

## Derivatives

### Practices and Industries

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Our Derivatives practice assists clients across all aspects of the derivatives markets in transactional and financial regulatory matters involving derivatives, hedging, structured products, commodities and alternative investments, as well as margin lending, prime brokerage, repos, securities lending and custody and collateral arrangements.

The practice is geographically distributed across our New York, Dallas, Houston, Washington, D.C. and London offices. Our lawyers have extensive backgrounds in related areas such as margin lending, bank financing, structured products, securities, commodities, capital markets, digital assets/cryptocurrency, insolvency, regulatory capital, investment funds, commodities and broker-dealer and bank regulation, and actively participate in ISDA, IECA, SIFMA, MFA, LSTA, FIA and other industry working groups and committees. Our derivatives attorneys also work closely with Haynes and Boone's other practices including finance, corporate, securities, investment funds, prime brokerage, fintech, real estate, bankruptcy and restructuring, energy, tax, ERISA and litigation.

Haynes Boone's derivatives practice group has been recognized by the major legal directory rankings (e.g., *Chambers*, *Legal 500* and *Legalese*). *Legal 500* (2020) recognized the group with a Band 4 ranking in the Structured Finance: Derivatives and Structured Products category for its vast experience in prime brokerage, credit derivatives, commodities and interest rate hedging and energy-related end-user issues, and with further individual recognitions for Giorgio Bovenzi, Phil Lookadoo and Brian Sung. According to *Chambers USA 2020*, clients describe the team as "extremely pragmatic problem solvers" who provide "first-class advice on sophisticated and complex legal issues surrounding prime brokerage and related financing structures." *Chambers USA 2020* recognized our team with a Band 4 ranking in the Financial Regulation category, with additional individual recognition for Giorgio Bovenzi and Craig Unterberg.

Haynes Boone's derivatives practice also benefits from our Global Credit Risk Management (GCRM) expertise. GCRM focuses on counterparty risk, domestic and foreign collateral, and close-

out netting rights, to ensure that the credit risks relating to the counterparty's hypothetical insolvency are properly understood, that the transaction is structured in a way that optimizes risk mitigation, and that our bank clients remain in compliance with the relevant Basel III regulatory capital rules. The core of the GCRM expertise is deeply rooted in a familiarity with credit and insolvency laws from a large set of countries (made possible by our close relationships with country counsel from more than 90 jurisdictions). The presence of several cross-border elements inherent to many derivatives and commodities products make GCRM the ideal tool to enhance our lawyers' work product in the derivatives field, enable real-time advice on complex cross-border finance and derivatives matters, and increase value for our clients.

## Representative Experience

Haynes Boone's unique collaborative culture enables an integrated approach to meet our clients' needs in a broad range of derivatives-related matters such as the following:

### *Prime Finance*

In the prime brokerage and prime finance area, we regularly represent both sell-side institutions (prime brokers, swap dealers, commodity brokers and other affiliates of U.S. and non-U.S. broker-dealers and banks) and buy-side funds and institutions (hedge funds, pension and sovereign wealth funds, investment managers, managed accounts, institutional investors and registered investment companies) in establishing prime brokerage and derivatives trading relationships, including advice on:

- prime brokerage, clearing, trade execution, custody, cross-margining and master netting agreements, guarantees and other credit support arrangements, and term margin/lockup agreements;
- ISDA Master Agreements (including Schedules) and related protocols, definitions, annexes and supplements, and Master Confirmation Agreements;
- bilateral and tri-party Credit Support Annexes as well as bespoke credit support and cross-margining agreements, side letters and related account control and custody documentation in relation to regulatory and non-regulatory margin for derivatives transactions;
- advice on interpretation and implementation of incoming derivatives regulatory requirements, such as variation margin and initial margin requirements, registration requirements and exemptions, reporting, trading relationship documentation, business conduct and trade reconciliation requirements;
- analysis of eligibility, in-scope and out-of-scope products and positions, de minimis thresholds and aggregation and cross-border/extraterritoriality rules under CFTC, SEC and banking prudential regulatory regimes in connection with potential swap dealer, futures commission merchant, swap execution facility, automated trading system and commodity pool operator registration requirements and available exemptions;
- repo and securities lending agreements, futures agreements, MSFTAs and various standard form and bespoke FX agreements;
- Dodd-Frank Act, Commodity Exchange Act, Volcker Rule, Investment Company Act and Investment Advisers Act and other SEC, CFTC, bank prudential regulator, broker-dealer and EMIR/EU, NFA and SIFMA rules and regulations governing derivatives and securities financing transactions, and related anti-money-laundering, FinCEN, money transmitter and other regulatory and compliance documentation and certifications;
- analysis of collateral, margin, guarantee, credit support and custody arrangements, including advice on related netting, setoff and rehypothecation issues and on creation, perfection,

priority and UCC/cross-border issues with respect to security interests, pledges and transfers of title in collateral;

- analysis of the applicability of Bankruptcy Code, SIPC and bank regulatory safe harbor provisions, resolution stay and qualified financial contract issues and true sale issues in connection with commodity, repo, derivatives and structured products transactions, and on related counterparty credit, insolvency and netting risk analyses;
- credit risk evaluation of international prime brokerage platforms across multiple jurisdictions, and the assessment of transaction eligibility under the Basel regulations;
- margin loan transactions, including multi-jurisdictional reviews of credit risks deriving from extending credit and margin loans to domestic and foreign counterparties and the assessment of the eligibility of the margin loan under the applicable Basel regulations; and
- reviews of cash deposit account requirements in jurisdictions that require beneficial owner identification of customers, including analysis of various complex alternative cash holding arrangements.

## *Trading and Synthetic Risk Transfer Instruments*

We also regularly represent banks, hedge funds, REITs, private equity funds, sponsors, portfolio companies and local/municipal government, corporate and other end users on a variety of exchange-traded and over-the-counter hedging and derivatives products in connection with the establishment of trading and investment platforms, including bespoke and plain-vanilla agreements for trading in swaps, options, futures and forwards linked to a variety of underliers such as interest rate, currency, credit, equity, commodity, energy, cryptocurrency and other bespoke risk exposures. Such work has included:

- advice to introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, swap execution facilities, investment funds and energy-sector and other corporate end users on CFTC, Commodity Exchange Act and EMIR/EU regulatory requirements and compliance matters in connection with derivatives brokerage and commodity trading activities, as well as on applicability of commodity regulations and exemptions to commercial transactions for physical delivery and hedging of metals, oil and gas, renewable energy credits, environmental attributes and other commodities;
- representation of cryptocurrency trading and financing entities in connection with physical and synthetic cryptocurrency financing and trading arrangements based on derivatives, repo and securities lending agreements, including:
  - establishment of trading platforms and agreement templates for long and short trading of forwards, swaps, options and swaptions, repos and secured lending of cryptocurrency, stablecoin, ETF and index/basket underliers, and
  - advice on applicable federal and state regulatory issues such as existing, new and proposed CFTC, SEC and banking, AML and FinCEN regulations;
- restructurings, novations, terminations and amendments of ISDA Master Agreements and derivatives transactions, related analyses of early termination, bankruptcy safe harbor and setoff/netting provisions, as well as related waivers, forbearances and unwinds;
- variable prepaid forward transactions (both domestic and cross-border) and advice on related securities laws, eligibility under the applicable Basel regulations, and other regulatory issues;
- call spread options, capped calls, accelerated share repurchases and other corporate equity derivative products for monetization and hedging of equity and convertible debt securities;
- equity derivatives transactions to monetize shares of U.S. exchange-listed issuers through the issuance of exchangeable limited partnership units and the contemporaneous entry into variable postpaid forward transactions with newly formed special purpose vehicle entities to hedge the underlying shares;

- total return swap trading platforms providing for trading in counterparty affiliate shares and 10b5-1 plans, and advice on related securities law and other regulatory issues;
- cross-currency swaps, interest rate swaps, FX options, credit default swaps, total return swaps and other derivatives;
- securities lending and repo and reverse repo agreements using industry standard form and bespoke agreements;
- interpretation, analysis and review of potential alternative investments transactions on behalf of institutional investors and investment managers;
- advice on Dodd-Frank requirements and on terms of proposed and final regulations of CFTC, SEC and Prudential Regulators;
- SPV-linked and other structured capital markets products, and the creation and disclosure of proprietary indices linked to swaps or structured products; and
- advice and participation on ISDA, ARRC, LSTA, LMA and IECA working groups in connection with development of industry standard documentation initiatives to address regulatory and compliance issues, including Qualified Financial Contract and resolution stay powers, LIBOR and other IBOR fallback adjustments, amendments to reference rate provisions in derivatives and lending agreements, including working groups focusing on development of ISDA IBOR Protocol, ISDA 2021 Definitions, ISDA US Resolution Stay Protocol, IECA QFC Amendment Agreements, ARRC Fallback Provisions, LSTA SOFR Concept Credit Agreement, and LSTA and LMA LIBOR remediation amendment agreements.

### *Hedging and Finance-Linked Derivative Products*

Working together with our leading finance practice, we also regularly represent corporate, SPV and investment fund borrowers and lenders, agents and hedge/swap providers in connection with interest rate, currency and commodity hedges linked to credit facilities, project finance and real estate financing transactions, and on related credit, intercreditor, security, guarantee and credit support documentation., including:

- interpretation, review, and negotiation of ISDA Master Agreements, Credit Support Annexes, transaction confirmations, financing-linked termination and security provisions, cross-netting and cross-margining agreements and various ISDA protocols, definitions, annexes and supplements;
- related corporate/fund governance matters such as development of internal hedging and derivatives policies, board and executive level approvals, partnership and management authorization issues, due diligence on and analysis of applicable requirements and obligations under existing credit facility and other transaction agreements, and advice on applicable regulatory exemptions and other compliance requirements;
- ISDA Dodd-Frank protocol documents and amendments, and other regulatory and compliance certifications and agreements to ensure compliance with updated regulatory requirements;
- analysis and advice regarding various insolvency and financial resolution regulatory provisions and other relevant derivatives, commodities, investment company and banking/financial institution regulatory provisions;
- bespoke and standardized commodity, FX and interest rate hedges;
- representation of borrowers, sponsors, lenders and hedge counterparties in real estate financing transactions in connection with interest rate swap and cap transactions and related provisions of credit agreements, security and intercreditor agreements;
- representation of financial institutions and other creditors on intercreditor disputes in relation to swap and derivatives portfolios, including analysis and advice on intercreditor rights and

- advice on available courses of action, and negotiation of settlement agreements and unwinds of swaps; and
- structured repo facilities and secured loan facilities on behalf of hedge funds and real estate investment funds to provide leveraged exposures to portfolios of mortgage loans, mortgage-backed securities and other underlying securities, as well as analyses of Volcker Rule, Dodd-Frank, securities law and insolvency matters (including non-consolidation, true sale and bankruptcy safe harbor analyses).