Regulation of non-EEA bank branches in the UK
Summary comparison of UK and US approaches to branch regulation
December 2012
The FSA’s proposed action against branches of US and other non-EEA banks highlights differences of approach to regulation of bank branches.

In general, the UK regime has been favourable to non-EEA banks allowed to have UK branches: in particular because they have been subject to few restrictions on their activities and no branch capital or, in many cases, liquidity requirements.

However, the FSA now proposes to ban banks from countries with “national depositor preference regimes” from accepting any deposits unless they can make alternative arrangements to protect depositors with their UK branches (Addressing the implications of non-EEA national depositor preference regimes, CP12/23, September 2012).

The US has a different approach to protecting depositors with US branches of foreign banks.

The US restricts the deposit-taking activities of US branches of foreign banks to wholesale deposit-taking.

The US generally requires foreign branches to hold a capital equivalency deposit of 1% of liabilities (or $2m if greater), and has powers to impose specific asset maintenance requirements on the branch.

US branches of foreign banks are subject to the special insolvency and receivership applicable to US banks and assets recovered are used to satisfy the creditors of the branch before being turned over to the home state liquidator/receiver.

The UK has begun to move towards this approach but could go further instead of imposing an outright ban on deposit-taking by foreign banks subject to national depositor preference.

The UK proposes to introduce depositor preference for insured depositors with UK branches of foreign banks.

The proposed EU recovery and resolution directive will give the UK authorities powers to ring-fence local assets for the benefit of UK branch creditors if the EU authorities decide that they cannot recognise home state resolution actions.

However, any move to allow ring-fencing will need careful consideration (e.g. to address issues relating to multi-branch netting of derivatives) and the imposition of local liquidity requirements (e.g. those recently proposed in the US) will remain an issue for foreign banks as overlapping rules may unnecessarily trap liquidity and result in duplicative requirements.

This document summarises aspects of the regulatory regimes for bank branches in the UK and the US. It is not intended to be comprehensive or to provide legal advice. Regulators may be able to waive requirements or impose additional requirements in individual cases. For more information, speak to your Clifford Chance contact or one of the lawyers named below.
<table>
<thead>
<tr>
<th><strong>Who is relevant local regulator?</strong></th>
<th><strong>UK</strong></th>
<th><strong>US</strong></th>
<th><strong>Comment</strong></th>
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<tr>
<td>Currently, Financial Services Authority (FSA). In future, Prudential Regulatory Authority (PRA) and Financial Conduct Authority (FCA)</td>
<td>Federal Reserve (Fed) and New York Department of Financial Services (DFS).</td>
<td>For UK, assumes the establishment of a UK branch of a non-EEA bank. For US, assumes the establishment of a New York state licensed branch of a non-US bank.</td>
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<tr>
<th><strong>Is there any explicit legal requirement that the bank is subject to equivalent regulation in its home state?</strong></th>
<th><strong>UK</strong></th>
<th><strong>US</strong></th>
<th><strong>Comment</strong></th>
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<td>No but the foreign bank must meet the threshold conditions for authorisation (and see below in relation to whole firm liquidity modifications).</td>
<td>Fed may not approve a branch application unless it finds that the foreign bank is subject to comprehensive consolidated supervision by its home country supervisor and has furnished all information that Fed requires to assess the application. But it may, in its discretion, approve the application if it finds that the home country supervisor is actively working to establish such arrangements and all other factors are consistent with approval.</td>
<td>Under the EU Banking Consolidation Directive, EU Member States must not apply to branches of non-EEA banks provisions &quot;which result in more favourable treatment&quot; than that accorded to branches of EEA banks. Certain non-US banks were not subject to review under the mentioned standards as their branches were established before the enactment of the Foreign Bank Supervision Enhancement Act of 1991.</td>
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<th><strong>Is there a requirement for any initial non-risk weighted branch capital (dotation capital)?</strong></th>
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<th><strong>US</strong></th>
<th><strong>Comment</strong></th>
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<td>No.</td>
<td>Yes. Branches must generally maintain a &quot;capital equivalency deposit&quot; with a depository bank of assets pledged to the DFS in an amount equal to the greater of 1% of the branch's average liabilities for the previous month or US$2m.</td>
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<th><strong>Is there an ongoing risk-based or similar capital requirement for the branch?</strong></th>
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<th><strong>US</strong></th>
<th><strong>Comment</strong></th>
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<td>No. However, it is a threshold condition that the authorised firm as a whole as adequate resources.</td>
<td>No (other than as stated above).</td>
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### Regulation of non-EEA bank branches in the UK

