Private Banking & Wealth Management

Contributing editors
Shelby R du Pasquier, Stefan Breitenstein and Fedor Poskriakov

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GETTING THE DEAL THROUGH

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United States

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This chapter focuses primarily on US federal regulation of entities providing private banking services. Unlike other jurisdictions where private banking services are routinely offered by specialised private banking institutions, in the United States, reflecting the historical segmentation of the US financial marketplace, such services are offered by the full panoply of US financial intermediaries – banks, broker-dealers, investment advisers, trust companies and insurance companies – each of which may also offer a varying range of commercial, investment and retail banking, and securities and commodities services, and is subject to a multitude of different, but often overlapping, functional regulatory frameworks. This chapter generally discusses private banking within the context of a full-service national bank (ie, a bank with a federal charter from the Office of the Comptroller of the Currency (OCC)) and the federal laws and regulations that apply. Each state can also charter banks and other institutions, and legal and regulatory frameworks for such institutions vary from state to state. Because many financial institutions operate in New York, this chapter also refers to certain aspects of New York law. Where appropriate, responses also mention the regulatory frameworks applicable to securities and insurance services.

Private banking and wealth management

1 What are the main sources of law and regulation relevant for private banking?

The principal statutes relevant to establishing and maintaining private banking operations on the part of national banks are:

- the Federal Reserve Act, establishing the Federal Reserve System and regulation of state-member banks (member banks);
- the Federal Deposit Insurance Act, providing for federal deposit insurance, the Federal Deposit Insurance Corporation (FDIC) as a regulator of FDIC-insured banks, the permissible activities for insured state non-member banks, and receivership of failed banks;
- the National Bank Act, providing for full-service and limited-purpose national banks and the OCC as their primary supervisor;
- the Bank Holding Company Act of 1956, as amended, subjecting companies that control a bank (ie, bank holding companies (BHCs)) and their subsidiaries to regulation by the Board of Governors of the Federal Reserve (the Federal Reserve));
- the Bank Secrecy Act of 1970, as amended (BSA), establishing program, record-keeping, and reporting requirements for US financial institutions to assist the US government in the detection and prevention of money laundering;
- the Securities Exchange Act of 1934 (the 1934 Act), requiring, inter alia, the registration of brokers and dealers of securities in interstate commerce and prohibiting manipulative and deceptive practices in connection with the purchase or sale of any security;
- the Investment Advisers Act of 1940 (the Advisers Act), requiring, inter alia, investment advisers to register with the Securities and Exchange Commission (SEC);
- the Employee Retirement Income Security Act of 1974 (ERISA), establishing minimum standards for pensions and retirement plans (eg, information requirements, fiduciary responsibilities) and giving participants the right to sue for breaches of fiduciary duty, among others; and
- state laws concerning, for example, chartering state banks and trust companies, trusts, wills, fiduciary activities, contracts, securities and registration of certain investment advisers. State law also regulates insurance (including annuities and life insurance investment products) and insurers.

Relevant regulations are generally found in the US Code of Federal Regulations at the following titles:

- Title 12, covering banking activities and consumer protections;
- Title 17, covering securities, securities trading, broker-dealers and investment advisers;
- Title 29, covering ERISA regulations (related provisions also codified, for instance, in Title 12 for national banks); and
- Title 31, covering economic sanctions, as well as anti-money laundering regulations.

2 What are the main government, regulatory or self-regulatory bodies relevant for private banking and wealth management?

The main federal regulatory bodies relevant for private banking and wealth management are:

- the Federal Reserve, as the primary supervisor of BHCs and member banks. The Federal Reserve also coordinates the supervision of foreign banking organisations' (FBO) US operations with other federal and state banking agencies;
- the FDIC, as a regulator of FDIC-insured banks, and the primary federal supervisor of state-chartered non-member banks;
- the OCC, within the Treasury Department, as the primary supervisor of full-service and limited-purpose national banks;
- the Financial Crimes Enforcement Network (FinCEN), within the Treasury Department, which collects and analyses financial transaction data to combat financial crimes, including money laundering and terrorist financing;
- the Office of Foreign Assets Control (OFAC), within the Treasury Department, which administers and enforces economic sanctions, including by imposing controls on transactions and freezing assets within the jurisdiction of the United States;
- the SEC, as regulator of much of the securities industry (ie, registered broker-dealers, investment companies, investment advisers, exchanges and clearing agencies), including many money managers, investment consultants and financial planners who are investment advisers;
- the Financial Industry Regulatory Authority (FINRA), a self-regulatory organisation, as regulator of member broker-dealers;
- the Consumer Financial Protection Bureau (CFPB), responsible for consumer protection as regulator over entities engaging in offering or providing consumer financial products or services;
- the Federal Trade Commission, preventing business practices by institutions other than banks, insurance companies, broker-dealers and investment advisers that are deceptive or unfair to consumers; and
- the Internal Revenue Service (IRS), as the US tax collection agency, which administers and enforces the Internal Revenue Code.

Additionally, federal and state prosecutors and state attorneys general can bring criminal and civil proceedings to enforce violations of the relevant financial laws and regulations.

As noted above, states can also regulate the financial sector. For example, the New York State Department of Financial Services (NYDFS) supervises the chartering, licensing and examining of safety and soundness of NY-chartered banks and trust companies, among other institutions; protects against financial fraud under state law; supervises insurance companies doing business in New York; and monitors certain real estate finance services, among other duties.

