Framework.

We understand that the participating countries have also separately agreed to an arrangement to provide mutual assistance to facilitate cross-border offerings of CIS to non-retail investors. However, no further details in this regard are currently given.

### APEC Asia Region Funds Passport

Another funds passport scheme is the APEC Asia Region Funds Passport, which was launched on 1 February 2019. It facilitates the distribution across regional borders of CIS funds manufactured, distributed and administered within the APEC region (similar to the operation of the ASEAN CIS Framework but with a broader reach).

Japan, Thailand, Australia and New Zealand are ready to receive registration applications from local prospective Passport funds as well as entry applications from foreign Passport funds.

The Republic of Korea continues to make progress with the legal and regulatory requirements for implementation required in its jurisdiction.

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# South Africa

## 1. Who regulates banking and financial services in South Africa?

The National Treasury, headed by the Minister of Finance, is responsible for setting policy regarding the regulation of private and public sector investment in South Africa. The South African Reserve Bank (SARB) is tasked with financial stability. The SARB also oversees the National Payment System and the Financial Surveillance Division of the SARB, which is responsible for the administration of exchange controls in South Africa.

The following regulatory authorities are responsible for overseeing activities by participants in the financial sector:

- a. The Prudential Authority, operating within the administration of the SARB, is primarily responsible for overseeing banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures.
- b. The Financial Sector Conduct Authority (FSCA) is a statutory body that supervises market conduct in relation to the provision of financial products and financial services in South Africa, including the conduct of financial institutions licensed in terms of various financial sector laws, such as banks, insurers, retirement funds and administrators, and market infrastructures. The mandate of the FSCA is significantly broader than that of its predecessor, the Financial Services Board.
- c. The SARB is the primary regulatory authority for payment systems and is responsible for the safety and soundness of the national payment system. SARB, in terms of the National Payment System Act, 1988, recognizes the Payment Association of South Africa as a payment system management body that has as one of its objectives the organizing, managing and regulating of the participation of its members (primarily banks) in the payment system.
- d. The Financial Intelligence Centre is responsible for implementing regulations to combat money laundering and the financing of terrorist activities.
- e. The National Credit Regulator is responsible for registering credit providers and supervising compliance with prescribed regulations for consumer credit.
- f. The Information Regulator (akin to a data protection authority) is responsible for monitoring and enforcing compliance with the provisions of the Protection of Personal Information Act, 2013.

In some industries, certain regulatory functions are delegated to associations or self-regulatory organizations. In terms of the Financial Markets Act in 2012, licensed

exchanges, central securities depositories and independent clearing houses operate as self-regulatory organizations that create rules and regulate their members and participants that are subject to the provisions of the Financial Markets Act.

South Africa is in the process of implementing a “twin peaks” approach to financial sector supervision, which commenced with the enactment of the Financial Sector Regulation Act in August 2017 and the creation of the Prudential Authority and FSCA in April 2018. The Treasury seeks to implement the transition of the South African financial sector regulation to a twin peaks model in two phases. As part of Phase 1, existing industry-specific legislation has been allocated to one of the new regulators as the principal regulatory authority for an industry, but both regulators will have the power to exercise supervisory powers and to apply and enforce the industry-specific legislation on a financial institution — the Prudential Authority in respect of prudential aspects and the FSCA in respect of market-conduct issues. The new regulators are also able to issue conduct and prudential standards to supplement industry-specific legislation.

Phase 2 represents the creation of a new consolidated regulatory framework that combines the regulation of, and the standards applied to, the various financial subsectors into overarching legislation applicable to all financial institutions. Existing financial sector legislation is currently fragmented, with a distinct statute applying to each of the different types of financial institutions providing a particular type of financial product or service, namely, securities exchanges, insurance companies, pension funds, collective investment schemes, banks, mutual banks, friendly societies, financial advisors, and intermediaries. Although existing sector-specific legislation will remain in place for an interim period, the National Treasury has confirmed that some or all of these laws will be replaced and consolidated by the overarching Conduct of Financial Institutions Act as part of the next phase of implementing the twin peaks model.

## 2. What are the main sources of regulatory laws in South Africa?

The following primary statutes and regulations govern “financial institutions,” including: (i) financial products or service providers; (ii) market infrastructures; (iii) holding companies of financial conglomerates; or (iv) persons required to be licensed in terms of a financial sector law.

### Legislation affecting participants in the financial sector generally

- The Financial Sector Regulation Act, 2017 provides an overarching framework for regulating and supervising activities and participants in the South African



financial sector. Please see the discussion under question 1 for more information.

- The Inspection of Financial Institutions Act, 1998 provides for the inspection of the affairs of financial institutions and for the inspection of the affairs of unregistered entities conducting the business of financial institutions.
- The Financial Institutions (Protection of Funds) Act, 2001 provides for the laws relating to the investment, safe custody and administration of funds and trust property by financial institutions.
- The Financial Intelligence Centre Act, 2001 establishes the Financial Intelligence Centre and a Money Laundering Advisory Council to combat money laundering activities and the financing of terrorist and related activities. It also imposes identification, record-keeping and reporting obligations upon “accountable institutions,” including banks, attorneys, accountants, estate agents, investment managers and authorized users of securities exchanges.
- The Prevention of Organised Crime Act, 1998 provides measures for combatting organized crime, money laundering and criminal gang activities.
- The Currency and Exchanges Act, 1933 (and the regulations issued in terms thereof) regulates, inter alia, legal tender and currency and the export of capital from South Africa, the holding of foreign currency in South Africa, and the retention of the South African rand abroad.
- The Electronic Communications and Transactions Act, 2002 provides for the facilitation and regulation of electronic communications and transactions.
- The Protection of Personal Information Act, 2013 regulates the manner in which personal information may be processed by prescribing minimum threshold requirements for the lawful processing of specified personal information in line with international data protection laws.
- The Trust Property Control Act, 1996 aims to regulate control of trust property, which is to be administered in accordance with a trust instrument.
- The Consumer Protection Act, 2008 under the Financial Sector Regulation Act provides that the Consumer Protection Act does not apply to (a) any transaction product or service that is subject to the National Payment Systems Act, 1988 or any financial sector law, and which is regulated by the FSCA, the SARB, the Prudential Authority or the Prudential Committee in terms of the Financial Sector Regulation Act; and (b) any transaction that constitutes a credit agreement in terms of the National Credit Act. To the extent that any goods or services provided by an institution falls outside the scope of financial sector laws, the Consumer Protection Act will apply to those goods or services.
- The Conduct of Financial Institutions Bill, 2020 (the “Bill”) will, once enacted, give legislative effect to the market conduct policy approach, including the implementation of the Treating Customers Fairly principles. The Bill aims to establish a consolidated and comprehensive regulatory framework for the conduct of financial institutions that will protect financial customers; promote the fair treatment of financial customers by financial institutions; support fair and efficient financial markets; promote innovation and the development of and investment in innovative technologies, processes and practices; promote competition; promote financial inclusion, and promote the transformation of the financial services sector.

#### **Legislation applicable to the banking sector**

- The Banks Act, 1990 and the regulations published in terms thereof provide for the regulation and supervision of the taking of deposits from members of the public and of

related activities.

- The South African Reserve Bank Act, 1989 regulates the SARB and the South African monetary system.
- The Mutual Banks Act, 1993 provides for the regulation and supervision of the activities of a juristic person that is registered as a mutual bank and its members.
- The Co-operative Banks Act, 2007 provides for the regulation and supervision of cooperative banks. The legislation acknowledges member-based financial services cooperatives as a different tier of the official banking sector.

#### **Other sector-specific financial regulations**

- The National Payment Systems Act, 1988, together with regulations and notices issued thereunder, provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in South Africa.
- The Financial Advisory and Intermediary Services Act, 2002 provides for the regulation and supervision of rendering certain financial advisory and intermediary services to clients and the marketing of financial products and services.
- The National Credit Act, 2005 regulates the provision of consumer credit and provides for the registration of credit providers, credit bureaus and debt counselors.
- The Home Loans and Mortgage Disclosure Act, 2000 promotes fair lending practices, which require disclosure by financial institutions of information regarding the provision of home loans and establishes an Office of Disclosure.
- The Credit Rating Services Act, 2012 provides for the registration and regulation of credit rating agencies in accordance with international regulatory principles.
- The Financial Markets Act, 2012 provides for the regulation of financial markets, including, inter alia, the establishment, licensing and operation of market infrastructures for the trading, custody and administration of securities and the clearing and settlement of transactions, as well as the conduct of authorized users of, or participants in, any market infrastructure. Users or participants must also comply with the rules of the relevant exchange or central securities depository. The Financial Markets Act also deals with the prohibition on insider trading.
- The Insurance Act, 2017 replaced and consolidated parts of the Long-term Insurance Act, 1998 and the Short-term Insurance Act, 1998. The Insurance Act aims to bring stability to the South African insurance market, in part by introducing stricter regulation for certain entities such as foreign-based insurers in the local market. It also creates a legal framework for the micro-insurance industry, thus promoting financial inclusion and unifying insurance-related regulations.
  - The Short-term Insurance Act, 1998 deals with the registration of short-term insurers and the regulation of short-term insurance providers and intermediaries, as well as the provision of policy benefits under short-term policies such as engineering, guarantee, miscellaneous, motor, accident and health, property, or transportation policies.
  - The Long-term Insurance Act, 1998 provides for the registration of long-term insurers and the regulation of long-term insurance providers and intermediaries in relation to the provision of policy benefits under long-term policies, which include assistance policies, disability policies, fund policies, health policies, life policies or sinking fund policies. Further amendments to the Short-term Insurance Act and Long-term Insurance Act are pending.



- The Pension Funds Act, 2008 and regulations issued thereunder provide for the registration, incorporation, regulation and dissolution of pension funds.
- The Collective Investment Schemes Control Act, 2002 regulates and controls the establishment and administration of collective investment schemes and the marketing of domestic and foreign investment schemes or funds to South African residents.

### 3. What types of activities require a license in South Africa?

Various role players and activities are regulated in South Africa, including the following:

- a. Accepting deposits from the general public:** Subject to a few exceptions, this activity would generally include the following:
  - Acceptance of, soliciting of, or advertising for deposits from the general public (including persons in the employ of the person accepting such deposits) as a regular feature of a business: this would cover typical retail banking activities under the Banks Act or deposit-taking by member-based organizations such as stokvels, co-operative finance institutions, co-operative banks, friendly societies and mutual banks in terms of legislation specific to those organizations
  - Utilization of money accepted by way of deposit for: (i) the granting of loans to other persons; (ii) investment by any person acting as an investor in such person's name or through the medium of a trust or a nominee; or (iii) the financing, to any material extent, by any person of any other business activity conducted by such person in his or her own name or through the medium of a trust or a nominee
  - Obtaining of money through the sale and repurchase of assets, to any person other than a bank, as a regular feature of the business
- b. Dealing in foreign exchange:** No person (other than an authorized dealer) is permitted to buy or borrow any foreign currency or any gold from, or sell or lend any foreign currency or any gold to, any person not being an authorized dealer unless they have obtained the requisite approval from the SARB through an authorized dealer. An authorized dealer is a person authorized by the Financial Surveillance Department of the SARB in respect of any transaction involving gold or foreign exchange or to deal in gold or foreign exchange.
- c. Payment services and money remittances**
- d. Any of the following "securities services," which are regulated in terms of the Financial Markets Act:**
  - Dealing in securities: including the buying or selling of securities as part of a business, the use of a securities exchange to buy or sell listed securities, or the furnishing of advice relating to security to any person
  - Operating a securities exchange: providing infrastructure for the trading of listed securities
  - Operating a clearing house: providing infrastructure for the clearing of transactions in listed or unlisted securities
  - Providing or participating in clearing and settlement processes

- Operating a securities depository: the provision of infrastructure for holding uncertificated securities, including a securities settlement system
- Custody and administration services –a person (referred to as a participant) authorized by a central securities depository to perform custody and administration services in terms of the central securities depository rules
- Maintaining records of securities transactions –a person (referred to as a trade repository) who maintains a centralized electronic database of records of securities transaction data

- e. Providing advisory or intermediary services in relation to a financial product or financial service:** "Advice" includes any recommendation, guidance or proposal of a financial nature to any person in respect of the purchase of, or investment in, any financial product; the conclusion of any other transaction aimed at incurring any liability or acquiring of any right or benefit in respect of any financial product; or on the variation of any term or condition applying to a financial product. "Intermediary services" include any act other than the furnishing of advice the result of which is that a client may enter into any transaction in respect of a financial product, including actions taken with a view to buying, selling or otherwise dealing in, managing, administering, keeping in safe custody, maintaining or servicing a financial product; collecting or accounting for premiums; or processing claims. Businesses typically affected by the Financial Advisory and Intermediary Services Act are investment managers, investment advisers, insurance brokers and advisers, foreign exchange intermediaries (persons who trade foreign exchange as an asset class for clients), financial planners and advisers.
- f. Collective investment schemes:** This involves establishing and managing an investment scheme into which individual investors' funds are pooled for investment purposes and marketing of domestic or foreign collective investment schemes or funds.
- g. Loans to consumers:** The National Credit Act, 2005 applies to all credit agreements entered into or having an effect in South Africa and which contemplates a credit facility, a credit transaction, a credit guarantee or any combination of these products or transactions being provided to a consumer. All credit providers must apply to be registered as a credit provider with the National Credit Regulator unless one of the following exceptions apply:
  - The borrower is a juristic person with a total asset value or annual turnover exceeding the specified threshold (currently at ZAR 1 million).
  - The borrower is a juristic person with a total asset value or annual turnover not exceeding the above threshold and the credit agreement is a mortgage agreement; or any other credit transaction where the principal debt amounts to ZAR 250,000 or more.
  - The credit agreement is not concluded on arm's length terms (i.e., related party transactions).
  - The agreement or transaction relates only to incidental credit, the letting of immovable property, an insurance policy, credit provided for the payment of insurance premiums, or a transaction between a stokvel and its members in accordance with the rules of the stokvel.
- h. Credit rating services:** This refers to the analysis, evaluation, approval, issuing or review of data and information for purposes of providing a credit rating that determines the creditworthiness of an entity, a security or financial instrument, or an issuer of a security or financial instrument.





- i. Establishing and operating a retirement fund
- j. Providing short-term or long-term insurance products
- k. **Supplying any financial product:** If the provision of a particular financial product is not regulated under any specific financial sector law, the product provider will be required to register under the Financial Sector Regulation Act.
- l. **Crypto-assets or crypto-currencies:** Such assets and currencies are not currently regulated in South Africa. The SARB has confirmed that it has the sole right to issue legal tender and that decentralized convertible virtual currencies do not constitute legal tender in South Africa. However, the Crypto-Assets Regulatory Working Group of the Intergovernmental Fintech Working Group (a body coordinating South African financial regulators on financial technology policy and regulation) published a position paper on 11 June 2021, which unequivocally states that crypto-assets cannot remain unregulated. The position paper contains recommendations for a revised policy position for crypto assets including treating crypto assets as financial products, improving the disclosure of consumer risks, introducing obligations for crypto asset service providers to comply with "Know Your Customer" and anti-money laundering regulations, recognition of crypto assets as 'capital' for exchange control purposes and introducing cross-border monitoring of financial flows, including the transfer of foreign currency by crypto asset trading platforms.

## 4. How do South Africa's licensing requirements apply to cross-border business into South Africa?

There is no single system by which foreign financial services or product providers can apply to supply such services or products to South African residents. Currently, this is determined by each financial subsector, as indicated below.

**Banking:** An institution established in a foreign jurisdiction and which lawfully conducts the business of a bank in such jurisdiction may establish the following:

- a. A representative office in South Africa, after obtaining the written consent of the Prudential Authority pursuant to a written application to be submitted to the Prudential Authority, together with the prescribed fee and a certificate from the competent authority in the foreign jurisdiction in which such institution conducts a business similar to the business of a bank: A representative office may not conduct the business of a bank in South Africa and instead serves to promote and facilitate the business of the foreign bank outside of South Africa.
- b. A branch of the foreign bank in South Africa to conduct the business of a bank in South Africa, with the prior written authorization of the Prudential Authority and subject to the prescribed conditions and such further conditions, if any, as the Prudential Authority may determine: The foreign bank will be required to lodge with the Prudential Authority an application in the form set out in the Regulations relating to Banks together with the prescribed fee. The application must include information regarding the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution's country of domicile. The Prudential Authority will not approve an application unless they are satisfied that proper supervision is or will be exercised by the responsible supervisory authority of the foreign institution's country of domicile. The foreign

institution will also be required to register as an external company (in accordance with the Companies Act, 2008).

**Financial advisors and intermediaries:** In terms of the Financial Advisory and Intermediary Services Act, a financial services provider who is not a resident may submit an application to the FSCA in the form and manner determined by the authority, which must be accompanied by information to satisfy the FSCA that the applicant complies with the prescribed fit and proper requirements. Broadly speaking, the FSCA acknowledges that foreign financial service providers may be subject to similar regulation and supervision by regulators in their home jurisdictions. Accordingly, provided the licensing requirements of the foreign regulator are at a standard acceptable to the FSCA, foreign financial service providers and their compliance officers may be able to obtain exemptions from compliance with some local fit and proper and auditing requirements prescribed in terms of the Financial Advisory and Intermediary Services Act. The FSCA has, in practice, required that a company operating as a financial advisor or intermediary to customers in South Africa be registered as an external company in South Africa.

**Collective investment schemes:** The manager or operator of a foreign investment fund must apply to the Registrar of Collective Investment Schemes, which is a functionary of the FSCA, for the registration of the particular investment fund and each relevant portfolio as a collective investment scheme in terms of the Collective Investment Schemes Control Act prior to soliciting investments in any such fund from members of the public in South Africa. The foreign investment fund must comply with the following requirements to be registered:

- The investment fund must be registered and supervised in a jurisdiction that is acceptable to the FSCA.
- The operator of the investment fund must be subject to at least the same standard of regulation and supervision as South African collective investment schemes.
- The operator must either: (a) enter into a representative agreement with a South African collective investment scheme manager that is authorized in terms of Collective Investment Schemes Control Act; or (b) establish and maintain a representative office in South Africa (which must be a company incorporated under the Companies Act, 2008).
- The operator must satisfy certain requirements by the Registrar, including the liquidity of the investment fund and that the assets of investors are properly protected by the principle of segregation and identification.

## 5. What are the requirements to obtain authorization in South Africa?

The primary legislation applying to each of the different types of financial institutions and financial services providers generally sets out the specific requirements that an applicant for a specific financial sector license must satisfy. Broadly speaking, the following requirements must be met to the satisfaction of the sector-specific authority:

- a. **Fit and proper:** The applicant must provide the FSCA with information evidencing that the fit and proper requirements have been satisfied in respect of the personal character, competence, operational ability and financial soundness of the individual applying for a license or key individuals or management of a legal entity applying for a license. The individual requirements will, however, vary according to the type of



license sought by the applicant.

- b. Assets and resources:** The applicant must implement an effective and reliable infrastructure and have adequate assets and resources within South Africa to ensure that it will comply with the requirements of financial sector laws in relation to the license. Relevant resources include financial, management and human resources with appropriate experience to perform its licensed function.
- c. Governance arrangements:** Governance arrangements must, inter alia, be clear and transparent, promote the safety and efficiency of the financial market infrastructure, and support the stability of the broader financial system, while taking into account relevant public interest considerations and the objectives of relevant stakeholders.
- d. Surveillance, supervision and monitoring:** The applicant must demonstrate arrangements for the efficient and effective surveillance, supervision and monitoring of all transactions, authorized users and general compliance. The nature and scope of surveillance, supervision and monitoring arrangements that an applicant must demonstrate will depend on the specific activity that is the subject of the license application. The applicant must demonstrate that it will be able to comply with the surveillance, supervision and monitoring obligations prescribed in terms of the specific legislation applicable to authorized entities in the relevant sub-sector.
- e. Risk management:** The applicant must implement arrangements to efficiently and effectively monitor and manage the material risks associated with the relevant activity.
- f. Record keeping and reporting:** The applicant must demonstrate that it has arranged for efficient and effective security and back-up procedures to ensure the integrity of the records of transactions.
- g. Prudential requirements and/or liability insurance:** The applicant must comply with the minimum capital requirements or comply with the prescribed insurance, a guarantee, compensation fund or other warranty requirements, which are prescribed for the particular sub-sector under sector-specific legislation.
- h. Public interest:** The relevant authority must consider whether issuing the license to the applicant would be contrary to the interests of financial customers, the financial sector or the public.

In terms of the Financial Advisory and Intermediary Services Act (FAIS) and the Determination of Fit and Proper Requirements, financial services providers, key individuals and representatives of the provider must comply with the prescribed “fit and proper requirements.” The Determination of Fit and Proper Requirements sets out the honesty, integrity and good standing; competency; operational ability; and financial soundness requirements for all financial services providers, key individuals and representatives. Individuals exercising oversight over the rendering of financial services by a financial services provider authorized under FAIS (referred to as “key individuals”) or who represent the authorized financial services provider in rendering financial services to clients (referred to as “representatives”) must complete certain regulatory examinations prescribed under the Determination of Fit and Proper Requirements.

## 6. What is the process for becoming authorized in South Africa?

The licensing process for the various financial sector activities is currently prescribed under the various sector-specific statutes and subordinate legislation. The application process involves, inter alia, the completion of required sector-specific application forms, the submission of supporting information and documents evidencing compliance with the requirements referred

to under question 5 generally and as set out in the specific financial sector legislation, and in the case of financial services providers, the completion of regulatory examinations prescribed by the FSCA.

The various sector-specific application forms, together with explanatory notes, may be obtained from the respective official websites of the primary regulators:

- The Prudential Authority: [www.resbank.co.za/PrudentialAuthority/Pages/default.aspx](http://www.resbank.co.za/PrudentialAuthority/Pages/default.aspx)
- The FSCA: [www.fsca.co.za](http://www.fsca.co.za)
- The National Credit Regulator: [www.ncr.org.za](http://www.ncr.org.za)
- The Payments Association of South Africa: <http://www.pasa.org.za>

In the event that the proposed financial sector activity does not fall within the scope of any sector-specific legislation, the entity is required to submit an application in terms of the Financial Sector Regulation Act and in accordance with standards to be published in terms thereof.

## 7. What financial services “passporting” arrangements does South Africa have with other jurisdictions?

South Africa does not have a financial services passporting regime.

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# Spain

## 1. Who regulates banking and financial services in Spain?

There are different public bodies overseeing the conduct of banking and financial services businesses in Spain. These public bodies have regulatory and supervisory authority over participants in both banking and financial markets.

The main supervisory authorities in Spain are the following:

### The Bank of Spain

The Bank of Spain, together with the European Central Bank (ECB), since the entry into force of Council Regulation (EU) No. 1024/2013, on 15 October 2013, establishing a single supervisory mechanism for banks in the euro area (SSM Regulation), supervises the Spanish banking system.<sup>1</sup>

Moreover, the Bank of Spain also supervises (i) credit financial entities, which are financial institutions that are not allowed to take deposits from the public and that have a more limited corporate purpose; (ii) payment institutions, which are legally entitled to provide payment services; and (iii) e-money institutions, which provide almost identical services as the previous institutions but are also allowed to issue electronic money.

The Bank of Spain comprises a governor, a sub-governor, a governing council (which is composed of the governor, the sub-governor, six directors, the general director of the Treasury and Financial Policy, and the vice president of the Comisión Nacional del Mercado de Valores or CNMV), and an executive commission (made up by the governor, the sub-governor and two directors, although all general directors of the Bank of Spain may attend without voting rights).

