

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-47364; File No. S7-41-02]

RIN 3235-A119

Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting amendments to its rule granting an exemption to banks from dealer registration for a *de minimis* number of riskless principal transactions, and to its rule that defines terms used in the bank exception to dealer registration for asset-backed transactions. The Commission also is adopting a new exemption for banks the definition of broker and dealer under the Securities Exchange Act of 1934 for certain securities lending transactions. In addition, the Commission is extending the exemption from rescission liability under Exchange Act Section 29 to contracts entered into by banks acting in a dealer capacity before March 31, 2005. These rules address certain of the exceptions for banks from the definitions of “broker” and “dealer” that were added to the Securities Exchange Act of 1934 by the Gramm-Leach-Bliley Act.

DATES: *Effective Date:* March 26, 2003.
Compliance Date: September 30, 2003.

FOR FURTHER INFORMATION CONTACT: Catherine McGuire, Chief Counsel; Lourdes Gonzalez, Assistant Chief Counsel; or Linda Stamp Sundberg, Attorney Fellow; (202) 942-0073, Office of the Chief Counsel, Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, NW, Washington, DC 20549-1001.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission (“Commission”) is adopting amendments to Rules 3a5-1 [17 CFR 240.3a5-1], 3b-18 [17 CFR 240.3b-18], and 15a-8 [17 CFR 240.15a-8] under the Securities Exchange Act of 1934 (“Exchange Act”). The Commission also is adopting an exemption from the definitions of “broker” and “dealer” for banks engaging in securities lending transactions pursuant to new Exchange Act Rule 15a-11 [17 CFR 240.15a-11].

Table of Contents

I. Introduction	
II. Temporary Exemption from the Definition of “Dealer”	
III. General Comments on the Proposed Amendments	
IV. Dealer Activities and the Dealer/Trader Distinction	
V. Discussion of Comments and Adoption of “Dealer” Rules	
A. Rule 3a5-1—the De Minimis Exemption for Riskless Principal Transactions	
1. Discussion of Comments Received on the Amendment to Rule 3a5-1—the De Minimis Exemption	
2. Amendment to Rule 3a5-1—the De Minimis Exemption	
B. Rule 3b-18—Definition of Terms Used in Asset-Backed Transaction Exception to Dealer Registration	
1. Discussion of Comments Received on the Amendment to Rule 3b-18—Definition of Terms Used in Asset-Backed Exception to Dealer Registration	
2. Amendment to Rule 3b-18—Definition of Terms Used in Asset-Backed Exception to Dealer Registration	
C. Rule 15a-11—Exemption from the Definitions of “Broker” and “Dealer” for Banks Engaging in Securities Lending Transactions	
1. Discussion of Comments Received on the Amendment to Rule 15a-11—Exemption from the Definitions of “Broker” and “Dealer” for Banks Engaging in Securities Lending Transactions	
2. Amendment to Rule 15a-11—Exemption from the Definitions of “Broker” and “Dealer” for Banks Engaging in Securities Lending Transactions	
D. Definition of “Qualified Investor”	
E. Temporary Exemption	
1. Discussion of Comments on the Temporary Exemption	
2. Adoption of Temporary Exemption and Effective Date of Dealer Rules	
F. Extension of Rule 15a-8—Section 29 Liability Exemption	
VI. Procedural Matters	
A. Paperwork Reduction Act	
B. Consideration of Comments on Benefits and Costs	
1. Benefits	
2. Costs	
C. Consideration of Burden on Competition, and on Promotion of Efficiency, Competition, and Capital Formation	
D. Regulatory Flexibility Act Certification	
Statutory Authority	
Text of Rules and Rule Amendments	

I. Introduction

On October 30, 2002, the Commission proposed amendments to the Interim Final Rules¹ (“the Rules”) under the Exchange Act concerning the definition

¹ Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Release No. 34-44291, 66 FR 27760 (May 18, 2001).

of “dealer.”² Today, the Commission adopts these “dealer” rules substantially as proposed with some technical amendments to the exemptions in response to comments received. In addition, the Commission is, by separate order, extending the banks’ temporary exemption from the definition of dealer until September 30, 2003. Finally, the Commission is amending Rule 15a-8 to give practical effect to the exemption from rescission liability under Exchange Act Section 29 on contracts entered into by banks in a dealer capacity for a finite transition period until March 31, 2005. This exemption was previously adopted, subject to comment.

The Commission previously adopted Exchange Act Rules 3a5-1, 3b-18, and 15a-8 on May 11, 2001 as part of the Rules, which were designed to implement the specific transactional exceptions for banks from the definitions of “broker” and “dealer.” The definitions of “broker” and “dealer,” in Exchange Act Sections 3(a)(4) and 3(a)(5), respectively, were amended by the Gramm-Leach-Bliley Act (“GLBA”).³

² Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Release No. 34-46745, 67 FR 67495 (November 5, 2002) (“the Proposing Release”).

³ Pub. L. No. 106-102, 113 Stat. 1338 (1999). On November 12, 1999, the President signed the GLBA into law. The GLBA changed federal statutes governing the scope of permissible activities and the supervision of banks, bank holding companies, and their affiliates. The GLBA lowered barriers between the banking and securities industries erected by the Banking Act of 1933 (popularly known as the “Glass-Steagall Act”) Pub. L. No. 73-66, ch. 89, 48 Stat. 162 (1933) (as codified in various sections of 12 U.S.C.). Section 101 of the GLBA repealed Sections 20 (12 U.S.C. 377) and 32 (12 U.S.C. 78) of the Banking Act of 1933. The GLBA did not repeal Sections 16 (12 U.S.C. 24 (Seventh)) and 21 (12 U.S.C. 377) of the Banking Act of 1933, which were retained as continuing safeguards. Section 16 prohibits national banks from underwriting, selling, or dealing in securities, except for certain bank-eligible securities such as U.S. government securities, and section 5(c) of the Glass-Steagall Act applies those same Section 16 restrictions to state-chartered banks that are members of the Federal Reserve System. See 12 U.S.C. 24 (Seventh) and 12 U.S.C. 335. Section 16 excludes from its prohibitions securities transactions in which the bank acts as agent for its customers, which is considered agency activity under banking law. Under state banking law, insured state banks also generally may act as agent for their customers. Under federal law, insured state banks are prohibited from engaging as principal in any activities that are not permissible for national banks, unless the state banks comply with applicable capital standards and the Federal Deposit Insurance Corporation (“FDIC”) has determined that the activity will not pose a significant risk to the appropriate insurance fund. Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, Title III, Section 303, 12 U.S.C. 1831a. Glass-Steagall Act Section 21, which is also still in effect, prohibits investment banks from offering checking or savings accounts. See 12 U.S.C. 378a.