3 How are private wealth services commonly provided in your jurisdiction?

Private wealth services are commonly provided by the various types of financial intermediaries described above, who design products and services to offer to high net worth individuals (HNWIs). Because some services (eg, cash deposit accounts) can only be offered by certain types of intermediaries, integrated financial services firms that combine different types of financial subsidiaries under one holding company are able to offer a 'suite' of private banking services to HNWIs. They often do so by designating investment professionals, typically sitting in a securities affiliate, as relationship managers to coordinate the various private banking services and products offered by the various group affiliates and business units.

A stand-alone investment adviser or trust company can offer a more limited range of 'non-banking services' that fall within the ambit of private banking services. Such services include offering advice for investment in securities on a discretionary or non-discretionary basis, but do not include accepting cash deposits. Family offices are not as common in the United States; however, they may be becoming more common.

4 What is the definition of private banking or similar business in your jurisdiction?

Private banking does not have a general statutory or regulatory definition under US federal law. See question 13 for a discussion of 'private banking accounts' within the context of anti-money laundering efforts.

5 What are the main licensing requirements?

The main licensing requirements are that an entity obtain a full-service or limited-purpose bank charter from the OCC or a state regulator, or a broker-dealer or investment adviser registration with the SEC and/or state regulators, or both (or under certain circumstances, neither). Licensing requirements vary based on the entity that will offer the private banking services.

Banks

No special licence is required for an existing bank to offer private banking services. However, for national banks, specific OCC approval is required to provide fiduciary services within the bank or a subsidiary of the bank. The creation of a full-service national bank requires an application to the OCC for a charter and typically requires an application to the FDIC for deposit insurance approval. During the application stage, the OCC evaluates the business plan, character and competence of the bank's management and directors, and the financial resources available, including the ability to maintain regulatory capital levels. After extensive review, conditional approval may be given and the bank will be subject to ongoing supervision to ensure that, consistent with its business plan, it is operated safely and soundly and that risks to the bank and the financial system are minimised. An alternative to the full-service national bank charter is the establishment of a limited-purpose national bank, which does not require an application to the FDIC for deposit insurance, but generally limits the new institution to providing only fiduciary services.

Although registration as an investment adviser under the Advisers Act may be required to provide investment advisory services, US banks and BHCs are generally excluded from the registration requirement. Additionally, registration or notice filing may be required in states where an investment adviser has a place of business or more than a de minimis number of clients.

Each state has its own laws and regulations for chartering banks within the state as well as granting fiduciary powers to banks and other institutions, which typically include trust companies, the state-law analogue to a limited-purpose national bank.

Non-banks

Investment advisory or custodial services may be provided outside of a banking organisation. If the entity meets the definition of investment adviser under the Advisers Act, registration is required, unless prohibited or an exemption applies. Investment advisers register with the SEC or a state regulator, or neither, depending on the amount of regulatory assets under management, location of offices and clients, and number of clients (some SEC-registered investment advisers must make 'notice filings' with state regulators).

Branches of non-US banks

Historically, banks that are located outside of the United States that have sought to branch directly into states have done so by obtaining licences from state regulators, principally in New York. Though there is evidence that this is changing because banks that seek to establish operations in more than one state can find the national breadth and efficiency of dealing with one regulator (the OCC) more efficient and cost-effective. Although branches of non-US banks cannot generally accept cash deposits of less than US$250,000, this is rarely a significant operational impediment in the private banking context. To establish a federal branch, a licence is needed from the OCC, which will evaluate the non-US bank's condition, its compliance history with US laws, the character, competence and experience of the anticipated management group for the fiduciary activities, community needs and the adequacy of the operating plan.

6 What are the main ongoing conditions of a licence?

Banks

A national bank is subject to ongoing supervision by the OCC and, like other banks, is examined every 12 to 18 months, depending on its size. Generally, a bank must maintain positive examination findings and is rated based on its (i) capital adequacy; (ii) asset quality; (iii) management ability; (iv) earnings performance; (v) liquidity; and (vi) sensitivity to market risk. Regular reporting and record-keeping requirements apply as well. The OCC can close national banks and revoke charters in order to protect the safety and soundness of the banking system. Other compliance issues include consumer protection, information security, privacy, anti-money laundering requirements, related party transactions, and community reinvestment requirements (eg, offering equal access to banking services regardless of race and meeting the credit needs of local individuals, including residents of low- and moderate-income neighbourhoods). Similar conditions apply to state banks and trust companies.

Non-banks

Investment advisers and broker-dealers register with the SEC or one or more states, or both, or neither. Investment advisers and broker-dealers are subject to examination by the SEC. In addition, broker-dealers are generally subject to examination by FINRA and must maintain sufficient amounts of net capital.

Branches of non-US banks

The Federal Reserve, FDIC (for insured branches) and OCC (for federal branches) coordinate supervision of branches of FBOs. Similar to national banks, federal branches are assessed on their (i) risk management; (ii) operational controls; (iii) compliance; and (iv) asset quality. Additionally, the FBO is assessed by the Federal Reserve to determine its capacity to provide financial, liquidity and management support to the federal branch and is subject to comprehensive consolidated supervision in its home country (ie, that home country regulators receive sufficient information on the foreign bank's worldwide operations so as to assess its overall financial condition and compliance with applicable laws and regulations).

7 What are the most common forms of organisation of a private bank?

Because various types of financial intermediaries may provide private banking services, there is no prevalent form of organisation. Increasingly, private banking products offered by different types of intermediaries are being managed by a lead relationship manager who coordinates and bundles services among affiliated or unaffiliated business units.

8 How long does it take to obtain a licence for a private bank?

There is no specific licence for a 'private bank,' as such. Chartering a bank or trust company entails a rigorous process of detailed disclosures to the regulators. For a national bank, the chartering process (including time to prepare a complete application) often takes 9 to 12 months or longer if the application constitutes an institution's first entry into the US market. A similar time frame is required to establish a federal branch.