The Bank of Spain is empowered with a wide range of functions, which can be classified into two broad categories:

- a. Functions linked to its members-status of the European System of Central Banks
- b. Functions as a National Central Bank
  - Holding and managing currency and precious metal reserves not

transferred to the ECB

- Promoting the proper working and stability of the financial system
- Supervising solvency and compliance with specific rules of credit institutions, other entities and financial markets, for which it has been entrusted with supervisory responsibility
- Placing coins in circulation and performing, on behalf of the state, any other functions entrusted to it related to this function
- Preparing and publishing statistics relating to its functions and assisting the ECB in the compilation of statistical information
- Providing treasury services and acting as a financial agent for government debt
- Advising the government and preparing appropriate reports and studies
- Supervising credit institutions and other entities in order to ensure compliance with regulatory and disciplinary rules In order to perform and carry out the supervisory function, the Bank of Spain may, among others:
  - Gather the information needed to check that the regulatory and disciplinary rules are being followed from the institutions and persons subject to its supervisory function.
  - Require of and communicate to the institutions subject to its supervision the information and measures included in the regulatory and disciplinary rules.
  - Conduct all the necessary investigations or inspections.

### European System of Central Banks

The European System of Central Banks is the central bank for the Eurozone's single currency, the Euro. The ECBs main task is to preserve the euro's purchasing power by maintaining price stability in the Eurozone.

As mentioned, in addition to the foregoing and pursuant to the SSM Regulation, the ECB has been vested with prudential supervisory powers to be exercised over credit institutions in the European Union. Together with each of the supervisory authorities of the participating member states, it constitutes the SSM, whose main purpose is to carry out thorough and effective banking supervision as well as to contribute to the safety and soundness of the banking system and to the stability of the financial

<sup>1</sup> Consistent with the exclusion made under Article 2(5) of Directive 2013/36/EU of the European Parliament and of the Council, dated 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms; the institutions identified thereunder are also excluded from the supervisory tasks conferred upon the ECB, which in the case of Spain affects the state-owned Instituto de Crédito Oficial.



system, guaranteeing equal treatment and conditions throughout the EU.

By virtue of the SSM Regulation, the ECB has exclusive competency to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions (CIs) established in participating member states:

1. To authorize and, where appropriate, withdraw the authorization of CIs and to assess notifications of acquisition or disposal of qualifying holdings in CIs, with certain caveats in the case of bank resolutions
2. To act as the local competent authority for CIs established in a participating member state that wishes to establish a branch or provide cross-border services in a non-participating member state
3. To ensure compliance with EU law on prudential requirements (Pillar 1), supervisory review procedures (Pillar 2) and market disclosure (Pillar 3), comprising, among other matters, the analysis of: own funds requirements, large exposure limits, liquidity, leverage, governance arrangements, the fit and proper requirements for senior management, internal control mechanisms, remuneration policies, and capital adequacy, including the assessment of internal risk models and the performance of stress tests
4. To carry out supervision on a consolidated basis over CIs' parent firms established in a participating member state, including over financial holding companies and mixed financial holding companies (where parent firms are not established in a participating member state, the ECB will participate in colleges of supervisors, without prejudice to the participation of National Competent Authorities as observers)
5. To participate in supplementary supervision of financial conglomerates in relation to their CIs, assuming, where appropriate, the task of coordinator of the financial conglomerate
6. To supervise recovery plans and early intervention measures and, where appropriate, request that the measures needed to resolve problems be adopted, excluding any resolution powers
7. To impose more stringent requirements, in close coordination with the national authorities of participating member states in respect of own funds requirements, additional capital buffers and systemic or macro-prudential measures

These supervisory functions are, without prejudice to others, entrusted to the ECB in relation to significant CIs.

#### **The CNMV**

The CNMV is Spain's national securities commission in charge of overseeing Spanish financial markets and supervising the activities of all market participants.

The main functions of the CNMV are to supervise and monitor the securities markets and the activity of all individuals or legal entities in relation thereto and, where appropriate, to impose sanctions following infringements of securities markets. It is also an advisory body to the central government and to the autonomous regions in all matters related to the securities markets.

Its main aim is to ensure the transparency and efficiency of the securities markets, orderly pricing therein and investor protection, as well as to disseminate any information that may be necessary for these purposes. Likewise, when so empowered by legislation, it can also issue circulars containing mandatory rules for the implementation and enforcement of the regulations

issued by the Council of Ministers or the Minister of Economy and Business, on a case-by-case basis.

#### **The Directorate General of Insurance and Pension Funds**

In relation to insurance, the Spanish Directorate General of Insurance and Pension Funds (DGSFP) is the body in charge of supervising in Spain the various activities carried out by: (i) insurance and reinsurance undertakings; (ii) pension plans and funds; and (iii) securitization vehicles.

In this financial sub-sector, insurance undertakings can adopt the following legal forms: (i) public limited companies; (ii) mutual insurance companies; (iii) cooperatives; and (iv) mutual benefit societies.

It must be taken into account that the DGSFP is also the body in charge of supervising other entities that might be related to the insurance business, such as intermediaries or actuaries.

#### **Spanish Anti-money Laundering Commission**

The Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offenses (SEPBLAC) is the supervisory authority concerning the prevention of money laundering and the financing of terrorism. Its main role is to fight against money laundering and terrorism and, for this purpose, it has supervisory and enforcement authority relating to financial sanctions and countermeasures.

## **2. What are the main sources of regulatory laws in Spain?**

As Spain is a member of the EU, a large part of the legal provisions derive from EU directives and regulations. Therefore, much of the Spanish legislation regarding banking and financial matters is enacted in order to give effect to EU legislation.

The main statutory provisions on banking and financial regulation in Spain are Act 10/2014, dated 26 June 2014, on the organization, supervision and solvency of credit institutions (Ley de Ordenación, Supervisión y Solvencia de entidades de crédito or CSSCIA), and Royal Legislative Decree 4/2015, dated 23 October 2015, enacting the recast Security Markets Act (Texto refundido de la Ley de Mercado de Valores or SMA).

In addition, both the Bank of Spain and the CNMV have been vested with authority to issue statutory dispositions called circulars (Circulares).

## **3. What types of activities require a license in Spain?**

Spanish law regulates a wide array of banking and financial activities. As a general rule, entities wishing to carry out those activities in Spain will need to obtain the necessary license from the relevant supervisory authority, for which they will need to meet certain criteria.

#### **Banking activities**

Under Article 3 of the CSSCIA, the activity of taking repayable funds from the public, either in the form of a deposit, loan, temporary assignment of financial assets or otherwise, and irrespective of their final destination, is an activity reserved for CIs in Spain. Any entity wishing to carry out such an activity must be duly authorized and registered with the Bank of Spain as





a CI. In addition, CIs may provide on a regular basis the full range of investment and ancillary services where their legal regime and their specific authorization enable them to do so.

Without prejudice to the above, CIs duly authorized in other member states may, by virtue of the EU-banking passport, provide this service in Spain (as well as all those activities itemized in the Annex of the CSSCIA<sup>2</sup>) without applying for a Spanish license.

### Financial services

The promotion and provision of investment services on a professional and regular basis can only be conducted by institutions that have been duly authorized for such purposes. In this sense, credit and investment firms are the main entities. However, management companies of collective investment schemes can also be authorized to provide certain types of investment services.

According to Article 138 of the SMA, investment firms are entities that have as their main corporate purpose the provision, on a professional basis, of investment services to third parties in relation to financial instruments described in Article 2 of the SMA.

In relation to what constitutes an “investment service,” Article 140 of the SMA lists the following activities:

1. Reception and transmission of orders from clients in relation to one or more financial instruments
2. Execution of orders on behalf of clients
3. Dealing on own account
4. Portfolio management
5. Placing of financial instruments without a firm commitment basis
6. Underwriting and placing of financial instruments on a firm commitment basis
7. Investment advice
8. Operation of Multilateral Trading Facilities
9. Operation of Contractual Organized Facilities

Similarly, Article 141 of the SMA classifies as ancillary investment services the following activities:

1. Safekeeping and administration of financial instruments for the account of clients
2. Granting of credits or loans to an investor to allow them to carry out a transaction in one or more financial instruments, where the firm granting the credit or loan is involved in the transaction
3. Provision of advice to undertakings on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings
4. Provision of services related to underwriting transactions
5. Administration of investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments
6. Provision of foreign exchange services where these are connected to the provision of investment services

7. Provision of investment services and activities, as well as ancillary services related to the non-financial assets underlying those financial instruments under sections e), f), g) and j) of Annex of the SMA, when connected to the provision of investment or ancillary services

Pursuant to Article 144 of the SMA, all “investment services” and all “ancillary investment services” are reserved for investment firms. There are two exceptions for (a) the provision of advice regarding undertakings on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings; and (b) the carrying out of investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments. Consequently, any entity wishing to pursue any of those services will need to obtain prior authorization.

### Crypto service-providers Registration

Spanish implementation of the Fifth Anti-Money Laundering Directive imposed AML obligations on the following providers:

- Providers of exchange between virtual currencies and fiduciary currencies (Article 1.2.6 of Act 10/2010); and
- Custodian wallet providers (Article 1.2.7 of Act 10/2010).

Those crypto service providers established in Spain or in other countries but offering their services to Spain-based individuals or legal entities (either through a branch, agents or in free provision) should also be registered with the Bank of Spain. The Bank of Spain’s register is expected to be established and operational by the end of October 2021.

A transitional regime applies to those providers who were already active before 29 April 2021, which may continue to carry out their activities subject to registration with the Bank of Spain before 29 January 2022.

Access to the register shall be conditional upon (i) the existence of adequate AML procedures and internal control bodies (as required by the AML Act) and (ii) compliance with the requirements of commercial and professional honorability.

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

Nearly all the activities carried out by a foreign entity when dealing with a client or a counterparty located in Spain are subject to Spanish laws and regulations, and therefore to supervision by the relevant supervisory authority. However, there are important differences depending on whether the foreign entity is based in an EU member state.

For EU-based foreign entities, please see question 7 relating to “passporting.”

Credit institutions and investment service companies from non-EU countries that have not been authorized in another member state need to seek authorization from the Bank of Spain or the CNMV before starting to carry out services in Spain. In these cases, the Bank of Spain and the

<sup>2</sup> The list enclosed as Annex to the CSSCIA mirrors the list of activities subject to mutual recognition included in Annex I of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

CNMV may request further information and, if deemed appropriate, deny permission to carry out all or part of the activities for which authorization was sought, or to impose additional requirements.

Neither the Bank of Spain nor the CNMV have issued guidelines in relation to when Spanish law considers a banking or an investment service to be provided in Spain. Although certain specific legislation contains criteria in this regard (e.g., Act 22/2007, dated 11 July 2007, on distance marketing of financial services to consumers), in general terms, and specifically in relation to banking services, Spanish doctrine tends to rely on the European Commission's Interpretative Communication of 1997 on the "freedom to provide services and the interest of the general good in the second banking directive." This states that in order to establish the place where an activity is carried out, the analysis must focus on the place where what may be termed as the "characteristic performance" of the service (i.e., the essential supply for which payment is due) is to be provided.

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

The requirements to obtain authorization vary depending on: (i) how the applicant wishes to conduct banking business in Spain (i.e., the incorporation of a new entity with a Spanish license, the establishment of a Spanish branch, the incorporation of a Spanish subsidiary or the provision of cross-border services in Spain without a permanent establishment); and (ii) the nature of the applicant.

### 1. Credit institutions

#### 1.1 Incorporation of new CIs

As a general rule, any person or entity seeking to undertake a banking business in Spain through a Spanish legal entity must first obtain a banking license. The application for authorization must be addressed to the Bank of Spain, although it is the ECB that ultimately grants the authorization, based on the proposal issued by the Bank of Spain.

Before conveying its proposal to the ECB, the Bank of Spain must obtain a report from the SEPBLAC, and where appropriate, from the CNMV and the General Directorate for Insurance and Pension Funds.

Authorization may be denied if: (i) the applicant lacks adequate organizational structure, does not comply with the minimum capital requirements, or fails to have adequate administrative and accounting procedures or internal controls to ensure safe and sound management; (ii) the shareholders or directors are not fit and proper; (iii) the applicant lacks adequate procedures for the prevention of money laundering or terrorism financing; or (iv) the entity fails to meet any of the basic statutory requirements mentioned below.

The basic statutory requirements for incorporating a new CI in Spain include, but are not limited to, the following:

- The entity must be incorporated as a public limited company (sociedad anónima).
- The entity must have a minimum fully paid up share capital of EUR 18 million represented by shares, which must be nominative.
- The corporate purpose of the entity must be limited to banking activities.

- Shareholders owning qualifying holdings must be considered suitable according to Article 6 of Spanish Royal Decree 84/2015 developing CSSCIA (CSSCIR).
- No special rights or preferences must be granted to the entity's founders.
- Management must be entrusted to a board of directors of at least five members, all of whom must be suitable. Any person who has been convicted of a criminal offense or has been indicted for crimes involving dishonesty or a breach of a fiduciary duty, such as money laundering, misuse of public funds, "unfaithfulness" in the custody of documents or disclosure of secrets, is ineligible to serve as a director. Furthermore, the majority of the members of the board of directors must have practical and theoretical knowledge and expertise in running a bank. All of the foregoing requirements also apply to the entity's general managers.
- The entity must have an appropriate administrative and accounting organization, as well as internal control procedures that ensure safe and sound management.
- The entity's registered address and headquarters must be in Spain.
- The entity must put in place appropriate proceedings for the prevention of money laundering in accordance with applicable legislation. This requirement also includes the drafting of an AML manual and the appointment of a representative before the SEPBLAC (i.e., MLRO).

#### 1.2 Incorporation of a subsidiary

Regarding the incorporation of subsidiaries, it must be noted that while the rules for incorporating a subsidiary of a foreign CI are substantially the same as the rules applicable to the incorporation of a new bank in Spain, two major differences exist for non-EU-based entities:

A foreign bank may be denied permission to incorporate a Spanish subsidiary if the country of residence of the parent foreign bank does not guarantee reciprocal treatment for Spanish banks under an international agreement.

The Bank of Spain may require the parent bank to guarantee the obligations of the Spanish subsidiary.

#### 1.3 Opening of a Spanish branch

As will be further explained in question 7, the opening of Spanish branches by CIs incorporated in EU member states are regulated through the "EU-passport," which enables an applicant that already holds authorization from its home member state to carry out activities in Spain by notifying its home country's competent authority, which shall in turn notify the Bank of Spain. Consequently, there is no prior authorization requirement vis à vis the Spanish authorities.

Conversely, the establishment of branches of CIs from non-EU countries is subject to the prior authorization of the Bank of Spain. The authorization must comply with requirements similar to those outlined for the incorporation of new CIs in Spain, although adapted to the legal nature of branches in Spain (i.e., non-legal entities, part of their parent undertaking). The main requirements are as follows:

References to minimum share capital shall be deemed to be made to permanent/fixed funds indefinitely allocated to the Spanish branch, available for loss absorption.





The requirement of a board of directors is substituted by two general managers. The same eligibility criteria and requirements apply.

The Spanish branches' business cannot include activities for which the parent undertaking does not hold a license in its home country.

The application shall include detailed information on the financial, legal and management characteristics of the parent undertaking, as well as evidence proving the parent undertaking is a duly authorized and registered CI in its home country.

The application may be rejected based on a lack of reciprocity for Spanish CIs in the home country of the parent undertaking.

#### 1.4 Representative office's incorporation

Representative offices are permanent establishments that are functionally and organically dependent on a duly authorized CI based in another country. The main purpose of such an establishment relates to the general promotion of information services on banking activities, as well as to provide support to the provision of cross-border services without a fixed commercial establishment in Spain. Consequently, representative offices cannot be remunerated for the provision of these services.

Banks from EU countries that are looking to establish a representative office in Spain need to communicate their intention to the Bank of Spain. Non-EU banks must apply for prior authorization from the Bank of Spain in order to establish the office.

Both the notification and the authorization should contain the following information:

Details of the activities to be carried out by the representative office

The name and personal details of the manager of the office

## 2. Other licensed entities providing banking services

According to Spanish law, there are other institutions that, though not CIs, are entitled to carry out certain banking activities:

### 2.1 Financial credit entities

Regulated by Royal Decree 309/2020 of 11 February 2020 on the legal regime for financial credit entities, these entities can provide the following services: (a) lending, including, *inter alia*, consumer credit, mortgage credit and factoring; (b) leasing, including certain ancillary services in relation thereto; and (c) the granting of financial guarantees. Additionally, and subject to a specific regime, these entities could provide payment services or issue e-money. The incorporation of financial credit entities is authorized by the Ministry of Economy and Business, in light of the conclusions of reports issued by the Bank of Spain and SEPBLAC.

### 2.2 Financial institutions

Pursuant to the implementation to Spanish law of Article 34 of 2013/36/EU of the European Parliament and of the Council, dated 26 June 2013, on access to the activity of

credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV), undertakings other than CIs, when subsidiaries of a CI or jointly owned subsidiaries of two or more CIs based in EU member states — the principal activity of which is to acquire holdings or to pursue one or more of the banking activities listed in Annex I of CRD IV (except taking deposits and other repayable funds), including a financial holding company, a mixed financial holding company, a payment institution or an asset management company — also benefit from EU-passport for the cross-border provision of services recognized for the parent CIs. As a consequence, these entities may provide services in Spain, either under the “freedom to provide services” regime or on a “right of establishment” as explained in question 7.

As this regime is ultimately based on EU legislation, there is no legal framework for the benefit of non-EU financial institutions.

### 2.3 Payment service providers

Regulated by Royal Decree - Act 19/2018 on payment services and other urgent financial measures and Royal Decree 736/2019, dated 20 December 2019, enacting the legal framework of payments services and payment service providers (PSRs), these entities may carry out: (i) the provision of services enabling cash to be placed on a payment account as well as all the operations required for operating a payment account; (ii) the provision of services enabling cash withdrawals from a payment account as well as all the operations required for operating a payment account; (iii) the execution of payment transactions, including transfers of funds on a payment account with the user's payment service provider or with another payment service provider; (iv) the execution of payment transactions where the funds are covered by a credit line for a payment service user; (v) the issuance of payment instruments and/or acquiring of payment transactions; (vi) the provision of money remittance services; (vii) the provision of payment initiation services; and (viii) the provision of account information services.

The incorporation of payment service providers (PSPs) must be authorized by the Bank of Spain, based on the conclusions of the reports obtained by SEPBLAC. In order to obtain the abovementioned authorization, the applicant must meet the requirements set forth in Article 2 of PSR.

In relation to the cross-border provision of payment services in Spain, one must differentiate between two regimes: one applicable to PSPs based in EU member states and another one for non-EU PSPs. While the former benefit from EU-passport regime, enabling them to provide services either under the “freedom to provide services” or under the “right of establishment” without requiring authorization from Spanish authorities (i.e., authorization is granted by the competent authority in its home country, which notifies the Bank of Spain of its approval), the latter need to apply for prior authorization from the Bank of Spain.

### 2.4 E-money entities

Regulated by Act 21/2011, dated 26 July 2011, on e-money, and Royal Decree 778/2012, dated 4 May 2012, on legal regime of e-money issuers, these entities can carry out the issuance of e-money and granting of credit in relation with some payment services.

The incorporation of e-money entities must be authorized by the Ministry of Economy

and Business, based on the conclusions of reports obtained by the Bank of Spain and SEPBLAC.

With respect to the cross-border provision of payment services in Spain, a regime similar to that mentioned for PSPs applies.

### 3. Incorporation of investment firms

According to Article 143 of SMA and Article 4 of the Spanish Royal Decree 217/2008, dated 15 February 2008, on the legal regime of investment firms and other entities providing investment services (RD 217/2008), Spanish law recognizes four different types of investment firms (IFs), the main differentiating characteristic among them being the scope of their authorization (i.e., the investment services they are allowed to perform):

#### 3.1 Broker dealer (sociedades de valores):

These are investment firms that are entitled to operate either in their own name or in the name and on behalf of third parties, and which can carry out all the investment services and ancillary investment services described in Articles 140 and 141 of the SMA (which mirrors the list of services and activities under Section A and B of Annex I to Directive 2014/65/EU of the European Parliament and of the Council, dated 15 May 2014, on markets in financial instruments (MiFID II)).

#### 3.2 Securities broker (agencias de valores)

These are investment firms that are only entitled to act in the name and on behalf of third parties, either with or without representation. Securities agencies are entitled to carry out all the investment services and ancillary financial services described in Articles 140 and 141 of the SMA, with the exception of: (i) dealing on own account; (ii) underwriting of financial instruments and/or placing of financial instruments (in relation to financial services); and (iii) the granting of credits or loans to an investor, allowing them to carry out a transaction in one or more financial instruments envisaged under Article 2 of the SMA (in relation to ancillary financial services).

#### 3.3 Portfolio management companies (sociedades gestoras de cartera)

These are investment firms that are only entitled to provide two financial services: (i) portfolio management services; and (ii) investment advice, as well as two ancillary financial services: (i) advice to undertakings on capital structure, industrial strategy and related matters, and advice and services relating to mergers and the purchase of undertakings; and (ii) investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments.

#### 3.4 Financial advisory entities (empresas de asesoramiento financiero)

These are legal or natural persons that can only provide investment advice (as financial service) and two ancillary financial services: (a) providing advice to undertakings on capital structure, industrial strategy and related matters, and advice and services relating to

mergers and the purchase of undertakings; and (b) undertaking investment research and financial analysis or other forms of general recommendation relating to transactions in financial instruments.

For purposes of carrying out investment services in Spain, investment services entities must be duly authorized and registered with the relevant registry of the CNMV.

Pursuant to Article 149 of the SMA, authorization to create investment firms shall be granted by the CNMV.<sup>3</sup> Any entity wishing to obtain authorization must submit an application before the CNMV, which should include a program of activities identifying the investment services to be pursued by the applicant, as well as its organizational arrangements and the means for the performance of the same.

In order to be granted authorization, the relevant applicant must satisfy, among others, the following statutory requirements:

- As a general rule, entities must be incorporated as a public limited company (sociedad anónima). As an exception, financial advisory entities may be incorporated as private limited companies (sociedades de responsabilidad limitada).
- Investment services entities must respectively have the following a minimum fully paid-up share capital<sup>4</sup>:
  1. Securities entities: EUR 730,000
  2. Securities agencies: As a general rule, EUR 125,000, and for those not authorized to hold funds or securities of their clients, EUR 50,000
  3. Portfolio management companies (any of the following alternatives):
    - An initial capital of EUR 50,000
    - A civil liability insurance policy and a guarantee or similar instrument, covering professional liability in the EU, for an amount of up to EUR 1 million in relation to each claim for damages, and a total annual amount of EUR 1.5 million for all claims
    - A combination of the preceding that provides similar coverage
  4. Financial advisory entities (any of the following alternatives):
    - An initial capital of EUR 50,000
    - A civil liability insurance policy covering professional liability in the EU, for an amount of up to EUR 1 million in relation to each claim for damages, and a total annual amount of EUR 1.5 million for all claims
    - A combination of the preceding that provides similar coverage
- The corporate purpose of the relevant entity must be limited to the investment services and ancillary investment services it shall pursue.
- No special rights or preferences may be granted to the entity's founders.
- As a general rule, the relevant entity must be governed by a board of directors of at

<sup>3</sup> Please note that Article 12 of RD 217/2008 still refers to the regime in force before the amendment introduced by Act 5/2015, dated 27 April, on the fostering of enterprise financing on the former SMA. Based on the hierarchy principle ruling between Acts and RD, the reference made by RD 217/2008 must be disregarded.

<sup>4</sup> Without prejudice to the need of complying with additional own funds requirements.



least three members. All members of the board of directors of the company as well as its general managers or persons with similar positions, must satisfy the requirements of suitability, experience and good repute as encapsulated in Article 182 of the SMA.

