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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 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. This Fourteenth Edition speaks as of September 15, 2009 and reflects a substantial re-writing and update from the 2008 edition.

As the Guide goes to print, the legislative and administrative response to the significant credit and securities market disruptions which began in 2007 are still playing out. The Guide will be supplemented with a summary of final relevant federal legislation when and if it is adopted. The Guide devotes significant attention to the implications of the credit/securities crisis of the past two years, 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 XI (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 legislative and regulatory proposals that could reshape the provision of financial services in the United States.

Under all pending proposals, the "bank charter" will remain an enormously powerful and comprehensive organizational framework for the conduct of capital markets-related activities. According, Part I analyzes the "business of banking" and the various powers given to different types of entities engaged in U.S. banking, insurance and capital markets operations. It also discusses "preemption issues" applicable to bank (primarily 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 (particularly in respect of commodities businesses), 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, all of which have been revised significantly.

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Part II discusses permissible trading and investment activities, and 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 an in-depth discussion of recent market and regulatory developments with respect to legal, compliance and "operational risk"-related aspects of banking organization trading activities (particularly in the context of the financial crisis of 2007-2009), 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 as well as the uncertainty arising from legislative proposals related to derivative markets,

Part II sets out an updated description of bank regulatory and market developments and initiatives respecting the legal structure for, and risks inherent in, the issuance and trading of derivative products (including, in particular, in respect 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 addresses loan sales markets and highlights a number of significant recent regulatory and industry developments. It discusses 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, 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 in a number of different contexts. 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 covers 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 discussion of private equity investments in regulated industries generally, and of concepts of "control" and "controlling influence" for regulatory purposes (including in the context of foreign bank investments in U.S. "critical infrastructure" that might trigger application of the Exon-Florio provisions of the Foreign Investment Act (as administered by the Committee on Foreign Investment in the United States (CFIUS)).

Part VII also includes an expanded analysis 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"). 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 are given particular attention. In particular, those sections of Part VIII which deal with economic sanctions and OFAC issues have been revised and expanded.

In addition, for the first time, Part VIII includes a discussion of the Foreign Corrupt Practices Act and its implications for the provision of global financial services.

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 enhancements, enforcement actions (including a new discussion of "Ponzi schemes" and their impact on asset management supervisory and control issues), enhanced disclosure, code of ethics, director responsibility and conflict-of-interest issues. The discussion of securities law considerations affecting asset management activities has been streamlined and enhanced.

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, including with respect to ongoing industry efforts to restore confidence in securitization markets.

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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 pending 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 expanded.

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