Multi-Agency Guidance on Leveraged Lending Practices

On March 21, 2013, the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("Federal Reserve") and the Federal Deposit Insurance Corporation ("FDIC") (collectively, the "agencies") issued joint guidance on leveraged lending (the "Guidance"),[1] modifying draft guidance which was initially proposed on March 26, 2012 (the "proposed guidance").[2] The Guidance supersedes lending standards that were previously issued by the agencies in 2001 (the 2001 Guidance").[3] The Guidance is substantially similar to that which the agencies initially proposed, but certain points have been changed or clarified with input from comment letters submitted by market participants and industry groups. Failure to adhere to these standards could result in a finding that an institution is conducting lending activities in an unsafe and unsound manner.

The Guidance emphasizes that financial institutions should be able to demonstrate their ability to evaluate and monitor underwritten credits (including unfunded commitments) and understand risks that could result from a variety of external factors. Each institution subject to the Guidance is required to meet the agencies' "minimum expectations" for robust risk management processes, and must adhere to policies and procedures on several topics discussed below.

The Guidance is not a set of mandatory rules, but it makes clear that "all institutions that originate or sponsor leveraged transactions should consider all aspects and sections of the guidance." The compliance date for the Guidance is May 21, 2013.

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[1] Interagency Guidance on Leveraged Lending, 78 Fed. Reg. 17,766 (March 22, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-03-22/pdf/2013-06567.pdf.

[2] Proposed Guidance on Leveraged Lending, 77 Fed. Reg. 19,417 (Mar. 30, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-03-30/pdf/2012-7620.pdf. For an analysis of the proposed guidance, refer to "Updated Multi-Agency Guidance on Leveraged Lending Practices," (May 15, 2012), *available at* http://www.orrick.com/Events-and-Publications/Pages/updated-multi-agency-guidance-on-leveraged-lending-practices-4758.aspx.

[3] *See* Federal Reserve System et al., Federal Reserve SR 01-09 (SUP), "Interagency Guidance on Leveraged Financing" (Apr. 17, 2001), *available at* http://www.occ.gov/news-issuances/bulletins/2001/bulletin-2001-18a.pdf; Office of the Comptroller of the Currency et al., "Agencies Issue Risk Management Practices for Leveraged Financing" (NR 2001-36) (Apr. 9, 2001), *available at* http://www.occ.gov/static/news-issuances/news-releases/2001/nr-ia-2001-36.pdf; Office of the Comptroller of the Currency, Bulletin OCC 2001-18, "Leveraged Finance: Sound Risk Management Practices" (Apr. 9, 2001), *available at* http://www.occ.gov/news-issuances/bulletins/2001/bulletin-2001-18.html.

Background

Since issuance of the 2001 Guidance, the agencies have witnessed "tremendous growth" in the volume of leveraged lending, as well as the increasing participation of unregulated investors including funds and CLOs whose appetite for "aggressively priced and structured commitments" is not subject to meaningful prudential limits. Financing innovations have also emerged and become increasingly common, including "covenant-lite" terms and payment-in-kind (PIK)-toggle features. The frequency of these trends crested prior to the financial crisis of 2007-2008, and as the loan market recovers and lending volumes rise they are becoming more common again.

Of significant concern to regulators is that, during the financial crisis, banks and other non-bank financial institutions took significant losses and writedowns, many related in substantial part to the poor performance of loans in their leveraged lending portfolios.[4] The Guidance aims to reform practices not sufficiently conducive to safe and sound leveraged lending in part to ensure that financial institutions do not heighten risks by originating poorly underwritten loans which may eventually be pooled with other loans or be participated out to the market.

The agencies have been monitoring and addressing risks associated with unsafe and unsound leveraged lending practices since the 1980s,[5] but the pre-2001 guidance was perceived as vague and only sporadically enforced. The 2001 Guidance was issued as a result, "driven in part by the relaxation of sound lending standard in the past years." After the subsequent cycle of further market liquidity and deal volume during the mid-2000s, followed by a severe market correction, financial institutions are now facing a reinvigorated supervisory regime.