- The entity must have appropriate administrative and accounting procedures, as well as internal control procedures that ensure safe and sound management of the activities it intends to perform.
- The entity must have internal conduct regulation based on the rules and regulations governing the Spanish Securities Markets (as established by SMA), as well as a special regime for the transactions to be performed by directors, executives, employees and attorneys of the entity, which guarantee the fulfillment of the conduct of business rules.
- Except for entities applying to become financial advisory entities, all other entities must adhere to the Spanish Investment Guarantee Scheme (Fondo de Garantía de Inversiones).
- The entity's registered address and headquarters must be in Spain.
- The entity must have a business plan evidencing the viability of its project.

The CNMV may only reject an application for authorization for purposes of establishing an investment firm under the following circumstances:

1. The applicant entity fails to comply with any of the statutory requirements.
2. Shareholders owning qualifying holdings in the share capital of the entity fail to be considered suitable on the grounds of the safety and soundness of the entity's management.
3. There is lack of transparency in relation to the group structure to which the entity shall eventually belong or where there are close links with other investment firms or natural or legal persons that could hinder the effective execution of the CNMVs supervisory functions.
4. The applicable legal framework to the natural or legal persons of a non-member state with whom the investment firm has close links may block effective supervision.
5. The members of the board of directors are not suitable, or lack sufficient expertise and good repute.
6. There are significant conflicts of interest between the offices, responsibilities or functions held by the members of the board of directors of the investment firm and other offices, and/or responsibilities or functions simultaneously held.

Finally, Spanish investment firms will also be entitled to carry out activities in a foreign country, albeit the regime will differ depending on the targeted country:

- a. If a Spanish investment firm wishes to open a branch or carry out activities without a fixed establishment in another member state, it must notify the CNMV, which shall in turn convey that information to the supervisory authority of the relevant member state.
- b. If the investment firm wishes to operate in a non-EU country by opening a branch or without a fixed establishment, it must obtain prior authorization from the CNMV.

Notwithstanding the foregoing, a Spanish entity must comply with the regulations and specific requirements of the country where it intends to operate.

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

### 1. Credit institutions

According to Article 6 of the CSSCIA and Article 3 of the CSSCIR, the ECB, based on the proposal of authorization of the Bank of Spain, grants authorization to undertake core-banking business (i.e., taking of deposits).

For these purposes, the authorization process must be completed within six months from receipt of a completed application by the Bank of Spain, and in any case, within twelve months from its receipt. Failure to obtain an express resolution should be deemed to constitute an implied rejection/denial.

Pursuant to Article 5 of the CSSCIR, the application for incorporating a new CI shall be submitted with the following documents:

- A draft copy of the bylaws of the entity, including a negative certification (certificación registral negativa) granted by the Spanish Central Commercial Registry evidencing that the proposed corporate name has not yet been registered
- The program of activities, which shall comprise: (i) the activities the entity intends to carry out; (ii) the entity's administrative and accounting procedures; (iii) the entity's internal control procedures; (iv) procedures to address client claims and complaints; and (v) internal procedures and bodies for the prevention of money laundering and terrorism financing
- Disclosure of the identity of the founding shareholders, indicating their stake in the share capital of the company
- Information on the members of the board of directors, general managers or equivalent, as well as on the individuals in charge of the internal control functions of the entity or holding key positions concerning the daily management of the company, with detailed information on the fulfillment of suitability requirements
- Evidence of having made a cash deposit in the Bank of Spain or having blocked public debt for the benefit of the Bank of Spain in an amount equivalent to 20% of the entity's minimum required share capital

### 2. Investment firms

According to Article 149 of the SMA, it is the CNMV that shall grant authorization to those that wish to undertake the provision of investment services.

For these purposes, authorization must be resolved within three months from its receipt or from the date all relevant documentation is filed, and in any case, the applicant must be informed of the outcome within six months from its receipt. Failure to obtain an express resolution thereof is deemed to constitute an implied rejection/denial.

Pursuant to Article 16 of the RD 217/2008, the application for incorporating a new investment firm shall be submitted with the following documents:

- A draft copy of the bylaws of the entity, including a negative certification granted by the Spanish Central Commercial Registry evidencing that the proposed corporate name has not been already registered
- The program of activities, which shall comprise: (i) the investment services and the ancillary investment services the entity intends to carry out, indication over which



financial instruments it shall provide them; (ii) the entity's administrative and accounting procedures; (iii) the entity's internal control procedures; (iv) procedures to address client claims and complaints; and (v) internal procedures and bodies for the prevention of money laundering and terrorism financing

- Disclosure of the identity of the founding shareholders, indicating their stake in the share capital of the company
- Information about the members of the board of directors, general managers or equivalent, with detailed information on their careers and qualifications;
- Internal conduct regulation based on the rules and regulations governing the Spanish Securities Markets (as established by SMA), as well as a special regime for the transactions to be performed by directors, executives, employees and attorneys of the entity, which guarantee the fulfillment of the conduct of business rules

This, of course, does not preclude the CNMV from requesting any additional documents or information it deems appropriate.

### 3. Fintechs and "sandboxes"

Spanish Law 7/2020, of November 13, for the digital transformation of the financial system also introduced a fintech sandbox regime in Spain, which establishes a new regime for entities to test financial services with technological innovation under a supervised environment before full authorization.

This new regime also foresees the possibility of reducing deadlines for authorization after a successful sandbox trial if the information exchanged with the authorities during the sandbox trial allows a simplified assessment.

## 7. What financial services passporting arrangements does Spain have with other jurisdictions?

The Treaty on the Functioning of the European Union recognizes the "freedom to provide services" and the "right of establishment" regimes. CRD IV, MiFID II and PSD2<sup>5</sup> further promote this freedom and this right by way of a mutual license recognition system among member states. Credit institutions and investment service companies that are authorized in another member state may carry out activities in Spain with no other requirement than a prior notification from the relevant home member state's competent authority to the relevant Spanish competent authority (depending on the type of entity) and vice versa. This regime is called the "EU passport."

While the "right of establishment" essentially entails the opening of a fixed establishment, typically a branch, the "freedom to provide services" enables entities to provide services on a cross-border basis without a fixed establishment in other member states.

The process, as previously explained: (a) requires the legal entity to be legally entitled to pursue the relevant activity; and (b) is dealt with between the regulated entity and its home member state's competent authority.

<sup>5</sup> Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market

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# Sweden

## 1. Who regulates banking and financial services in Sweden?

Sweden has one regulator with the responsibility for the authorization and supervision of banks, insurers, and other financial institutions: the Swedish Financial Supervisory Authority (SFS).

Sweden's Central Bank (*Riksbanken*) is a public authority under the Swedish parliament (*Sveriges riksdag*). The Central Bank's objective is to ensure that inflation is low and stable, and is therefore responsible for Sweden's monetary policy; influencing inflation through the interest rate. The Central Bank has also been given the task of overseeing that the system for making payments functions without disruption. Additionally, the Central Bank issues banknotes and coins and manages Sweden's reserve of gold and foreign currencies.

The EU's supervisory authorities, namely the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority play an important role in issuing technical standards, and have powers of supervision over Swedish institutions in some limited respects.

The European Central Bank (ECB) has recently become the supervisor of Eurozone banks under the EU's Single Supervisory Mechanism (SSM). Sweden is not in the Eurozone so Swedish banks are not within the scope of the SSM. However, Eurozone branches or subsidiaries of Swedish banks are, in some cases, within the SSM and therefore under supervision by the ECB.

The Swedish Police Authority leads the national coordinating function for measures to prevent and combat money laundering and terrorist financing and the SFS is included in this function. The SFS shares responsibility with the Financial Intelligence Unit within the Swedish Police and the Swedish Economic Crime Authority regarding enforcement of the Swedish anti-money laundering regime in relation to regulated financial institutions and entities under its supervision. Regulated institutions and entities under SFS supervision who fail to comply with anti-money laundering obligations and requirements risk being subject to punitive measures such as, inter alia, sanctions or getting their licenses and authorizations revoked.

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

Much of the relevant law in Sweden is derived from EU directives and regulations. In many respects, therefore, Swedish local legislation and rules simply give effect to pan-European legal requirements. However, since many European directives only set minimum standards, the way in which directives are implemented across Europe can vary. In other words, Sweden and other European jurisdictions have introduced local laws that may exceed European level requirements. Directives also contain obligations and discretions at a member state level, and Sweden also has various local rules.

The main regulatory laws in Sweden for the banking, financial services and insurance industries include, inter alia, the following:

- Banking and Financing Business Act (*Bank - och finansieringsrörelselagen (2004:297)*)
- Securities Market Act (*lag (2007:528) om värdepappersmarknaden*)
- Insurance Business Act (*Försäkringsrörelselagen (2010:2043)*)
- Insurance Distribution Act (*lag (2018:1219) om försäkringsdistribution*)
- Swedish UCITS Act (*lag (2004:46) om värdepappersfonder*)
- Alternative Investment Funds Managers Act (*lag (2013:561) om förvaltare av alternativa investeringsfonder*)
- Payment Services Act (*lag (2010:751) om betaltjänster*)
- Electronic Money Act (*lagen (2011:755) om elektroniska pengar*)
- Mortgage Business Act (*lag (2016:1024) om verksamhet med bostadskrediter*)
- Deposit Business Act (*lagen (2004:299) om inlåningsverksamhet*)
- Certain Financial Operations Reporting Duty Act (*lagen (1996:1006) om valutaväxling och annan finansiell verksamhet*)
- Certain Consumer Credit-related Operations Act (*lagen (2014:275) om viss verksamhet med konsumentkrediter*)
- Pension Commitments Act (*lag (1967:531) om tryggnad av pensionsutfästelse m.m.*)
- Anti Money Laundering Act (*lag (2017:630) om åtgärder mot penningtvätt och finansiering av terrorism*)

There is also a large volume of delegated legislation in the form of regulations and guidelines from the SFS. These regulations and guidelines are applicable primarily to Swedish-regulated or -supervised institutions, but are also relevant in certain respects to non-Swedish institutions.



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

Sweden regulates a broad range of activities. These include (among others):

- Accepting deposits: This covers typical retail banking activities involving the operation of current and deposit accounts.
- Issuing electronic money: Electronic money is a prepaid electronic payment product that can be card- or account-based.
- Carrying out payment services: This covers a broad range of activities involving matters such as money remittance, card issuance, acquiring card transactions, and the operation of payment accounts.
- Consumer lending: This covers both lending to consumers as well as activities such as credit brokerage and debt collection on behalf of third parties.
- Arranging regulated mortgage contracts: This relates to the sale of certain residential mortgage contracts.
- Carrying on insurance business: This involves effecting and carrying out contracts of insurance, both life and general.
- Providing investment advice: Providing advice on most categories of investments is a regulated activity in Sweden. This activity covers the provision of advice on the merits of acquiring or disposing of particular investments.
- Trading in securities and other investments as principal or as agent: This covers brokers as well as most institutions engaged in proprietary trading.
- Arranging transactions in investments: This activity covers the role of intermediaries in investment transactions. It is very broad and covers infrastructure providers, including electronic communication networks that route orders for execution.
- Insurance mediation activities: Swedish regulation covers various insurance brokering activities.
- Discretionary investment management: Managing investments on behalf of another person is a regulated activity. Specific permission is required where a person carries on this activity in relation to an alternative investment fund.
- Establishing, operating and winding up a collective investment scheme: Most types of funds will be regarded as collective investment schemes under Swedish law. This will extend to open-ended bodies corporate, unit trusts and partnerships.
- Providing custody (safeguarding and administration of investments): Providing custody services in relation to assets that include investments is a regulated activity.
- Provision of pension foundation: Pension foundation is a foundation founded by an employer with the exclusive purpose of safeguarding the payment of pension to employees or employees' survivors. The foundation's assets must therefore be invested prudently.
- Crypto-assets and crypto currencies - As of now, there is no specific legal or regulatory regime tailored to crypto currencies and/or crypto-assets in Sweden. Depending on the nature of the crypto-assets and services, these may be included under other regimes in Sweden, such as, inter alia, Certain Financial Operations Reporting Duty Act, Electronic Money Act and Payment Services Act. Furthermore, natural and legal persons who conducts cryptocurrency trading on a large scale or other financial operations are likely to be assessed as carrying out so called "other financial operations" and are likely to be deemed as financial institutions as defined in Securities Market Act.

### 4. How do Sweden's licensing requirements apply to cross-border business into Sweden?

Where an institution outside Sweden deals with a client or a counterparty located in Sweden, those activities will typically be subject to Swedish laws and regulations. The service provider will need to consider whether they are triggering a local Swedish licensing obligation and whether they are complying with Swedish marketing rules.

In relation to marketing, Swedish laws regulate the issuance of "financial promotions," which is defined as an "invitation or inducement" to engage in an investment activity. The decisive issue is whether or not a service is directed/offered to the Swedish market. Thus, if a service provider is approached by a client abroad on such client's own initiative (reverse solicitation), it does not matter if the transactional documents are sent to the client's address in Sweden. Correspondingly, if Swedish entities/persons are targeted via marketing or a webpage in Swedish, services will be seen as offered irrespective of whether any agreements are entered into in Sweden.

Under European laws, institutions established outside the European Economic Area (EEA) are called "Third Country Firms" (TCF). Until recently, European laws have not sought to harmonize the approach of member states to TCFs. This has meant that access to the markets of member states had to be considered on a case-by-case basis. However, the trend in European legislation is now towards harmonizing the approach across all member states to TCFs. On the one hand, this approach is likely to create a barrier to entry to European markets. On the other hand, institutions who become compliant with new EU standards will be able to access the whole EEA market, as opposed to having to consider the market on a country-by-country basis.

Certain exclusions are presently available under Swedish law, which enable TCFs to deal with clients based in Sweden. This is on the basis that the activities in question will be regarded as being carried on outside the territory of Sweden and therefore not subject to Swedish laws, or because a specific exemption will cover the activities.

By way of example, the following activity is regarded as being carried on outside Sweden and therefore not subject to Swedish regulation (although providers of these services will still need to consider Swedish marketing restrictions):

- The activity of accepting deposits is regarded as being carried on where the deposit funds are accepted. Where a Swedish person credits funds to a bank account held outside Sweden, the foreign bank where the individual holds the account will not be regarded as accepting deposits in Sweden. A Swedish resident can, therefore, hold an account with an offshore bank without the bank contravening Swedish laws, provided that the client relationship was established on the basis of reverse solicitation. Some financial promotion rules, which impose some limitations on marketing offshore bank accounts to Swedish customers, will apply to this activity.

In other cases, the activities might be deemed to be carried on in Sweden and subject to Swedish laws.

Some EU legislation, particularly the following, will limit the ability of foreign institutions to do business in Sweden:



- The Alternative Investment Fund Managers Directive imposes limitations on non-EEA persons marketing fund interests to persons in Sweden (and other European jurisdictions).
- MiFID II (comprising a recast of the Markets in Financial Instruments Directive and a European regulation), entails greater restrictions on TCFs conducting business in Sweden.
- Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) entails certain requirements and obligations for insurance providers as regards to distribution of insurance products and services in Sweden.

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

In order to become authorized, an applicant must satisfy the SFSA that it meets the requirements for authorization set out in the relevant applicable act(s) and SFSA regulations.

The requirements for authorization can vary, depending on the particular regulated activities that the applicant intends to carry on. Broadly, however, the following conditions will need to be satisfied:

- a. Location of offices/residence of directors:** For Swedish incorporated companies, the head office must be located in Sweden. As to the composition of the board of directors, a majority of the board and the managing director will need to be resident in the EEA.
- b. Effective Supervision:** The applicant must be capable of being effectively supervised. This emphasizes the need for institutions to have a substantive presence in Sweden that is accessible to Swedish regulators and enables the regulator to supervise the institution. The regulator will also consider whether there are any impediments to supervision of the applicant, including the group structure and any relevant laws restricting access to information.
- c. Appropriate resources:** Applicants must satisfy the regulator that they have adequate resources to carry on the relevant regulated activities. Resources include financial as well as human resources (including management with the required skills) and infrastructure.
- d. Suitability:** Applicants must be fit and proper to be authorized, having regard to all the circumstances.
- e. Business model:** The regulator will examine the applicant's business model. In addition to understanding the economic aspects of the business, matters such as the impact of the model on clients and that the planned operations will be conducted under the applicable regulations will be regarded.

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

An applicant must complete a formal process to obtain authorization, involving the completion of required application forms and the submission of supporting information.

In relation to timing, the regulator will, in most cases, have approximately three to five months from receipt of a completed application in which to decide whether to approve the application or not.

The forms required for authorization vary depending on the particular regulated activities that the applicant intends to carry on. Broadly, however, the following forms will be required to be completed:

- a. Core details:** This form sets out factual background information relating to the applicant.
- b. The Supplements:** The Supplements will require the institution to provide details of its Regulatory Business Plan and Internal Guidelines, the regulated activities it will perform, its financial resources, its personnel, its compliance arrangements, and its fees/levies.
- c. Ownership assessment:** Details about individuals/entities who control or exert influence over the institution, which will enable the regulator to assess their roles, must be submitted.
- d. Management assessment:** Details about certain individuals in management positions must be submitted. They will need to submit forms providing information about themselves, which will enable the regulator to assess their fitness and propriety to perform their roles.
- e. Financial statements and projections:** Information on the applicant's financials along with projections must be submitted.
- f. Outsourcing agreements:** Certain outsourcing agreements (e.g., risk management and compliance functions) must be submitted and registered with the SFSA.
- g. Supporting documents:** Various documents must be submitted with the application (e.g., articles of association for approval by the SFSA and relevant board minutes).

Moreover, other information that the applicant and the SFSA deems necessary for the application to be complete must be submitted. Please note that, as of now, there are no special procedures for fintechs and so called "sandboxes" for technologically innovative new services.

## 7. What financial services "passporting" arrangements does Sweden have with other jurisdictions?

Once authorized in Sweden, a Swedish institution can generally passport its authorization into other EEA member states. This passport is, however, only available to institutions established in Sweden and will not be available to EEA branches of TCFs. Passporting permits the provision of cross-border services and also the establishment of a physical branch location.

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# Switzerland

## 1. Who regulates banking and financial services in Switzerland?

The Swiss Financial Market Authority (FINMA) is the main regulatory and supervisory authority in Switzerland. FINMA is a functionally and personally independent governmental institution with extensive regulatory competencies. It is mandated to supervise banks, insurance companies, trading venues and facilities, securities dealers, collective investment schemes, fund management companies, asset managers for collective investment schemes and portfolio managers (so-called independent asset managers), trustees, and fintech innovators such license. In short, FINMA is responsible for microprudential supervision, that is, the firm-level and consolidated oversight of most financial firms.

Additionally, FINMA supervises the anti-money-laundering (AML) compliance of institutions under its supervision. For unlicensed financial intermediaries, AML supervision is conducted by the so-called self-regulatory organizations (SROs). Moreover, from 1 January 2022 the ongoing business supervision of portfolio managers and trustees has been delegated to so-called supervisory organizations (SOs), which are founded at the private initiative of the asset management industry.

The regulatory aims pursued by FINMA are the protection of creditors, investors, financial service customers and holders of insurance policies; safeguarding the proper functioning of financial markets; and financial stability. To achieve these aims, FINMA has a broad range of enforcement tools. It may issue declaratory rulings and prohibitions from practicing a profession, publish supervisory rulings (“naming and shaming”), confiscate profits, appoint an investigating agent, and revoke the respective license. However, unlike financial market authorities in other jurisdictions, FINMA is not authorized to impose substantial fines or other criminal sanctions.

In addition to FINMA, the SROs and the SOs for portfolio managers and trustees, the Swiss National Bank (SNB) has specific regulatory competencies related to macroprudential supervision: that is, in respect of the stability of the whole financial system. For instance, the SNB is responsible for designating systemically important banks (SIBs), which means that these banks must meet additional regulatory criteria or recommend an increase of capital levels of certain banks (countercyclical capital buffer). Compared to FINMA, however, the regulatory competencies of the SNB can be considered rather narrow.

FINMA may: (i) carry out a supervisory review itself; (ii) arrange for the review to be carried out by an audit agent appointed by FINMA; or (iii) arrange for the review to be carried out by an auditor appointed by the supervised financial firm. As a general

rule, FINMA does not conduct supervisory activities itself but delegates these tasks to audit agents. The same is expected for the newly created SOs. This leads to a high participation rate of audit firms in the supervisory process.

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

The Swiss financial market architecture has recently undergone significant reforms. Traditionally, particular types of financial market activities (e.g., banking, stock exchanges) were regulated in separate federal acts. The reform project, which will be fully in force as of 1 January 2022, aims to regulate financial activities in four federal framework acts spanning different types of activities. This also has the effect that rights and duties in respect of particular types of financial activities are more intensely regulated on the ordinance level, that is, in regulations issued by the Swiss Federal Council (which is the Swiss federal executive government), FINMA or the SNB.

The new regulatory framework consists of the following four acts:

- Federal Act on the Financial Market Infrastructure and the Market Behaviour in Securities and Derivatives Trading (FMIA, which entered into force on 1 January 2016)
- Federal Act on Financial Services (FinSA), which will regulate the provision of financial services, in particular, the behavior of organizations and client advisors (entered into force on 1 January 2020 with transitory provisions applicable as of 1 January 2022)
- Federal Act on Financial Institutions (FinIA), which is mainly concerned with the supervision of previously unregulated portfolio managers and trusts (entered into force on 1 January 2020 with transitory provisions applicable as of 1 January 2022)
- Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA, which entered into force on 1 January 2009)

However, the business of banks is (and will continue to be) regulated by the Banking Act of 1934 (BankA), as amended. The BankA remains in force after the reform of the mentioned Swiss financial market regime, subject to partial amendments. The same applies to the supervision of insurance (Insurance Supervision Act or ISA) and to collective investment schemes (Collective Investments Schemes Act or CISA).



Furthermore, the Anti-Money Laundering Act (AMLA), that applies to all financial intermediaries and certain dealers (that accept substantial amounts of cash), as well as the National Bank Act (NBA) (which regulates the SNB) are significant sources of the Swiss financial market regime.

It is noteworthy that the newer Swiss financial market laws aim to achieve equivalence with EU regulations in order to (hopefully) ensure market access to the EU in the future. This particularly holds true with respect to Swiss investor protection rules, which are largely based on the respective EU regulations (MiFiD II and MiFIR).

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

Switzerland regulates a broad range of financial activities. As a basic principle, accepting and managing assets deposited by the public for commercial purposes requires a license issued by FINMA, and the acceptance of funds from the public other than in the context of a debenture issue or within certain narrowly defined exceptions set out in the Banking Ordinance is prohibited without the respective license. In particular, the following types of activities must be licensed by FINMA:

- **Banking:** This is defined as the acceptance of deposits from the public to finance (in a broad sense) third parties. The right to execute foreign exchange dealings for customers is also reserved for banks.
- **Fintech license:** This newly introduced “banking license light” category is designed for innovative firms that intend to accept deposits from the public of up to CHF 100 million without conducting the traditional deposits and loans banking business.
- **Securities dealing:** Various types of trading require licenses (regulated in the FinIA).
- **Portfolio management and the activities of trustees.**
- **Operation of stock exchanges and similar trading facilities, such as multilateral trading facilities (MTFs), organized trading facilities (OTFs) and distributed ledger technology (DLT) trading facilities:** Some activities, such as the operation of OTFs, may only be conducted by banks, securities dealers or other financial market participants supervised by FINMA.
- **Operation of financial market infrastructures: central counterparties (CCPs), central securities depositories, trade repositories and payment systems:** A payment system requires a license only if this is necessary to safeguard the proper functioning of the financial system or the protection of financial market participants. A bank is not required to obtain an additional license for the operation of payment systems.
- **Establishing, managing, safekeeping and distributing collective investment schemes (CIS) :** The mere distribution of CIS to professional investors requires only the appointment of a Swiss representative and a Swiss paying agent.
- **Offering insurance:** The licensing requirement applies both to direct insurance and reinsurance. Furthermore, with very few exceptions, insurance brokers are subject to registration with FINMA.
- **Issuing mortgage bonds (Pfandbriefe):** Only two institutions are admitted as issuers of mortgage bonds in Switzerland.

