Briefing Note

CRD6 Art21c – Analysis and Possible Impacts

19 January 2022

Objective of this paper

The Commission's legislative proposal[1] to amend the Capital Requirements Directive (CRD)[2] would impose a new obligation on Member States to prohibit 3rd country undertakings carrying on a wide range of banking and other activities in their territory otherwise than on a reverse solicitation basis, unless the undertaking establishes a locally authorised branch in the relevant Member State.[3]

The objective of this paper is:

1) To explain that, as drafted, the proposal set out in Articles 21c, 47 and 48c(1) represents a major change which is wide ranging in scope
2) To set out the potentially significant impact of the proposal by providing illustrations of the types of activities and clients which would be affected
3) To show that cross-border access to the EU would be very limited compared to the cross-border regimes of other jurisdictions by providing comparisons with the cross-border regimes in the US, Switzerland and UK

Executive summary

The proposals represent a major change to the existing regimes regulating cross-border business into the EU, rather than a clarification of existing treatment. They would oblige Member States to impose authorisation requirements on 3rd country undertakings conducting cross-border business when EU firms conducting similar activities would not be subject to authorisation, either because the activity is not regulated in the EU or because exemptions apply under EU or national law. They would also conflict with existing regimes under EU and national law which allow 3rd country undertakings to conduct cross-border business with EU clients or counterparties. The proposal would directly impact a wide range of 3rd country undertakings, including 3rd country banks but also non-deposit taking institutions such as broker/dealers, as well as wide range of activities, going beyond those that are typically considered to be core banking activities.

The proposals would have a significant adverse impact on the ability of EU financial institutions, corporates, governmental entities and individuals to access international markets and cross-border services. There are many cases where EU persons need to access the services and liquidity provided by 3rd country undertakings that would be restricted by the proposed rules.

[1] See Commission announcement of banking package on 27 October 2021.
[2] Directive 2013/36/EU.
[3] Proposed new Articles 21c, 47 and 48c(1) CRD.

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The reverse solicitation exemption is unlikely to allow for the effective conduct of cross-border business. It can be difficult to demonstrate and document that a transaction or relationship resulted from the 'exclusive initiative' of the client, particularly in cases of pre-existing client relationships. The proposals also do not provide an explicit basis on which 3rd country undertakings would be able to provide cross-border financing or other services to their EU affiliates.

Cross-border access to the EU would be significantly limited compared to the cross-border regimes of other jurisdictions. Switzerland, the UK and the US and other major jurisdictions have regimes which allow foreign firms to conduct cross-border business with local clients and counterparties, otherwise than on a reverse solicitation basis without the establishment of a locally authorised branch.
References to the EU and Member States should be read as including, where appropriate, references to the EEA and the non-EU Member States of the EEA.

I. CRD6 Art21 c – A major change to the existing regimes regulating cross-border activities into the EU, with a wide-ranging scope

The proposed CRD Art 21c[4] effectively introduces an authorisation requirement requiring 3rd country undertakings that wish to carry out any activities set out in CRD Annex I (see Table 1) into a Member State (otherwise than on a reverse solicitation basis) to have an authorised branch in that Member State, at least where the 3rd country undertaking is a deposit-taking bank or a 'class 1' investment firm that would be treated as a bank in the EU under the Capital Requirements Regulation (CRR)[5]. This represents a major change to the existing regimes regulating cross-border business into the EU, rather than a clarification of existing treatment as is suggested by the preamble to the legislative proposal.[6]

CRD Art 8 requires Member States to impose authorisation requirements on EU banks[7], which are then allowed to carry on the activities in CRD Annex I in other Member States on the basis of mutual recognition (which means they can 'passport' these activities into other Member States)[8].

Art 9 CRD requires Member States to prohibit persons or undertakings that are not banks from carrying out the business of taking deposits or other repayable funds from the public. However, Art 9 CRD allows Member States to define 'the public' and provide other exemptions (e.g., to allow undertakings to take deposits from banks or other providers of funds), limit the territorial scope of the prohibition so that it does not apply to 3rd country undertakings taking deposits where the 'characteristic performance' of the activity takes place outside their territory[9] and establish national regimes authorising 3rd country banks to carry on deposit-taking business in their territory. Accordingly, many Member States do permit 3rd country banks to take deposits from local depositors without establishing a locally authorised branch in at least some circumstances.

The CRD does not otherwise require Member States to impose authorisation requirements on EU or 3rd country undertakings carrying on activities covered by CRD Annex I and many of the activities covered by that Annex are also not covered by authorisation requirements under other EU legislation (see Table 1). Accordingly, many Member States do not impose authorisation requirements on EU or 3rd country undertakings carrying out, for example, corporate lending, financial leasing, guarantees and commitments, spot foreign exchange trading, corporate finance or M&A advisory business.

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[4] Proposed CRD Art 48c(1) also contains a similar prohibition but does not provide a derogation for 3rd country undertakings carrying on activities in a Member State on a reverse solicitation basis.
[5] Regulation (EU) No 575/203, Art 4(1)(1)(b).
[6] Recital 3 of the legislative proposal.
[7] See the definition of 'credit institution' in Article 4(1)(1) CRR.
[8] Art 33 CRD.
[9] Compare Commission Interpretative Communication, Freedom to provide services and the interest of the general good in the Second Banking Directive (1997, available here).

Table 1: Activities included in Annex I of the CRD

	Annex I CRD activity	EU law requires authorisation for EU firms?
1.	Taking deposits and other repayable funds	Only if the undertaking's business is taking funds from the public (Article 9 CRD)
2	Lending including, inter alia: consumer credit, credit agreements relating to immovable property, factoring, with or without recourse, financing of commercial transactions (including forfeiting)	Only if the activity constitutes consumer or mortgage credit activity covered by the Consumer Credit Directive or Mortgage Credit Directive.
3	Financial leasing.	See point 2.
4.	Payment services as defined in Article 4(3) of Payment Services Directive.	Only if none of the exemptions in the Payment Services Directive apply.
5.	Issuing and administering other means of payment (e.g. travellers' cheques and bankers' drafts) insofar as such activity is not covered by point 4.	No.
6.	Guarantees and commitments.	See point 2.
7.	Trading for own account or for account of customers in any of the following: (a) money market instruments (cheques, bills, certificates of deposit, etc.); (b) foreign exchange; (c) financial futures and options; (d) exchange and interest-rate instruments; (e) transferable securities.	Only if the undertaking is an investment firm (as defined in MiFID) carrying on an activity covered by Section A Annex I MiFID in relation to financial instruments falling within Section C Annex I MiFID and none of the exemptions in Article 2 MiFID apply. For example, spot foreign exchange transactions are not financial instruments falling within Section C Annex I MiFID.
8.	Participation in securities issues and the provision of services relating to such issues.	See point 7. For example, corporate finance advisory services are not services falling within Section A Annex I MiFID.
9.	Advice to undertakings on capital structure, industrial strategy and related questions and advice as well as services relating to mergers and the purchase of undertakings.	No.
10.	Money broking.	See point 7.
11.	Portfolio management and advice.	See point 7.
12.	Safekeeping and administration of securities.	No.
13.	Credit reference services.	No.
14.	Safe custody services.	No.
15.	Issuing electronic money.	Only if none of the exemptions in the Electronic Money Directive apply.

Note:
Article 8 CRD also requires authorisation for EU undertakings that fall within the definition of a credit institution in Article 4(1)(1) CRR.