A prospective investment adviser registers by filing Form ADV with either the SEC or the state securities authorities. Most prospective broker-dealers file Form BD with FINRA, but some prospective municipal securities dealers instead file Form MSD with the SEC and a US banking regulator. Although the SEC and/or FINRA will complete their initial review of the application within 30 to 45 days after the registration application is filed, the application process, including preparation of the application, can take several months.

9 What are the processes and conditions for closure or withdrawal of licences?

Banks

A national bank can relinquish its full-service or limited-purpose charter through voluntary liquidation, conversion to another type of charter (such as a state bank), or merger or consolidation with a depository institution that does not hold a national bank charter. If a bank receives a poor examination rating (eg, for operating in an unsafe or unsound condition) or is near insolvency and does remedy the situation in sufficient time, the bank may be put into FDIC receivership (whereby the FDIC liquidates the bank and its affairs are wound up) or conservatorship (whereby the FDIC preserves the bank as a going concern). Often, the bank is quickly sold to another institution, with or without government assistance.

Non-banks

An investment adviser or broker-dealer may deregister by filing notice with the SEC, but books and records retention requirements will generally continue for five years from the date of deregistration. The SEC can revoke an investment adviser or broker-dealer's registration through an enforcement action in connection with a violation of a regulatory provision or obligation. Additionally, an individual can be suspended from being associated with an investment adviser or broker-dealer.

Branches of non-US banks

Like a national bank, a federal branch can close through voluntary liquidation or through merger or acquisition. In voluntary liquidation, notice to the OCC and public notice in a newspaper are required. Additionally, the OCC can revoke a federal branch's licence if the non-US bank has violated applicable US law or is engaging in unsafe and unsound practices (the Federal Reserve can also recommend termination).

10 Is wealth management subject to supervision or licensing?

Wealth management, as such, is not subject to special supervision or licensing, but is covered by the licensing and supervision frameworks applicable to the financial intermediaries (eg, banks, trust companies, investment advisers) described above. An entity that is neither a traditional bank nor an investment adviser may provide certain services that fall within the range of wealth management services, such as a limited-purpose national bank or state trust company that offers fiduciary services.

Professionals offering wealth management services owe fiduciary duties to their clients and must disclose all conflicts of interest and provide full and fair disclosure of all material facts about themselves and their investments. For licensing or supervisory purposes of investment advisers, there is no distinction between discretionary or non-discretionary wealth management services. However, a national bank that provides discretionary fiduciary accounts is subject to additional OCC regulations and must conduct annual reviews of its discretionary fiduciary accounts.

11 What are the main licensing requirements for wealth management?

Banks with fiduciary powers, investment advisers, or a non-bank with fiduciary powers at the state level, among other intermediaries, subject to their general licensing requirements, may conduct wealth management activities. Individual wealth managers who work for firms may be required to pass licensure examinations that are administered by FINRA (eg, Series 7 exam). As an alternative to the FINRA-administered exams, certain individual wealth managers may be able to rely on various professional credentials, including being a Certified Financial Planner (CFP) or a Chartered Financial Analyst (CFA). Each involves an examination by a board or institute.

12 What are the main ongoing conditions of a wealth management licence?

State law specifies the ongoing conditions for non-bank fiduciaries, and in some cases, trustees and professional wealth managers. These vary by state, to the extent they are separately regulated from banks. Some states may have additional applicable regulations for state banks with fiduciary powers.

Individual wealth managers may have professional certification requirements based on minimum continuing education requirements and an ongoing record of ethical behaviour.

Anti-money laundering and financial crime prevention

13 What are the main anti-money laundering and financial crime prevention requirements for private banking in your jurisdiction?

The Bank Secrecy Act (BSA), a federal law, requires financial institutions (banks, broker-dealers, US branches of foreign banks and some insurance companies, but as of today, not stand-alone investment advisers or trust companies) to maintain effective AML compliance programmes reasonably designed to prevent them from being used to facilitate money laundering and terrorist financing. Institutions covered by the BSA are expected to take a top-down approach with respect to implementing anti-money laundering policies that reinforce a culture of compliance throughout the organisation. The board of directors must approve AML policies and an annual risk assessment should be performed. An effective AML compliance programme also includes the designation of a BSA/AML compliance officer, training, independent testing of BSA/AML compliance and customer due diligence (CDD). Investment advisers may become subject to federal AML requirements in the near future; however, in practice, those affiliated with banking organisations comply with the policies and procedures that apply to those organisations.

The customer identification program (CIP) and CDD requirements apply to banks, broker-dealers, and others, and entail acquiring additional information from each customer and an understanding of how an account will be used. This information is used to assist in risk-rating and suspicious activity detection.

Private banking accounts are subject to special enhanced due diligence standards and prohibitions under federal law. Such accounts are defined for AML purposes in the USA PATRIOT Act to mean an account, or a combination of several accounts (i) established or maintained for the benefit of a non-US person; (ii) with a minimum aggregate deposit of funds or assets of at least US$1 million; and (iii) assigned to a bank employee serving as liaison between the bank and the non-US person (eg, a relationship manager).

Financial institutions are also required to maintain appropriate records and file certain currency transaction reports (CTRs) for a transaction involving currency greater than US$10,000 and suspicious activity reports (SARs). Additionally, any US person (including a financial institution, corporation or other entity formed under the laws of the United States) that maintains a foreign financial account (eg, a bank account, securities account or other account such as an insurance or annuity policy with a cash value in a country other than the United States) with an aggregate value of US$10,000 at any point during a calendar year must report that account to FinCEN by filing a 'report of foreign bank and financial account'.