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[4] *See* David Cutler et al., "U.S., European bank writedowns, credit losses (Factbox)," Reuters, Nov. 5, 2009, http://www.reuters.com/article/2009/11/05/banks-writedowns-losses-idCNL554155620091105?rpc=44; Senior Supervisors Group, "Observations on Risk Management Practices during the Recent Market Turbulence," at pp. 4, 5, 17, *available at* http://www.newyorkfed.org/newsevents/news/banking/2008/SSG_Risk_Mgt_doc_final.pdf.

[5] *See* Office of the Comptroller of the Currency, EC-245, "Highly Leveraged Transactions" (Dec. 14, 1988), *available at* http://www.occ.gov/static/news-issuances/bulletins/pre-1994/examining-circulars/ec-1988-245.pdf; Board of Governors of the Federal Reserve System, SR 98-18 (SUP), "Lending Standards for Commercial Loans" (June 23, 1998), *available at* http://federalreserve.gov/boarddocs/srletters/1998/sr9818.htm.

Applicability

The Guidance applies to all Federal Reserve-supervised, FDIC-supervised or OCC-supervised financial institutions,[6] including insured depository institutions, financial holding companies, bank holding companies and their non-bank subsidiaries, and the US branches and agencies of foreign banks, that are "substantially engaged in leveraged lending activities." Given the dominance in the leveraged lending market of a small group of the largest and most sophisticated banks, the agencies expect that the Guidance will have a minimal impact on regional and community banks and other small financial institutions.

The Guidance does not apply to unregulated entities like hedge funds, private equity sponsors and their affiliates, mezzanine funds and unregulated commercial lenders.

Definition of Leveraged Lending

The Guidance requires financial institutions to maintain a definition of leveraged lending that "facilitates consistent application across all business lines." "Leveraged lending" has been refined to encompass the entire debt structure of a leveraged obligor, including loans and letters of credit, mezzanine tranches, senior and subordinated bonds (with the exception of bond and high-yield debt held by both bank and non-bank investors).

The agencies have provided an exception for standalone asset-based loans, noting that asset-based loans should not be included in the Guidance "unless such loans are part of the entire debt structure of a leveraged obligor." The identifying factors included in the Guidance are virtually identical to a definition of leveraged lending that was published by the OCC at the beginning of the financial crisis,[7] including that:

- the proceeds are often used for buyouts, acquisitions or capital distributions,
- a typical transaction may involve the borrower's Total Debt-to-EBITDA ratio or Senior Debt-to-EBITDA Ratio exceeding 4:1 or 3:1, respectively, or other defined levels as appropriate to the industry or sector,[8]

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[6] "Financial institutions" means national banks, federal savings associations, and Federal branches and agencies supervised by the OCC; state member banks, bank holding companies, savings and loan holding companies and all other institutions for which the Federal Reserve is the primary federal supervisor; and state nonmember banks, foreign banks having an insured branch, state savings associations, and all other institutions for which the FDIC is the primary federal supervisor.

[7] *See* Office of the Comptroller of the Currency, "Leveraged Lending: Comptroller's Handbook" (Feb. 2008), available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/_pdf/leveragedlending.pdf.

[8] Notably, the proposed guidance does not use or refer to a net debt concept, i.e., netting the borrower's unencumbered cash against indebtedness for purposes of calculating leverage, which is a common feature in many leveraged loan transactions.

- the borrower is recognized in the market as a highly leveraged firm, characterized by its debt-to-net-worth ratio, and
- the borrower's post-financing leverage exceeds industry norms or historical levels based on debt ratios or industry standards.

The Guidance notes, possibly in response to strong commentary from the LSTA[9] and certain banks[10] that "fallen angels," i.e., borrowers that have exhibited a significant deterioration in financial performance after loan inception and subsequently become highly leveraged, would not be included within the scope of the Guidance, unless the credit is modified, extended, or refinanced.

The Guidance cautions that an institution's definition or implementation of leveraged lending should include an institution's direct and indirect exposure via limited recourse financing secured by leveraged loans, or financing extending to financial intermediaries (such as conduits and special purpose entities, such as CLOs, that hold leveraged loans).

Comment letters have suggested that leveraged lending should be defined by the risk of the loan, not the characteristics of the borrower,[11] and that an over-broad definition of leveraged lending would require extensive modification of existing management information systems ("MIS") and undermine the utility of the proposed information collection.[12] However, except for the changes noted above, the Guidance differs little from the proposed guidance.