Even where other EU legislation requires Member States to impose authorisation requirements on activities that are also covered by CRD Annex I, that EU legislation is subject to limitations on the categories of firms or activities that are covered by the authorisation requirements or provides exemptions from authorisation requirements for certain categories of firms or activities that are not replicated under the proposal[10]. Even in the one case where EU legislation explicitly seeks to harmonise the authorisation requirements that apply to cross-border business by 3rd country undertakings, under the Markets in Financial Instruments Directive and Regulation (MiFID/MiFIR) [11], that legislation allows Member States to choose whether or not to require 3rd country firms conducting cross-border retail business to establish a locally authorised branch[12] and allows 3rd country firms to continue to rely on national regimes permitting cross-border wholesale business unless and until the Commission has adopted an equivalence decision in respect of the 3rd country[13].

Therefore, currently, in many cases, 3rd country undertakings can carry on activities on a cross-border basis in Member States *without* establishing a locally authorised branch, with the specifics depending on Member State national regimes. Table 2 below sets out examples of national regimes in EU Member States under which non-EEA firms may carry on business on a cross-border basis with local clients, otherwise than on a reverse solicitation basis and without establishing a locally authorised branch, either under a cross-border authorisation, registration or individual exemption or under an exemption for certain classes of cross-border activity. Moreover, some Member States consider that the characteristic performance of the cross-border provision of products and services should not be regarded as taking place within their territory and thus treat the provision of those services as outside the scope of their authorisation requirements (e.g., EU residents holding bank accounts in 3rd countries or the underwriting of issues by EU issuers of non-EU currency bond or equity issuances offered outside the EU).

The proposed new requirement would fundamentally change this current treatment of cross-border business at the EU and Member State levels.

[10] See e.g., Art 2 of Directive 2008/48/EC on credit agreements for consumers, Art 2 of Directive 2014/65/EU on markets in financial instruments (MiFID) and Art 3 of Directive (EU) 2015/2366 on payment services.
[11] Under Chapter 4, Title II MiFID (above) and Title VIII Regulation 600/2014/EU on markets in financial instruments (MiFIR).
[12] Art 39 MiFID
[13] And for three years after the adoption of the equivalence decision. Article 54(1) MiFIR. The Commission has not yet adopted any equivalence decisions in respect of 3rd countries under this regime.

Table 2: Examples of EU Member State national regimes

Jurisdiction	Legislation	Description
Cross-border authorisation, registration and individual exemption regimes		
Belgium	Article 14 Investment Firm Law	Non-EEA firms can provide cross-border investment services to professional clients, eligible counterparties and certain expatriate clients, provided that a prior notification has been submitted to the Financial Services and Markets Authority.
Denmark	Section 33 Financial Business Act[14]	Non-EEA firms can obtain authorisation from the Financial Supervisory Authority to provide cross-border investment services to professional clients and eligible counterparties.
Finland	Investment Services Act	Non-EEA firms can obtain authorisation from the Financial Services Authority to provide cross-border investment services to professional clients and eligible counterparties.
Germany	Section 2(4) Banking Act	Non-EEA firms can obtain an exemption from BaFin allowing them to engage in banking transactions or provide financial services on a cross-border basis. Exemptions are granted case-by-case, based on individual circumstances. A German-Swiss memorandum of understanding facilitates the ability of Swiss firms to obtain an exemption, including for cross-border retail business.
Italy	Article 16 Banking Act and Articles 28 to 29 Financial Act	Non-EEA firms can obtain authorisation from: • Bank of Italy or Consob to provide cross-border investment services to professional clients and eligible counterparties; and • Bank of Italy to provide cross-border banking and payment services to retail and professional clients and eligible counterparties.
Luxembourg	CSSF Regulation No 20-02 (as amended)	Firms from a non-EEA jurisdiction for which the CSSF has adopted an equivalence decision can apply to the CSSF to be allowed to provide cross-border investment services to professional clients and eligible counterparties.
Netherlands	Article 10 Exemption Regulation	Firms from Australia, Switzerland and the USA can register with the AFM, allowing them to provide cross-border services to professional clients and eligible counterparties and deal on own account.
Spain	Article 171 of the Recast Text of the Spanish Securities Market Act and Article 17 of Royal Decree 84/2015, implementing Law 10/2014	Non-EEA firms can obtain authorisation from Bank of Spain or CNMV to provide cross-border banking, payment services and investment services to per se professional clients and eligible counterparties