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<th>US</th>
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<td><strong>Is there an ongoing liquidity requirement for the branch?</strong></td>
<td>Yes. Branches are subject to UK liquidity requirements, including a self sufficiency requirement. However, banks that are subject to a broadly equivalent home state regime may be able to obtain a whole firm liquidity modification permitting it to rely on the whole firm’s liquidity resources.</td>
<td>No. But the Dodd-Frank Act authorises the Fed to impose liquidity requirements on systemically important banking organisations operating in the US and in December 2012 the Fed proposed rules imposing liquidity requirements on US branches of a non-US banking organization with combined US assets of US$50 billion or more.</td>
<td>The Fed’s recent proposals would only require the US branch to maintain the first 14 days of its 30-day liquidity buffer against stressed cash flow needs (the balance could be met at the consolidated level).</td>
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<td><strong>Are there any other requirements for the branch to maintain a particular level of assets relative to the branch’s liabilities (asset maintenance requirement)?</strong></td>
<td>No.</td>
<td>The DFS can require a branch of a foreign bank to maintain a certain amount of eligible assets. Currently, the amount is set at zero but the DFS may impose an asset maintenance requirement on a case-by-case basis.</td>
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<td><strong>Do central bank reserve requirements apply?</strong></td>
<td>Yes. Cash ratio deposits with Bank of England.</td>
<td>Yes. Reserve requirements with the Fed.</td>
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<td><strong>Are there any restrictions on deposit-taking activities of the branch?</strong></td>
<td>Generally no. But FSA could impose conditions on the bank’s deposit-taking permissions e.g. restricting the ability to accept retail deposits.</td>
<td>Generally, US branches of foreign banks cannot take retail deposits (deposits with initial amount of less than $250,000) or offer US federal deposit insurance to depositors (however, there are some grandfathered branches).</td>
<td>Foreign banks in the UK are generally unlikely to be affected by the implementation of the Vickers report, because the recommendations are only to apply to banks with more than £25bn of mandated deposits. It is unclear how the recommendations of the EU Liikanen report will affect non-EEA banks with EU branches, in particular if the branch takes insured deposits.</td>
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<td>Are there any other restrictions on the type of activities the branch can conduct?</td>
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<td>US</td>
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<tr>
<td>No (but is required to obtain FSA permission to conduct other regulated activities and those permissions may be subject to conditions e.g. as regards dealings with retail clients).</td>
<td></td>
<td>Yes. Branch is subject to the same activities restrictions as a New York bank, including the restrictions on underwriting securities. It is also required to &quot;push-out&quot; otherwise permissible securities broker-dealer and swaps activities.</td>
<td>See above.</td>
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| Can the head office or other foreign branches rely on the authorisation to conduct cross-border business? | Yes. The licence is granted to the bank. | Yes. The licence is granted to the bank. | |

| Are there prudential requirements that apply to the home state or other foreign operations of the bank? | Limited requirements apply to the bank as a whole. | The bank as a whole will be treated as a bank holding company and subject to restrictions on its non-banking activities and to the Volcker rule (subject to some reliefs). | |

| Are the branch’s deposits insured under the local deposit guarantee scheme? | Yes. Covers retail and SME deposits up to £85,000. | Generally, no. | |

| What are the applicable insolvency or resolution regimes? | Currently, the only applicable insolvency regime is winding up by the court. The Banking Act special resolution regime does not apply to a non-EEA bank. | US branches of foreign banks are subject to the special insolvency and resolution regime to which US banks are subject (distinct from general corporate insolvency proceedings). The proposed EU recovery and resolution directive would give EU authorities powers to recognise home state special resolution proceedings or to use special resolution measures in respect of the branch. | |

| What are the rules on distribution of assets in insolvency? | In principle, the assets recovered in the UK winding up are available to be distributed to the bank's worldwide creditors, including the creditors of the branch (recent proposals would give UK insured depositors a liquidation priority). | The US assets of the bank would be applied to meet the claims of creditors of the US branch before being turned over the liquidator or receiver in the home state insolvency proceeding. The proposed directive would give the authorities powers to ring-fence the branch's business for the benefit of local depositors or other creditors if they did not recognise home state resolution actions. | |
Contacts

**Chris Bates**
Partner
T: +44 20 7006 1041
E: chris.bates@cliffordchance.com

**Caroline Dawson**
Senior Associate
T: +44 20 7006 4355
E: caroline.dawson@cliffordchance.com

**Caroline Meinertz**
Senior Associate
T: +44 20 7006 4253
E: caroline.meinertz@cliffordchance.com

**Nick O’Neill**
Partner Expatriate
T: +1 212878 3119
E: nick.o’neill@cliffordchance.com

**Thomas Pax**
Partner
T: +1 202912 5168
E: thomas.pax@cliffordchance.com

**Dermot Turing**
Partner
T: +44 20 7006 1630
E: dermot.turing@cliffordchance.com

Regulation of non-EEA bank branches in the UK
Worldwide contact information
35* offices in 25 countries

Abu Dhabi
Clifford Chance
9th Floor
Al Sila Tower
Sowwah Square
PO Box 26492
Abu Dhabi
United Arab Emirates
Tel +971 (0)2 613 2300
Fax +971 (0)2 613 2400

