

Among other things, the GLBA provided for functional regulation of securities activities by eliminating the complete exception for banks from the definitions of "broker" and "dealer" and replacing them with specific transaction-based exceptions. Before the GLBA amendments, Sections 3(a)(4) and 3(a)(5) of the Exchange Act provided that the terms "broker" and "dealer" did not include a "bank."⁴ Accordingly, banks⁵ that engaged in securities activities were excepted from the requirement to register as broker-dealers under the Exchange Act.⁶ The amended statutory definitions create eleven "broker" and four "dealer" exceptions for banks.

In response to interpretive questions as well as industry-specific concerns, the Commission adopted the Rules on May 11, 2001 to give the banking industry guidance on the parameters of these new bank exceptions. Although

the GLBA became law in November 1999, these amended statutory definitions had a delayed effective date of May 12, 2001. Because the exceptions from the definition of "broker" and "dealer" are exceptions to the Exchange Act, the Commission is statutorily charged with interpreting them. The Rules were designed to provide guidance by defining certain key terms used in the new statutory exceptions and provided additional exemptions from the definition of "broker" and "dealer" for banks that were engaged in certain types of securities transactions. Although the Rules were adopted as interim final rules, the Commission specifically solicited public comment on them.

The amendments we are adopting today generally are limited to certain of the "dealer" exceptions under GLBA. While there are four statutory dealer exceptions, these amendments only define terms used in one of them—the exception for asset-backed transactions. These amendments also make the counting of riskless principal transactions more flexible under the *de minimis* exemption and create a new exemption for securities lending transactions, which will be an exception to the definitions of both broker and dealer for qualifying transactions.

Congress believed that, given the expansion of the activities and affiliations in the financial marketplace, functional regulation was important in building a coherent financial regulatory scheme.⁷ The Commission supported modernizing the legal framework governing financial services consistent with a system of functional regulation to ensure that investors purchasing securities through banks received the same protections as when they purchased securities through registered broker-dealers.⁸

II. Temporary Exemption From the Definition of "Dealer"

In order to give banks time to ensure that their securities transactions conform to the requirements of the GLBA, the Rules included a temporary exemption that effectively extended the general bank exception from broker-dealer registration.⁹ To further accommodate the industry's continuing

compliance concerns, the Commission delayed the effective date of the bank "dealer" rules through a series of orders that ultimately extended the temporary exemption to February 10, 2003.¹⁰ Concurrently with issuing this Release, the Commission is issuing an additional Order extending the temporary exemption from the effective date of the bank "dealer" rules through September 30, 2003.¹¹

III. General Comments on the Proposed Amendments

We received 12 comments on the proposed amendments to the Rules relating to the definition of "dealer" for banks and the proposed exemption for securities lending.¹² These comments

¹⁰ Through an earlier order, the Commission delayed the effective date of the bank "broker" exceptions through orders that extended the temporary exemption to May 12, 2003.

¹¹ Rule 15a-9 continues to exempt savings associations and savings banks from the definitions of "broker" and "dealer" under Exchange Act Sections 3(a)(4) and 3(a)(5) on the same terms and conditions that apply to banks. This exemption is limited to savings associations and savings banks that have deposits insured by the FDIC under the Federal Deposit Insurance Act ("FDIA"). 12 U.S.C. 1811 *et. seq.*

¹² See letter dated November 19, 2002, signed by Jackie G. Prester of Baker, Donelson, Bearman & Caldwell, on behalf of First Tennessee Bank, N.A. ("the First Tennessee Letter"); letter dated December 2, 2002, received incomplete and unsigned ("the Anonymous letter"); letter dated December 9, 2002, signed by Edward Rosen of Cleary, Gottlieb, Steen & Hamilton on behalf of an ad hoc coalition of banks consisting of The Bank of New York, Barclays Global Investors, N.A., Citibank, Credit Suisse First Boston, Deutsche Bank, HSBC, and JP Morgan Chase Bank ("the Coalition of Banks" Letter"); letter dated December 10, 2002, signed by J. Virgil Mattingly, Board of Governors of the Federal Reserve System ("Federal Reserve"), William F. Kroener, FDIC, and Julie L. Williams, Office of the Comptroller of the Currency ("OCC") ("the General Counsels" Letter"); letter dated December 5, 2002, signed by Lawrence R. Uhlick of the Institute of International Bankers ("the IIB Letter"); letter dated December 5, 2002, signed by Sarah A. Miller of the American Bankers Association and ABA Securities Association ("the ABA/ABASA Letter"); letter dated December 6, 2002, signed by Jeffrey P. Neubert of the New York Clearinghouse Association, whose members are: Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association ("the NYCH Letter"); letter dated December 5, 2002, signed by Jeffrey S. Missman of the Compliance Department of Commerce Bancshares ("the Commerce Banc Letter"); letter dated December 5, 2002, signed by Joanne F. Shephard of the Independent Community Bankers of America ("the ICBA Letter"); letter dated December 12, 2002, signed by Christine A. Bruenn of the North American Securities Administrators Association ("the NASAA Letter"); letter dated December 13, 2002, signed by Jose Arau of CalPERS ("the CalPERS Letter"); and letter dated December 24, 2002, signed by Richard Whiting of the Financial Services Roundtable ("the Roundtable Letter").

The GLBA also lowered barriers between the banking and the insurance industries erected by the 1982 amendments to the Bank Holding Company Act of 1956 (the "Bank Holding Company Act"). The Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982) (as codified in various sections of 12 U.S.C.), amending section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. 1841-1850 (1994).

⁴ Before the GLBA, Exchange Act Section 3(a)(4) defined the term "broker" as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." Before the GLBA, Exchange Act Section 3(a)(5) defined the term "dealer" as "any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank * * *."

⁵ Exchange Act Section 3(a)(6) [15 U.S.C. 78c(a)(6)] defines the term "bank" as:

(A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency * * * and which is supervised and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this title, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

⁶ Exchange Act Section 15(a) [15 U.S.C. 78o(a)] generally provides that:

[i]t shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with [the provisions] of this section.

⁷ H.R. Rep. No. 106-74, pt. 3, at 113 (1999).

⁸ See, e.g., letter from Arthur Levitt, Chairman, U.S. Securities and Exchange Commission, to Senator Phil Gramm, Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate (Oct. 14, 1999) (stating that "the Securities and Exchange Commission has long supported financial modernization legislation that provides the protections of the securities laws to all investors.").

⁹ 17 CFR 240.15a-7.