

## GUIDE TO BANK UNDERWRITING, DEALING AND BROKERAGE ACTIVITIES

This Guide is about the capital markets 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 and other business under applicable banking and securities laws, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Gramm-Leach-Bliley Act, the Bank Holding Company Act, the Glass-Steagall Act and the International Banking Act. This Twentieth Edition speaks as of September 15, 2015 and reflects a substantial re-writing and update from the 2014 edition.

This Guide devotes significant attention to the dramatic re-focusing of banking and securities regulation that the Dodd-Frank Act requires. Dodd-Frank analysis is set out in Part I (Dodd-Frank summary, impact on Gramm-Leach-Bliley Act empowerments and preemption issues), Part II (risk management, “Volcker Rule” implications for proprietary trading and fund investment, hedge fund operations and derivatives), Part III (enhanced restrictions on a bank’s covered transactions with its affiliates), Part V (loan trading), Part VII (private equity investments), Part VIII (investment advisory/management and related developments), Part IX (enhanced broker-dealer requirements), Part X (securitization developments), and Part XI (international linkages).

This Guide consists of 12 Parts, and is supplemented by a detailed Table of Contents and Index of Defined Terms to make it easier to locate (and cross refer to) specific issues and areas of interest.

Part I discusses the framework, scope, implementation and evaluation of regulatory policies for the integration of investment and commercial banking activities. It provides an overview of 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 addresses the Dodd-Frank Act and its attendant rulemakings, including its implications for reshaping the provision of financial services in the United States. Since Dodd-Frank’s scope and rulemakings have evolved in the past year, Part I includes a significantly more detailed discussion of Dodd-Frank-related regulatory and market developments.

Dodd-Frank notwithstanding, the “bank charter” remains an enormously powerful and comprehensive organizational framework for the conduct of capital markets activities. Accordingly, 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 capital markets activities (including in the context of Dodd-Frank).

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, the scope of “complementary activities” which financial holding companies are permitted to conduct (particularly in respect of commodities businesses), 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 Dodd-Frank Act and the Gramm-Leach-Bliley Act has been organized topically and included in the various subsequent Parts of the Guide, all of which have been substantively revised.

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Part II goes to the heart of many of the most significant and far-reaching Dodd-Frank initiatives, including the Volcker Rule and U.S. derivatives markets.

Part II also discusses permissible trading and investment activities, ranging from U.S. federal, state, municipal and other “eligible” instruments, to “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. It includes an enhanced discussion of bank/bank holding company capital-related developments, as well as of the expanding regulatory framework applicable to state and municipal securities markets.

Part II includes an updated and expanded discussion of the final form of the Volcker Rule relating to bank/bank holding company/financial holding company “proprietary trading” and “private equity and hedge fund” sponsorship and investment.

In addition, Part II discusses recent market and regulatory developments with respect to legal, compliance and “operational risk”-related aspects of bank capital markets activities, administrative, enforcement and litigation-related aspects of the management and operation of hedge funds and investment vehicles, and bank participation in “complex structured finance transactions”. Part II also includes an expanded discussion of enforcement-related issues and developments.

Moreover, given the critical importance of derivatives activities to banking organizations, Part II updates the statutory, regulatory and market developments and initiatives respecting the legal structure for the issuance, trading and clearance of derivative products (including, in particular, energy, equity, emissions, credit, commodity, “event” and other derivatives). Dodd-Frank Act requirements applicable to “swap dealers” and “major swap participants” are given special attention.

Finally, the discussion of foreign exchange, precious metals and bullion activities -- including especially in the enforcement context -- has been expanded as well.

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Part III has been reorganized; it addresses securities underwriting and dealing empowerments relevant to bank/financial holding companies, while the discussion of acquisition-related considerations has been expanded and moved to Part XII.

Part III includes a detailed analysis of anti-tying considerations in the capital markets context, reflecting 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 applicable Dodd-Frank provisions and the most recent regulatory precedents.

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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, and SEC proceedings respecting “deposit-like” corporate/“prime” debt obligations.

Recognizing the increased focus on liquidity management and contingent funding, Part IV also addresses the marketing of different types of CD products, as well as 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 accounting and securitization issues, increased regulatory focus on leveraged lending, and 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.