Amsterdam
Clifford Chance
Droogbak 1A
1013 GE Amsterdam
PO Box 251
1000 AG Amsterdam
The Netherlands
Tel +31 20 711 9000
Fax +31 20 711 9999

Bangkok
Clifford Chance
Sindhorn Building Tower 3
21st Floor
130-132 Wireless Road
Pathumwan
Bangkok 10330
Thailand
Tel +66 2 401 8800
Fax +66 2 401 8801

Barcelona
Clifford Chance
Av. Diagonal 682
08034 Barcelona
Spain
Tel +34 93 344 22 00
Fax +34 93 344 22 22

Beijing
Clifford Chance
33/F, China World Office 1
No. 1, Jangchunmenwai Dajie
Chaoyang District
Beijing 100004
China
Tel +86 10 6535 2288
Fax +86 10 6535 9028

Brussels
Clifford Chance
Avenue Louise 65 Box 2
1050 Brussels
Belgium
Tel +32 2 533 5911
Fax +32 2 533 5959

Bucharest
Clifford Chance Badea Excelsior Center
28-30 Academiei Street
12th Floor, Sector 1
Bucharest, 010016
Romania
Tel +40 21 66 66 100
Fax +40 21 66 66 111

Casablanca
Clifford Chance
169, boulevard Hassan 1er
Casablanca 20000
Morocco
Tel +212 520 132 080
Fax +212 520 132 079

Changsha
Clifford Chance
One Nanhu Plaza
Changsha 410000
China
Tel +86 731 888 1111
Fax +86 731 888 1110

Chongqing
Clifford Chance
Chongqing 400015
China
Tel +86 23 6363 1000
Fax +86 23 6363 1001

Hong Kong
Clifford Chance
28/Floor
Jardine House
One Connaught Place
Hong Kong
Tel +852 2825 8888
Fax +852 2825 8800

Istanbul
Clifford Chance
Kanyon Ofis Binai Kât 10
Büyükdeğirmen Cad. No. 185
34394 Levent
Istanbul
Turkey
Tel +90 212 339 0000
Fax +90 212 339 0098

Jeddah
Clifford Chance
King Fahad Road
Jeddah 21491
Saudi Arabia
Tel +966 1 400 4201
Fax +966 1 250 6500

Kuala Lumpur
Clifford Chance
11th Floor
14 Lebuh Tunku Abdul Rahman
Kuala Lumpur 50150
Malaysia
Tel +60 3 2031 0000
Fax +60 3 2031 0001

Luxembourg
Clifford Chance
2-4 place de Paris
B.P. 1147
L-1011 Luxembourg
Grand Duché de Luxembourg
Tel +352 48 13 85
Fax +352 48 50 50 50

Madrid
Clifford Chance
Paseo de la Castellana 110
28046 Madrid
Spain
Tel +34 91 590 75 00
Fax +34 91 590 75 75

Milan
Clifford Chance
Piazza Z. Boschi, 3
20121 Milan
Italy
Tel +39 02 806 341
Fax +39 02 806 34200

Moscow
Clifford Chance
U. Gashake 6
125047 Moscow
Russian Federation
Tel +7 495 258 5050
Fax +7 495 258 5051

New York
Clifford Chance
360 5th Avenue
New York, NY 10017
USA
Tel +1 212 881 4500
Fax +1 212 881 4555

Nairobi
Clifford Chance
19th Floor
18th Floor
20th Floor
Nairobi 00100
Kenya
Tel +254 20 339 0000
Fax +254 20 339 0001

Paris
Clifford Chance
9 Place Vendôme
75001 Paris
France
Tel +33 1 44 05 52 52
Fax +33 1 44 05 52 00

Perth
Clifford Chance
Level 7, 190 St Georges Terrace
Perth, WA 6000
Australia
Tel +61 8 9262 5555
Fax +61 8 9262 5522

Singapore
Clifford Chance
12 Marina Boulevard
25th Floor Tower 3
Marina Bay Financial Centre
Singapore 018982
Tel +65 6410 2200
Fax +65 6410 2288

Sydney
Clifford Chance
Level 16
No. 1 O’Connell Street
Sydney NSW 2000
Australia
Tel +61 2 9922 6000
Fax +61 2 9922 8088

Tokyo
Clifford Chance
Akasaka Tameike Tower, 7th Floor
1-1 Akasaka-2 Chome
Minato-ku, Tokyo 107-0052
Japan
Tel +81 3 5561 6600
Fax +81 3 5561 6699

Washington, D.C.
Clifford Chance
2001 K Street NW
Washington, D.C. 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

Washington
Clifford Chance
King Street West
Washington DC 20006 - 1001
USA
Tel +1 202 912 5000
Fax +1 202 912 6000

**The Firm also has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.

* Clifford Chance’s offices include a second office in London at 4 Coleman Street, London EC2R 5JJ.

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