[14] Also see Section 41 new Act on Investment Companies and Investment Services and Activities

Jurisdiction	Legislation	Description
Exemptions from authorisation requirements for certain classes of cross-border activity		
France	Article D.532-40 Financial and Monetary Code	Non-EEA firms can enter into cross-border transactions on own account (without providing other investment services) outside a trading venue with banks, investment firms and certain other institutions (that are also acting on own account) and on a trading venue.
Germany	Section 32, para. 1a Banking Act	Non-EEA firms can conduct cross-border 'own account trading' (*Eigengeschäft*) on German exchanges or trading venues as participants or members of such exchanges or trading venues.
Ireland	Reg 5 EU (Markets in Financial Instruments) Regulations 2017	Non-EEA firms can provide investment services and activities to professional clients and/or eligible counterparties on a cross-border basis.
Netherlands	Article 10a Exemption Regulation	Non-EEA firms can deal on own account with persons that are permitted (as a matter of Dutch law) to provide investment services or to deal on own account in the Netherlands.
Poland	Article 31 Act on Trading in Financial Instruments	Non-EEA firms that do not provide investment services in Poland can be parties to transactions entered into on a trading venue in Poland and can access a Polish trading venue via direct electronic access services provided by a member of, or a participant in, the trading venue.

Notes:

The table provides examples of national regimes in EU Member States under which non-EEA firms may carry on business on a cross-border basis with local clients, otherwise than on a reverse solicitation basis and without establishing a locally authorised branch, either under a cross-border authorisation, registration or individual exemption or under an exemption for certain classes of cross-border activity. The table assumes that the non-EEA firm does not have a place of business, branch, establishment, agency or other presence in the jurisdiction.

The table does not describe all the conditions that a non-EEA firm may have to satisfy to rely on the specified regimes. It also does not discuss the compliance or other requirements that may apply to a foreign firm relying on these regimes or that may apply to the sale or distribution of particular products. It does not consider any anti-money laundering obligations or related supervisory regimes that may be applicable.

The table does not set out the scope of Member States' regulatory perimeter or whether their authorisation requirements only apply to a non-EEA firm if the characteristic performance of the activities takes place in their territory. This table does not, therefore, set out all bases on which non-EEA firms are able to conduct cross-border banking and investment business with clients or counterparties in the EU.

II. Scope of the proposal is broad in terms of both the activities as well as the entities it covers

The proposal would have a broad effect across both the dimensions of activities and *entities*. It would go beyond requiring 3rd country *banks* to establish a physical presence in order to conduct the core banking activity of taking deposits.

For example, it would cover *entities such as non-bank lenders and undertakings carrying on the business of dealing on own account or underwriting*, even if a similar EU firm would fall outside the scope of EU or Member State authorisation requirements because the relevant activity is not regulated or because the firm would be able to rely on exemptions from authorisation requirements under the relevant EU legislation. It would also cover activities that are not subject to authorisation requirements, at the EU or national level, either at all or because exemptions from authorisation apply. In addition, it would conflict with existing EU and national regimes specifically governing cross-border business by 3rd country undertakings, including those in MiFID and MiFIR and the national regimes referred to above.

In particular:

- The proposal would apply to all the cross-border CRD Annex I activities of both 3rd country banks *and* 3rd country undertakings that engage in own account dealing or underwriting financial instruments and meet the size tests for 'class 1' investment firm to be treated as a bank in the EU[15]. These firms cannot rely on the proposed derogation from the authorisation requirement for smaller 3rd country undertakings that engage in specified CRD Annex I activities[16]. They would be subject to authorisation even if they principally (or only) provide services such as portfolio management or M&A advisory services to EU clients.