General Policy Expectations

In crafting credit policies and procedures responsive to the Guidance, the agencies expect each financial institution to address (i) the institution's designated risk appetite, with clearly defined pipeline limits and transaction and aggregate hold levels as may be approved by the institution's board of directors, (ii) a framework that includes the institution's limits for single transactions and obligors, as well as aggregate portfolio and pipeline exposure limits and geographic and industry concentrations,

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[9] *See* Letter from R. Bram Smith, Exec. Director, LSTA, to Office of the Comptroller of the Currency, at p. 4 (August 21, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/September/20120907/OP-1439/OP-1439_082112_108232_543977965114_1.pdf.

[10] *See* Letter from Suzanne V. Alwan, Managing Counsel, Wells Fargo Bank, to Office of the Comptroller of the Currency, at p. 1 (June 8, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/June/20120614/OP-1439/OP-1439_060812_107827_559214238478_1.pdf; Letter from James H. Peterson, Sr. V.P., Capitalsource Bank, to Robert Feldman, Exec. Secretary, FDIC, at p. 3 (June 8, 2012), *available at* http://www.fdic.gov/regulations/laws/federal/2012/2012-leveraged-lending-c_09.pdf.

[11] *See* Letter from Michael Lempres, Asst. General Counsel and Practice Head, SVB Financial Group, to Office of the Comptroller of the Currency, at p. 5 (June 8, 2012), *available at* http://www.federalreserve.gov/SECRS/2012/June/20120619/OP-1439/OP-1439_060812_107826_559213925974_1.pdf.

[12] *See* Letter from R. Bram Smith, Exec. Director, LSTA, to Office of the Comptroller of the Currency, *supra* note 9, at p. 5.

and which framework assesses the impact of stress losses, flex terms, capital usage and earnings at risk, (iii) procedures for ensuring the risks of leveraged lending activities are adequately reflected in the institution's allowance for loan and lease losses and capital adequacy analyses, (iv) credit and underwriting approval authorities, and procedures for approving and documenting changes to approved transaction terms, (v) guidelines for appropriate oversight by senior management, including adequate and timely reporting to the institution's board of directors, (vi) the expected risk-adjusted return for leveraged transactions, (vii) effective minimum underwriting standards, and (viii) effective underwriting practices for primary loan origination and secondary loan acquisition.

Underwriting Standards

The centerpiece of the Guidance is that each institution's underwriting standards should be "clear, written, measurable, and accurately reflect the institution's risk appetite." The agencies also stress that financial institutions should have clear limits on the size of transactions they will arrange for distribution, both individually and in the aggregate.

The agencies emphasize that poor underwriting may be unsafe and unsound *regardless of whether a loan is fully distributed or held on the books of the originating institution*. In prior guidance, the hallmark of unsafe lending practices was the "pipeline risk" of a large unsyndicated commitment. Here, the agencies caution institutions to be aware of the reputational risk of poorly underwritten transactions "which may find their way into a wide variety of investment instruments and exacerbate systemic risks within the general economy."

The agencies note that the underwriting standards should, at a minimum, consider the following factors:

- whether there is a sound business premise for each transaction, and whether the borrower's capital structure is sustainable without regard to whether the transaction is underwritten for the institution's portfolio or the intent to distribute,
- the borrower's ability to repay the debt, with the most realistic cash flow projections showing "the ability to fully amortize senior secured debt or repay a signification portion of total debt over the medium term,"[13]
- due diligence expectations, with collateral evaluation standards and clearly defined credit risk management roles in the diligence process,[14]

[13] This language has changed noticeably from the proposed guidance, in which the agencies suggested that a borrower be able to "fully amortize senior secured debt or repay at least 50 percent of total debt over a five to seven year period." However, such an ability is now referenced as an example "commonly assumed by supervisors to evidence adequate repayment capacity when performing a risk rating analysis." While the change may suggest that there is no bright-line standard, financial institutions should be cognizant that the 50 percent repayment standard still serves as a reference point within the Guidance.

