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Guide to Bank Underwriting, Dealing and Brokerage Activities

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The Guide to Bank Underwriting, Dealing and Brokerage Activities is about the capital markets trading activities of U.S. and foreign banks and bank holding companies in the United States. It describes in some detail the U.S. regulatory regime applicable to these activities and tries to highlight recent developments respecting the conduct of securities-related business under the Gramm-Leach-Bliley Act, the Bank Holding Company Act, the Glass-Steagall Act and other applicable banking and securities laws. The new Thirteenth Edition will be available shortly; it speaks as of September 15, 2008 and reflects a substantial re-writing and update from the 2007 edition.

As the Guide goes to print, the significant credit and securities market disruptions which began in 2007 are still playing out. The Guide will be supplemented with a summary of the federal legislative response. In addition, the Guide devotes significant attention to the implications of the ongoing credit/securities crisis, including in Part I (legislative and administrative proposals relating to the structure and operation of financial service operations), Part II.A (risk management), Part III (commercial banking organization acquisition of securities operations and restrictions on covered transactions by a bank with its affiliates), Part VII (private equity investments in U.S. banking organizations) and Part IX (international linkages and implications).

The Guide consists of 11 Parts.

Part I discusses the framework, scope, implementation and evaluation of regulatory policies for the integration of investment and commercial banking and insurance activities. It provides a general overview for U.S. and foreign bank and holding company securities-related activities, and outlines the applicable regulatory framework, and legislative/administrative measures for financial services convergence. Part I devotes significant attention to the "business of banking" and the various powers given to different types of entities engaged in U.S. banking, insurance and capital markets operations, and discusses "preemption issues" applicable to national bank capital markets activities.

Part I also highlights initiatives and developments with respect to joint ventures, "networking", "strategic alliance" and other "controlling" and "non-controlling" arrangements between and among banking organizations, securities firms and other business operations.

In addition, Part I includes a detailed, issue-oriented analysis of the Gramm-Leach-Bliley Act, including the scope of the powers of financial holding companies, ongoing expansion of the scope of "complementary activities" which financial holding companies are permitted to conduct, evolution and application of "privacy" principles and other significant recent legislative, regulatory and market developments related to Gramm-Leach's operation and implementation. Appendix A provides a current list of financial holding companies (domestic and foreign), as well as of financial subsidiaries of national banks.

In addition to Part I's summary, a more detailed substantive discussion of various provisions of the Gramm-Leach-Bliley Act has been organized topically and included in the various subsequent Parts of the Guide.

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Part II discusses permissible trading and investment activities for financial holding companies, bank holding companies and banks. It focuses on governmental and other "eligible" securities (including auction-rate and other governmental securities markets), "investment securities", specialized equity securities and "identified banking products". It analyzes powers at the financial holding company, bank holding company and bank levels, and addresses the Gramm-Leach-Bliley Act "push-out" provisions relating to bank dealer activities.

Part II also includes a significantly expanded and reorganized treatment of recent market and regulatory developments with respect to "operational risk"-related aspects of banking organization trading activities (particularly in the context of the market turmoil of 2007-2008), legal and compliance-related risks in the trading and derivatives context, and operational, administrative enforcement and litigation-related aspects of the management and operation of hedge funds and related investment vehicles, and bank participation in "complex structured finance transactions".

Moreover, given the critical importance of derivatives activities to banking organizations, Part II sets out an updated and expanded description of bank regulatory and market developments respecting the issuance and trading of derivative products (including, in particular, in respect of recent regulatory expansion of bank participation in energy, equity, emissions, credit, commodity, "event" and other derivatives), as well as foreign exchange, precious metals and bullion.

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Recognizing that, at this time, virtually every major investment bank has converted into, or been acquired by, a bank/financial holding company, Part III addresses securities underwriting and dealing empowerments relevant to bank/financial holding companies, and discusses various considerations (including under the Hart-Scott-Rodino Antitrust Improvements Act) relevant to the acquisition of investment banking firms by banking organizations.

Part III's detailed analysis of anti-tying considerations in the capital markets context reflects ongoing regulatory and industry evaluation of the Anti-tying Statute. Moreover, Part III contains an updated discussion of Sections 23A and 23B of the Federal Reserve Act and the Board's Regulation W, including the most recent regulatory precedents.

For ease of reference, Appendix B provides an annotated text of the Operating Standards applicable to financial holding companies and, more broadly, to bank holding company securities operations. For historical context, it also retains an annotated version of the "Section 20 firewalls" (which are applicable under some very limited circumstances notwithstanding the adoption of the Operating Standards).

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Parts IV and V focus on those instruments which are not themselves "securities" for most banking and securities law purposes.

Part IV discusses developments respecting certificates of deposit (CDs) and similar money market instruments -- including with respect to CD characterization as "non-securities" under securities and banking law, FDIC-insurance-related issues, and SEC proceedings respecting "deposit-like" corporate/"prime" debt obligations. Part IV discusses the marketing of different types of CD products, as well as of ongoing issues with respect to equity- and commodity-linked CDs (both "interest-only at risk" and "principal at risk").