- The proposal would apply to 3rd country undertakings that engage in own account dealing or underwriting financial instruments and meet the size tests for a 'class 1' investment firm to be treated as a credit institution in the EU even if the size of their EU assets and the EU assets of their affiliated entities is below the thresholds set for EU undertakings[17]. In addition, this part of the proposal could cover a much wider range of 3rd country undertakings than broker-dealers, such as asset managers that *occasionally* deal on own account in fund units, insurance companies, commodity and emission allowance dealers, collective investment undertakings, corporates dealing on own account and other undertakings that in the EU would currently be able to rely on exemptions from authorisation under CRD or MiFID[18]. Any of these entities might meet the size tests, in particular after taking into account the aggregation of the assets of affiliates.

- In any event, it is not clear why it should be impossible for a large EU corporate to enter into a short-term interest-rate derivative with a large 3rd country investment firm (or a 3rd country bank of any size) without a local branch, yet it would be possible for the same corporate to enter into a complex, long-term derivative with a much smaller 3rd country investment firm (which would continue to be able to rely on Member State national regimes to transact with that corporate).

The preamble to the proposal refers to concerns surrounding EU financial stability if 3rd country undertakings conducting cross-border activities were to fall outside of the "scope or reach of the system of prudential regulation". However, with the exception of the case where 3rd country banks take a significant volume of deposits from EU (retail) customers, cross-border activity is primarily a prudential risk for the 3rd country home jurisdiction, rather than for the EU. The EU has already introduced measures to mitigate the risks to financial stability of cross-border OTC derivatives business through mandatory clearing and margining and other risk mitigation rules under EMIR (and reporting requirements enabling EU authorities to monitor cross-border activity).

III. Impacts for EU financial institutions, governments, investors, corporates and individuals could be significant

Although the proposal has an exemption for reverse solicitation, this exemption would not be sufficient to allow the effective conduct of business across borders. We discuss this issue in more detail in the subsequent section.

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[15] CRR Art 4(1)(1)(b).
[16] Proposed new Art 47(2) CRD.
[17] See the EBA's proposed revised approach to apply the '30 billion euro test' to *global group assets* as set out in the 2nd EBA consultation on the Draft RTS on the reclassification of investment firms as credit institutions in accordance with Art 8a of the CRD (June 2021).
[18] See the exemptions in CRR Art 4(1)(1)(b) and Art 2 MIFID.

Bearing this in mind, the impacts of the proposal would be significant and include the following:

- EU financial institutions, corporates and investors would find it more difficult to hold bank accounts in a non-EU jurisdiction. These can be required for many reasons including when accessing 3rd country market infrastructure or correspondent banking services, paying tax, employees or suppliers in 3rd countries or purchasing or selling or receiving income on, or paying expenses relating to, assets or property outside the EU.

- EU corporates would encounter challenges when seeking to raise finance, manage risk abroad, access trade and supply chain financing or when generally seeking to carry out or develop business abroad. In such cases they may rely on non-EU providers to support their business and transactions in non-EU currencies. Currently for example, an EU corporate considering an acquisition in, say, Brazil can instruct corporate finance advisers both in the EU and locally in Brazil, while under the new proposal they would be limited to those (very few, if any) Brazilian corporate finance advisers with an EU branch. EU corporates will de facto not be able to benefit from the expertise of local advisers with in-depth knowledge of the target market. In the same vein, an EU corporate considering a listing on the New York Stock Exchange may seek to instruct a US bank and an EU corporate considering a yen bond issuance a Japanese bank. It is unclear how an EU branch of a US or Japanese bank could provide these services from the EU. Even if it were possible, the requirement to have a branch in the home Member State of each EU corporate wanting these services would be disproportionate.

- Given that the proposal would restrict 3rd country firms' ability to continue existing correspondent banking services with EU banks, EU businesses would find it more difficult to make or receive cross-border payments in connection with international trade (and in the context of increasing demand for cross-border payments globally).

- Restricted access to the foreign exchange market (which is by definition a cross-border market) would have significant operational impacts including for EU corporates and investors that regularly participate in the market to reduce risk by hedging currency exposures, to pay suppliers or be paid for services outside the EU, convert returns from international investment into domestic currency, make investments in other countries and raise funding in other currencies as already noted.

- The proposal may also present challenges to EU governments and governmental entities that wish to raise funds on 3rd country markets or in 3rd country currencies and to manage their risks in those currencies.

- EU corporates, asset managers and banks would also face challenges in hedging or diversifying their risk and in accessing the most liquid markets for products where this is outside the EU. In some cases, EU firms wanting to be active on certain international markets would, be unable to avail themselves of the services of a local broker who is a member of the relevant market.

- EU banks and investment firms when engaging for instance in inter-dealer trading have to date been able to engage directly on a cross-border basis with 3rd country entities in certain cases. Whereas this is not (always) the case for retail counterparts, many Member States allow direct cross-border business with eligible counterparties and professional clients because they are deemed of being capable of assessing the nature of, and risks arising from, 3rd country entities. The current proposal would, however, prevent all EU eligible counterparties and professional clients from directly accessing liquidity, managing risks or obtaining financial services from the global financial system on a regular basis.

- The access of EU banks and investment firms to execution services on 3rd country exchanges and clearing services on third-country CCPs where the EU bank is not itself a trading or clearing member would be restricted, as would custody or sub-custody services where an EU firm wishes to hold securities in a 3rd country CSD of which it is not a member and underwriting services where the EU bank or investment firm wishes to raise funds by issuing on 3rd country markets or to sub-underwrite EU offerings for distribution on 3rd country markets.

- The proposals could potentially cause 3rd country firms to withdraw or significantly restrict products and services to individuals in the EU (EU Consumers), even if these EU Consumers are not permanent EU-residents and they are outside of the EU when taking out these products and services. The proposals would likely create new obstacles and significant customer detriment to EU Consumers maintaining existing, or taking out new, bank accounts in local currency, mortgages, loans and investment management or other services provided by a 3rd country firm, which could e.g. impact on EU Consumers' ability to continue to pay the mortgage on their local property or cause them to lose local tax benefits accrued over time. For example, EU Consumers:

    - may need these local products and services where they wish to buy property or support dependents and obligations outside the EU; or
    - have other needs to receive or make payments in local currency outside the EU; or
    - have recently moved to the EU but need to maintain an existing relationship with their current 3rd country provider.

  EU firms may not be able to provide these products and services because, for example, they are not members of local payment systems, they require local authorisation or permission in the 3rd country, they need to take security over local property or are unable to provide products with the specific local tax treatments. In addition to the expected impact on EU Consumers, these issues would also likely impact corporates and businesses, e.g. they may make it more difficult for EU firms to hire and pay staff from outside the EU.

IV. Reverse solicitation does not enable the effective conduct of cross-border business

While the proposal would allow for activities to take place on a cross-border basis if they are initiated by a client in the EU[19] , this *reverse solicitation* exemption is unlikely to allow for the effective conduct of cross-border business.

The application of reverse solicitation is used in the context of MiFID and has been elaborated in ESMA Guidance[20]. It is however challenging to use as a basis for enabling business as it can be difficult to demonstrate and document that a transaction or relationship resulted from the 'exclusive initiative' of the client, particularly in cases of pre-existing client relationships. The interpretation of the 'exclusive initiative test' is also still subject to differing interpretations across Member States.

Given the challenges inherent in conducting business on a reverse solicitation basis, third-country undertakings may therefore no longer wish to engage in such activities. This was for instance evidenced in a 2019 exchange of letters between AMAFI and the French NCAs AMF/APCR where such concerns were raised. It is these types of concerns which have motivated Member States to create many of the national regimes that would potentially be overridden by the proposed CRD Article 21c (including the confirmation that 3rd country firms do not require permission in France when carrying out inter-dealer transactions with French credit institutions and investment firms as referred to in the exchange of letters).

A note on intragroup transactions

The ability for 3rd country firms to transact with their affiliates established in the EU is a critical part of the EU's broader cross-border framework. Intragroup transactions are key for the funding and risk management of EU entities of 3rd country groups. Indeed, if intragroup funding was not available, subsidiaries of third

[19] Proposed Art 21c(2)
[20] See for instance the following ESMA Q&As and public statement

country group would only have access to funds raised within the EU which would impact on their ability to support the EU economy. Moreover, given their ongoing nature, it may be difficult for 3rd country affiliates to rely on reverse solicitation in relation to intragroup transactions. As drafted, Art 21c (2) states that the provisions on reverse solicitation are "without prejudice to intragroup relationships". However, this does not provide an explicit basis on which 3rd country undertakings would be able to provide cross-border financing or other services to their EU affiliates. It is critical to make clear that the proposals do not affect cross-border intragroup transactions.

V. Comparison with cross-border access regimes in other jurisdictions

As drafted, the proposal would create a situation whereby cross-border access to the EU would be significantly limited compared to the cross-border regimes of other jurisdictions.

To illustrate this point, Table 3 provides examples of selected regimes under which foreign firms may carry on business on a cross-border basis with local clients in Switzerland, the UK and the US, *otherwise* than on a reverse solicitation basis and *without* establishing a locally authorised branch.

The table focuses on some of the key activities included under Annex I of the CRD, including trading for own account and securities underwriting which are also relevant in the context of MiFID activities 3 and 6 provided by non-bank credit institutions (class 1 investment firms).

Other major jurisdictions, such as Australia, Canada, Japan and New Zealand, also have regimes allowing foreign firms to carry on cross-border business with local clients and counterparties otherwise than on a reverse solicitation basis and without establishing a locally authorised branch.

Table 3: Cross-border business into Switzerland, the UK and the US

Activity	Switzerland	UK	US
Deposit-taking	Foreign firms may take deposits from Swiss clients.	Foreign firms may take deposits outside the UK from UK clients.	Deposit-taking may require an authorised branch.
Commercial lending	Not a regulated activity (with exceptions). To the extent it is regulated, foreign firms may lend to Swiss clients.	Not a regulated activity.	Not a regulated activity under US federal law or under most US state laws, including the laws of New York.
Payment services	Not a regulated activity in its own right (with exceptions).	Foreign firms may provide payment services to UK clients.	Foreign firms may provide payment services to US clients, subject to registering with FinCEN as money services businesses (under US federal law) and licensing as money transmitters (under US state laws).