Implementing and maintaining a well functioning and properly proportioned AML compliance system has proven to be a challenge for a number of US financial institutions and has resulted in significant enforcement actions. Such difficulties often involve processing payments that originate from or are paid to beneficiaries residing outside the US, as well as providing specialised services to HNWIs, including politically exposed persons (PEPs).

In June 2016, the NYDFS adopted new regulations requiring certain financial institutions (notably state banks, state trust companies, state-licensed branches of non-US banks, among others, but not broker-dealers and investment advisers) to implement transaction monitoring and watch list filtering programmes to ensure compliance with federal AML and sanctions laws. Additionally, the board of directors or senior officers will be required to file an annual 'compliance finding' with the NYDFS.

Finally, in August 2016, FinCEN proposed a new rule to subject private banks and certain trust companies, inter alia, that do not have a federal regulator to the AML programme and beneficial ownership requirements.

14 What is the definition of a politically exposed person (PEP) in local law? Are there increased due diligence requirements for establishing a private banking relationship for a PEP?

Generally, the term applies to international political figures and those who are closely connected to them. It does not apply to US counterparts. Under US law, the term includes current and former senior foreign political figures, their immediate family members and close associates. Actual roles, rather than titles, determine who is a PEP.

Banks are not prohibited from providing services to PEPs but, under the USA PATRIOT Act, enhanced scrutiny is required for any PEP's private banking account. Specifically, the institution must (i) determine the identity of the nominal and beneficial owners of the private banking account; (ii) determine whether any owner is a senior foreign public official that is subject to enhanced scrutiny; (iii) determine the sources of the funds deposited and the purpose or expected use of the account; and (iv) review the account activity to verify that the activities conducted are consistent with the bank's understanding of the source and expected use of the account. Institutions that are not certain as to their ability to meet the enhanced due diligence requirements should consider whether to offer banking services to PEPs at all.

15 What is the minimum identification documentation required for account opening? Describe the customary level of due diligence and information required to establish a private banking relationship in your jurisdiction.

The CIP rule requires a bank (including a non-US bank's US branch), as well as broker-dealers and others, to collect certain customer information before opening an account. The minimum information required generally includes the individual's name, date of birth, address, and an identification number (eg, Social Security number, employer identification number, passport number and country of issuance). Institutions are expected to obtain copies of the government-issued identification document used to establish a customer's identity. Additionally, such institutions must have procedures to determine whether customers appear on any suspected terrorist or terrorist organisation lists issued by the US government and are prohibited from engaging in transactions with certain countries or non-US citizens (generally called 'specially designated nationals') under OFAC rules. Typically this is done by submitting names through an automated screening process that identifies potential matches against government issued lists. Although insurance companies are not subject to CIP, they generally must obtain all relevant and appropriate information related to the customer to administer an effective anti-money laundering programme.

16 Are tax offences predicate offences for money laundering? What is the definition and scope of the main predicate offences?

No. However, the US Supreme Court has held that, in certain contexts, fiscal offences (even those involving non-US tax laws) can constitute violations of the US wire and mail fraud statutes, which are predicate offences. Some other predicate offences that may apply in the context of private banking are:

- fraud: in the sale of securities; against financial institutions; fraudulent bank entries; fraudulent Federal Deposit Insurance transactions and related activity in connection with identification documents;
- bribery and corruption; and
- crimes such as computer fraud and abuse; smuggling goods; counterfeiting; and forgery, false use or misuse of a passport.

17 What is the minimum compliance verification required from financial intermediaries in connection to tax compliance of their clients?

A client of a US bank is not subject to tax compliance verification by the bank. However, financial institutions may have specific reporting obligations. See questions 30–32.

18 What is the liability for failing to comply with money laundering or financial crime rules?

Clients can face criminal and civil penalties for money laundering, terrorist financing, and violations of the BSA (eg, up to 20 years in prison, a fine of up to US$500,000 and forfeiture of property involved in a transaction or traceable to the proceeds of the criminal activity).

Financial institutions can face cease-and-desist orders and enforcement actions for failure to establish and maintain a reasonably designed BSA compliance programme. In addition to asset forfeiture and civil monetary penalties, banks risk losing their charters and facing possible criminal penalties.

Employees risk being barred from banking activities. Wilful violations of the BSA, its regulations or structuring transactions to evade BSA reporting requirements can result in criminal penalties.

Client segmentation and protection

19 Does your jurisdiction's legal and regulatory framework distinguish between types of client for private banking purposes?

Federal and state banking laws generally apply to all clients. Additionally, investment advisers owe fiduciary duties to all clients, regardless of assets but must take the type of client (eg, institutional or retail investor) into account when determining whether a particular investment is suitable. In some cases, consumer protections do not apply for certain secured loans at certain values.

Certain securities laws, however, do make exceptions for sophisticated investors (ie, generally with a net worth of at least US$1 million or an income of at least US$200,000 for each of the last two years), for instance, allowing them to buy pre-IPO securities, if certain conditions are satisfied.

As mentioned above, enhanced due diligence requirements apply under the USA PATRIOT Act. See questions 13 and 14.

20 What are the consequences of client segmentation?

See question 19. Limited exceptions may apply.

21 Is there consumer protection or similar legislation in your jurisdiction relevant to private banking?

Both federal and state consumer protection laws apply to private banking activities involving HNWIs. Generally, federal consumer protection laws apply to every individual regardless of his or her income or net worth. Notable provisions include:

- the Truth in Lending Act, which requires disclosures regarding the cost and terms of using consumer credit. Its protections may not apply in certain circumstances (eg, non-real estate secured loans above a certain amount);
- the Real Estate Settlement Procedures Act, which requires certain disclosures for home purchase and other real-estate related loans, as well as other safeguards, including a prohibition against kickbacks for referrals of settlement services;
- the Fair Credit Reporting Act, which regulates the collection, distribution and use of consumer information, and protects consumers from the inclusion of inaccurate information in their credit reports;
- the Fair Debt Collection Practices Act, which provides legal protections from certain practices of third-party debt collectors and a process to dispute and obtain validation of debt information;

- the Electronic Fund Transfer Act, which requires certain fund transfer protections (eg, error resolution for unauthorised transfers and consumer authorisation for pre-authorised electronic fund transfers) and disclosures; and
- SEC rule 10b-10 under the 1934 Act, which requires securities trade confirmations.

In addition, states have their own consumer protection laws. For instance, state law may require specific details in account statements or disclosures. State licensing requirements for consumer lending may not apply to unsecured consumer loans or consumer loans secured by personal property if the principal amount exceeds a certain threshold.

Exchange controls and withdrawals

22 Describe any exchange controls or restrictions on the movement of funds.

Not applicable.

23 Are there restrictions on cash withdrawals imposed by law or regulation? Do banks customarily impose restrictions on account withdrawals?

Besides the reporting requirement for CTRs (see question 13), generally no. There are certain limitations to the number of withdrawals from savings accounts to prevent them from operating as cash transaction accounts (eg, cheques), but these limitations do not prevent large one-time withdrawals (usually via a bank cheque or electronic transfer).

24 Are there any restrictions on other withdrawals from an account in your jurisdiction?

No.

Cross-border services

25 What is the general framework dealing with cross-border private banking services into your jurisdiction?

In principle, non-US financial institutions have access to the US market on equal terms as US institutions; certain additional inquiries may apply related to a non-US institution's home country and other non-US operations.

A financial institution operating outside the United States must comply with US law to the extent that it is applicable. This means that, if it satisfies certain registration 'triggers' (that differ among various types of intermediaries and US regulators, and that may involve, for example, dealing with persons or entities in the United States, US persons outside the United States, persons or entities subject to US sanctions, or conducting transactions through or in the United States), it will have to register.

Non-US institutions have also been successfully prosecuted by US authorities for violations of US sanctions, anti-money laundering and tax law violations in connection with the provision of cross-border services to private banking clients.

26 Are there any licensing requirements for cross-border private banking services into your jurisdiction?

Generally, accepting deposits, lending, or opening or servicing bank accounts for customers in the United States will trigger licensing requirements. Approval is also required for the establishment of representative offices by state licensed banks. Such offices only provide limited services compared to those offered by US branches and agencies of non-US banks. However, meeting with existing customers in the United States and furthering existing relationships, without accepting deposits, executing agreements or selling additional products or services may be permissible, depending on state law, if it is otherwise in compliance with US federal law (for example, it does not assist US taxpayers in evading their US tax obligations).

To conduct business in the United States, non-US broker-dealers and non-US investment advisers (ie, investment advisers whose principal office and place of business is outside the United States) must generally register under the 1934 Act or Advisers Act, respectively, and have been penalised by the SEC for not doing so. There are no residency requirements or minimum educational requirements, and foreign investment advisers are not required to establish a US subsidiary. Certain foreign investment advisers can be exempt from registration if they have (i) no place of business in the United States, (ii) fewer than 15 clients and investors in the United States in private investment funds advised by the adviser, (iii) less than US$25 million in regulatory assets under management attributable to clients and investors in the United States, and (iv) not been holding themselves out to the public generally in the United States as investment advisers. Other narrower exemptions may be available (ie, for private fund advisers and venture capital funds).

27 What forms of cross-border services are regulated and how?

See questions 25 and 26.

28 May employees of foreign private banking institutions travel to meet clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

If the employees work for entities that are licensed or registered with the appropriate US regulator (and they otherwise comply with US law), they may travel to meet clients and prospective clients in the United States. For others, entering the United States and engaging in private banking activities that require licensing or registration (as described above) is prohibited. Furthermore, travelling to the United States or soliciting US customers from outside the United States, in order to aid in the evasion of US tax or other laws, will subject such individuals and their employers to criminal prosecution.

Additionally, certain border checks may apply. For instance, a 'Report of International Transportation of Currency or Monetary Instruments' must be submitted for negotiable monetary instruments (eg, currency, endorsed personal cheques, traveller's cheques, securities in bearer form) valued at US$10,000 or more that are transported into the United States. Travelling employees also must disclose the purpose of their visits to US border authorities.

29 May foreign private banking institutions send documents to clients and prospective clients in your jurisdiction? Are there any licensing or registration requirements?

Yes, documents may be sent to clients within the United States from non-US financial institutions, but in some situations, the transmission of such documents may trigger US licensing and registration requirements. As a general matter, once US 'jurisdictional means' (email, mail, or telephone) are used, the United States may enforce federal laws against the people who employ such means whether or not they are in the United States.

Tax disclosure and reporting

30 What are the main requirements on individual taxpayers in your jurisdiction to disclose or establish tax-compliant status of private banking accounts to the authorities in your jurisdiction? Does the requirement differ for domestic and foreign private banking accounts?

There is no explicit disclosure requirement for US and non-US taxpayers to disclose a US account to the US tax authorities. However, US taxpayers must report income derived from such accounts on their US tax returns. In addition, US financial institutions generally must report to the IRS information about income paid to such individuals' bank accounts. The requirements differ with respect to private banking accounts held by US persons outside the United States: the existence of such accounts must be reported to US tax authorities and the US Treasury Department.

31 Are there any reporting requirements imposed on the private banks or financial intermediaries in your jurisdiction in respect to their domestic and international clients?

