

Our dealer/trader discussion was meant to give guidance on the underlying principles that should be applied to any factual situation.<sup>26</sup> The question of whether a bank acts as a dealer under the securities laws is entirely separate from the question of whether it acts as a dealer under the banking laws, and it is possible for a bank to be a "dealer" under the securities laws but not under the banking laws. A bank therefore should look to the securities laws and the Commission's rules and interpretations in conducting its analysis under the Exchange Act.<sup>27</sup>

The other commenter asked whether the failure to meet a condition of a statutory exception or Commission exemption was sufficient reason to presume dealer activity.<sup>28</sup> A bank has

<sup>26</sup> We have given recent guidance on what constitutes "dealer" activity. See OTC Derivatives Dealers, Release No. 34-40594, Section II.A.1., n. 61, 63 FR 59362 at 59370 (November 3, 1998). As we explained with respect to a group of derivative dealers that engage in limited activities:

[E]xcept to the extent expressly permitted under the rules and rule amendments, an OTC derivatives dealer may not engage directly or indirectly in any activity that may otherwise cause it to be a "dealer" as defined in Section 3(a)(5) of the Exchange Act (15 U.S.C. § 78c(a)(5)). This includes, but is not limited to, without regard to the security, (1) purchasing or selling securities as principal from or to customers; (2) carrying a dealer inventory in securities (or any portion of an affiliated broker-dealer's inventory); (3) quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities) in connection with the purchase or sale of securities permitted under Rule 15a-1; (4) holding itself out as a dealer or market-maker or as being otherwise willing to buy or sell one or more securities on a continuous basis; (5) engaging in trading in securities for the benefit of others (including any affiliate), rather than solely for the purpose of the OTC derivatives dealer's investment, liquidity, or other permissible trading objective; (6) providing incidental investment advice with respect to securities; (7) participating in a selling group or underwriting with respect to securities; or (8) engaging in purchases or sales of securities from or to an affiliated broker-dealer except at prevailing market prices.

<sup>27</sup> Of course, a bank also should continue to determine whether any proposed securities activity is permitted under banking law, and should consult its appropriate Federal banking agency, if necessary, to assist it in that analysis.

<sup>28</sup> See the Coalition of Banks' letter. This commenter also urged the Commission to confirm that in analyzing whether a particular activity undertaken by a non-bank person, the existence or non-existence of a GLBA bank exception or exemption for that activity is not relevant to the analysis of whether that activity would constitute "broker" activity. Although we believe that this statement is generally true, we will address "broker" activity later when we propose amendments to the Rules pertaining to banks' exceptions from the definition of broker. In addition, this commenter noted that because so much of the dealer/trader distinction is set forth in the context of the Commission staff's no-action and interpretive letters, it would be helpful for the Commission to note the existence of these letters,

flexibility when it analyzes whether its securities activities would require it to register with the Commission as a dealer. As we stated in the proposing Release, as an analytical matter, a bank may opt first to consider whether its proprietary securities purchases and sales cause it to be "engaged in the business" of buying and selling securities for its own account "as part of a regular business." If the bank meets that part of the test, then the bank would have to consider whether those securities activities fall within one of the bank-specific transaction exceptions or exemptions from the dealer definition in Exchange Act Section 3(a)(5). Alternatively, a bank may simply analyze whether its proprietary securities purchases and sales fall within an exception or exemption from Section 3(a)(5). If all of the bank's securities activities fall within one or more exceptions or exemptions from the dealer definition, then the bank could avoid having to determine separately whether it satisfies the "engaged in the business" component of the definition. A bank that relies on a transaction exception or an exemption must meet all of the terms of that exception or exemption in order to claim it.

Finally, we note that our analysis of what constitutes "dealer" activity has not changed for persons that are not banks merely because banks have specific transactional exceptions and exemptions. These bank exceptions and exemptions provide banks with legal certainty for transactions conducted in accordance with the terms of these exceptions and exemptions. The bank-specific exceptions and exemptions from the definition of "dealer" for specific products or transactions are independent of the question of whether a person would satisfy the general definition of "dealer" in the first instance.

In general, the bank dealer exceptions apply to transactions in specified products and contain limiting conditions. Some of these bank exceptions and exemptions are more restrictive than others. For example, while some bank dealer exceptions permit a bank to buy and sell securities, the asset-backed transactions exception only permits a bank to issue and sell securities through a grantor trust or

other separate entity to qualified investors.<sup>29</sup> In addition, the investment transactions exception only permits the bank to buy or sell securities "for investment purposes" for its own account or in the accounts for which it acts as a trustee or fiduciary.<sup>30</sup>

In sum, as a bank considers its securities activities, it must evaluate the totality of these activities to determine if they are permissible under banking law, meet the definition of dealer (or broker) activities under the securities laws, and are excepted or exempted from the dealer (or broker) registration requirements under the Exchange Act.<sup>31</sup>

## V. Discussion of Comments and Adoption of "Dealer" Rules

The GLBA provides four exceptions to banks from the definition of "dealer." Each of these exceptions permits a bank to act as a dealer with respect to specified securities products if the bank complies with the enumerated statutory conditions. The GLBA bank "dealer" exceptions are outlined briefly below.<sup>32</sup>

- *Investment transactions:* permits banks to buy and sell securities for investment purposes for the bank and in its customers' trustee and fiduciary accounts.

- *Permissible securities transactions:* permits banks to buy and sell exempted securities, certain Canadian government obligations, and Brady bonds.

- *Identified banking products:* permits banks to buy and sell certain "identified banking products," as defined in Section 206 of the GLBA.

- *Asset-backed transactions:* permits banks through a grantor trust or other separate entity to issue and sell to qualified investors certain asset-backed securities representing obligations predominantly originated by a bank, an affiliate of the bank other than a broker-

<sup>29</sup> See Exchange Act Section 3(a)(5)(C)(iii). [15 U.S.C. 78c(a)(5)(C)(iii).]

<sup>30</sup> See Exchange Act Section 3(a)(5)(C)(ii). [15 U.S.C. 78c(a)(5)(C)(ii).]

<sup>31</sup> A bank that contemplates a new securities activity may also seek an exemption or no-action relief from the Commission. Exchange Act Section 36 [15 U.S.C. 78mm] authorizes us to exempt any person, security, or transaction from the provisions of the Exchange Act, to the extent that such exemption is necessary or appropriate in the public interest, and consistent with the protection of investors. We authorized the Director of the Division of Market Regulation to consider, on a case-by-case basis, individual requests for exemptive relief from banks, savings associations, and savings banks. Exchange Act Rule 30-3 [17 CFR 200.30-3(a)(72)]. In appropriate circumstances, the staff also may provide guidance in the form of no-action letters. See Release No. 33-5127 (January 25, 1971). See also Release No. 33-6279 (December 5, 1980).

<sup>32</sup> This outline is a summary. It does not describe the exceptions in full. See Exchange Act Section 3(a)(5). [15 U.S.C. 78c(a)(5).]

clarify that these letters are still valid, and confirm that the proposing Release was intended to summarize, but not to modify, the traditional "dealer/trader" distinction. Because the Commission staff's letters have been written over the seven decades of the Commission's existence and are based on specific factual situations, we do not believe that it is appropriate to re-visit these letters in the context of adopting these amendments to the Rules.