Part V also analyzes recent statutory, regulatory and judicial precedents as to the status of loan “notes” and “participations” under Dodd-Frank and other federal banking and securities laws, as well as various grounds for assessing liability of a loan seller to a loan purchaser. It includes a checklist of suggested steps to increase the likelihood that a loan note/participation sale program will not be characterized as involving the trading or 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 statutory/regulatory/administrative developments respecting private placement services (including under the “JOBS Act”, and with respect to disclosure obligations and diligence responsibilities), 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, venture capital and investment empowerments available to financial holding companies, bank holding companies and banks (U.S. and foreign) under the Bank Holding Company Act and other federal banking laws.

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 analyzes in detail the manner, scope and structuring of "control" and "non-control" investments in U.S. and foreign banking organizations and other depository institutions. It addresses Federal Reserve Board and FDIC guidance concerning private equity investments in U.S. banks and bank holding companies.

Part VII also discusses SBIC, community/business development and other equity-related investments (in both the domestic and the international context), and covers regulatory empowerments and market developments for real estate investment, management and brokerage.

Significant recent bank regulatory and securities law requirements in the M&A advisory, "finder" and corporate finance context are given special attention, and their presentation has been enhanced.

Part VIII recognizes the enormous importance of 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 Assets Control (OFAC). Part VIII has been streamlined and reorganized, and key regulatory issues are addressed through descriptions of "red flags" and "best practices" regarding BSA/PATRIOT Act/OFAC compliance requirements. The continuing and aggressive nature of securities/bank regulatory/Department of Justice enforcement actions, as well as issues with respect to "virtual currencies", are given particular attention.

In addition, Part VIII includes an expanded discussion of the Foreign Corrupt Practices Act (FCPA) and other anti-corruption/anti-bribery initiatives, and their 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 emphasizes the most recent developments respecting funds management and collective investment vehicles, including legislative and regulatory enhancements (under the Dodd-Frank Act and otherwise), enforcement actions (including in respect of "Ponzi schemes", and their impact on asset management, supervisory and control issues), and enhanced disclosure, code of ethics, director responsibility and conflict-of-interest considerations.

Appendix B 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 agency (or agency-equivalent) intermediation by banking organizations in financial markets. It includes significant recent developments concerning “brokerage” and “riskless principal” activities, securities lending/repo services, “outsourcing” and “offshoring” developments, bank holding company/bank involvement in physically-settled commodity and energy-related transactions and other transactional activities. Special attention is given to the Dodd-Frank Act, as well as to Gramm-Leach-Bliley “push-out” provisions relating to bank broker activities.

In addition, as enforcement efforts -- by the SEC, FINRA and state securities regulators – and private actions have increased in number and intensity, Part IX discusses current statutory, regulatory, compliance and examination issues relating to broker-dealer, analyst and other securities operations.

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Part X discusses ongoing developments from a bank capital markets perspective with respect to asset securitization. It includes an analysis of securitization issues under the Dodd-Frank Act, as well as information on ongoing regulatory and industry efforts with respect to 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 statutory and regulatory 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 an expanded discussion of significant enforcement actions relating to cross-border securities, tax, funds management and banking-related linkages (including issues and recent judicial developments with respect to the extraterritorial reach and scope of U.S. statutory schemes). It also addresses the continuing globalization of securities, asset management and derivatives markets, as well as concepts of “mutual recognition” of foreign regulatory regimes.

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Part XII reflects the increased importance of alternative ways in which banking organizations intersect and interrelate in the provision of capital markets services. It discusses various considerations (including under the Hart-Scott-Rodino Antitrust Improvements Act) relevant to the acquisition of investment banking firms by banking organizations, and 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.

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This Guide would not have been possible without the extensive participation of a number of our colleagues, including Patrick Fuller and Joanna Lampe (Part I), Colin Lloyd and Robert McNamee (Part II), Allison Breault (Parts II and III), Craig Wasserstrom (Parts II and VIII), Temenouga Kolarova (Part IV), Macey Levington (Part V), Daniel Gottlieb (Part VI), Meredith Leigh Mann (Part VII), Sarah Crandall, James Corsiglia and Kristin Bresnahan (Part VIII), Daniel Por, Brandon Hammer and Lauren Gilbert (Part IX), Joanna Maria El Khoury (Part X), Steven Church (Part XI) and Jeffrey Shaffer (Part XII).

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

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