

have originated 85% of the obligations in any pool as measured by the value of the obligations. We did not change the 85% requirement for the purpose of the asset-backed transaction exception. To enhance clarity, however, we proposed a change to the definition of “predominantly originated” in Rule 3b-18(g) to expressly set forth the meaning of the term in the context of a syndicate of banks. Thus, the banks, and their affiliates other than broker-dealer affiliates, participating in any such syndicate must have originated 85% of the obligations in any pool as measured by the value of the obligations. We received no comments on this change.

To enhance clarity, we also proposed to substitute two separate definitions for the definition of “member of a syndicate of banks” found Rule 3b-18(c). In particular, we first proposed to define “member” as it relates to the term “syndicate of banks” in proposed Rule 3b-18(c) to make clear that the individual banks and their affiliates other than their broker or dealer affiliates, originate the obligations, rather than the syndicate. This change recognizes that the syndicate of banks only comes together to issue and sell the obligations. Second, we proposed to modify the definition of “syndicate of banks” in Rule 3b-18(h) to mean a group of banks that acts jointly, on a temporary basis, to issue securities backed by obligations originated by each of the individual banks and their affiliates other than their broker or dealer affiliates.

We proposed to keep the requirement found in Rule 3b-18(c) that when a syndicate of banks issues asset-backed securities through a grantor trust or other separate entity, each bank and its affiliates other than its broker or dealer affiliates selling the securities, and thus acting as a dealer in the transaction, must have originated at least 10% of the value of the pool of obligations backing the securities. This 10% requirement is applicable only to the bank or banks that actively sell the securities backed by the pool because these are the only banks that need to use an exception from the definition of dealer.⁴¹ We believe that it is reasonable as well as

in accordance with the legislative history to retain this requirement for the bank or banks that need the exception because they sell the securities secured by the pool of obligations originated by banks that are members of a syndicate of banks. We did, however, propose a change to the rule to clarify that the affiliates of the banks other than broker or dealer affiliates also may originate the obligations.

1. Discussion of Comments Received on the Amendment to Rule 3b-18—Definition of Terms Used in Asset-Backed Exception to Dealer Registration

We received four comments regarding the proposed amendments to Rule 3b-18.⁴² One commenter supported the proposed amendments and specifically agreed with our clarification of when a bank “predominantly originates” obligations.⁴³ One commenter stated that requiring a bank to originate at least 85% of the loans under an asset-backed transaction is likely to be a barrier to community banks’ ability to sell loans on the secondary market and recommended that we adopt a definition that would allow a bank to originate only a simple majority (*i.e.* 51%) of the underlying loans.⁴⁴

Two commenters stated that the use of the term “initially” in the definition of “originate” could be interpreted to require a correspondent bank to enter into a firm contractual commitment to sell a loan prior to funding for the loan to be considered “originated” by the bank utilizing the asset-backed transactions exception.⁴⁵ These commenters suggested eliminating the word “initially” or changing the term “provided that” to “as evidenced by” to indicate that the test would be met by fulfilling the conditions. Alternatively, they suggested that the Commission provide guidance as to the meaning of “initially approving and underwriting” and “initially agreeing to purchase” to clarify when the approval or agreement must be in place and whether a contractual commitment must be in place to fund a loan for the loan to be considered originated by the purchasing bank.

2. Amendments to Rule 3b-18—Definition of Terms Used in Asset-Backed Exception to Dealer Registration

In the proposing Release, we noted we had been informed that very few banks

issue and sell asset-backed securities without employing a registered broker-dealer. Indeed, we had identified only two banks that conduct this business without a broker-dealer. Although we requested comment on whether any additional banks engage in issuing and selling asset-backed securities without utilizing a broker-dealer, we received no comments on this question.

Based on the comments received, we expect that the amendments we are adopting will permit the banks that currently issue and sell asset-backed securities directly to continue to do so under the terms of the exception without having to employ a broker-dealer. Thus, while not necessarily covering all hypothetical business practices, the proposed amendments appear to accommodate current business practice. We are, therefore, adopting the definitions as proposed.

Although we are sensitive to the concerns expressed by the two commenters regarding the definition of “originated,” we continue to believe that to meet the test of having “originated” a loan, a bank must have some established relationship to the entity making the loan at the time the loan is initially made. The proposed definition does not require the bank to have a binding contractual relationship with the person making the loan at the time the loan is made. Rather, the rule requires the bank to have some established relationship to the entity making the loan. In addition, the loan must be made using the underwriting standards of the bank. We believe the proposed definition of the term “originated” permits a bank to have some flexibility in the way that it structures its relationship to the borrower and to the person who deals directly with the borrower. We believe that the proposed definition of the term “originated” appropriately balances the needs of banks for flexibility while also giving effect to the statutory requirement that the bank and its affiliates predominantly originate the loans backing the securities.

With respect to the 85% test, as we explained in the proposing Release, we included this requirement to define “predominantly originated” because the test closely tracks the language of the statute.⁴⁶ We did not propose changing

⁴¹ We proposed to retain this requirement because the legislative history indicates that each bank selling the securities should be more than an insignificant member of the syndicate. The legislative history suggests that threshold is met when a bank together with its affiliates other than broker or dealer affiliates provided at least 10% of the obligations in the pool. The legislative history states that, “[t]he Committee expects this provision shall be interpreted so that the bank will [have] not less than ten percent of the assets in the syndicate or pool of obligations.” H.R. Rep. No. 106-74, pt. 3, at 171 (1999).

⁴² See the ICBA Letter, the First Tennessee Letter, the General Counsel’s Letter, and the NASAA Letter.

⁴³ See the NASAA Letter.

⁴⁴ See the ICBA Letter.

⁴⁵ See the First Tennessee Letter and the General Counsel’s Letter.

⁴⁶ In defining the term “predominantly,” which modifies the term “originated,” we looked to other sections of the GLBA in which the term is used. Section 103(n) of the GLBA uses the term “predominately” to modify “financial” and to allow analysis of whether nonfinancial activities and affiliations may be retained. Bank Holding Company Act Section 4(n)(2) [12 U.S.C. 1843(n)(2)].