There are comprehensive reporting requirements imposed on US financial institutions with respect to their US and non-US clients. Income paid with respect to US stocks or securities is generally subject to information reporting by the payor if the amount exceeds US$10. In addition, other information reporting requirements may apply, such as the Foreign Account Tax Compliance Act (FATCA). US financial intermediaries (including US affiliates of non-US banks) that make payments to non-US financial intermediaries are also required to comply with FATCA information reporting requirements which apply to all payments from US sources.

32 Is client consent required to permit reporting by the private bank or financial intermediary? Can such consent be revoked? What is the consequence of consent not being given or being revoked?

No client consent is required to enable reporting by a financial institution to the IRS, however a US taxpayer's failure to provide certain required taxpayer identifying information may result in the imposition of withholding tax.

Structures

33 What is the most common legal structure for holding private assets in your jurisdiction? Describe the benefits, risks and costs of the most common structures.

Limited liability companies (LLCs), corporations, trusts and partnerships are the most frequently used structures in the United States. The manner in which each structure is taxed may provide certain benefits or costs. The risk associated with each type of structure is largely based on the corporate formalities required or the extent to which liability is limited.

LLCs are formed under state law and are a popular structure because they provide the limited liability of corporations and provide the ability to be treated as pass-through entities for taxation purposes (ie, individuals are taxed, not the entity). LLCs may be formed with either one or more members. Although an LLC requires compliance with certain legal and procedural formalities, they are generally not as onerous as those for a corporation.

Corporations are chartered under state law and must follow certain legal and procedural formalities in order to maintain a separate legal identity from its owners. As a general matter, income derived by a corporation is subject to US federal income tax at the corporate level and is also subject to US federal income tax at an individual taxpayer level when distributed to its shareholders.

Partnerships are formed under state law. For US federal income tax purposes, income generally flows through the partnership and is reported on each partner's individual income tax return. In a general partnership, partners are liable for the business debts of the partnership (unlike a corporation, limited liability is not available). Other partnership forms (limited partnerships and limited liability partnerships) offer varying degrees of liability protection. Individuals typically do not hold wealth in partnership form unless the partnership is a collective investment vehicle, such as an investment fund. Under US tax rules, a partnership may elect to be taxed as if it were a corporation.

Trusts are created under state law, whereby trustees hold property for the benefit of beneficiaries. As a general matter, complex trusts are considered taxable entities while simple trusts and grantor trusts are treated like pass-through entities, such that income derived by the trust is taxed as if it were derived directly by the beneficiaries of a simple trust or the grantor of a grantor trust. Trusts that engage in a trade or business may elect to be taxed as a corporation or partnership.

34 What is the customary level of know-your-customer (KYC) and other information required to establish a private banking relationship with a structure?

New regulations were issued by FinCEN in 2016 will apply general KYC requirements to structures that are legal entities under US law (eg, LLCs, corporations, and partnerships); accordingly, all CDD requirements will apply starting in May 2018. Although financial institutions are not required to look through a trust to its beneficiaries, additional steps to verify the identity of a customer that is not an individual, such as obtaining information about persons with control over the account, may be required.

35 What is the definition of controlling person in your jurisdiction?

Generally, in the case of a trust, a controlling person means any natural person who exercises control over the trust, which could be the settlors, the trustees, the protectors, the beneficiaries or any other natural person. Note that the concept of a 'controlling person' generally is not relevant for US taxation purposes, which looks to the beneficial owner of the trust or the trust itself for determining tax liability.

In the case of legal entities (ie, other than trusts), natural persons in similar positions are controlling persons. In the case of a corporate structure, an investor can be a controlling person if he or she owns or controls more than a certain percentage of a corporation's voting or outstanding shares. The specific percentage of share ownership or control that will trigger controlling person status varies depending on the relevant legal requirement, and may be as low as five per cent in the case of ownership of an insured bank or as high as 50 per cent for certain economic sanctions.

36 Are there any regulatory or tax obstacles to the use of structures to hold private assets?

State law requirements must be satisfied to reap the benefits (eg, potentially simplified taxation, limited liability) that structures afford. For instance, corporate formalities must be followed or the corporate form will be disregarded, with generally negative consequences for the individuals behind the structure.

Typically, the choice of structure is governed by whether the investor desires look-through treatment (eg, the ability to offset income with certain investment losses) or seeks to defer tax until a distribution is made or the corporate stock is sold.

The choice of how to deal with the tax obligations imposed under US law is complex and investors should always contact their tax adviser for assistance in determining the best approach based on their particular facts and circumstances.

Non-US owners of certain entities that invest in the United States may be obligated to report certain information to the US tax authorities. In addition, US entities are generally obligated to report, on an annual basis to the US tax authorities, certain payments made to their equity or debt holders.

Contract provisions

37 Describe the various types of private banking contract and their main features.

Private banking services may entail various contracts depending on the products, services and intermediaries involved. Typically, the contractual relationship between a customer and a bank is fairly one-sided, in favour of the bank. However under federal law, banks are required to disclose or provide notice of the key terms and features for a customer's accounts or products. Such disclosures may include deposit agreement terms, loan terms and related disclosures for electronic banking and ATM usage, among others.

For investment advisers, certain contractual terms are prohibited, for example, assignment without the client's consent. Additionally, the contract language cannot waive compliance with the rights or rules under the Advisers Act. Similarly, a customer cannot contractually waive his or her rights or duties owed under the 1934 Act. Also, broker-dealers that are members of FINRA must arbitrate disputes with customers before FINRA panels (FINRA has its own code of rules for arbitration).

38 What is the liability standard provided for by law? Can it be varied by contract and what is the customary negotiated liability standard in your jurisdiction?

Contract liability

A financial institution that breaches its agreement with a client may be liable for actual damages occurring as a result of the breach, provided that the damages were (i) foreseeable (that is, reasonably contemplated by the parties) at the time of contracting; (ii) proven with reasonable certainty; and (iii) proven by a preponderance (more than 50 per cent) of the evidence. Punitive damages generally are not available for breach of contract. In New York, punitive damages may be available for breach of contract if the breach was aimed at the public generally and involved particularly egregious misconduct. A contract may select the body of law to be applied, as well as the court (venue) in which the dispute will be resolved, and typically will be permitted to select arbitration as an alternative to judicial adjudication, but cannot vary the liability standard. A contract may, however, agree on the amount of applicable damages (known as 'liquidated damages') if (i) the amount of damages would be uncertain if damages had to be proven; and (ii) the amount selected is reasonable. A contract can also provide for a waiver of consequential damages (ie, damages that do not arise directly from the breach) and incidental damages arising from a breach, or may include a cap on contractual damages. Damages arising from a breach may be offset if the customer recovers from other sources (eg, insurance).

Update and trends

Financial technology and innovation (fintech) is beginning to affect how institutions provide private banking and wealth management services. Multiple federal regulators and several state regulators have taken steps to promote responsible innovation and modernise existing regulations to respond to the changing climate.

The OCC is in the process of setting up a new form of limited-purpose national bank charter that will allow fintechs to pursue their business models. A fintech company chartered as a limited-purpose national bank will be subject to many of the same laws and regulations as other national banks and will be able to operate in all 50 states without having to pursue registration or licensure on a state-by-state basis. Certain states and the Conference of State Bank Supervisors (CSBS) have challenged the OCC's actions in court as exceeding its authority, and those challenges remain pending at this time.

New investment and transaction technologies that may affect private banking include distributed ledger technology (DLT) (also called blockchain or distributed database technology) and robo-advising (also called automated advising). DLT changes how transactions are processed in ways that should increase the speed of transactions and the resiliency/integrity of the transaction processing system. However, DLT presents AML compliance concerns because transactions using DLT can involve anonymous counterparties, network operators and record-keepers, none of whom would be visible to the suspicious activity monitoring that is conducted by nation financial intelligence units such as FinCEN. Other compliance issues with DLT include control over assets, customer privacy and security. Robo-advising involves the use of algorithms and online programs to provide digitally tailored investment advice that is based on information input into the program by the client. The SEC has taken an interest in robo-advisers and recommends that institutions conduct regular monitoring and maintenance of the algorithmic programs and provide adequate information to the client about the nature of the investment advice and how it is generated.

Other regulators have introduced innovation initiatives within their spheres of regulation, including: (i) the CFPB's Project Catalyst to promote consumer-friendly innovation; (ii) the Federal Reserve's 2016 study on DLT in payments, clearing and settlement; and (iii) state initiatives, such as the Conference of State Bank Supervisors Vision 2020 in May 2017, the NYDFS's 'BitLicense' for virtual currency businesses, and the Illinois Department of Financial and Professional Regulation's guidance on virtual currencies.

Institutions that provide private banking and wealth management services will need to evaluate how new technologies may affect existing legal requirements and obligations and offer opportunities to grow and innovate.

Tort liability

Under (typically state) common law, all types of financial institutions typically can be held liable to their clients for their negligence. Negligence is the failure to use reasonable care which results in damage to a client.

In some instances, an institution may be permitted, by contract, to limit its liability to customers to those cases involving gross negligence or wilful misconduct. Gross negligence is serious carelessness and involves a voluntary, conscious disregard of the need to use reasonable care that is likely to cause foreseeable grave harm to persons or property. Wilful misconduct requires proof of knowledge or intent by the institution to engage in wrongdoing (eg, fraud, conversion (civil theft), or other intentional torts).

Wilful misconduct can result in the imposition of punitive damages. In many states, gross negligence can also result in the imposition of punitive damages. In some instances, an institution may be permitted, by contract, to preclude punitive damages, but as a matter of public policy, many courts will not enforce such limitations on punitive damages in cases of wilful misconduct or gross negligence.

Broker-dealers, custodians, investment advisers, and others with relationships of trust with their clients (which may occur in the private banking context) typically owe their clients a fiduciary duty, and may be liable to their clients for breach of fiduciary duty. A fiduciary duty is the highest standard of care. It typically includes obligations of good faith, fair dealing, and loyalty. Damages for a breach of fiduciary duty may include any amounts necessary to make the client whole and, typically in cases involving evidence of egregious misconduct, may include punitive damages. A financial institution that breaches its fiduciary duty may also be required to account (providing accounting details) to help the client trace his or her money and assess his or her damages.

Statutory liability

Statutes (typically federal) may also impose liability on institutions in specific contexts. For example, broker-dealers must fulfil an obligation of suitability to their customers: they must reasonably believe that their recommendations are in the best interests of the customer. Additionally, broker-dealers and investment advisers have a duty of best execution; that is, they must seek the best execution reasonably available for their customers' orders.

39 Are any mandatory provisions imposed by law or regulation in private banking contracts? Are there any mandatory requirements for any disclosure, notice, form or content of any of the private banking contract documentation?

See question 37. Broker-dealers, investment advisers and insurance companies must generally give privacy notices (as banks do) and there may also be product-specific notices required by law.

40 What is the applicable limitation period for claims under a private banking contract? Can the limitation period be varied contractually? How can the limitation period be tolled or waived?

Contracts are generally governed by state law and statutes of limitations vary by state. For instance, in New York, the statute of limitations for contracts is six years. At times, statutes of limitation are also specified in federal law. For instance, for SEC enforcement actions, the statute of limitations is five years from the date of the violation (in the case of a private right of action, it may be two years after the discovery of the facts constituting the violation).