Other financial dealing/intermediation, such as issuing means of payment (including payment tokens/cryptocurrencies), precious metal and commodity dealing, leasing or factoring, is subject only to anti-money-laundering supervision under the AML Act.

Registration with a designated registration body is required for customer advisors of financial service providers that are not subjected to prudential supervision in Switzerland, but no license is required. Furthermore, financial service providers are bound to join an Ombudsman, which is a conciliation board, if they provide financial services in Switzerland.

As in the European Economic Area (EEA), the offering and admission to trading of financial instruments is generally subject to the duty to publish a prospectus, which must be pre-approved by the review bodies.

### 4. How do Switzerland’s licensing requirements apply to cross-border business into Switzerland?

The regulations applying to the provision of financial services and the offering of financial instruments set out in the FinSA and the licensing and supervision requirements for financial institutions set out in the FinIA must be distinguished.

In principle, there are three constellations in which the FinSA is applicable:

- A financial service provider in Switzerland provides a financial service for clients in Switzerland (domestic service).
- A financial service provider abroad provides a financial service for clients in Switzerland (inbound service).
- A financial service provider in Switzerland provides a financial service abroad (outbound service).

Exceptions to the relatively broad scope of application are defined in the Financial Services Ordinance (FinSO). The scope of financial services provided in Switzerland does not include the following:

- Financial services provided by foreign financial service providers within the scope of a client relationship that has been entered into on the express initiative of a client
- Individual financial services requested by clients on their express initiative from a foreign initiative from a foreign financial services provider

In addition, there is no offer of financial instruments within the meaning of the FinSA if the provision of information is made at the instigation of the client and is not preceded by advertising within the meaning of the FinSA by the provider or an agent of the provider in relation to the specific financial instrument.

This refers to so-called reverse solicitation. In contrast to active solicitation, where a customer relationship is based on the initiative of the financial service provider, the regulation of the home country of a financial service provider should not apply if the customer relationship for individual financial services was initiated by reverse solicitation on the initiative of the customer.

The law does not further specify the criteria for reverse solicitation. In our opinion, the following general criteria can be identified:





- Reverse solicitation exists only if the initiative for a service or product comes exclusively from the customer. If the customer is personally made aware of or referred to the service or product in question by the service provider, reverse solicitation no longer exists.
- Reverse solicitation must always concern a specific service, a specific product or a specific type of product that is being requested. General inquiries about the company or individuals are not likely to meet these requirements.
- Reverse solicitation is an exception. Accordingly, the concept of reverse solicitation can never serve as a business model.
- Because reverse solicitation is considered an exception that can significantly lower the level of customer protection, it is likely to be narrowly interpreted in legal practice in light of the purpose of the law. In particular, this concept will probably only ever cover those types of services that the customer has expressly requested. However, it is unlikely to be possible to offer an existing reverse solicitation customer new types of services under the guise of reverse solicitation that they did not originally request.

In any event, a foreign financial services provider seeking to rely on reverse solicitation to avoid FinSA regulations should clearly document the customer's own initiative. Websites deserve special attention. In general, these must not be trimmed to cater to customers in Switzerland and should contain appropriate disclaimers and filters.

As to the licensing and supervision requirements for financial institutions, these generally apply only if the financial institution is based in Switzerland or has a physical presence in Switzerland. Only if and once the service provider has an actual presence (a de facto presence suffices) in Switzerland (i.e., representation, branch or subsidiary), it becomes subject to the respective licensing requirements. In this context, however, careful attention needs to be paid to the frequency and regularity of visits to Switzerland (for professional purposes) and business activities in Switzerland (to prevent FINMA from considering these visits and/or activities as amounting to a de facto presence).

In any case, the distribution of collective investment schemes to non-qualified investors or the offering of insurance in Switzerland is subject to authorization by FINMA. The offering of such investment schemes to qualified investors requires a Swiss representative and a Swiss paying agent. Furthermore, foreign stock exchanges without a registered office in Switzerland must be authorized by FINMA before they can allow Swiss securities dealers to access their facilities.

Finally, the granting or brokerage of consumer loans to Swiss consumers on a cross-border basis requires approval from the relevant cantonal authorities under the Federal Act regarding Consumer Credits.

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

The requirements to obtain a license depend on the particular type of activity. FINMA publishes detailed guidelines regarding the information and documents required for all types of licenses (available at [www.finma.ch](http://www.finma.ch), partially available in English). In general, the following criteria are examined by FINMA:

- a. Capital adequacy:** In particular, banks, securities dealers, and insurers are subject to minimum capital requirements. The business plan is examined as a part of the licensing

process in order to ensure that capital adequacy can be maintained.

- b. Proper business conduct:** The management and the qualified participants/shareholders (being persons who directly or indirectly hold at least 10% of the capital or the voting rights) of the licensed entity must exhibit proper business conduct. This requirement gives FINMA rather broad discretion with respect to granting and revoking a license: as well as to impose sanctions.
- c. Organization:** Depending on the type of license sought, FINMA examines the organization of the management, the separation of internal functions, the effectiveness of the risk management, and the internal control system.
- d. Location of offices and legal form:** Some licenses require a registered office and central management in Switzerland or a certain legal form (e.g., stock corporation).
- e. Consolidated supervision:** If the entity is part of a financial group, it may be subject to the requirement of adequate consolidated supervision by a recognized supervisory authority.
- f. Reciprocity:** Applicants under foreign control are in general only eligible for a license if the country where the qualified participants are domiciled guarantees reciprocal rights.
- g. Appointment of supervisory auditor:** A regulatory audit firm (recognized by FINMA) that conducts the ongoing supervision of the entity is required for some types of licenses.

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

In order to obtain a license from FINMA, the applicant is required to undergo and complete a formal process. This includes the submission of a detailed application showing that the license requirements are met and that they can be maintained. The documentation to be filed strongly depends on the type of license sought. Broadly, details on the following items must be provided:

- a. General data:** Business model, financials, history of the parent entity, etc.
- b. Capitalization and shareholdings:** Information on the company capital and shareholders, particularly in respect to qualified participations/shareholders
- c. Management:** Organization and composition of management bodies and detailed information on the members of the governing bodies
- d. Activity and organization:** Details on the planned activities and internal processes
- e. Business plan:** Detailed business plan including budget for the next fiscal years
- f. Audit firm:** Information regarding the supervisory auditor
- g. Proof of adequate consolidated supervision:** If the applicant is part of a financial group, it must be demonstrated to FINMA that the group is subject to adequate consolidated supervision.

The application must be filed in a Swiss official language (i.e., German, French or Italian). It is advantageous to establish informal contact with FINMA before the formal application is filed. The length of the application process greatly depends on the type of license sought and the quality and complexity of the application at hand. As a point of reference, FINMA indicates a period of approximately six months to obtain a bank or securities dealer license. For applications with cross-border elements, such as the establishment of branches of foreign firms, the response time of the respective foreign supervisory authorities must be taken into account.

## 7. What financial services “passporting” arrangements does Switzerland have with other jurisdictions?

As Switzerland is not a member of the EU or the EEA, financial institutions based in Switzerland do not automatically have a “passport” to conduct activities in the EU. As there is presently no general cross-border exemption for Swiss-based firms, such firms are, in principle, required to follow the ordinary approval procedure for the establishment of a branch or subsidiary in the EU. Certain simplifications regarding access to the EEA particularly apply under the Alternative Investment Fund Managers Directive (AIFMD). However, automatic access is not guaranteed. Access of Swiss financial service providers to the EU/EEA in the future will, to a large extent, depend on whether Swiss financial regulation, as it is currently being reformed, is regarded as equivalent to EU regulation.

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# Taiwan

## 1. Who regulates banking and financial services in Taiwan?

Taiwan has two regulators responsible for the authorization and supervision of banks, insurers and other financial institutions. These are the Financial Supervisory Commission (FSC) and the Central Bank of the Republic of China (Taiwan) (CBC). The allocation of responsibilities between the FSC and the CBC is as follows:

- The FSC functions as an independent agency that directly reports to the Executive Yuan, Republic of China (Taiwan), Taiwan's highest administrative agency. Its responsibilities include supervision, examination and inspection of the financial market. Four bureaus and one government-owned corporation, the Central Deposit Insurance Corporation (CDIC), compose the FSC. The Banking Bureau, the Securities and Futures Bureau and the Insurance Bureau supervise financial institutions, while the Examination Bureau monitors their operations and audits financial institutions from time to time. CDIC is organized to protect depositors' rights and interests in financial institutions, maintain credit order and enhance the sound development of financial businesses in accordance with the Banking Act and the Deposit Insurance Act. Anti-money laundering and counter-terrorism are the key areas monitored by the FSC and the Ministry of Justice, which is the competent authority of the Money Laundering Control Act.
- The CBC is mandated by the Banking Act and the Central Bank of the Republic of China (Taiwan) Act to implement monetary policy and foreign exchange regulations.

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

The Banking Act, the Financial Holding Company Act and the Central Bank of the Republic of China (Taiwan) Act are the three main pillars of the domestic banking industry's legal framework. The Banking Act sets forth general regulations that govern the banking business, protect depositors, facilitate the development of enterprises and coordinate banks' operations within the national financial policy of Taiwan. The Financial Holding Company Act regulates the establishment and operations of financial holding companies. In addition, a separate Offshore Banking Act governs offshore banking units, and the Credit Cooperatives Act regulates community financial institutions. The Act Governing Electronic Payment Institutions ("EPI Act") and the Act Governing Issuance of Electronic Stored Value Cards used to be the two pillars governing electronic payment, which have increased in

significance with the emergence of fintech solutions from the financial market. Nonetheless, as Taiwan's president executed and announced the amendment bill of the EPI Act on 27 January 2021, the electronic payments and electronically stored value card will be integrated and collectively governed by the amended EPI Act, aiming to establish a unified electronic payment-centered ecosystem. Meanwhile, the Act Governing Issuance of Electronic Stored Value Cards will be repealed. The FSC is also developing relevant regulations and rulings that are expected to be announced the end of May this year at the earliest. According to FSC press releases, the amended EPI Act and the aforementioned relevant regulations and rulings are expected to be implemented in June 2021.

The Insurance Act is the main framework law in Taiwan for insurance enterprises. There are a number of regulations, including the Enforcement Rules for the Insurance Act; Regulations Governing Insurance Brokers; Regulations Governing Insurance Agents; Regulations Governing Establishment and Management of Insurance Enterprises; and Regulations Governing Offshore Insurance Branches. In general, insurance activities in Taiwan will trigger different requirements for insurance licenses.

The Securities and Exchange Act is the main framework law in Taiwan for securities and securities firms. The regulations include Regulations Governing the Offering and Issuance of Securities by Securities Issuers; Regulations Governing the Offering and Issuance of Securities by Foreign Issuers; Regulations Governing Securities Firms; Regulations Governing Offshore Structured Products; and Taipei Exchange Rules Governing the Operation by Securities Firms of the Business of Proprietary Trading of Security Tokens.

The government has promulgated other financial laws to regulate various financial activities in Taiwan, including the Trust Enterprise Act; the Financial Institutions Merger Act; the Act Governing Bills Finance Business; Securities Investment Trust and Consulting Act; the Financial Asset Securitization Act; Real Estate Securitization Act; and Financial Technology Development and Innovative Experimentation Act.

While the initial coin offerings or securities token offerings (STO) and transactions involving other categories of crypto-assets are emerging from the Taiwan market, the regulators are just in the early stages of crafting legislation related to the crypto-assets markets, focusing mainly on anti-money laundering and STO regulations. The Taipei Exchange Rules Governing the Operation by Securities Firms of the Business of Proprietary Trading of Security Tokens have been in force since 20 January 2020 to regulate the STO and trading business. However, the regulatory regime governing outside of such activities is still unclear. Among all types of crypto-assets, Taiwan regulators only provide a specific legal framework





for security tokens, which are subject to the Securities and Exchange Act and relevant securities token offerings regulations (with a few exemptions). In contrast, if the crypto-asset involved does not qualify as a security token, there is no bright-line indicating whether and how those relevant service providers concerned will be regulated. For instance, Bitcoin is still treated like a commodity not subject to financial regulations unless from the anti-money laundering perspective. Therefore, drawing distinctions between different types of crypto-asset (though not easy) is critical in Taiwan because the regulatory treatment hinges largely on whether or not it is a security, which is determined via FSCs case-specific analysis. Lacking in clear supervision, crypto-asset service providers call for being supervised to ease their business promotion. Otherwise, they have difficulties in conducting “know-your-customer” checks and connect with the fiat currency.

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

The types of activity that may qualify as banking and financial activity requiring a license in Taiwan include the following:

- Deposit taking: As defined in the Banking Act, “deposit taking” refers to the act of accepting deposits or other funds from the general public and agreeing to return the principal or to pay an amount equal to or greater than the principal.
- Providing mortgage loans: Under the Banking Act, “mortgage loan” refers to a kind of “secured credit,” which implies that the following types of collateral have been furnished to secure such credit:
  - Mortgage for immovables or movables
  - Pledge for movables or rights
  - Bills/notes receivable from business transactions of a borrower
  - Guarantees extended by a government agency in charge of the public treasury, a bank or a government-authorized credit agency
- Consumer lending: This is defined as the extension of credit by a bank to a person to accommodate the financing needs of such person for the acquisition of a property, an investment, consumption or other expenditures, as defined in the Guidelines Governing the Credit Extensions by Member Banks of the ROC Bankers Association. A bank will usually expect the borrower’s salary, interest revenue, leasing revenue, investments, and the like, as repayment sources. The Fair Trade Commission and various consumer protection institutions closely monitor the consumer lending terms and conditions.
- Issuing credit and charge cards: “Credit card” pertains to the card used by a card holder to obtain in advance, by virtue of the card-issuing institution’s credit, money, goods, services or other benefits from certain specially arranged parties, and to repay the relevant indebtedness thereafter or in accordance with other arrangements.
- Issuing electronic stored value cards: According to the amended EPI Act, “electronic stored value card” refers to an IC chip, card, certificate or other forms of debt obligation that uses electronic, magnetic or optical means to store monetary value, and performs the function of data storage or computing and is used for multiple payment purposes. Only an institution that the FSC has approved may engage in an electronically stored value card business.
- Taiwan and other countries are keen to develop its fintech by introducing a sandbox

regulation where fintech solution providers may be exempted from certain regulatory requirements if they are approved to enter into an experiment.

- Providing foreign exchange and money remittance services: “Money remittance services” refer to the purchase or sale of foreign currency and money transfers to and from Taiwan. Under the amended EPI Act, an entity other than banks or electronic payment institutions (EPI) will be allowed to engage in limited foreign exchange and inward/outward remittance services provided to foreign workers subject to further approval by the FSC. Such relaxation aims to satisfy more migrant workers’ needs, who used to suffer from relatively expensive transaction costs for migrant remittances.
  - The definition and scope of “foreign exchange business” include the following:
  - Foreign exchange business related to export
  - Foreign exchange business related to import
  - Inward and outward remittances
  - Foreign currency deposits
  - Foreign currency loans
  - Foreign currency payment guarantees
  - Foreign exchange derivatives business
  - Other foreign exchange businesses
- Conducting trust business: This covers the following activities:
  - Trust of money
  - Trust of loans and related security interests
  - Trust of securities
  - Trust of movable property
  - Trust of real estate
  - Trust of leases
  - Trust of superficies
  - Trust of patents
  - Trust of copyrights
  - Trust of other property rights

Trust products or services in Taiwan are standardized because they are highly regulated by the FSC.

- Providing securities investment trust and securities investment consulting services: “Securities investment trust services” refers to offering securities investment trust funds and issuing beneficial interest certificates to unspecified persons, or privately placing securities investment trust funds and delivering beneficial interest certificates to specified persons, and investing in or trading securities, securities-related products, or other items approved by the competent authority. “Securities investment consulting services” refers to providing analysis, opinions or recommendations on matters relating to an investment in or trading of securities, securities-related products or other items approved by the competent authority, in return for compensation obtained directly or indirectly from a principal or third party.



- Carrying on insurance business, insurance agency business and insurance broker business: “Insurance agent” refers to a person who, on the basis of a contract of agency or a letter of authorization, collects remuneration from an insurer and acts as a business agent on the insurer’s behalf. “Insurance broker” refers to a person who, on the basis of the interest of the insured, negotiates an insurable contract or provides related services and collects a commission or remuneration.
- Providing securities custody, book-entry transfer and registration of book-entry securities
- Carrying on business of securities underwriting, proprietary trading and securities brokerage: Only a licensed securities firm is allowed to carry on securities business.
- Providing electronic payment services: “Electronic payment institution” means a company approved by the competent authority to engage in the following businesses in the capacity of an intermediary between payers and recipients:
  - Collecting and making payments for real transactions as an agent, excluding an institution that engages only in this business and where the total balance of funds collected/paid and kept by them as an agent does not exceed TWD 1 billion
  - Accepting deposits of funds as stored value funds (top-up service)
  - Inward and outward remittances: Transferring limited amount of funds between e-payment accounts or electronically stored value cards
  - Trading foreign currencies to operate the aforementioned three businesses
  - Other related businesses approved by the competent authority, such as: (1) assisting merchants in the issuance, sale and write-off of the e-vouchers on the EPI platform, as long as both the consumer and the merchant open an e-payment account; and (2) allowing points issued gratuitously by the merchants to any consumer who pays by their e-payment account for the real transaction made could be integrated on the EPI platform.
- Securitization of real estate and financial assets: Securitization of real estate covers a trustee establishing a real estate investment trust (REIT) or real estate asset trust (REAT) and acquiring funds from issuing beneficiary securities to specific persons through private placement. Securitization of financial assets covers the act that the originator entrusts the assets to a trustee or transfer the assets to a specific purpose company (SPC), whereby the trustee or SPC issues beneficial securities or asset-backed securities. However, the REIT or REAT markets are no longer active in Taiwan because the regulations are not flexible, and there are better alternatives in the market. Specifically, the current model governed by the Real Estate Securitization Act, which allows trust structure REIT alone, fails to provide sufficient flexibility to satisfy Taiwan REIT market appetite. On 12 January 2021, the FSC proposed to amend the Securities Investment Trust and Consulting Act, which will be renamed as the Investment Trust and Securities Consulting Act shortly after the said amendment bill is passed, permitting REIT to be issued in fund structure in parallel with the existing trust structure. In the near future, business operators may choose to issue REIT through either fund or trust structure. They will be regulated by the Securities and Futures Bureau or Banking Bureau, respectively.
- Financial information service business: This refers to an inter-bank financial information network operator that provides a value-added network for real-time settlement of interbank transactions between financial institutions. The term “settlement” refers to the procedures of crediting and debiting the designated accounts of participants according to the payment instructions of financial institutions and the netting of receivables and

payables between financial institutions to discharge the payment obligations of the paying bank.

- Service enterprise engaged in inter-bank credit information processing and exchange: This is an enterprise that either gathers credit information from financial institutions and/or enterprises related to financial institutions, or having been authorized by the competent authority, gathers and processes various kinds of credit information with the object of duly providing such information for access and use by financial institutions, interested parties or other parties authorized by the competent authority.

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

Banking and financial activities are highly regulated in Taiwan. Any person (individual and entity) planning to conduct banking and financial activities shall be recognized and licensed for its business and activities in Taiwan. An offshore financial institution that is not licensed in Taiwan cannot operate any banking or financial business or conduct any related activities in Taiwan.

Furthermore, it is the FSC’s strict policy that an offshore bank may not dispatch its staff into Taiwan for any banking business activities. Banking business and activities in Taiwan by an offshore bank or its staff is strictly prohibited. The FSC has not provided any exemption for an unlicensed offshore bank in that regard. In addition, cross-border financial services provided in Taiwan by a foreign bank/branch without license or approval in Taiwan is not allowed. In other words, even though an offshore financial institution has set up its Taipei branch, staff from other branches, subsidiaries or affiliates of such offshore financial institution may not conduct any business activities in Taiwan, and the staff from its branch/branches other than its Taipei branch cannot promote or introduce any financial products to clients in Taiwan.

By way of reiteration of this policy, the FSC issued two rulings to the ROC Bankers’ Association in Taiwan, on 27 March 2014 (“27 March Letter”) and on 10 May 2016 (“10 May Letter”), which expressly provide that financial institutions that have no presence in Taiwan shall not provide financial services within the territory of Taiwan, and the local branches or subsidiaries of an offshore bank shall not solicit a client in Taiwan to open an overseas account with the head office, affiliates and/or alliance of such offshore bank or any other financial institution that is not approved by the competent authorities of Taiwan, nor absorb funds.

Nevertheless, according to the FSC ruling to the ROC Bankers’ Association in Taiwan on 9 September 2014 (“9 September Letter”), a local bank may provide assistance to its offshore entities with respect to confirmation and delivery of information, contract signing and identity verification in the process of conducting deposit taking, and credit facility business with corporate clients and responsible persons of corporates. With respect to deposit taking, however, a local bank may only provide assistance to offshore branches; with respect to the credit facility business, a local bank may provide assistance to offshore branches and subsidiaries. Further, provision of assistance by offshore subsidiaries of a local bank to such local bank with respect to confirmation and delivery of information, contract signing and identity verification in the process of conducting deposit taking and facility business is currently not prohibited by ROC laws, and is subject to the laws of the place where the offshore subsidiary is located. After COVID, the FSC promulgated a ruling on 14 January 2021 to extend the 9

September Letter to be applied for the periodical renewal process, not only of corporate clients but also of individual clients, to ease the continuous anti-money laundering due diligence check process for existing clients of both offshore subsidiaries as well as branches.

To provide information/marketing material via remote communication such as telephone or email by an unlicensed foreign institution upon a client's request is not expressly prohibited. We note that offshore financial institutions may come to Taiwan and meet clients for a courtesy visit or social event. Such activity is not restricted because a courtesy visit or social event in Taiwan is not deemed as a business activity. However, these offshore financial institutions should be cautious not to mention or explain any unapproved or non-licensed offshore products or offshore services to clients in Taiwan, even if they make any request during such a visit or social event.

It is a common market practice in Taiwan for an offshore branch of a multinational financial institution to participate in cross-border syndication for granting straight loans to Taiwan customers or simply in a bilateral loan because lending (including project finance, ship/aircraft finance, real estate finance, acquisition finance and trade finance) by offshore arrangers and/or lenders to onshore borrowers is not prohibited. There are no requirements or prohibitions on the location of the booking centers for such straight loans. Other unlicensed banking services or products provided by an offshore bank or financial institution to Taiwan customers, including but not limited to promotion and solicitation activities in Taiwan, visiting customers in Taiwan or executing contracts and documentation in Taiwan, are restricted. Negotiation and discussion of the terms of any financial products with clients in Taiwan could be deemed to be within the scope of conducting banking or financial business, which is not allowed.

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

The requirements for becoming authorized to conduct banking and financial activities in Taiwan can vary, depending on the particular regulated activities. In general, the applicant should first apply to the FSC for prior approval and obtain an establishment permit. Upon receiving an establishment permit, the applicant is required to apply for company registration before applying for a business license from the FSC. Broadly, the following requirements may need to be satisfied:

- Submission of information and supporting documents: This may include an application form for an establishment permit; business plan; the list of promoters and its certification; self-assessment form for promoters from financial industry meeting requirements of investments-related regulations; the application forms for the same person or the same interested parties who have more than 10% of the shares concerning promoters who are from a non-financial industry; the minutes of the promoters' meeting; a written declaration of the promoters stating that they are of good moral character; certification that the promoters have already deposited the capital; description of promoters' fund source/s; articles of the public offering; the certification of qualifications of the president, vice president and assistant vice president; articles of incorporation of the bank; auditing opinions of a certified public accountant and lawyer; and other documents required by the competent authority.
- Having a physical presence in Taiwan: The applicant must establish a company limited by shares, a branch, or a representative office in Taiwan.
- Meeting capital requirement: The minimum paid-in capital for an onshore commercial bank (including a virtual bank) is TWD 10 billion; TWD 2 billion for an insurance company;

from TWD 200 million to TWD 400 million for a securities firm; TWD 300 million for a securities investment trust enterprise; TWD 20 million for a securities investment consulting enterprise; and TWD 2 billion for a trust enterprise. The amended EPI Act adopts a more differentiated regulation. For instance, the minimum capital requirement will be categorized in three tiers: TWD 500 million, TWD 300 million and TWD 100 million. Without engaging in a limited amount of inward and outward remittance business, the EPI will only be required to prepare TWD 300 million paid-in capital. If it is not involved in the top-up service, the minimum capital threshold will be reduced to TWD 100 million.

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

An applicant for authorization must complete a formal process to apply for prior approval and obtain an establishment permit. After incorporation but before the commencement of business, an applicant must apply for a business license from the FSC. Also, in order to meet the capital requirements, an applicant must apply for an injection of capital to invest in Taiwan and after the capital injection, it is also required to apply for verification of such investment with the Investment Commission, MOEA (IC).

The time frame within which to obtain approvals and of commencement of business is on a case-by-case basis. For instance, it may take about two months for the FSC to determine whether or not to approve the application of establishment of a securities firm, one month for the IC to approve the injection of capital, and one month for the FSC to issue a business license for a securities firm.

For an onshore commercial bank, the following are required to be completed:

- Prior approval: To establish an onshore commercial bank in Taiwan, the applicants (e.g., the promoters of the bank) must submit the following information before incorporation:
  - Application form for establishment permit
  - Business plan: The business scope, the principles and guidelines of the business operation and the concrete method to carry out the business (including the location of facility, the division of the internal organization, the employment and training of personnel, the business development plan and the financial forecast for the next three years), etc.
  - The list of promoters and their certifications
  - Self-assessment form for promoters from financial industry meeting requirements of investments-related regulations
  - The application forms stipulated in paragraph 6 of Article 25 of the Banking Act for the same person or the same interested parties who have more than 10% of the shares concerning promoters who are from non-financial industry
  - The minutes of the promoters' meeting
  - Written declaration of the promoters stating that none of the circumstances listed in Article 3 of the "Regulations Governing Qualification Requirements and Concurrent Serving Restrictions and Matters for Compliance by the Responsible Persons of Banks" apply to them
  - Certification that the promoters have already deposited capital of at least TWD 2 billion





- Description of promoters' fund source/s
  - Articles of public offering
  - Certification of qualifications of the president, vice president and assistant vice president
  - Articles of incorporation of the bank
  - Auditing opinions of a certified public accountant and lawyer
  - Other documents required by the competent authority
- Incorporation and registration: Upon receiving approval from the FSC, the promoters shall then incorporate the onshore commercial bank by filing a company registration application with the Ministry of Economic Affairs (MOEA). When applying for company registration, an application together with a complete set of the documents as required must be filed with the MOEA. The minimum paid-in capital of an onshore commercial bank is TWD 10 billion.
  - Capital injection: To inject capital to invest in the contemplated bank, the applicants must submit the following information:
    - Application form for investment
    - Identification information of the applicant
    - Information of the invested enterprise (i.e., the contemplated bank)
    - Minutes of board or shareholders' meeting
    - Other supporting document as required
  - Banking business license: After incorporation but before the commencement of a banking business, an onshore commercial bank must apply for a banking business license from the FSC by submitting the following supporting documents:
    - Application for a banking business license
    - Certificate of company registration
    - Statement of capital verification
    - Articles of Incorporation of the bank
    - Minutes of the promoters' meeting
    - Shareholders' roster and minutes of shareholders' meetings
    - Directors' roster and minutes of board meetings
    - Managing directors' roster and minutes of their meetings
    - Supervisors' roster and minutes of their meetings
    - Managerial officers' roster
    - Internal rules and guidelines as well as business procedures
    - Declaration statements of directors, supervisors and managerial officers
    - A record of operation of simulated business for two weeks or more

The FSC shall approve the scope of business of each onshore commercial bank in accordance with the type of bank and the business items provided under the Banking Act. However, the business items related to foreign exchange must be approved by the CBC. An onshore commercial bank's business items will be provided in its banking business license granted by

the FSC. On 7 August 2020, the FSC activated a new business item by enforcing regulations enabling an onshore commercial bank's domestic banking unit (DBU) to provide specific financial products or investment services to its high net worth clients, such as foreign-currency-denominated structured notes or other indices in the local equity market that used to be open to its offshore banking unit (OBU) alone as such investments are considered riskier. The term "high net worth client" refers to any individual or juristic person that: (1) provides a certificate of account balance that shows the net worth of investable assets and insurance products is more than TWD 100 million; or (2) has investable assets worth more than TWD 30 million in the said bank's account and provides a declaration that the net worth of investable assets and insurance products is more than TWD 100 million. In deploying the new wealth management rules, Taiwan is attempting to position itself as the rising Asian financial hub to seize potential capital outflows, particularly from Hong Kong, and compete with Singapore. As of February 2021, the FSC has only granted three local banks permission to launch this special wealth management program while dismissing the other six banks' applications.

Regulations governing the establishment of virtual banks or non-financial enterprises providing limited regulated financial activities with innovative digital technology or business model by trying sandbox are underway.

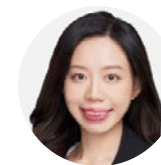
## 7. What financial services "passporting" arrangements does Taiwan have with other jurisdictions?

As Taiwan is not a European Economic Area member state, a Taiwan-regulated financial institution is not entitled to the right of passporting across Europe or to any other jurisdiction.

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# Thailand

## 1. Who regulates banking and financial services in Thailand?

In general, Thailand has three main regulators responsible for the approval and supervision of banks, insurers and securities companies. These are the Bank of Thailand (BOT), the Office of Insurance Commission (OIC), and the Securities and Exchange Commission (SEC). The allocation of responsibilities between the BOT, the OIC and the SEC is as follows:

- The BOT, as Thailand's central bank, is responsible for the macro-supervision of the banking and financial services industries in general. These include all credit foncier companies, finance companies and commercial banks (deposit takers), as well as certain financial activities, such as exchange controls and electronic payment systems.
- The SEC regulates all activities related to securities and certain types of regulated over-the-counter derivatives, as well as activities of listed companies in Thailand. Listed companies in Thailand are also subject to rules issued by the Stock Exchange of Thailand (SET).
- The OIC supervises all insurance companies, both life and non-life.

In addition to the main regulators discussed above, the Anti-Money Laundering Office (AMLO) also regulates the operations of Thai financial institutions to be in accordance with requirements, such as reporting requirements, under Thai anti-money laundering regulations.

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

Generally, the relevant legislation in Thailand can be classified according to the regulators in charge:

- The Financial Institution Business Act B.E. 2551 (2008), as amended (FIBA), is the key legislation for the banking and financial services industries that governs all key financial institutions in Thailand. The BOT is the main regulator in charge of this legislation; it therefore issues a large volume of secondary and delegated regulations.
- The Securities and Exchange Act B.E. 2535 (1992), as amended ("SEC Act"), is the main framework law in Thailand that governs all securities-related

activities, including securities offering and securities business operation. As the key regulator, the SEC has issued a number of subordinated regulations under the SEC Act.

- The Derivatives Act B.E. 2546 (2003), as amended ("Derivatives Act"), governs derivatives business operations in Thailand, such as derivatives brokerage activities. The SEC is also the regulator of this legislation, under which several subordinated regulations have been issued.
- For insurance businesses, the relevant statutory laws are the Life Insurance Act B.E. 2535 (1992), as amended, and the Non-Life Insurance Act B.E. 2535 (1992), as amended. Similar to the three preceding legislations, the OIC issues many regulations under these acts.

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

Thailand regulates a broad range of activities, which include but are not limited to the following:

- **Conducting a financial institution business:** This would cover typical banking activities involving the operation of current and deposit accounts. The bottom line is that any financial business that accepts deposits from the public is regulated.
- **Issuing electronic money:** Electronic money is a prepaid electronic payment product, either card or account-based.
- **Carrying out payment services:** This covers a broad range of activities involving matters such as money remittance, card issuance, and acquisition of card transactions.
- **Providing personal loans:** This basically covers providing uncollateralized loans to retail consumers and lending with vehicle registration as collateral, and lending that originated from hire purchase and lease that is not for vehicles and types of machinery.
- **Conducting a digital asset business:** This would cover the offering of digital assets and businesses undertaking digital asset related activities, such as digital asset exchanges, digital asset brokering and digital asset dealerships.
- **Carrying out insurance business:** Thai regulation covers various insurance activities, such as acting as insurer or reinsurer, as well as insurance agencies or brokerages.
- **Providing investment advice:** Providing advice on investments in most securities or derivatives is a regulated activity in Thailand. For example, the



provision of advice on the merits of acquiring or disposing of particular securities requires the proper license.

- **Trading securities or derivatives as principal or as an agent:** This would cover brokers as well as dealers.
- **Underwriting securities:** This covers the act of underwriting securities for subscription on behalf of the issuer.
- **Providing securities lending:** Securities lenders, whether acting as a principal or an agent, are regulated.
- **Conducting foreign exchange business:** The regulated businesses include money changing, cross-border remittance and treasury centers, for which a specific license is required.
- **Engaging in fund management:** This mainly covers mutual fund and private fund management. The former is the operation of a collective investment scheme, while the latter is the management of investments through a custodial account on behalf of another person.

Notwithstanding the examples above, the Foreign Business Act B.E. 2542 (1999) (FBA), being the main general legislation regulating foreign participation in the operation of restricted businesses (e.g., service-based business) in Thailand, requires any non-Thai person who carries out any business in Thailand to obtain a foreign business license before actually operating the business. By “any business,” the FBA covers a broad range of business activities — whether or not regulated under other specific regulations — with certain exemptions.

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

Thai regulations operate on a territorial basis. This means to be subject to Thai licensing requirements, business or activities must have at least some element taking place in Thailand. Based on this, whether and to what extent a given activity will be regulated under Thai law can be considered in light of the following conceptual scenarios:

- **Purely offshore:** If not a single element of the business activity takes place in Thailand, such as cases where the service provider is located outside Thailand with no presence or communication entering into or originating in Thailand, such a business activity will generally not be subject to the licensing requirements under Thai law.
- **Cross-border communication:** Where there is no physical presence of the service provider in Thailand, but communication (e.g., emails and phone calls) is made to or from clients or prospects in Thailand, separate consideration needs to be given to two different regulatory schemes: the FBA requirements and other business-specific licensing requirements (including securities offering regulations). For the FBA aspect, since there is no physical activity in Thailand, based on the authority’s view, it is very unlikely that the service provider will be considered conducting restricted business in Thailand that would require a license under the FBA unless a foreign business operator sends an employee to conduct business activities in Thailand. There are some business-specific licensing requirements (applicable to, e.g., securities business or banking business) that should be considered. Where offshore business operators make no solicitation to Thailand-based clients or prospects for them to use their services or buy their products, and instead, only

offer their products/services to Thailand-based clients on a reverse inquiry basis or in reliance on official exemptions, the offshore business operator will not be subject to any business-specific licensing requirements under Thai law.

- **Onshore basis:** Where a regulated activity is physically conducted in Thailand, the regulatory risks would substantially increase from both the perspective of the FBA and business-specific licensing requirements. Most activities conducted by non-Thai persons are restricted and not permitted without a license under the FBA. Separately, whether any business-specific licensing requirement applies needs to be considered on a case-by-case basis.

There are specific exemptions from certain licensing requirements when the activity is conducted on a cross-border basis. By way of example, we wish to highlight the following regulated businesses for which there are official exemptions - investment advisory and private fund management services.

### Investment advisory

Providing what is considered “investment advice” in the normal course of business for a fee is regulated as an investment advisory business. While a specific license is required, none is available to offshore entities. Thus, there are certain exemptions from the licensing requirement. One instance is where investment advice is given exclusively to a Qualified Institutional Investor. Another example is where an offshore investment advisor duly licensed by a securities regulatory agency that is a member of IOSCO gives investment advice to retail investors through a Thai-licensed brokerage firm or investment advisor who arranges such investment advice. Both of these cases are exempt from the investment advisory license.

### Private fund management

Regulated private fund management services under Thai law is also known as discretionary investment management services. Those who manage the investment of Thailand-based investors through a custodial account under an investment mandate given by the investors are subject to this licensing requirement. A relevant example of the official exemptions available is where an offshore securities business operator (duly licensed to operate securities business by an agency of a country that is a member of IOSCO) offers and/or provides its private fund management services exclusively to a Qualified Institutional Investor.

### Unofficial safe harbor

Apart from the official exemptions discussed above, some offshore business operators adopt the practice of “reverse inquiry” as an unofficial safe harbor to provide their products or services to clients in Thailand. While this practice is neither official nor endorsed by any regulator, it is often used as an argument that the offshore operator has no intention to provide its products or services in Thailand, but rather it is the client or investor that approaches the offshore business to obtain them. Therefore, the business operation, they argue, should be considered as operating offshore, and the offshore business operators should not be subject to the regulatory scheme under Thai law. This practice should, however, be adopted with extreme care.

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

While there are many types of licenses for providing financial services in Thailand, depending on the nature of the activity in question, most business-specific licenses are only available to Thai entities — with some available to Thai branches of foreign entities. For example, commercial



banks seeking a banking license under the FIBA can be either a Thailand-incorporated entity or a Thai branch of a foreign bank (which, once licensed, will have varying legal capacities in terms of operating their banking business in Thailand), while no securities business licenses under the SEC Act are available to offshore entities. As there is no unified platform under any particular regulation on which to apply for different types of financial business licenses, the application process needs to be considered on a case-by-case basis.

For business activities in Thailand in general, non-Thai persons (determined based on the place of incorporation and/or shareholding structure in the case of companies) are required to obtain a foreign business license under the FBA. Only some types of businesses are narrowly excluded from this general licensing requirement.

Notwithstanding the foregoing, some business activities, such as issuing certain types of electronic money, only require registration or notification to the authority. Some registration schemes are available to offshore entities for certain activities, such as dealing in derivatives on one's own account.

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

In most cases, an applicant for a license (or registration) must complete a formal process involving the completion of required application forms and the submission of supporting documentation to the authority in charge. While there is no unified application process for all licenses/registration, and the particular forms that must be completed will depend on the nature of the regulated activities being conducted, the Facilitation Act B.E. 2558 (2015) — effective 21 July 2015 — requires the authorities responsible for any specific license/registration to publish a relevant licensing manual for the public. Each manual must cover the rules, procedures and conditions for submission of the application, as well as the authority's timing commitment. A centralized online database of such manuals is available here.

Currently, market participants who introduce innovative financial services to the Thai securities or derivatives market could also choose to participate in the SECs sandbox scheme. Qualified participants under such scheme will be exempted from securities or derivatives licensing requirements during the period of the scheme, which should be no longer than a year. However, the participants could apply for an extension of such a period to the SEC.

## 7. What financial services passporting arrangements does Thailand have with other jurisdictions?

Thailand has no equivalent to European style passporting arrangements, with the closest yet much narrower scheme available in Thailand being the ASEAN CIS, which aims to streamline the regulatory approval and filing processes for offering investment units in certain qualified collective investment schemes (CIS) across certain ASEAN nations (at present, Thailand, Malaysia and Singapore).

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# Turkey

## 1. Who regulates banking and financial services in Turkey?

Turkey has six main regulators that authorize and supervise bank and non-bank financial institutions.

1. The Banking Regulatory and Supervisory Authority (Bankacılık Düzenleme ve Denetleme Kurumu or the BRSA) regulates deposit banks, participation banks, investment and development banks, branches and representative offices of non-Turkish banks, and certain non-bank financial institutions, such as factoring companies, financial leasing companies and finance companies.
2. The Capital Markets Board of Turkey (Sermaye Piyasası Kurulu or the CMB) regulates brokerage firms, portfolio management companies, mutual funds, pension funds, investment companies, investment advisory firms, stock exchanges, real estate valuation companies, crowdfunding platforms, banks operating in capital markets, and rating firms offering services to institutions operating in capital markets.
3. The Insurance and Private Pension Regulatory and Supervisory Authority (Sigortacılık ve Özel Emeklilik Düzenleme ve Denetleme Kurumu or the IRSA) regulates insurance and private pension companies and intermediaries, such as insurance agents, brokers and private pension intermediaries.
4. The Central Bank of the Republic of Turkey (Türkiye Cumhuriyet Merkez Bankası or the Central Bank) regulates payment and electronic money institutions. It also plays a complementary role in regulating the banking industry as it implements policies related to the protection of the value of the Turkish currency and financial stability. For example, the Central Bank determines the overnight and weekly repo interest rates; calculates reserve and liquidity requirement ratios; supervises the implementation of maximum interest rates applied by banks on deposits and loans; and supervises maximum interest rates in credit card agreements. Banks operating in Turkey must provide their financial statements to the Central Bank periodically. The Central Bank is the regulator of payment and securities settlement system operators.
5. The Financial Crimes Investigation Board's (Mali Suçlar Araştırma Kurulu or MASAK) primary function is to fight against the offense of money laundering, which is the processing of criminal proceeds to disguise their illegal origin and prevent terrorist financing offences. MASAK is organized under the Turkish Ministry of Treasury and Finance. MASAK conducts investigations, prepares sectoral studies regarding the offense of money laundering, develops measures, establishes policies, develops implementation strategies, drafts laws, bylaws and regulations in line with the adopted policies and performs other activities to raise public awareness. VI. The Savings Deposit Insurance Fund (Tasarruf Mevduatı Sigorta Fonu) is responsible for protecting the rights

of depositors and restructuring banks experiencing financial difficulties. It implements various measures imposed by the BRSA, such as restructuring or taking over the management or ownership of a bank with a weak financial structure or failing to comply with banking laws in rare cases.

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

Turkey has various framework laws for financial institutions and services, including the following:

- The Banking Law No. 5411
- The Capital Markets Law No. 6362
- The Insurance Law No. 5684
- The Private Pension Savings and Investment System Law No. 4632
- The Financial Leasing, Factoring and Financing Companies Law No. 6361
- The Payment and Security Settlement Systems, Payment Services and Electronic Money Institutions Law No. 6493
- The Debit Cards and Credit Cards Law No. 5464

The BRSA, the CMB and the Central Bank set detailed rules and guidelines applicable to companies and activities they regulate, in the form of regulations, communiqués, respective board resolutions, circulars, sector announcements and guidelines. The IRSA started operations in June 2020 but has yet to set any rules and guidelines applicable to the insurance sector. That said, rules and guidelines set by the Republic of Turkey Ministry of Treasury and Finance (T.C. Hazine ve Maliye Bakanlığı), which was responsible for regulating and supervising the insurance sector prior to the establishment of the IRSA, are still applicable. The BRSA, the CMB, the Ministry of Treasury and Finance, and the Central Bank's rules and guidelines are prudential regulations that include audit requirements, capital adequacy ratios, corporate governance requirements, financial statements and reporting standards, internal systems, regulators' audits, record retention, and provisioning requirements.

Although not a member, Turkey is a candidate for full European Union membership and has been in accession negotiations since 2005. It is also active in harmonizing its financial services legislation with the acquis. Turkey has its financial market infrastructure, securities markets and investment services regulations aligned with the acquis with the enactment of the Banking Law No. 5411 and the Capital Markets Law No. 6362 and their secondary regulations. Turkey has also adopted Basel II and some Basel III principles in the Turkish banking sector.

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

Turkey strictly regulates a broad range of financial services and activities. Financial institutions must be authorized by their regulators (i.e., the BRSA, the CMB, the IRSA and the Central Bank) for incorporation and authorization. These services include the following:

- **Accepting deposits:** This covers typical retail banking activities involving the operation of current and deposit accounts.
- **Accepting participation funds:** This covers Islamic banking activities involving the operation of current and participation accounts (i.e., accounts paying a yield of profit share under Islamic banking principles).
- **Extending loans:** This covers both cash and non-cash loans extended to legal entities, individuals and consumers.
- Providing factoring and financial leasing services.
- **Issuing electronic money:** Electronic money is a prepaid electronic payment product accepted as a payment instrument by its issuer and other individuals and legal entities.
- **Carrying out payment services:** This includes deposit and withdrawals from payment accounts, fund transfers, issuing or accepting payment instruments and money transfers.
- **Operating payment and securities settlement systems:** This covers operating a platform for the realization of clearing and settlement transactions in connection with the fund and security transfer orders given by three or more participants.
- **Banks' asset management:** This covers purchasing and selling banks and other financial institutions' non-performing loans.
- **Issuing debit and credit cards and providing related payment services:** This covers financial institutions' provision of debit and credit card services.
- **Trading and carrying out intermediation activities in securities and other capital markets instruments:** This covers banks and brokerage firms engaging in proprietary trading that also receive and route orders for the sale and purchase of securities.
- Underwriting and intermediation of public offering of capital markets instruments
- **Providing investment advice:** This is a regulated activity under Turkish law.
- **Asset management:** Managing investments on behalf of third parties is a regulated activity under Turkish law, requiring specific permission in relation to investment companies, mutual funds and non-Turkish collective investment schemes (e.g., alternative investment funds or US management investment companies).
- Establishing, operating and winding up investment companies and mutual funds (i.e., collective investment schemes under Turkish law)
- **Share-based crowdfunding:** This covers intermediation activities concerning share-based crowdfunding on electronic media. Only joint-stock companies that apply to and are listed by the CMB may operate as a share-based crowdfunding platform.
- **Providing custody services:** Custody services related to assets that include investments is a regulated activity. Specific permission is required to act as the custodian of a collective investment scheme (i.e., investment companies and mutual funds).
- **Carrying out insurance business (effecting and carrying out both life and non-life insurance contracts):** Each insurance branch (e.g., accident insurance, health insurance) requires a separate license.
- Carrying out private pension business (can also engage in life and personal accident

insurance business with separate licenses)

- **Insurance and private pension intermediation activities:** This covers insurance agents and brokers as well as private pension intermediaries.

In addition, the activities of financial institutions that constitute ancillary financial services (e.g., deposit banks' capital markets activities or private pension companies' life and personal accident insurance business) may require separate permits from the regulator overseeing those activities.

For the time being, issuance or trade of crypto assets and crypto currencies do not require a license. However, with the Regulation Prohibiting Payments With Crypto Assets ("**Crypto Assets Regulation**"), the CBRT banned payments with crypto assets. The Crypto Assets Regulation defines crypto assets as intangible assets that are created virtually using distributed ledger or similar technologies and distributed over digital networks, that are not qualified as money, registered money, electronic money, payment instrument, security or any other capital market instrument. According to the Crypto Assets Regulation, crypto assets cannot be used directly or indirectly for payments, and services regarding the direct or indirect use of crypto assets in payments are prohibited. Moreover, payment services and electronic money institutions are prohibited from intermediating (i) the transfer of funds to platforms that offer trading, custody, transfer or issuance services regarding crypto assets, and (ii) the transfer of funds from these platforms.

### 4. How do Turkey's licensing requirements apply to cross-border business into Turkey?

The activities of a firm outside Turkey relating to a client or counterparty located in Turkey might be subject to Turkish law. A service provider located abroad needs to consider whether it is triggering a Turkish licensing obligation and complying with Turkish marketing rules.

Foreign financial service providers must take no action that would create an impression that they are providing financial services in Turkey. However, they can respond to reverse inquiries where the Turkish resident customer has initiated the relationship. Foreign financial service providers must avoid any promotion, distribution, marketing or other solicitation of their services and products in Turkey that may be subject to licensing in Turkey.

There is no exact definition of "marketing, promotion and solicitation of financial products and services" under Turkish financial services regulations. Marketing, promotion and solicitation cover all initiatives to market financial products and services, including passive marketing. For instance, a foreign bank calling or emailing a customer resident in Turkey to provide information on its products and/or services without the customer asking first is considered to be marketing its services and products in Turkey.

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

Generally, foreign financial service providers that will enter into the Turkish market need to incorporate a subsidiary or branch in Turkey and apply with the respective regulator to obtain an incorporation permit. An applicant seeking incorporation permits for financial services must satisfy the conditions set out by the regulator supervising the applicant's



planned activity. The conditions can vary depending on the intended regulated activities (e.g., banking, insurance or capital markets brokerage) and, in particular, whether the applicant will be regulated by the BRSA, the CMB, the IRSA or the Central Bank. Generally, the following conditions need to be satisfied:

- a. Company type and registered offices:** Financial institutions incorporated in Turkey are generally required to be formed as joint stock companies (anonim şirket). Banks and insurers located abroad can establish branches in Turkey with the BRSA's and the IRSA's approval, respectively, without incorporating a Turkish entity. Other non-Turkish financial institutions seeking to operate in Turkey are required to incorporate a Turkish entity.
- b. Constitutional documents:** The applicant's articles of association must be in line with the laws and regulations of the activities planned to be conducted and the regulator must approve them.
- c. Capital requirements and financial adequacy:** The regulator must be satisfied that the applicant has adequate financial resources to carry out the activities. The minimum capital requirement varies depending on the extent of the services a financial institution provides (e.g., higher for banks compared to capital markets brokerage firms), which can be increased upon the regulator's request after assessing the application.
- d. Founders' and directors' suitability:** The applicant's founders and directors must be financially sound, reputable and proper (i.e., financial and criminal records must evidence their adequacy to be shareholders/directors of the financial service provider).
- e. Viable business model:** The regulator will examine the applicant's business model, the business's economic aspects and the applicant's projections.
- f. Transparent shareholding structure:** The regulator will examine the applicant's shareholding structure, its shareholders' financial adequacy, and documentation on the financial institution's direct and indirect shareholding.

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

Under Turkish law, certain financial institutions (e.g., payment and electronic money institutions and system operators) are required to obtain one single permit to be authorized to operate in Turkey. In contrast, others (e.g., banks, insurance companies, private pension companies and brokerage firms) are required to obtain both incorporation and operation licenses.

An applicant for an operation license must undergo a formal process to obtain authorization, which involves completing and submitting required application documents, forms, undertakings and supporting information. The BRSA, the CMB, the IRSA or the Central Bank may require additional documents from applicants if necessary.

In most cases, the regulator responds to the applicant within three to six months from receipt of the complete application. This period can be extended, depending on the regulator's assessment and satisfaction with the applicant's documents.

The documents, forms, undertakings and supporting information required will depend on the nature of the regulated activities being conducted. Generally, however, a financial institution must satisfy the following conditions to obtain an operation license:

- a. Required capital:** The minimum required capital (or any higher amount the regulator

deems necessary) must be fully paid in cash, and shares must be issued in registered form (nama yazılı). Any other payable fees or contributions to the government must also be paid before obtaining the license.

- b. Corporate governance:** A financial institution must comply with the corporate governance requirements set by its regulator, such as having a certain number of independent board members and publishing quarterly and annual reports.
- c. Internal systems:** A financial institution must set up required internal systems, such as internal control, internal audit, and risk management systems.
- d. Technical infrastructure:** A financial institution's technical infrastructure, such as its IT systems, must be in place to carry out its activities and protect customer privacy and other confidentiality requirements.
- e. Personnel requirements and qualifications:** A financial institution must have an adequate number of personnel with sufficient qualifications. Directors, managers and other designated officers, such as portfolio manager and internal control director, must meet certain qualifications depending on the financial institution. The applicant will need to submit forms providing information that enables the regulator to assess their fitness and propriety to perform their roles.

There are no regulatory sandboxes in operation in Turkey and fintechs are not exempt from authorization requirements.

## 7. What financial services "passporting" arrangements does Turkey have with other jurisdictions?

Although Turkey is a candidate for full membership, it is not a member of the EU or the European Economic Area, nor is it a party to any agreement for passporting financial services across Europe. Therefore, a Turkish financial institution cannot passport its authorization into EEA member states or any other jurisdiction, and foreign financial institutions cannot operate without required licenses in Turkey.

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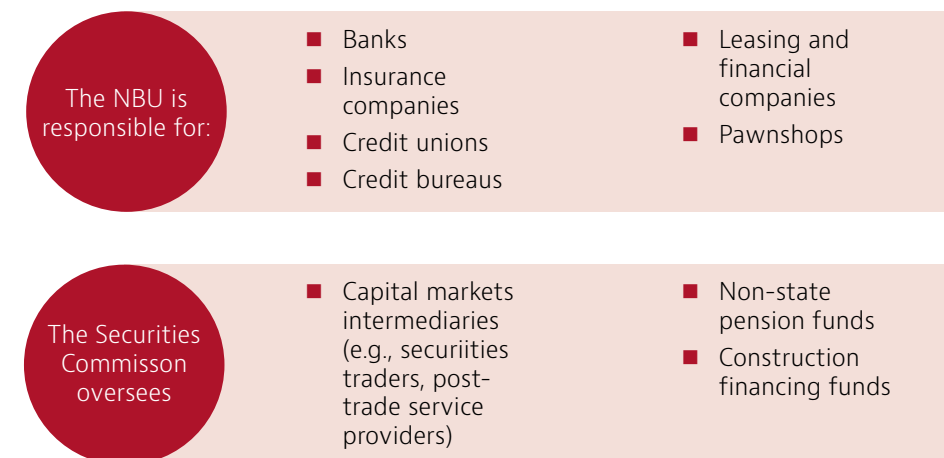
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# Ukraine

## 1. Who regulates banking and financial services in Ukraine?

The National Bank of Ukraine (NBU) regulates banks and banking services in Ukraine. The other non-banking financial institutions have historically been regulated by the NBU, the National Securities and Stock Market Commission (“Securities Commission”) and the National Commission Carrying out State Regulation of the Financial Services Markets (“Financial Services Commission”). However, the Financial Services Commission has been abolished, and from 1 July 2020, its functions have been reallocated to the NBU and the Securities Commission. After this split, the remaining two regulators have shared the oversight vis-à-vis the different groups of financial institutions, as follows:



Ukraine has a two-tier financial monitoring system: (i) the initial financial monitoring that is carried out by banks and non-banking financial institutions (IMIs) and (ii) state-level financial monitoring. The bodies of the second tier (state level) govern and supervise the activities of IMIs. The key enforcement role in the second tier belongs to the State Service of Financial Monitoring, which is regarded as a central body of the executive power acting as the financial intelligence unit. Also, both the NBU and the Securities Commission (along with some other competent authorities) act as additional second-tier agencies that carry out the regulatory and oversight functions vis-à-vis the respective IMIs.

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

The main laws and regulations in the fields of banking and financial services are the following:

### Banking services

- Law of Ukraine “On the National Bank of Ukraine” dated 20 May 1999
- Law of Ukraine “On Banks and Banking Activity” dated 7 December 2000 (“Banking Law”)
- Law of Ukraine “On Financial Services and State Regulation of the Financial Services Markets” dated 12 July 2001 (for non-banking financial services)
- Law of Ukraine “On Households Deposit Guarantee System” dated 23 February 2012
- Regulation on Licensing of Banks approved by the NBU Resolution No. 149 on 22 December 2018

### Other financial services

- Law of Ukraine “On Financial Services and State Regulation of the Financial Services Markets” dated 12 July 2001
- Law of Ukraine “On Securities and Stock Market” dated 23 February 2006
- Law of Ukraine “On Insurance” dated 7 March 1996
- Law of Ukraine “On Mutual Funds” dated 5 July 2012
- Regulations of the Financial Services Commission adopted prior to 1 July 2020 (in effect until the NBU and the Securities Commission adopt their own respective regulations)
- Regulations of the NBU
- Regulations of the Securities Commission

The Ukrainian financial services sector is undergoing a major reform. On 16 January 2020, the NBU, the Securities Commission, the Financial Services Commission, the Deposit Guarantee Fund and the Ministry of Finance of Ukraine approved the Strategy of Ukrainian Financial Sector Development until 2025, which provides for the alignment of financial services market regulation with EU requirements and other internationally recognized principles applicable to the regulation of financial services markets.

To implement this strategy, the draft law On Financial Services and Financial Companies was registered by the Verkhovna Rada of Ukraine on 15 February 2021,



which is set to replace the current Financial Services Law adopted back in 2001. The new law will establish general rules for the provision of all financial services in Ukraine and create a framework for the further development of legislation governing non-banking financial services. In particular, the NBU plans to prepare and submit to the Verkhovna Rada of Ukraine the following draft laws regulating the different types of services:

- On Payment Services (adopted by the Verkhovna Rada of Ukraine on 30 June 2021, but will come into effect on 1 August 2022)
- On Credit Unions
- On Insurance
- On Financial Leasing (adopted by the Verkhovna Rada of Ukraine in full on 4 February 2021)

Adoption of these laws will establish new rules for relevant market participants and expand the range of their activities.

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

#### Banking activities

A commercial bank carries out its banking activities pursuant to a banking license issued by the NBU. A banking license permits a bank to: attract funds (deposits) from legal entities and individuals; open, maintain and carry out transactions with current accounts of clients and correspondent banks; and place attracted funds in its own name, on its own terms and at its own risk. Only a duly licensed commercial bank may carry out all of the foregoing, except for certain banking operations that may be carried out by the Central Securities Depository based on the license of the NBU. A duly licensed commercial bank may also render financial services to its clients (save for other commercial banks), including through its commercial agents, based on agency agreements. The list of such services is set out by the NBU.

In addition, a duly licensed commercial bank may also carry out the following activities:

- Issuance of its own securities
- Provision of safekeeping services (but not including the custody of securities)
- Rendering of consulting and information services related to banking and other financial services
- Investments
- Organization of monetary lotteries
- Transportation of currency valuables and cash collection

A duly licensed commercial bank may also render banking and other financial services in foreign currencies, which constitute foreign currency operations, based on its banking license issued by the NBU.

#### Other financial services activities

Subject to certain exceptions, financial services may generally only be rendered by a financial institution that has obtained the relevant license from either of the following, as applicable:

- The NBU
- The Securities Commission

All the licenses issued by the Financial Services Commission prior to 1 July 2020 are deemed effective. The NBU and the Securities Commission conduct their review of filings for a license on the basis of the currently applicable regulations of the Financial Services Commission until they adopt their own regulations. Pursuant to the applicable Ukrainian legislation, the NBU issues licenses for the following:

- Trading of currency valuables
- Attraction of financial assets with an obligation of their subsequent repayment
- Financial leasing
- Provision of loans, including on the terms of a financial loan
- Provision of guarantees
- Money transfers
- In the sphere of insurance
- Factoring

#### The Securities Commission issues licenses for the following:

- Activities within the system of a cumulative pension provision
- Professional activity on the capital markets

#### Status of crypto assets and crypto currencies

On 6 December 2019, Verkhovna Rada of Ukraine partially implemented the 5th EU AML Directive and the respective FATF guidance and introduced a "virtual asset" concept. Moreover, it extended the list of the obliged entities engaged in the following activities:

- exchange of virtual assets;
- transfer of virtual assets;
- custody and/or administration of virtual assets or instruments, which enable their control;
- participation and provision of financial services related to the issuer's offering and/or sale of virtual assets.

In addition, on 2 December 2020, Verkhovna Rada of Ukraine adopted in the first reading the draft law on virtual assets. Among other things, it sets out (i) the legal status of the virtual assets; (ii) their issuance rules; (iii) the relevant regulator and scope of its powers; and (iv) the liability for a breach of conduct of business rules.

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

Where the service provider is a foreign entity while the client is a Ukrainian resident, Ukrainian legislation neither expressly requires that the service provider be subject to licensing and/or registration in Ukraine, nor does it provide for any explicit criteria to determine when a particular financial product or service should be deemed to be rendered in Ukraine. In the



absence of an express legal requirement, a foreign provider of financial services is advised to seek additional guidance on a case-by-case basis (taking into account its specific business model) on whether it would be required to be licensed and/or registered in Ukraine if it renders relevant services from outside of Ukraine.

Additionally, Ukraine recently adopted a new ambitious legal framework governing the activity of capital markets intermediaries. The Law of Ukraine On Amending Certain Legislative Acts of Ukraine in relation to Investment Attraction and Introduction of New Financial Instruments (“Capital Markets Law”) dated 19 June 2020 makes foreign capital market intermediaries subject to a specific licensing regime in Ukraine. The Securities Commission is authorized to adopt specific guidelines that should enable foreign intermediaries to obtain necessary authorizations for acting as professional intermediaries in Ukraine. The Capital Markets Law came into force on 1 July 2021 (save for certain provisions that came into force on 16 August 2020).

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

### Banking activities

Under the Banking Law, a commercial bank registered with the NBU may only commence its banking operations upon obtaining a banking license from the NBU. The NBU decides to grant the banking license on the basis of a bank’s application within two months upon receipt of the documents evidencing that the bank has satisfied the following requirements:

- Share capital is fully paid up and registered in conformity with the requirements of the Banking Law.
- The bank is fully equipped with banking equipment, computer hardware and software, and appropriate leased or owned banking office premises.
- At least three individuals who possess the necessary professional skills and business reputation are appointed as board members.
- Individuals who possess the necessary professional skills and business reputation are appointed as chief accountant and head of internal audit.

The NBU may refuse to grant the license if these requirements are not complied with by a bank within one year from the date of its state registration. In such cases, the state registration of the bank would be canceled and the bank would be subject to liquidation procedures.

### Other financial services activities

The requirements to obtain authorization and the process for becoming authorized in the field of financial activity depend on the type of financial institution (insurance company, custodian, pension fund, etc.). Ukrainian legislation provides for different requirements and procedures for each type of financial institution.

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

### Banking activity

In order to obtain a banking license (authorization to perform banking services), an applicant must submit to the NBU an application form (based on the form provided by the legislation) and the following supporting documents:

- A copy of the by-laws of the bank with the state registrar’s indication of the state registration of the legal entity
- For a bank established as a joint-stock company, copies of the report registered by the State Commission for Securities and Stock Market on the results of private stock placement and certificate of registration of issue of shares
- Information on the number of members of the Supervisory Council, the Board and the Revision Committee
- The evidence set out in an NBU form showing:
  - the availability of at least three persons, appointed members of the board, including its chairman, as well as information on their professional skills and business reputation
  - the professional skills of the chief accountant and the head of Internal Audit
  - the business reputation of the supervisory council members, chief accountant and the head of Internal Audit
  - the availability of the organizational structure and corresponding specialists necessary to ensure the provision of banking and other financial services, banking equipment, computers, software and premises compliant with NBU requirements
- Copies of the internal bank regulations that: a) govern the rendering of banking and other financial services; and b) determine the performance of internal control and risk management procedures
- A business plan for three years compiled in line with NBU requirements
- A copy of the payment document confirming payment of the fee for the banking license in an amount determined by the NBU

The NBU must decide whether to grant the banking license within two months from the day when it received the full set of documents.

### Other financial services activities

The documents and time scale to obtain authorization and process for becoming authorized in the field of financial activity depend on the type of financial institution (insurance company, custodian, pension fund, etc.). Ukrainian legislation provides for different requirements and procedures for each type of financial institution.

### FinTechs and “sandboxes” for technologically innovative new services

On 19 February 2021, Verkhovna Rada of Ukraine adopted in the first reading the draft law on payment services. Very broadly, it seeks (i) to remove certain regulatory barriers to entry to the payments market and (ii) implement certain EU laws applicable to payment services, such as Directive 2015/2366 (PSD2) and Directive 2009/110/EC (Second E-Money Directive).

Very broadly, all payment market participants may be allocated into four separate groups. The usual suspects are banks (which may provide any payment service based on their banking license) and other financial institutions (e.g., insurance companies) entitled to provide money remittance and acquiring services subject to conditions envisaged under the general financial services legal framework. The second largest group comprises various financial infrastructure entities, such as payment and e-money institutions, postal operators and providers of non-financial payment services. These also seem to exist in the Ukrainian market now, albeit

sometimes under different names and with different capacities. The third group is composed of the regulator and competent authorities. Finally, the last group is composed of providers of limited payment services. Moreover, the draft law provides for the setting up of the regulatory sandbox to test products and services based on innovative technologies.

## 7. What financial services passporting arrangements does Ukraine have with other jurisdictions?

It is envisaged under the EU-Ukraine Association Agreement that as soon as Ukraine implements a number of EU financial services *acquis communautaire*, it will become eligible for access to the EU internal market for financial services. In practice, this implies that both the EU and Ukraine may potentially achieve an “unprecedented level of integration” whereby both EU and Ukrainian financial institutions could “passport” their services in Ukraine and EU markets accordingly. This innovative market access regime is, however, subject to a very strict conditionality procedure. Given the current pace of European integration activities carried out by the Ukrainian government, this is not likely to happen in the near future. Reports prepared by the Ukrainian government provide a more detailed assessment of the European integration process.

In addition, on 1 July 2020, the NBU introduced a kind of a “passporting” regime for an operator of a foreign payment system: it effectively allowed such foreign operator to render money remittance services in Ukraine based on the respective license issued by the relevant competent authority abroad.

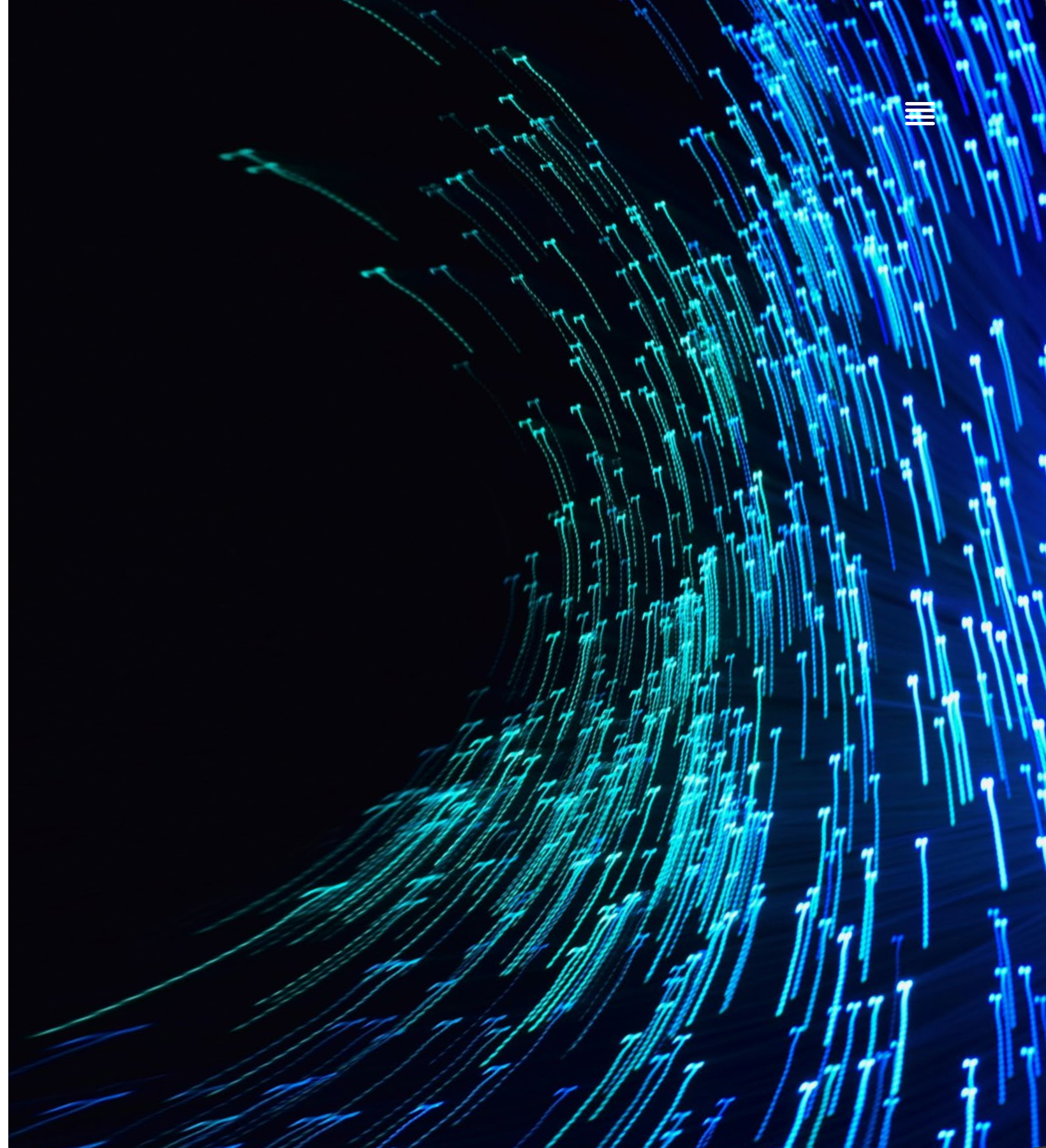
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# United Arab Emirates

## 1. Who regulates banking and financial services in the UAE?

The UAE has four different regulators responsible for the authorization and supervision of banks, insurers and other financial institutions. These are: (i) the Central Bank of the UAE (CB); (ii) the Securities and Commodities Authority (SCA); (iii) the Dubai Financial Services Authority (DFSA), which is the regulator of the Dubai International Financial Centre (DIFC); and (iv) the Financial Services Regulatory Authority (FSRA), which is the regulator of the Abu-Dhabi Global Market (ADGM).

There are two regulators in the “on-shore” UAE: (i) The Central Bank of the UAE that regulates banks, finance companies, payment service providers and insurance companies and (ii) the Emirates Securities and Commodities Authorities (ESCA) that regulates markets, listed companies and securities brokers.

The Central Bank under its new law no. 14 of 2018 has very wide powers to supervise and sanction the FIs within its remit with the ability to censure, fine, sanction and withdraw licenses and to cooperate with foreign regulators.

The ESCA has more limited powers under its law no. 4 of 2002 but is trying to exert more control, including naming and shaming violators of its regulations.

The AML supervisor is the Financial Intelligence Unit (FIU), an independent body hosted at the Central Bank

The allocation of responsibilities between the CB, SCA, DFSA and FSRA is as follows:

- a.** The CB and SCA regulate and supervise on a UAE federal level, respectively, all banks, insurers and insurance brokers for the CB while the SCA regulates, securities traders and markets. In 2020 the UAE legislator merged the Insurance Authority (IA) with the CB, and the IA is now fully integrated within the CB
- b.** The UAE Council of Ministers has also decided to consider the two UAE exchanges, the Dubai Financial Market (DFM) and the Abu Dhabi Exchange (ADX), as self-regulated organizations under the supervision of the SCA.
- c.** The DFSA is the financial regulator and supervisor of all banks, investment firms, securities traders and re-insurers that operate within the DIFC, a financial free zone located in the emirate of Dubai, which is governed by its own rules and regulations largely based on common law principles, as opposed to civil law on the UAE federal level. DFSA-regulated firms include investment firms, asset managers, hedge funds, brokers, financial advisers

and insurance intermediaries.

- d.** The FSRA is the financial regulator and supervisor of all banks, investment firms, securities traders and re-insurers that operate within the ADGM, a financial free zone located in the emirate of Abu Dhabi, which is governed by its own rules and regulations based on the laws of England and Wales, as opposed to civil law on the UAE federal level. ADGM-regulated firms include investment firms, asset managers, hedge funds, brokers, financial advisers and insurance intermediaries

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

There are two sources of regulatory laws in the UAE, the Central Bank Law no. 14 of 2018 and the ESCA law no. 4 of 2002. The main federal law for banking and financial services is Federal Law No. 14 of 2018 regarding the Central Bank and organization of Financial Institution and Activities, which replaced the old Law No. 10 of 1980 concerning the Central Bank, the Monetary System and Organization of Banking and the insurance industry. The SCA is governed by Federal Law No. 4 for the year 2000 concerning the Emirates Securities and Commodities Authority and Market. The two regulators have issued a number of regulations applicable to the financial institutions that fall under their jurisdictions.

The CB is also supposed to issue a number of updated regulations pursuant to its new law, and it is now issuing a number of these regulations, such as the Stored Value Facility (SVF) and the Retail Payment System (RPS).

With regard to the DIFC, the DFSA issues rules and regulations that apply to the financial institutions that operate within the DIFC. The main laws governing financial institutions in the DIFC are the following:

- a.** Regulatory Law 2004
- b.** Markets Law 2012
- c.** Law Regulating Islamic Financial Business 2004
- d.** Trust Law 2005
- e.** Collective Investment Law 2010
- f.** Investment Trust Law 2006





In addition, the DFSA has published a number of regulations applicable to financial institutions incorporated within the DIFC.

The FSRA issued the Financial Services and Market Regulations, which were broadly modeled after the UK's Financial Services and Markets Act (2000) and other related legislation.

### 3. What types of activities require a license in the UAE?

The CBUAE regulates the below activities:

- Taking deposits of all types, including Shari`ah-compliant deposits
- Providing credit facilities of all types
- Providing funding facilities of all kinds, including Shari`ah-complaint funding facilities
- Providing currency exchange and money transfer services
- Providing monetary intermediating services
- Providing stored values services, electronic retail payments and digital money services
- Providing virtual banking services
- Arranging and/or marketing for Licensed Financial Activities
- Acting as a principle in financial products that affect the financial position of the Licensed Financial Institution, including but not limited to foreign exchange, financial derivatives, bonds and sukuk, equities, commodities, and any other financial products approved by the Central Bank

The Central Bank regulates Stored Value Facilities, including crypto currencies and the ESCA regulates crypto-assets.

The regulators in the Financial Free Zones regulate various activities, including the following:

- Accepting deposits
- Dealing in investments as principal or as agent
- Providing credit
- Managing assets
- Operating collective investment funds
- Providing custody and trust services
- Acting as a trustee of a fund
- Advising on financial products or credit
- Insurance intermediation and management
- Carrying out payment services
- Consumer lending
- Providing investment advice
- Trading in securities and other investments as principal or as agent
- Arranging transactions in investments
- Managing profit-sharing investment accounts
- Crowdfunding

### 4. How do the UAE's licensing requirements apply to cross-border business into the UAE?

Currently, there is no prohibition on foreign banks that deal with clients located in the UAE. The only restriction is the prohibition on holding mortgages on real estate, and such banks would need to have recourse to a local security agent that is a bank or a financial institution licensed by the CB.

A law issued in 2016 creates a secure registry for movable assets, and foreign banks may register as pledgee and hold movable assets as security without needing to have a local security agent.

There are more restrictions on insurers and insurance brokers that are required to be licensed by the CB. Foreign insurance companies may not insure assets located in the UAE.

Similar restrictions apply to the promotion and marketing of foreign funds in the UAE. This must be done through a local agent licensed by the SCA, unless the promotion or marketing is on a reverse solicitation basis or such foreign funds are targeted to Sovereign Wealth Funds or Qualified Investors, provided they are not individuals.

In the DIFC and ADGM, which are wholesale jurisdictions, a foreign entity may only deal through a DFSA-authorized firm unless it is dealing with a market counterparty.

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

Each of the four regulators mentioned above have their own specific requirements that must be satisfied by the applicant firm seeking to become authorized. These requirements are also largely dependent on the type of activity the applicant firm is seeking to practice. However, the following general factors will be considered:

- a. Ownership and group structure
- b. Corporate governance structure
- c. Senior management resources
- d. Suitability
- e. Fitness and propriety

There is a moratorium on new banks in the UAE, including branches of foreign banks. As for other FIs, a RBP must be submitted together with a number of key individuals: (i) a CEO, (ii) a compliance officer, (iii) a money laundering reporting officer, (iv) an internal audit officer. This personnel must be fit and proper.

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

Both the CBUAE and ESCA have sandboxes that are for a year and after that, the company may be licensed on a fast track basis or has to wind up. As for licensing, it starts with a meeting with the BSU at the CB to be followed by submitting an RBP and then the appropriate manuals. It

takes up to six months to be licensed by the CBUAE. The process at ESCA should take between 2-3 months. In detail, an applicant firm must complete a formal process to obtain authorization from the relevant regulator. As described above, the process for authorization will vary depending on the regulator.

For example, the process for becoming authorized by the DFSA involves the following:

**a. Submission of a Letter of Intent:** The Letter of Intent generally covers the following:

1. Intention of the applicant and the activities intended to be conducted
2. Reasons for setting up in the DIFC
3. Founding directors and corporate structure
4. Resources and functions — details of who will be based in the DIFC entity
5. Permanent office space requirements

**b. Submission of a Regulatory Business Plan (RBP):** The RBP should set out the strategy and rationale for establishing an operation in the DIFC, as well as demonstrate how the business will be managed and controlled. The DFSA needs to understand the business model of the applicant firm so they can ensure that it is authorized for the correct financial services, investment types and client types, as well as to enable them to assess the adequacy of the applicant firm's resources. The applicant firm will need to do the following:

1. Identify all the financial services and any other activities it intends to carry out
2. Identify all the likely business and regulatory risk factors
3. Explain in depth how it will monitor and control these risks
4. Consider any intended activities

**c.** Submission of additional DFSA Application Forms and supporting documentation

The timing for processing each application for authorization can take anywhere between four and six months from the date of receiving the applicant firm's full and complete application.

## 7. What financial services "passporting" arrangements does the UAE have with other jurisdictions?

The UAE does not have financial services "passporting" arrangements with any other jurisdiction. However, the DFSA has signed a number of MOUs with foreign regulators.

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# United Kingdom

## 1. Who regulates banking and financial services in the UK?

In the UK, two regulators are primarily responsible for the authorization and supervision of financial institutions: the Prudential Regulation Authority (PRA) (part of the Bank of England) and the Financial Conduct Authority (FCA). The allocation of responsibilities between the PRA and the FCA is as follows:

- a. The PRA regulates banks (deposit takers), insurers and large investment firms (i.e., investment banks) for prudential purposes, including in relation to regulatory capital requirements.
- b. The FCA regulates all other firms for prudential purposes. These firms include, for example, investment firms, asset managers, hedge funds, brokers, financial advisers, insurance intermediaries, consumer credit firms and payment providers. These firms are called “solo-regulated firms.”
- c. The FCA supervises all types of firms for conduct purposes. Firms supervised by the PRA for prudential purposes are also supervised by the FCA for conduct purposes. These firms are called “dual-regulated firms.”

The Bank of England is responsible for the macro-supervision of the banking and financial services industries, including financial stability. Under this remit, it is empowered to supervise financial market infrastructures, including recognized interbank payment systems, central counterparties, central securities depositories, and settlement systems.

The Payment Systems Regulator is an economic regulator in respect of various payments systems, including Pay UK, the retail payment systems operator (comprising Bacs, Faster Payments and the Image Clearing System), CHAPS, Mastercard and Visa Europe. The PSR looks to see that payment systems are operated and developed in the interests of users while promoting competition and innovation.

HM Treasury is the UK government department responsible for financial services policy.

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

The regulation of financial services in the UK is governed by the Financial Services and Markets Act 2000 (FSMA). FSMA is the main framework law in the UK for the

banking, financial services and insurance industries, and regulates the carrying on of certain activities that are in the nature of financial services. There are two fundamental restrictions that apply:

1. the general prohibition on carrying out regulated activities in the UK; and
2. the restriction on issuing financial promotions which are capable of having an effect in the UK.

**General Prohibition:** section 19 FSMA prohibits a person from carrying on a “regulated activity” in the UK, or purporting to do so, unless the person is an authorized person (i.e., they hold permission to carry out particular regulated activities by the PRA or the FCA) or an exempt person, or they can rely on an exclusion. The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO) sets out an exhaustive list of regulated activities that give rise to a licensing obligation under FSMA (unless an exclusion applies). Persons who carry on “regulated activities” on a cross-border basis from outside the UK may also be deemed to be carrying on regulated activities in the UK in certain circumstances.

**Financial Promotion Restriction:** section 21 FSMA prohibits a person from communicating, in the course of business, an invitation or inducement to engage in investment activity, unless they are an authorized person, an exclusion applies, or the communication has been approved by an authorized person. This restriction covers advertising and marketing activities. In the case of a communication originating outside of the UK; however, the restriction only applies if the communication is capable of having an effect in the UK. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (FPO) sets out exemptions to the financial promotion restriction.

These restrictions apply separately to one another: it is possible that a particular activity is not considered to be carrying on a regulated activity in the UK (or is exempt from regulation), but sending communications to customers in relation to that activity may still be a breach of the financial promotion restriction. A breach of either of these restrictions is a criminal offense and may result in certain agreements being unenforceable. Persons who suffer loss as a result of an unauthorized person breaching either of the above restrictions may also have an action against the unauthorized person to make good that loss.

There are two other notable authorization regimes for financial services in the UK. The Payment Services Regulations 2017 (PSRs) govern the authorization and prudential requirements applying to payment services. The regulatory regime applying to electronic money (e-money) institutions is set out in the Electronic Money Regulations 2011 (EMRs) and parts of the PSRs.





Both the FCA and the PRA issue rules and guidance, which apply to the firms that they regulate. These rules and guidance are applicable primarily to UK-regulated or -supervised firms but are also relevant in certain respects to non-UK firms. For UK-regulated firms, the rules and guidance contained in the FCA Handbook (and PRA Rulebook, if applicable) form the bedrock of their legal and regulatory obligations.

Much of the current regulatory requirements in the UK are derived from European Union directives and regulations that applied in the UK prior to Brexit and were “onshored” at the end of the Brexit transition period. This onshored body of legislation and technical standards has been amended to correct deficiencies as a result of Brexit (for example, by substituting references to EU bodies for UK ones or limiting territorial scope). However, the UK has signaled its intent to consider future divergence from the EU financial services regulatory framework where divergence might be best for UK consumers and markets, and at the time of writing HM Treasury is undertaking a number of consultations relating to the future direction of financial services in the UK.

### 3. What types of activities require a license in the UK?

An activity is regulated in the UK if it: (a) is of a specified kind that (b) relates to a specified investment or, where it relates to a specified activity, property of any kind and (c) is carried on by way of business (d) in the UK. The specified activities and investments are set out in the RAO.

A broad range of activities are set out in the RAO, including the following:

- **Accepting deposits:** This covers typical retail banking activities involving the operation of current and deposit accounts.
- **Issuing e-money:** E-money is a prepaid electronic payment product that can be card- or account-based.
- **Carrying on payment services:** This covers a broad range of activities involving matters such as money remittance, card issuance, acquiring card transactions and the operation of payment accounts.
- **Consumer lending:** This covers both lending to consumers as well as activities such as crowdfunding, credit brokerage and debt collection on behalf of third parties.
- **Arranging regulated mortgage contracts:** This relates to the sale of certain residential mortgage contracts.
- **Carrying on insurance business:** This relates to effecting and carrying out contracts of insurance, both life and general.
- **Providing investment advice:** Providing advice on most categories of investments is a regulated activity in the UK. This activity covers the provision of advice on the merits of acquiring or disposing of particular investments.
- **Trading in securities and other investments as principal or as agent:** This covers brokers as well as most firms engaged in proprietary trading.
- **Arranging transactions in investments:** This activity covers the role of intermediaries in investment transactions. It is very broad and covers infrastructure providers, including electronic communication networks that route orders for execution.
- **Insurance mediation activities:** UK regulation covers various insurance broking activities as well as the handling of claims on behalf of the insured.

- **Investment management:** Managing investments on behalf of another person is a regulated activity. Specific permission is required where a person carries on this activity in relation to an alternative investment fund (AIF).
- **Establishing, operating and winding up a collective investment scheme:** Most types of funds are regarded as collective investment schemes under UK law. This extends to structures such as open-ended bodies corporate, unit trusts and partnerships. Certain closed-ended bodies corporate are also categorized as AIFs; for example, certain listed investment trusts are treated as AIFs.
- **Providing custody (safeguarding and administration of investments):** Providing custody services in relation to assets that include investments is a regulated activity. Specific permission is required to act as the depositary of an alternative investment fund.

There is currently no bespoke regime for cryptoassets and related activities. Whether a cryptoasset and related activities are regulated depends on whether the characteristics of the cryptoasset mean that it falls within the regulatory perimeter. To assist market participants, the FCA has published guidance on its approach, which sets out three broad categories of cryptoasset in relation to how they fit within existing FCA regulation:

- **Security tokens,** which provide rights and obligations akin to specified investments and fall within the regulatory perimeter
- **E-money tokens,** which fall within the scope of e-money and are subject to the EMRs
- **Unregulated tokens,** which are any other tokens that are not security or e-money tokens, including utility tokens (those used to access a service) and exchange tokens (e.g., cryptocurrencies).

At the time of writing, HM Treasury has proposed a new category of regulated cryptoassets — “stable tokens” — and to introduce a regulatory regime for stable tokens used as a means of payment. The regulated category of stable tokens would refer to tokens which stabilise their value by referencing one or more assets, such as fiat currency or a commodity (i.e., stablecoins), and therefore could be reliably used for retail or wholesale transactions. The category would also include other forms of tokenized payment and settlement assets, as well as tokenized forms of central bank money, and is technology-agnostic. Unregulated tokens may be the subject of a future consultation on widening the regulatory perimeter further.

By contrast, the UK’s anti-money laundering regime, under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs), applies only to cryptoassets using distributed ledger technology.

Although HM Treasury has not indicated a specific target date by which it will respond or set out legislative measures, the FSB’s roadmap to enhance cross-border payments targets the completion of international standard-setting work on global stablecoins by December 2021 and the establishment of national regulatory frameworks by July 2022.

As noted above, for an activity to be a regulated activity, it must be “carried on by way of business.” The term “by way of business” is not defined in FSMA or the RAO, but the FCA has issued guidance on “the business test” in its Perimeter Guidance Manual (PERG), based on a number of decisions by UK courts. Ultimately, whether an activity is carried on by way of business is a question of case-by-case analysis which takes into account several factors, including the degree of continuity, the existence of a commercial element, the scale of the activity, and the proportion which the activity bears to other activities carried on by the same person but which are not regulated.



## 4. How do the UK's licensing requirements apply to cross-border business into the UK?

The UK licensing requirements are only triggered where regulated activities are carried on in the UK. In certain cases, activities may be regarded as being carried on in the UK because a client is located in this jurisdiction, even if the service provider is located outside the UK. Whether activities are to be regarded as being carried on in the UK will in each case be a question of fact as to the degree of connection with the UK and may differ depending on the specific activity.

By way of example, the following activities are regarded as being carried on outside the UK and therefore not subject to UK regulation (although providers of these services will still need to consider UK marketing restrictions):

- Accepting deposits is regarded as being carried on where deposit funds are accepted. Where a UK person credits funds to a bank account that they hold outside the UK, the foreign bank where the individual holds his account will not be regarded as accepting deposits in the UK. A UK resident can, therefore, hold an account with an offshore bank without contravening UK laws. Some financial promotion rules will apply to this activity, which impose some limitations on marketing offshore bank accounts to UK customers.
- Managing investments is carried on where discretionary investment decisions are taken. Where all members of an investment committee are located outside the UK when making decisions, the activity of managing investments will be regarded as being carried on abroad and not be subject to UK regulation. If on the other hand a person located in the UK participates in the making of discretionary decisions, this is likely to be sufficient to trigger UK licensing obligation even where the majority of the other decision makers are located outside the UK.
- Effecting and carrying out contracts of insurance is regarded as being carried on where underwriting decisions are taken.

In other cases, the activities might be deemed to be carried on in the UK and subject to UK laws. For example, advice is regarded as being given where the recipient of the advice is located, so that where a foreign firm is advising a client in the UK, the firm will be regarded as carrying on the activity of advising in the UK. The same analysis applies in relation to the activity of dealing, so that where a counterparty to a transaction is located in the UK, the activity of dealing will be regarded as being carried on in the UK.

Where a firm outside the UK deals with a client or a counterparty located in the UK, those activities will typically be subject to UK laws and regulations. The service provider will need to consider whether they are triggering a local UK licensing obligation and also whether they are complying with UK financial promotion rules. Communications with UK counterparties or clients will most likely constitute financial promotions.

Certain exclusions are available under the UK regulatory regime which enable overseas firms to deal with UK-based clients. This is on the basis that the activities in question will be regarded as being carried on outside the territory of the UK and therefore not subject to UK laws, or because a specific exemption will cover the activities.

The UK has a specific exclusion for overseas firms called the "overseas persons exclusion." This enables persons who do not carry on UK-regulated activities from a permanent place

of business in the UK to carry on business with persons in the UK. The exclusion also allows travel to the UK on temporary visits without needing a UK license. This enables a relationship manager to come to the UK to meet with clients or firms to come on roadshows to the UK to promote particular investments. The overseas persons exclusion is only available in limited circumstances, however. In order for this exclusion to apply, the client must either approach the overseas firm (reverse solicitation), or the overseas firm must be able to rely on an exclusion from the UK's rules on financial promotion. The effect of this is that overseas persons can carry on certain activities with other financial institutions, large corporates, and subject to some limitations, high-net-worth individuals. Other exemptions might apply. For details on the UK's equivalence regime, see Question 7.

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

In order to become authorized, an applicant must satisfy the relevant regulator that it meets the Threshold Conditions set out in Schedule 6 of FSMA. The requirements set out in Schedule 6 are supplemented by the Threshold Conditions (COND) part of the FCA Handbook.

The Threshold Conditions can vary depending on the particular regulated activities that the applicant intends to carry on and, in particular, whether the applicant will be PRA- or FCA-authorized. Broadly, however, the following conditions need to be satisfied:

- a. Location of offices - For UK-incorporated companies, both the head and registered office must be located in the UK. This can have implications for the composition of the board of directors, so that a majority of the board will need to be resident in the UK and the central administrative functions will also need to be located in the UK.
- b. Effective Supervision - Applicants must be capable of being effectively supervised. This emphasizes the need for firms to have a substantive presence in the UK that is accessible to UK regulators and enables the regulator to supervise the firm. The regulator will also consider whether there are any impediments to supervision of the applicant, including the group structure and any relevant laws restricting access to information.
- c. Appropriate resources - Applicants must satisfy the regulator that they have adequate resources to carry on the relevant regulated activities. Resources include financial resources as well as human resources (including management with the required skills) and infrastructure.
- d. Suitability - Applicants must be fit and proper to be authorized, having regard to all the circumstances.
- e. Business model - The regulator will examine the applicant's business model. In addition to understanding the economic aspects of the business, matters such as the impact of the model on consumers and the impact on the UK financial system will also be considered.

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

An applicant must complete a formal process to obtain authorization, which involves the completion of required application forms and the submission of supporting information.

In relation to timing, in most cases the regulator will have six months from receipt of a completed application in which to determine whether or not to approve the application.

The application must be determined within 12 months where it is deemed to have been submitted incomplete.

The particular forms that must be completed for submission to the regulator will depend on the nature of the regulated activities being conducted. For example, for a firm which intends only to advise on investments and to carry out deals on behalf of their customers (which the FCA deems a “non-complex securities and futures firm”), the following forms will be required to be completed:

- a.** Core details - This form sets out factual background information relating to the applicant.
- b.** The Supplement - The Supplement will require the firm to provide details of its Regulatory Business Plan, the regulated activities it will perform, its financial resources, its personnel, its compliance arrangements, and its fees/levies.
- c.** Individuals Forms - Certain individuals will be required to be personally approved by the regulator to perform certain senior management functions. They will need to submit forms providing information about themselves that will enable the regulator to assess their fitness and propriety to perform their roles.
- d.** Owners and Influencers Appendix - Details about persons/entities who control or exert influence over the firm must be submitted.
- e.** IT systems questionnaire - Details of the firm’s IT systems must be provided.
- f.** Checklist and declaration form
- g.** Fees and levies supplement
- h.** Supporting documents - Various documents must be submitted with the application or at least be available for review, if required. Applicants will need to document compliance arrangements and monitoring programs, and must have a compliance manual. Financial statements and projections must also be provided with the forms.

## 7. What financial services “passporting” arrangements does the UK have with other jurisdictions?

The UK’s departure from the EU Single Market has resulted in a loss of passporting rights for UK-based firms. The UK has prioritized regulatory autonomy over alignment in its negotiations with the EU over financial services arrangements and, instead of blanket market access mechanisms to replace passporting, it is seeking regulatory and supervisory cooperation arrangements. This means that the UK is not pursuing bespoke EU market access arrangements but will instead rely on assessments of equivalence. Equivalence is a recognition system which can be used to grant domestic market access to overseas or third-country firms in certain areas of financial services, based on the principle that the countries where those firms are based have regimes which are “equivalent” in outcome.

Equivalence decisions are unilateral decisions that are outside the terms of the UK-EU Trade and Cooperation Agreement (TCA). It is important to note that equivalence regimes do not cover the entirety of the financial services sector. For example, there is no equivalence regime for retail banking. Further, equivalence decisions may be unilaterally withdrawn.

For incoming European Economic Area (EEA) firms accessing the UK, the UK has issued a number of decisions granting equivalence. However, for UK-based businesses accessing the EU, at the

time of writing, the EU Commission has only granted equivalence on a time-limited basis for UK central securities depositories (CSDs) and for UK central counterparties (CCPs) for financial stability purposes.

The UK has put in place post-Brexit transitional measures for incoming EEA firms which previously conducted business in the UK via passporting rights. These arrangements include temporary permissions and contractual runoff regimes to enable a smooth transition to the new regulatory framework. While some individual member states have put in place limited additional measures, the EU has not established any Union-wide arrangements similar to the UK’s Brexit transitional regimes. Further, in many EEA jurisdictions it is no longer possible for UK firms to service EEA retail customers from the UK.

In the absence of equivalence decisions, strategies for UK firms wishing to access European markets include:

- Reviewing whether cross-border access is necessary to service EEA-based clients — EU law applies what is known as the “characteristic performance” test in determining whether a firm is regarded as doing business in another jurisdiction. The “characteristic performance” comprises the services that the firm is supplying to clients and for which it is being remunerated. Depending on the facts, firms might take the view that the “characteristic performance” takes place in the UK even where clients are located in an EEA country. This is on the basis that the firm is not carrying on any relevant activities in other jurisdictions. If so, no cross-border access would be needed.
- Considering suitability of light touch regimes Certain EEA countries have a light touch regime for third-country firms which permits them to access their markets without having a passport under a Single Market Directive (particularly in the case of wholesale/institutional business). Firms can investigate the options available to them to provide services under such light touch regimes, which can involve no more than a straightforward registration or notification procedure.
- Use of reverse solicitation rules (particularly for existing customers and contacts) where permitted in individual member states A firm that does not actively market its services in EEA jurisdictions might fall outside local regulations. Where a client or counterparty on its own initiative approaches the firm for the provision of services or to enter into a transaction, engaging in that business may be permissible under the relevant member state’s reverse solicitation rules.
- Use of National Private Placement Regimes for marketing AIFs in individual EEA member states
- Using a group company located in an EEA jurisdiction to introduce business to the UK firm
- Setting up delegation and/or outsourcing arrangements between an EEA-licensed firm and a UK group company to carry on performing some activities in the UK — There are, however, significant limitations to such arrangements which cannot in any event amount to little more than “letter-box entities.” The European Supervisory Authorities have published guidelines on supervisory principles in this regard.



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# United States of America

## 1. Who regulates banking and financial services in the US?

### 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.”

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.<sup>1</sup>

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.<sup>2</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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.

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 securities<sup>3</sup>-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

<sup>3</sup> 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."

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.

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

#### 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 the US?**

### **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 market in 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<sup>4</sup>” 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.

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

### 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 \$25 million under management. In addition, foreign advisers to private funds with U. S. 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 September 14, 2021, certain legacy swaps relationships until December 31, 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:

- a. Any natural person who is a resident of the United States
- b. Any estate of a decedent who was a resident of the United States at the time of death
- c. 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
- d. 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)
- e. 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

<sup>4</sup> 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.





- f.** 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
- g.** 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
- h.** "Conduit affiliates" (i.e., non-US. entities that have certain trading, ownership or accounting relationships with US. affiliates)
- i.** 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 the US?**

#### **Banking**

As indicated above, 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 the US?

### **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 Depository 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 the US have with other jurisdictions?

### **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.





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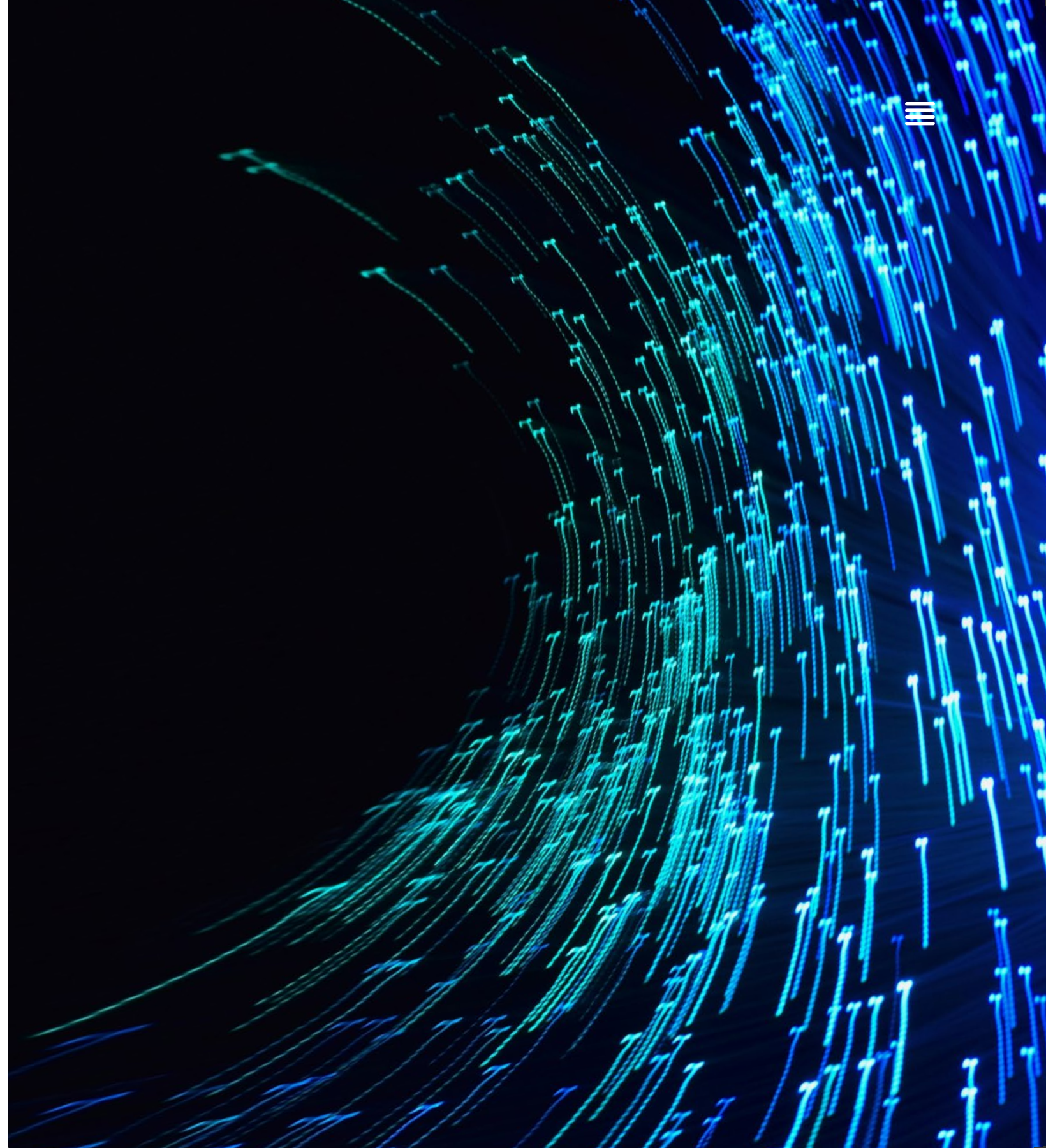
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# Vietnam

## 1. Who regulates banking and financial services in Vietnam?

The State Bank of Vietnam (SBV) and the Ministry of Finance (MOF) are the regulators responsible for the authorization and supervision of banks, insurers and other financial institutions in Vietnam. The allocation of responsibilities between the SBV and the MOF is as follows:

- The SBV regulates banks and other credit institutions (i.e., finance companies, financial leasing companies, other non-bank credit institutions, microfinance institutions and People's Credit Funds). The SBV (through its headquarters in Hanoi and its network of provincial branches) performs the traditional role of a central bank and regulates the banking system in Vietnam, that is, it is in charge of granting licenses for the establishment and operation of banks in Vietnam, issuing guidance for banking activities, and supervising the banking system.
- The MOF regulates insurance companies, securities companies and fund management companies. The State Securities Commission (SSC), an organization under the MOF, regulates all Vietnam's securities activities.

Regarding anti-money laundering (AML), under the AML laws, the SBV is under a general duty of implementing State management on AML. The SBV is specifically in charge of, among others, inspecting and supervising AML activities of reporting entities subject to State management on currency, banking and foreign exchange activities. The MOF is in charge of, among others, inspecting and supervising AML activities of reporting entities subject to the State management on insurance business and securities. The SBV/MOF has the power to handle or propose to competent authorities the handling of breaches against the laws on AML.

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

Banking activity in Vietnam is governed by the Law on the State Bank of Vietnam and the Law on Credit Institutions, both passed by the National Assembly on 16 June 2010 and effective since 1 January 2011. The Law on Credit Institutions was amended on 20 November 2017, with the amendments taking effect from 15 January 2018. The Law on Securities passed on 26 November 2019 and which took effect on 1 January 2021, is the main regulation on securities activities. The Law on Insurance Business is

the main legal framework in Vietnam for the insurance business.

The government and the relevant authorities (i.e., the SBV and the MOF) have also issued a number of implementing decrees, circulars and decisions to govern banking and financial services activities.

International treaties are also an important legal source, especially for offshore providers, to provide cross-border services into Vietnam.

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

Vietnamese regulations provide a broad range of activities for each type of financial institution.

For banks and other credit institutions, these activities include the followings, among others:

- Deposit-taking, that is, receiving money from an organization or individual as a demand or term deposit, or a savings deposit and issuing deposit certificates, bills or treasury bills and other forms of receiving deposits on the principle of full payments of principals and interest to the depositor under the agreement
- Credit extension, that is, an agreement allowing an organization or individual to use a sum of money, or a commitment enabling the use of a sum of money, on the repayment principle by the following types of operations: lending, providing discounts, financial leasing, factoring, providing bank guarantees and other credit extension operations
- Provision of via account payment services, that is, the provision of payment instruments; provision of services of payment by check, payment order, payment authorization, collection, collection authorization, bank cards, letters of credit and other payment services for clients via their accounts
- Regarding payment instruments, the SBV instructed that Vietnam has not provided specific regulations on virtual money and virtual asset, and such regulations are being developed by competent authorities. That said, the SBV is of the opinion that virtual money in general and Bitcoin/Litecoin in specific are illegal payment instruments and not currency. The SBV has issued warnings that investing in such items involves significant risks for investors.
- Borrowing of loans from the SBV and/or other credit institutions and financial institutions
- Banks, finance companies and financial leasing companies may deal in and



provide foreign exchange services and derivative products.

- Other business activities, which include cash management, banking and financial consultancy, asset management and preservation, and safekeeping; consultancy of corporate finance, business acquisition, sale, consolidation and merger and investment; trading in government bonds and corporate bonds; money brokerage services; and securities depository, gold trading and other business activities related to banking operation
- Commercial banks may also act as a custodian bank for securities following registration with the SSC for providing depository services and supervising the management of public funds and securities investment companies. The assets that a bank manages as a custodian must be held separately from its other assets. A custodian bank's duties can also include the certification of reports prepared by a fund management company or a securities investment company (as applicable).
- Commercial banks may operate as an agent to provide Vietnamese customers insurance products and services through its banking channels, with approval from the SBV.
- Finance companies may, among others, issue money deposits, provide loans (including consumer loans), provide guarantees and issue credit cards.
- Finance leasing companies may, among others, take deposits from organizations, issue money deposits, and provide finance leases and operating leases.

Insurance companies may carry out insurance business (effecting and carrying out contracts for both life and non-life insurance), including the following, among others:

- Insurance business, reinsurance business
- Risk, loss prevention and limitation
- Damage assessment
- Damage assessment agency, indemnity settlement, request for compensation by a third party
- Fund management and capital investment

Insurance brokers may perform insurance broking activities, including, among others, supply of information, consultancy, negotiation, and arrangement of the execution of insurance contracts.

Insurance auxiliary services are part of insurance business activities performed by insurance companies, insurance brokers and other organizations/individuals for gaining profit, including insurance consultancy, insurance risk assessment, actuary, insurance loss appraisal, and support on claim settlement.

Securities companies and fund management companies may carry out the following business activities, among others:

- Securities companies may trade in securities and other investments as principal or as the agent. This would cover trading as brokers as well as proprietary trading.
- Securities companies may carry out securities underwriting and securities investment consultancy.
- Securities companies may carry out entrusted management of individual investors' securities trading accounts and provide financial consultancy services and other financial services.
- Fund management companies may carry out the management of securities investment

funds and securities portfolios and securities investment consultancy.

- Fund management companies may mobilize and manage foreign investment funds to invest in Vietnam.

The SBV, SSC and the MOF are state bodies with authority to grant licenses for banks and other financial institutions. The scope of a financial institution's permitted activities is specified in its establishment and operation license.

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

The cross-border supply of banking and financial services into Vietnam is subject to Vietnamese law and the international treaties to which Vietnam has acceded. In general, offshore financial institutions can supply the following banking services into Vietnam on a cross-border basis:

- The provision and transfer of financial information and financial data processing and related software by suppliers of other financial services
- Advisory, intermediation and other auxiliary financial services

Offshore insurance companies and insurance brokerage companies can supply the following insurance services into Vietnam on a cross-border basis:

- Insurance services provided to enterprises with 49% or more foreign-invested capital and foreigners working in Vietnam
- Reinsurance services
- Insurance services in international transportation, including insurance of risks relating to:
  - international maritime transport and international commercial aviation, with such insurance to cover any or all of the goods being transported, the vehicle transporting the goods, and any liability arising there-from
  - goods in international transit
- Insurance broking and reinsurance broking services
- Insurance auxiliary services

Offshore financial institutions can supply the following securities services into Vietnam on a cross-border basis:

- Provision and transfer of financial information and related software by suppliers of securities services
- Advisory, intermediation and other securities-related auxiliary services, including investment and portfolio research and advice, and advice on acquisitions and on corporate restructuring and strategy

Lending services from an offshore provider is permitted under Vietnamese law and subject to registration with the SBV. The offshore lender may provide loans into Vietnam without license or approval from the SBV.



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

Foreign investors that intend to invest in banking activities in Vietnam may purchase shares of Vietnamese commercial banks and/or set up a local bank or a foreign bank branch in Vietnam.

Foreign investors who intend to invest in insurance or insurance brokerage activities in Vietnam may purchase shares of Vietnamese insurance companies or insurance brokers and/or set up a local insurance company or broker. Foreign non-life insurance companies may establish a branch in Vietnam.

Foreign investors who intend to invest in securities activities in Vietnam may establish a joint venture, purchase shares of Vietnamese securities/fund management companies, and/or set up a 100% foreign-owned securities/fund management company or a branch in Vietnam.

Restrictions on foreign ownership in Vietnamese credit institutions, insurance companies/brokers and securities/fund management companies

### Credit institutions

The acquisition by foreign investors of a shareholding in a Vietnamese joint stock credit institution is subject to significant restrictions.

The total aggregate shareholding of foreign investors in a Vietnamese commercial bank may not exceed 30% of its 'charter capital'. The total aggregate shareholding of foreign investors in a Vietnamese non-bank credit institution is subject to the regulations on public companies and listed companies. The specific ownership limits applicable to each type of foreign investor in a credit institution are as follows:

- An individual investor: 5%
- An organization –15%
- A strategic investor:: 20%

The shareholding of any single foreign investor and its affiliated persons may not exceed 20% of the charter capital of a Vietnamese credit institution.

The Prime Minister has the right to lift the limits on foreign shareholders' participation in a Vietnamese credit institution, but only for the purpose of restructuring weak credit institutions facing difficulties or ensuring the stability of the credit institutions system. The determination of institutions that would fall within this definition will, in practice, be at the discretion of the SBV or other competent authorities.

The parent entity must have total assets of at least USD 10 billion at the end of the year prior to its application. Entirely foreign-owned credit institutions must comply with Vietnamese prudential requirements on a stand-alone basis.

### Insurance companies

There is no foreign ownership limit applicable specifically to insurance companies and insurance brokers.

### Securities/fund management companies

Foreign investors being organizations meeting certain requirements (discussed under Section

6 below) may purchase shares to own up to 100% charter capital of a securities company or a fund management company, or establish a 100% foreign-invested securities company or fund management company.

Foreign investors being organizations not meeting such requirements or foreign investors being individuals may only own up to 49% of the charter capital of a securities company or fund management company.

Foreign bank branches, foreign non-life insurance companies branches, foreign securities/fund management companies branches

### Foreign bank branches

Foreign banks may also open branches with no separate legal status. The parent bank must have total assets of more than USD 20 billion at the end of the year prior to application. A foreign bank branch may not open transaction offices at locations other than its registered branch office, which in practice, poses real practical problems for foreign banks in expanding their activities in Vietnam.

### Foreign non-life insurance companies branches

Foreign non-life insurance companies may open branches with no separate legal status before it may participate in the non-life insurance business. The foreign parent company must undertake to be responsible for all obligations and undertakings of the branch in Vietnam.

### Foreign securities companies branches

Foreign securities companies may open branches with no separate legal status. Foreign securities companies branches are only allowed to carry out securities investment consultancy activities, including the following:

- Providing analysis report on trading on the securities market and making an investment recommendation
- Providing analysis report on the operation of public companies, listed companies and other enterprises, and making an investment recommendation
- Signing securities investment consultancy agreement with the client

Representative offices of foreign banks, insurance companies, securities companies and fund management companies

Foreign banks, insurance companies, insurance brokers, securities companies and fund management companies can operate through representative offices, which are not permitted to conduct commercial/profit-generating activities in Vietnam. A representative office merely acts as a liaison office between the parent bank/company and their Vietnam clients. As such, its activity is generally limited to market research and the promotion and follow-up of the offshore parent entity's activities involving Vietnamese credit institutions or companies.

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

### Credit institutions

In general, to set up a joint venture or wholly foreign-owned credit institution in Vietnam, the foreign investor must fully meet the following conditions, among others:





- The foreign credit institution may conduct banking operations under the country's law in which it has its headquarters.
- The operations to be conducted in Vietnam are those that the foreign credit institution is licensed to conduct in the country in which it has its headquarters.
- The foreign credit institution's operation is healthy and it meets requirements on total assets, financial status and safety ratios under the SBV's regulations.
- The foreign institution makes a written commitment to provide support in finance, technology, governance, administration and operation for the joint venture or wholly foreign-owned credit institution. It guarantees that the joint venture or wholly foreign-owned credit institution keeps the actual value of its charter capital not lower than the legal capital and observes regulations on safety assurance under the laws.
- A competent foreign authority has signed an agreement with the SBV on inspection and oversight of banking operations and exchange of information on banking safety oversight, and has made a written commitment to the foreign credit institution's operations' consolidated supervision to international practices.

In general, to set up a foreign bank branch, the foreign bank must fully meet the following conditions, among others:

- The foreign bank may conduct banking operations under the country's law in which it has its headquarters.
- The operations to be conducted in Vietnam are those that the foreign bank is licensed to conduct in the country in which it has its headquarters.
- The foreign bank's operation is healthy and it meets requirements on total assets, financial status and safety ratios under the SBV's regulations.
- A competent foreign authority has signed an agreement with the SBV on inspection and supervision of banking operations and exchange of information on banking safety oversight and has made a written commitment on consolidated supervision of the foreign bank's operations according to international practices.
- The foreign bank makes a written commitment to be liable for all obligations and commitments of its branch in Vietnam; and guarantees that the actual value of the branch's allocated capital is not lower than the legal capital and its observance of regulations on safety assurance.

In general, a foreign credit institution or another foreign institution engaged in banking operations may obtain a license for a representative office when it fully meets the following conditions, among others:

- It is a legal entity licensed for banking operations overseas.
- Under the country's law in which it has its headquarters, it may set up a representative office in Vietnam.

The legal capital required for the joint venture bank and wholly foreign-owned bank is VND 3,000 billion (approximately USD 130 million) and USD 15 million for a foreign bank branch.

The official fee for setting up a foreign-owned bank in Vietnam is VND 140 million (approximately USD 6,000). For a foreign bank branch, the official fee for its establishment is VND 1 million (approximately USD 43).

By law, the timeline for establishing of a foreign-owned bank or a bank branch spans about one year. In practice, however, the timing could vary from two to three years or even to six to seven years in some cases. In addition, as a matter of policy, the SBV in recent years has not supported the setting up of new banks wholly owned by foreign companies and foreign bank branches in Vietnam.

#### **Insurance companies**

In general, to set up an insurance company or insurance broker in Vietnam, an investor must first fully meet the following conditions, among others:

- The investor must actualize their capital contributions in cash, which must not be financed by a loan or investment entrusted from other entities.
- Investors being organizations contributing to at least 10% of the charter capital must have a profitable business in three consecutive years immediately preceding the year in which the license application is submitted.
- Investors being organizations conducting business lines having a prescribed legal capital must ensure that their owner's equity less the minimum legal capital is at least equal to the planned amount of investment.
- If an investor being an organization is an insurance company, insurance broker, commercial bank, finance company or securities company, it must fulfil and maintain financial safety conditions and obtain permission from competent authorities to make the investments be in accordance with specialized laws.

Besides the general conditions, the foreign investor must be an organization to set up a limited liability insurance company and must further meet the following conditions:

- It is a foreign insurance company authorized by competent foreign authorities to conduct business in the sector contemplated to be carried out in Vietnam, or a subsidiary specializing in outbound investment under a foreign insurance company, duly authorized by such foreign insurance company to contribute capital to establish an insurance company in Vietnam.
- It has at least seven years of experience in the business it plans to conduct in Vietnam.
- It has total assets amounting to at least USD 2 billion in the year immediately preceding the year it submits the application for a license.
- It has not seriously violated regulations on the country's insurance business where the foreign investor has its headquarters during the three years preceding the year the application for a license is submitted.

Besides the general conditions, a foreign investor must further meet the following conditions to set up an insurance broker:

- It is a foreign insurance broker authorized by the competent foreign authority to conduct insurance broking business in Vietnam.
- It has at least seven years of experience in insurance broking.
- It has not seriously violated regulations on insurance broking of the country where the foreign investor has its headquarters during the three years preceding the year the application for a license is submitted.

The legal capital required for an insurance company varies depending on the operation, as follows:

- Non-life insurance company: VND 300 billion to 400 billion
- Life insurance company: VND 600 billion to 1,000 billion
- Health insurance company: VND 300 billion
- Foreign branches: VND 200 billion to 300 billion
- Reinsurance company: VND 400 billion to 1,100 billion
- Insurance broker: VND 4 billion to 8 billion

By law, the timeline for the establishment of an insurance company spans about three months from the date the Ministry of Finance receives a complete and valid application dossier. In practice, however, this time frame can be longer.

#### **Securities/fund management companies**

In general, to set up a securities company or fund management company, an investor being an organization must fully meet the following conditions, among others:

- It has legal capacity and operates lawfully.
- It has a profitable business in the two years preceding the year of application.
- If it has been a shareholder/capital contributing member holding at least 10% of the charter capital of a securities company/fund management company, the investor and its related persons (if any) must not hold more than 5% of the charter capital of another securities company/fund management company.
- Its most recent audited financial statement must be unqualified.

Besides the requirements above, foreign investors being organizations must further satisfy the following conditions to own 100% of a securities company or fund management company:

- It is an organization in the banking, securities, insurance sector with an operation term of at least two years immediately preceding the year of capital contributions or share purchase.
- The foreign licensing authority in the home country of the foreign investor and the SSC must have signed a bilateral or multilateral agreement on the exchange of information and on cooperation on management, inspection and supervising securities activities and the securities market.

The legal capital required for a securities company and the official fee for setting up a securities company varies depending on the operation, as follows:

- Securities brokerage: legal capital of VND 25 billion and licensing fee of VND 20 million
- Securities proprietary trading: legal capital of VND 50 billion and licensing fee of VND 60 million
- Securities underwriting: legal capital of VND 165 billion and licensing fee of VND 100 million
- Securities investment consultancy: legal capital of VND 10 billion and licensing fee of VND 20 million

If a securities company applies for more than one operation in its license, the required legal capital is the sum of the legal capital required for all operations for which an application has been made.

The legal capital required for a fund management company is VND 25 billion. The official fee for setting up a fund management company in Vietnam is VND 30 million.

By law, the timeline for the establishment of a securities company or fund management company spans about four months from the date the SSC receives a complete and valid application dossier. However, in practice, the timing can be longer.

#### **Financial technology (fintech) companies**

Vietnam neither provides for the definition of fintech nor a single comprehensive legislative instrument governing fintech. That said, fintech in the forms of intermediary payment service (IPS) (e.g., e-wallet service, payment gateway service and support service for entrusted collection/payment service) is regulated. An IPS provider must obtain a License to Provide Intermediary Payment Service (IPS License) by submitting a dossier to the SBV evidencing that it satisfies the following conditions:

- The company must have an incorporation license or enterprise registration certificate issued by competent authorities.
- The company must have an IPS provision plan which includes certain details and is approved by competent authorities in accordance with the charter of the company.
- The company must have a minimum charter capital of VND 50 billion (approx. USD 2,145,000).
- The company must satisfy certain personnel requirements and technical requirements.

By law, within 60 days from the date of receipt of a valid dossier, the SBV will issue IPS License or send a refusal notification to the applicant. In practice, the process would normally be longer.

Apart from fintech in the form of IPS, other forms of fintech are not provided under the laws. That said, in early June 2020, the Government issued a draft decree providing for a fintech regulatory sandbox in the banking sector. Under this draft sandbox decree, fintech organizations must obtain a Certificate of Registration for participating in the sandbox. Financial services that are eligible for fintech test run include payment, credit, P2P lending, KYC support, Open API, solutions applying innovative technologies (e.g., block chain), and other services supporting banking activities (e.g., credit scoring, savings, fundraising). Basically, the draft sandbox decree provides for the conditions and procedures to obtain such license, the test run requirements and the extension/exit scheme for fintech organizations.

## **7. What financial services “passporting” arrangements does Vietnam have with other jurisdictions?**

Vietnam does not currently have any financial services passporting arrangements with foreign countries. That said, foreign financial institutions that wish to set up a presence in Vietnam or provide cross-border services into Vietnam must comply with Vietnamese laws and the international treaties to which Vietnam has acceded.





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