Activity	Switzerland	UK	US
Trading for own account or the account of customers in: • **Securities** • **OTC derivatives** • **Exchange-traded derivatives (ETDs)**	Foreign firms may deal with Swiss clients subject to compliance with certain conduct and organisational rules and registration of client advisers with a FINMA-approved registration body. Prudentially supervised foreign firms are exempt from the registration requirement if they only provide services to professional or institutional clients. (Title II of the Financial Services Act) Foreign firms may trade on Swiss trading venues (for own or customers' account), subject to obtaining authorisation from FINMA. (Art 40 Financial Market Infrastructure Act)	Foreign firms may deal: (1) with or through UK authorised persons and certain exempted persons; (2) with investment professionals and high net worth companies and trusts. (3) with certified high net worth individuals and certified and self-certified sophisticated investors (subject to product limitations); (4) with previously overseas customers. (Overseas persons exclusion under Art 72 FSMA (Regulated Activities) Order and Arts 19, 31, 32 and 48 to 50A FSMA (Financial Promotions) Order)	*Securities:* Foreign firms may deal with: (1) SEC-registered broker-dealers and US banks (acting in a broker-dealer capacity); or (2) US institutional investors with the assistance of an SEC-registered broker-dealer. (SEC Rule 15a-6) *OTC derivatives:* Foreign firms may deal with US eligible contract participants: (1) without registration with the CFTC or SEC up to specified *de-minimis* trading levels (CFTC Rule 1.3; SEC Rule 3a71-2); or (2) if registered with the CFTC or SEC as a swaps or securities-based swaps dealer (CFTC Rule 23.23; SEC Rule 3a71-3). *ETDs (other than securities):* CFTC Rules provide for registration of 'foreign futures and options brokers' as well as certain exemptions from such registration when trading in CFTC-regulated ETDs, including an exemption permitting a foreign firm to carry the accounts of a US CFTC-registered firm and execute trades on foreign futures exchanges on behalf of certain authorized US customers of the US firm. (Part 30 CFTC Rules)
Spot foreign exchange	Not a regulated activity.	Not a regulated activity.	Generally, not a regulated activity under US federal law or state laws (but see above where money transmission is involved).
Underwriting issues of securities	Foreign firms may underwrite securities of Swiss issuers.	Foreign firms may underwrite securities of issuers under (1) and (2) of securities and derivatives trading above.	Underwriting generally requires registration as a broker-dealer with the SEC.

Activity	Switzerland	UK	US
Corporate finance and M&A advisory services	Not a regulated activity.	Foreign firms may provide services to persons referred to under securities and derivatives trading above.	Certain M&A advisory activities may be conducted without a license, including broker facilitation of M&A transactions between sellers and buyers of privately held companies. (SEC Staff No-Action Letter, Jan.31, 2014)
Portfolio management and related investment advice	These are financial servi-ces under the Financial Services Act: see securities and derivatives trading above. Portfolio management (but not mere investment advice) is also a prudentially regulated activity: but foreign firms may provide such services to Swiss clients.	Foreign firms may provide services to persons referred to under securities and derivatives trading above.	Foreign firms may provide these services: (1) to a limited number of US investors with limited aggregate assets under management; (2) if eligible for 'exempt reporting adviser' status (e.g., private fund advisory only) and filing reports with the SEC; or (3) if registered with the SEC as an investment adviser. (Investment Advisers Act of 1940)
Safekeeping and administration of securities.	Not a regulated activity in its own right.	Foreign firms may provide services to persons referred to under securities and derivatives trading above.	Not a regulated activity under US federal law or US state laws, except that acting in a trust or fiduciary capacity may require an authorised branch.

Notes:

The table provides examples of selected regimes under which foreign firms may carry on business on a cross-border basis with local clients in the covered jurisdictions, otherwise than on a reverse solicitation basis and without establishing a locally authorised branch. The table assumes that the foreign firm does not have a place of business, branch, establishment, agency or other presence in the jurisdiction.

The table does not describe all the conditions that a foreign firm may have to satisfy to rely on the specified regimes. It also does not discuss the compliance or other requirements that may apply to a foreign firm relying on these regimes or that may apply to the sale or distribution of particular products. It does not consider any anti-money laundering obligations or related supervisory regimes that may be applicable. The scope of activities that are regulated under local law may differ between the different jurisdictions (and from the EU).

References to:

- *activities that are not regulated activities are to activities that are not subject to prior authorisation requirements under local law;*
- *commercial lending exclude lending to individuals or small partnerships or companies, residential mortgage lending and lending to finance transactions in securities or other financial instruments;*
- *payment services exclude the services provided by payment systems;*
- *trading in spot foreign exchange are to trading on a spot delivery basis in physically-settled foreign exchange transactions;*
- *underwriting issues of securities are to the underwriting of securities issued by a local issuer and do not include sales of the securities to local investors;*
- *safekeeping and administration of securities are to the holding of securities in custody for clients (and do not cover any related services or the activities of central securities depositories).*

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