Part V discusses loan sales markets and highlights a number of significant recent regulatory and industry developments. Among other things, it discusses accounting-related issues, and issues with respect to transactions in sub-prime credits. Precedents and guidance with respect to the use or misuse of "inside information" in loan, loan participation and other credit-related transactions in the United States and the European Union have been given special attention, reflecting ever-increasing regulatory focus. Part V also analyzes the status of loan "notes" and "participations" under federal securities laws (including under the Gramm-Leach-Bliley "push-out" provisions), as well as the other bases for assessing

liability of a loan seller to a loan purchaser. It includes a checklist of suggested steps to be taken to increase the likelihood that a loan note/participation sale program will not be characterized as involving the disposition of "securities".

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Parts VI through IX focus on an "activity analysis" of bank capital markets activities (i.e., an analysis of activities which fall short of "underwriting" or "dealing").

Part VI discusses "agency placement" and related activities. It reflects recent market and regulatory developments respecting private placement services and discusses the nature and type of these services provided by financial holding companies, bank holding companies and banks.

Part VII addresses merchant banking/private equity developments and empowerments. It discusses the Federal Reserve Board's Gramm-Leach-Bliley Merchant Banking Rules, and includes a detailed and contextual analysis of other private equity empowerments available to financial holding companies, bank holding companies and banks under the Bank Holding Company Act and other federal banking laws. Part VII raises issues concerning venture capital, SBIC and other investments (in both the domestic and the international context). It includes an expanded discussion of regulatory empowerments for real estate investment, management and brokerage, and addresses significant recent bank regulatory and securities law requirements in the M&A advisory, "finder" and corporate finance context.

Part VII includes a detailed and expanded discussion of private equity investments in regulated industries generally, of concepts of "control" and "controlling influence" for regulatory purposes, and, more particularly, of the manner, scope and structuring of "control" and "non-control" investments by private equity pools, sovereign wealth funds and other collective vehicles in U.S. and foreign banking organizations and other depository institutions.

Part VIII recognizes the increasing importance of, and regulatory focus on, compliance with the anti-money laundering and anti-terrorist financing provisions of the Bank Secrecy Act (BSA) and the USA PATRIOT Act, and with the economic sanctions/embargoes administered by the U.S. Office of Foreign Asset Control (OFAC), each of which is critically relevant to the global provision of asset management, investment fund and capital markets services. Key regulatory issues are addressed through descriptions of "red flags" and "best practices" regarding BSA/PATRIOT Act/OFAC compliance requirements, and securities and bank regulatory enforcement actions and given particular attention. In

particular, those sections of Part VIII which deal with economic sanctions and OFAC issues have been revised, reorganized and expanded.

Part VIII also covers a broad range of private banking, fiduciary, mutual fund and asset management issues, and places special emphasis on the most recent developments respecting funds management and collective investment vehicles, including legislative and regulatory actions, enhanced disclosure, code of ethics, director responsibility and conflict-of-interest issues. Appendix C enumerates the administrative services addressed by the Federal Reserve Board in various approvals respecting mutual fund-related operations as well as the interrelationship between these approvals and other statutory and regulatory overlays.

Part IX discusses all types of intermediation by banking organizations in financial markets. It includes significant recent developments concerning "brokerage", securities lending/repo services, broker-dealer "outsourcing" issues, permissible bank holding company/bank involvement in physically-settled commodity and energy-related transactions and other transactional activities. Special attention is given to the Gramm-Leach-Bliley "push-out" provisions relating to bank broker activities.

In addition, Part IX includes a detailed discussion of current regulatory, compliance and examination issues relating to broker-dealer, analyst and other securities operations. Part IX also addresses recent developments respecting the Internet's application to securities and other capital market activities

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Part X discusses ongoing developments from a bank capital markets perspective with respect to asset securitization, focusing in particular on the expanding universe of assets (both by type and by geography) that are the subject of securitization efforts, as well as on the emergence of "covered bonds" as a securitization alternative.

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Part XI discusses international securities linkages, focusing on significant recent developments with respect to the scope of capital markets activities permitted to U.S. and foreign financial institutions which involve cross-border transactions. Special attention is given to issues with respect to the relationship between a U.S. broker-dealer/investment adviser/asset manager/investment company and its foreign bank/securities dealer affiliates (including under the Federal Reserve Board's Regulation K, the SEC's Rule 15a-6 and extensive no-action letters and other regulatory precedents).

Part XI includes a discussion of the SEC's 2008 proposal to amend Rule 15a-6, as well as of other cross-border securities, funds management and banking-related linkages. It addresses market developments which evidence the continuing globalization of securities, asset management and derivatives markets. The discussion of concepts of "mutual recognition" of foreign regulatory regimes, in particular, has been reorganized and expanded.

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The Guide would not have been possible without the extensive participation of a number of our colleagues, including Desmond Eppel (Part I), Richard Kim (Part II), Gregg Rozansky (Parts III and VII), Antonino Carbonetto (Parts IV and VI), Timothy Byrne (Part V), Katherine Mooney Carroll (Part VIII), David Aman (Part IX), Kory Langhofer (Part X) and Ardith Eymann (Part XI).

While we gladly acknowledge the efforts and insights of all our colleagues, responsibility for shortcomings in the Guide is, of course, ours alone.

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