Confidentiality

41 Describe the private banking confidentiality obligations.

US federal law does not provide the type of strict confidentiality (data protection and financial privacy) found in many other countries. Two federal statutes provide a lower level of protection.

The Right to Financial Privacy Act of 1978 (RFPA) applies to US government requests for financial records for most customers (ie, individuals, but not necessarily all companies or partnerships) of banks, among other institutions. The RFPA provides mechanisms to disclose such records to government authorities, provided that the financial institution complies with certain notice procedures to customers (if applicable), among other requirements. Certain exceptions may apply that allow for the disclosure of financial records in connection with law enforcement activities and private parties may be able to subpoena financial records in the context of private litigation, depending on the nature of the dispute and subject to a court's determination.

In addition, the Gramm-Leach-Bliley Act (GLBA) prohibits financial institutions (including banks and investment advisers) from disclosing non-public personal information about a consumer to non-affiliated third parties, unless the institution satisfies various notice and opt-out requirements or an exception applies. Even if a financial institution does not disclose non-public personal information, notice must be given at the time the customer relationship is established and annually thereafter if there has been a change to the policies and practices since the last notice. Furthermore, federal regulations require notice to customers and provide opt-out opportunities in situations involving marketing among affiliates.

State constitutions or statutes may provide more confidentiality beyond what federal law provides (eg, Florida has a state constitutional right to privacy that includes financial privacy) but, as a general matter, they do not restrict the ability to obtain financial information in civil or criminal proceedings. State common law, contractual obligations, and industry practice also generally prevent a financial institution from disclosing confidential customer information to unaffiliated third parties absent customer consent, a court or administrative order, or a clear legal authorisation to do so (eg, disclosure of confidential information that is necessary to pursue a legal claim against a customer in a court).

42 What information and documents are within the scope of confidentiality?

The RFPA covers financial records: an original or copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution.

Under GLBA, non-public personal information includes any information that is not publicly available, for instance, information that a consumer provides to a financial institution to obtain a financial product or service; results from a transaction between a consumer and the institution involving a financial product or service; or a financial institution otherwise obtains about a customer by providing a financial product or service.

43 What are the exceptions and limitations to the duty of confidentiality?

Exceptions to the RFPA include, among others, when a financial institution submits financial records for bank supervisory or regulatory purposes, or in accordance with federal statutes (eg, the BSA), by court order, judicial or administrative subpoena, or when requested by a government authority subject to a lawsuit involving the customer.

The GLBA includes certain exceptions to a customer's right to opt out, including when (i) the customer receives initial notice that a non-affiliated third party will perform services for the financial institution and that third party is prohibited by contract from using or disclosing the information outside of the specified purposes of the contract; (ii) disclosure is necessary to effect a transaction authorised or requested by the customer; (iii) a financial institution seeks to protect a customer against actual or potential fraud, or gives the information to its attorneys, accountants or regulators; or (iv) disclosure is to comply with federal or state laws or other legal requirements or to comply with authorised civil, criminal, or regulatory investigations or subpoenas or to respond to judicial process or government regulatory authorities. The BSA provides a safe harbour for financial institutions and their employees in connection with a good faith SAR filing.

44 What is the liability for breach of confidentiality?

A customer may collect civil penalties from any government agency or department that obtains, or financial institutions or their employees who disclose, information in violation of the RFPA. Penalties can include actual damages, court costs and reasonable attorneys' fees, as well as punitive damages for wilful or intentional violations. However, a financial institution that relies in good faith on a federal agency or department's certification may not be held liable to a customer for the disclosure of financial records.

Under the GLBA, civil and criminal penalties (including fines and imprisonment for five to 10 years) may be imposed on the institution as well as its officers and directors. Additionally, sanctions may be imposed including, for banks, the termination of FDIC insurance, as well as removal of the financial institution's management, and potentially barring those individuals from working in the banking industry. See question 38 for a discussion of the liability standards that would apply to other breaches of a duty of confidentiality involving a financial institution or its employees (eg, breaches involving contract liability).

Disputes

45 What are the local competent authorities for dispute resolution in the private banking industry?

Federal and state courts are available for dispute resolution. In addition, arbitration is available and sometimes can be mandatory under contractual agreements between the customer and a bank or other institution. However, the CFPB proposed a rule in May 2016 to curtail the use of mandatory arbitration clauses when consumers (eg, individuals, not entities and generally not investors (eg, brokerage accounts)) enroll for certain banking or financial services.

46 Are private banking disputes subject to disclosure to the local regulator? Can a client lodge a complaint with the local regulator? How are complaints investigated?

Banking regulators typically do not get involved in disputes between a bank and its clients; however, federal examiners will evaluate a bank's exposure to litigation and its impact on the bank's risk profile in the course of their supervisory activities. To do so effectively, the examiner will need to know about significant pending or potential litigation against the bank. In addition, the Class Action Fairness Act requires banks and US branches of non-US banks (among others) to notify their federal regulator of proposed class action settlements.

A broker-dealer, on a Form BD, and investment adviser, on a Form ADV, must disclose facts about certain legal or disciplinary events that are considered to be material to a client's evaluation of the business or its management, including litigation or customer complaints, and such complaints must be kept in records that the SEC or FINRA inspect during examinations.

Furthermore, customers can lodge complaints with federal or state regulators, and a state's attorney general typically accepts financial crime complaints. For instance, the SEC accepts complaints related to the federal securities laws directly through hotlines. In the case of a registered broker-dealer or investment adviser, the SEC may directly inquire as its regulator. For other US persons, the SEC can use the federal courts. For non-US persons, the SEC will work with foreign regulators to investigate the violation.

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