- standards for evaluating risk-adjusted returns including potential losses, taking into consideration normal distribution strategies as well as alternative strategies during market disruptions,
- reliance on enterprise value and other intangible factors as a predicate for repayment assumptions,
- expected sponsor support, based on financial capacity, capital contribution, and other motives, noting that institutions looking to rely on sponsor support as a "secondary source of repayment for the loan" should be able to document, among other things, its financial or liquidity statements showing recent willingness and ability to support the credit extension,
- whether lender approval is required for material dilution or disposition of collateral or other cash-flow producing assets,
- financial covenants and ongoing monitoring requirements, including debt-to-cash flow ratios, interest or fixed charge coverage ratios, reporting requirements and compliance monitoring. Note that the agencies state that a Total Debt-to-EBITDA ratio in excess of 6:1 "raises concerns for most industries,"[15]
- whether collateral requirements in credit agreements specify acceptable collateral types, loan-to-value guidelines, valuation methodologies and monitoring functions, and
- ongoing financial reporting requirements of the borrower.

The agencies note that the guidelines are not intended to discourage workouts, DIP and exit financing under the Bankruptcy Code, or "well-structured" standalone asset-based credit facilities.

Valuation Standards

The Guidance observes that financial institutions rely on a borrower's enterprise value when (i) evaluating a loan request, (ii) determining a borrower's ability to repay debt through asset sales, (iii) assessing a borrower's ability to access capital markets, and (iv) estimating a borrower's enterprise value as a "secondary source of repayment." Because enterprise value is important to risk assessment in numerous situations, and because a valuation requires specialized knowledge to

[14] Financial institutions should consider how such roles and responsibilities can be best addressed in the diligence process.

[15] This ratio was retained in the Guidance despite pointed commentary criticizing the use of the bright-line cutoff. *See* Letter from James H. Peterson, Sr. V.P., Capitalsource Bank, to Robert Feldman, Exec. Secretary, FDIC, *supra* note 10, at p. 2 (arguing for no numeric examples whatsoever in the Guidance); Letter from R. Bram Smith, Exec. Director, LSTA, to Office of the Comptroller of the Currency, *supra* note 9, at pp. 11-12 (stating that underwriting standards should apply industry norms and allow banks to use their own qualitative judgments).

prepare, the Guidance provides that valuations should be performed or validated by "qualified persons independent of the origination function."

Of the three main approaches to valuing a private company, the Guidance emphasizes the reliability of income-driven "capitalized cash flow" and "discounted cash flow" methods over asset-and market-based valuation methods. The proposed guidance stated that value estimates should "reconcile" results from the use of all three approaches. The Guidance dispensed with that onerous requirement and now states that final value estimates should be based on the method or methods that give the most credible results.[16] Regardless of the methodology used, the assumptions underlying enterprise-value estimates should be clearly documented, well supported, and understood by decision-makers and risk oversight functions at the institution being examined.

Pipeline Management

The treatment of pipeline management in the final Guidance is largely the same as in the proposed guidance. The agencies expect institutions to develop and maintain a clearly documented appetite for risk (taking into account the institutional effects of such risk), procedures for defining and managing "hung" deals and other distribution failures, and ongoing monitoring and periodic stress-testing and reporting of commitments in the pipeline. The Guidance cautions that an institution's board of directors is ultimately responsible both for reviewing reports on transactions reclassified as hold-to-maturity and establishing "clear expectations for the disposition of pipeline transactions that have not been sold according to their original distribution plan."

The Guidance also provides that institutions should develop controls designed to measure actual pipeline distribution against original expectations, as well as policies and procedures on acceptable hedging practices to reduce pipeline exposure.

Reporting and Analytics

Despite comment letters from the LSTA and banks both large and small that the reporting and analytics requirements suggested in the proposed guidance impose substantial costs and may confer few benefits, the Guidance retains high expectations regarding how banks should monitor their loans. The agencies expect stronger MIS at financial institutions engaged in leveraged lending. They caution

[16] The guidelines further state that changes in the value of a firm's assets should be tested "under a range of stress scenarios, including business conditions more adverse than the base case scenario." The base case scenario and more adverse conditions appear to be a reference to "baseline" and "adverse" scenarios required under the proposed OCC rules implementing Dodd-Frank stress-testing. *See* Annual Stress Test, 77 Fed. Reg. 16,484 (Mar. 21, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-03-21/pdf/2012-6811.pdf. The stress test rules provide for annual testing to assess the potential impacts on capital of an institution under (at a minimum) "baseline," "adverse," and "severely adverse" scenarios as provided by the OCC.

that a lack of "robust risk management processes and controls" could contribute to a finding of unsafe and unsound banking practices, and call for stronger and more comprehensive monitoring practices, including regular reports to the institution's board of directors. In particular, the agencies expect institutions to have access to risk management systems that look across business lines and provide periodic and real-time reporting, including migration analysis, deviation from pipeline projections, and aggregate counterparty exposures (including indirect exposures).

The Guidance details fourteen categories of information for data capture and reporting to management and the board of directors. They are:

- individual and portfolio exposures within and across all businesses and entities, including pipeline exposures,
- risk rating and distribution analysis, including tracking of borrowers removed from the portfolio because of improvements in their risk profile,
- industry mix and maturities,
- default and loss probability metrics,
- portfolio performance measures (covenant breaches, restructurings, delinquencies charge-offs, etc.),
- amount and nature of asset impairments, and allowance for loan and lease losses owing to leveraged lending,
- policy exceptions and aggregate performance data,
- exposure by collateral type, including unsecured transactions and those where enterprise value will be the source of repayment for leveraged loans,
- secondary market pricing data and trading volume, when available,
- exposures and performance by deal sponsors (the Guidance introduces the notion that deals introduced by sponsors may, in some cases, be considered exposure to related borrowers),
- gross and net exposures, hedge counterparty concentrations and policy exceptions,
- deviations from syndicated pipeline projections with regular updates,
- total and segment leveraged lending exposures, whether direct or indirect, with detailed global reporting, and
- exposures booked through other business units including default swaps, total return swaps and repo.

Risk Rating Leveraged Loans

For the purposes of rating credit exposures in a leveraged lending transaction, the agencies refer to previously issued guidance for rating credit transactions.[17] They note, however, that such analysis should rely on "realistic repayment assumptions to determine the borrower's ability to de-lever" to a sustainable level in a reasonable timeframe (namely, the ability to repay 50 percent of total debt over a five to seven year period, formerly described in the "Underwriting Standards" section of the proposed guidance, and referenced here as an example of evidence of adequate repayment capacity[18]), and they note that even recently underwritten credits will be criticized or reclassified as substandard if refinancing is the only viable option.[19] Loan extensions and restructurings would also be subject to greater scrutiny to ensure they are not masking a borrower's incapacity to service debt.

In terms of making assessments regarding a borrower's repayment ability, the agencies consider enterprise valuations generally inappropriate as a secondary source of repayment unless that value is well supported by evidence such as a binding purchase and sale agreement with third parties, or valuations which take into account distressed circumstances. In the absence of collateral support or well-evidenced enterprise value, examiners will rate as "doubtful" or "loss" the unsupported value of such loans, and potentially place the loan on non-accrual. For lenders not accustomed to these tightened standards, significant changes may be required in risk rating and underwriting practices in order to adhere to the Guidance.

Other Key Risk Management Components

The Guidance also addresses other components of the underwriting and management of leveraged lending risk. Key insights are described below.

Deal Sponsors

In assessing a borrower's risk rating, lenders may be inclined to assume some level of sponsor support. The agencies expect institutions that rely on sponsor support as a secondary source of

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[17] *See, e.g.*, Board of Governors of the Federal Reserve System, "Sound Credit Risk Management and the Use of Internal Credit Risk Ratings at Large Banking Organizations" SR 98-25 (Sept. 21, 1998), *available at* http://www.federalreserve.gov/boarddocs/srletters/1998/sr9825.htm; Office of the Comptroller of the Currency, "Leveraged Lending: Comptroller's Handbook" *supra* Note 7; Office of the Comptroller of the Currency, "Rating Credit Risk: Comptroller's Handbook" (Apr. 2001), *available at* http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/rcr.pdf. *See also* Federal Deposit Insurance Corporation, "Risk Management Manual of Examination Policies, Loans" (Apr. 2005), *available at* http://www.fdic.gov/regulations/safety/manual/section3-2.pdf.

[18] *See "*Interagency Guidance on Leveraged Lending," *supra* Note 1, at 17,774-75.

[19] Institutions should consider bridge financing in acquisitions in light of this standard, given that clarifications to the Guidance indicate that bridge loans are covered by the guidelines.

repayment to develop guidelines for evaluating the qualifications of financial sponsors to provide such support, and note that “even with documented capacity and a history of support, a sponsor’s potential contributions may not mitigate supervisory concerns absent a documented commitment of continued support.” Such documentation should include an analysis of the sponsor’s past practices and contractual obligations, history of borrower support, incentives to provide financial support, and most meaningfully, documentation of the degree of support promised (whether by guarantee, comfort letter, verbal assurance, or other documentation). Lenders should not rely on a sponsor’s history of support or verbal assurance alone, and are expected to substantiate such reliance where relevant to a particular borrower.

Credit Analysis

Policies for estimating collateral liquidation and asset sale value estimates should be based on “current market conditions and trends,” rather than simply being conservative estimates, as described in the proposed guidance. The credit analysis guidelines are otherwise unchanged.

Credit Review

Institutional credit review functions should be strong and independent from oversight or influence which could impair the integrity of credit determination. There should be adequate staffing and resource allocation “to ensure timely, independent, and accurate assessments of leveraged lending transactions” and periodic portfolio reviews. The Guidance has clarified that assessments should be performed by individuals with applicable expertise and experience for such loans and industries.

Conflicts of Interest

The agencies expect institutions to develop policies to address and prevent potential conflicts of interest, specifically, when it has both equity and lending positions, or where an institution acts as sell-side advisor and also provides staple financing to potential buyers. In light of litigation involving certain financings from the past few years which received media attention and critical judicial commentary, financial institutions should be particularly sensitive when crafting conflicts policies, as they could be sought in discovery in the event a leveraged lending transaction results in litigation.

Implications for Financial Institutions

Increased Board Responsibility

While much of the Guidance is directed at implementation and oversight of various practices at the level of management, the Guidance provides a number of areas specifically requiring an institution’s board of directors to make determinations, set standards and review and presumably act on various risk reports. However, the Guidance does not go as far as to impute any new fiduciary duties on boards of directors, and specifically omits the sole reference to fiduciary responsibilities in the proposed guidance.

Shadow Banking

To the extent the Guidance results in tightened lending policies at financial institutions, unregulated lenders may step into the gap. For instance, hedge funds not subject to the Guidance may be incentivized to extend bridge loans requiring refinancing for repayment and loans at higher leverage multiples. This could result in the most sensitive financings being conducted in unregulated or less regulated regions of the market.

Anti-Tying

Section 106 of the Bank Holding Company Act Amendments of 1970 generally prohibits a bank from "tying," the practice of conditioning the availability or price of one product on a requirement that a customer also obtain another product from the bank or an affiliate of the bank.[20] In the "Compliance" section of the Guidance, the agencies noted that "the intent behind Section 106(b) [of the Bank Holding Company Act Amendments of 1970] is to prevent financial institutions from using their market power over certain products to obtain an unfair competitive advantage in other products."[21] This statement appears to reverse the stance taken by the Federal Reserve in 2003, in which it said that economic power was *not* a necessary element of a Section 106 claim,[22] and may provide some clarity to market particpants that were concerned about the potentially overbroad impact of Section 106(b).[23]

Jason White, Partner	Ronan Wicks, Partner	Derek Gluckman, Associate

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[20] *See generally* 12 U.S.C. 1972.

[21] *See* Interagency Guidance on Leveraged Lending, *supra* note 1, at 17,776.

[22] *See* Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, 68 Fed. Reg. 52,024, 52,027, FN 21 (Aug. 29, 2003), *available at* http://www.gpo.gov/fdsys/pkg/FR-2003-08-29/pdf/03-22091.pdf.

[23] *See* this Orrick alert, analyzing the reference to "market power" as an element of an impermissible tying claim.

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If you would like to receive additional information on any topic discussed in this publication, please contact any of our partners in the Banking and Debt Capital Markets Group listed below:

Ronan M. Wicks
New York
rwicks@orrick.com
+1-212-506-5005

Alan G. Benjamin
Los Angeles
abenjamin@orrick.com
+1-213-612-2431

Julian S.H. Chung
New York
jchung@orrick.com
+1-212-506-5101

Patrick J. Flanagan
New York
pflanagan@orrick.com
+1-212-506-3525

Ramon P. Galvan
Los Angeles
rgalvan@orrick.com
+1-213-612-2383

William S. Haft
New York
whaft@orrick.com
+1-212-506-3740

Andrew Mattei
New York
amattei@orrick.com
+1-212-506-5025

B. J. Rosen
New York
bjrosen@orrick.com
+1-212-506-5246

Jason White
New York
jwhite@orrick.com
+1-212-506-3595