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consult with staff of the Board to determine whether such activities have been properly authorized under Regulation K.

[Reg. K, 64 FR 58781, Nov. 1, 1999]

§ 211.605 Permissible underwriting activities of foreign banks.

(a) *Introduction.* A number of foreign banks that are subject to the Bank Holding Company Act (''BHC Act'') have participated as co-managers in the underwriting of securities to be distributed in the United States despite the fact that the foreign banks in question do not have authority to engage in underwriting activity in the United States under either the Gramm-Leach-Bliley Act (''GLB Act'') or section 4(c)(8) of the BHC Act (12 U.S.C. 1843(c)(8)). This interpretation clarifies the scope of existing restrictions on underwriting by such foreign banks with respect to securities that are distributed in the United States.

(b) *Underwriting transactions engaged in by foreign banks.* (1) In the transactions in question, a foreign bank typically becomes a member of the underwriting syndicate for securities that are registered and intended to be distributed in the United States. The lead underwriter, usually a registered U.S. broker-dealer not affiliated with the foreign bank, agrees to be responsible for distributing the securities being underwritten. The underwriting obligation is assumed by a foreign office or affiliate of the foreign bank.

(2) The foreign banks have used their U.S. offices or affiliates to act as liaison with the U.S. issuer and the lead underwriter in the United States, to prepare documentation and to provide other services in connection with the underwriting. In some cases, the U.S. offices or affiliates that assisted the foreign bank with the underwriting receive a substantial portion of the revenue generated by the foreign bank's participation in the underwriting. In other cases, the U.S. offices receive ''credit'' from the head office of the foreign bank for their assistance in generating profits arising from the underwriting.

(3) By assuming the underwriting risk and booking the underwriting fees in their foreign offices or affiliates, the foreign banks are able to take advantage of an exemption under U.S. securities laws; a foreign underwriter is not required to register in the United States if the underwriter either does not distribute any of the securities in the United States or distributes them only through a registered broker-dealer.

(c) *Permissible scope of underwriting activities.* (1) A foreign bank that is subject to the BHC Act may engage in underwriting activities in the United States only if it has been authorized under section 4 of the Act. The foreign banks in question have argued that they are not engaged in underwriting activity in the United States because the underwriting activity takes place only outside the United States where the transaction is booked. The foreign banks refer to Regulation K, which defines ''engaged in business'' or ''engaged in activities'' to mean conducting an activity through an office or subsidiary in the United States. Because the underwriting is not booked in a U.S. office or subsidiary, the banks assert that the activity cannot be considered conducted in the United States.

(2) The Board believes that the position taken by the foreign banks is not supported by the Board's regulations or policies. Section 225.124 of the Board's Regulation Y (12 CFR 225.124(d)) states that a foreign bank will not be considered to be engaged in the activity of underwriting in the United States if the shares to be underwritten are distributed outside the United States. In the transactions in question, all of the securities to be underwritten by the foreign banks are distributed in the United States.

(3) Regulation K (12 CFR part 211) was amended in 1985 to provide clarification that a foreign bank may not own or control voting shares of a foreign company that directly underwrites, sells or distributes securities in the United States (emphasis added). 12 CFR 211.23(f)(5)(ii). In proposing this latter provision, the Board clarified that no part of the prohibited underwriting process may take place in the United States and that the prohibition on the activity does not depend on the activity being conducted through an office or subsidiary in the United

States. Moreover, in the transactions in question, there was significant participation by U.S. offices and affiliates of the foreign banks in the underwriting process. In some transactions, the foreign office at which the transactions were booked did not have any documentation on the particular transactions; all documentation was maintained in the United States office. In all cases, the U.S. offices or affiliates provided virtually all technical support for participation in the underwriting process and benefitted from profits generated by the activity.

(4) The fact that some technological and regulatory constraints on the delivery of cross-border services into the United States have been eliminated since the Regulation K definition of ''engaged in business'' was adopted in 1979 creates greater scope for banking organizations to deal with customers outside the U.S. bank regulatory framework. The definition in Regulation K, however, does not authorize foreign banking organizations to evade regulatory restrictions on securities activities in the United States by directly underwriting securities to be distributed in the United States or by using U.S. offices and affiliates to facilitate the prohibited activity. In the GLB Act, Congress established a framework within which both domestic and foreign banking organizations may underwrite and deal in securities in the United States. The GLB Act requires that banking organizations meet certain financial and managerial requirements in order to be able to engage in these activities in the United States. The Board believes the practices described above undermine this legislative framework and constitute an evasion of the requirements of the GLB Act and the Board's Regulation K. Foreign banking organizations that wish to conduct securities underwriting activity in the United States have long had the option of obtaining section 20 authority and now have the option of obtaining financial holding company status.

(d) *Conclusion*. The Board finds that the underwriting of securities to be distributed in the United States is an activity conducted in the United States, regardless of the location at which the underwriting risk is assumed and the underwriting fees are booked. Consequently, any banking organization that wishes to engage in such activity must either be a financial holding company under the GLB Act or have authority to engage in underwriting activity under section 4(c)(8) of the BHC Act (so-called ''section 20 authority''). Revenue generated by underwriting bank-ineligible securities in such transactions should be attributed to the section 20 company for those foreign banks that operate under section 20 authority.

[Reg. K, 68 FR 7899, Feb. 19, 2003]

PART 212—MANAGEMENT OFFICIAL INTERLOCKS

Sec.
212.1 Authority, purpose, and scope.
212.2 Definitions.
212.3 Prohibitions.
212.4 Interlocking relationships permitted by statute.
212.5 Small market share exemption.
212.6 General exemption.
212.7 Change in circumstances.
212.8 Enforcement.
212.9 Effect of Interlocks Act on Clayton Act.

AUTHORITY: 12 U.S.C. 3201–3208; 15 U.S.C. 19.

SOURCE: 61 FR 40302, Aug. 2, 1996, unless otherwise noted.

§ 212.1 Authority, purpose, and scope.

(a) *Authority*. This part is issued under the provisions of the Depository Institution Management Interlocks Act (Interlocks Act) (12 U.S.C. 3201 *et seq.*), as amended.

(b) *Purpose.* The purpose of the Interlocks Act and this part is to foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

(c) *Scope.* This part applies to management officials of state member banks, bank holding companies, and their affiliates.

§ 212.2 Definitions.

For purposes of this part, the following definitions apply: