

because Congress did not place any such restriction on the statutory exception for securities lending.⁶⁴ Another commenter noted that the “qualified investor” requirement may limit the scope of securities lending activities that banks might otherwise engage in, but also indicated that it does not believe that there is a substantial amount of securities lending transactions conducted by banks in a non-custodial or non-clearing capacity with persons other than qualified investors.⁶⁵ In adopting this exemption, we plan to retain the requirement that securities lending transactions be conducted only with qualified investors.

We specifically asked banking regulators to advise us if the securities lending exemption would pose any risks that the Commission should address. Neither the banking regulators, nor any other commenter identified any risks that we should address. The General Counsels specifically stated that: “we do not believe there are any risks related to the securities lending activities of banks that the Commission needs to address in this rulemaking.”⁶⁶

We also requested comment on whether our choice not to impose conditions to the exemption that would require that banks conform to the standards applicable to registered broker-dealers that engage in securities lending transactions was appropriate.⁶⁷ Three commenters stated that no additional conditions were necessary and that the conditions applicable to broker-dealers should not be imposed on banks’ securities lending transactions.⁶⁸ One of these commenters stated that any such conditions would create an unfair burden on banks and would be unnecessary due to the exemption’s limit to transactions with qualified investors.⁶⁹ The General Counsels’ Letter stated, “it would be unnecessary and inappropriate for the Commission to impose any additional restrictions on the securities lending activities of banks.”⁷⁰ No commenters suggested that those conditions should be imposed on banks under this exemption.

One commenter agreed that securities lending should be conducted under a written agreement.⁷¹ Some commenters suggested technical and other

clarifications, or changes.⁷² These specific suggestions will be discussed and responded to in the next section.

2. Amendment to Rule 15a-11—Exemption From the Definitions of “Broker” and “Dealer” for Banks Engaging in Securities Lending Transactions

We received a number of comments that requested technical changes to the language in the securities lending exemption. We agree that many of these changes will enhance the clarity of the securities lending exemption as well as the legal certainty afforded to banks. In addition, some of the comments requested that we expand the exemption in certain respects to give banks greater flexibility in conducting securities lending transactions. We also agree with many of these changes and are adopting a more flexible rule.

One commenter asked the Commission to confirm that term loans of securities are as “agreed by the parties” in Rule 15a-11(b).⁷³ We agree that term loans of securities would be considered as “agreed by the parties” under the exemption.

Two commenters urged the Commission to change the required form of the documentation in Rule 15a-11(a) as long as the bank is dealing with a “qualified investor.”⁷⁴ These commenters argued that the availability of the exemption should not turn on the form of documentation used by the parties.⁷⁵ In their view, where a bank is acting as a conduit lender, it may not enter into a separate “agreement to provide securities lending services” with the lender. Instead, it may have two “securities lending agreements”: one with the lender and one with the borrower. The terms of the agreement with the lender would normally include those items listed in the proposed exception that the parties deemed relevant. These commenters suggested that the bank would still, in effect, be providing securities lending services to the lender by borrowing securities in accordance with the securities lending agreement between the parties and in turn lending those securities to a third party.⁷⁶ We agree. We believe that it is unnecessary for a bank taking advantage of this exemption to develop a form of agreement solely to meet the terms of the wording of our exemption. Thus, we are eliminating the requirement that

there be a securities lending agreement. We believe that in many instances, banks will have a securities lending agreement, especially for agency lending transactions, but we do not believe that it is necessary for us to make the existence of a securities lending agreement a condition of this exemption. We are, however, retaining the list of securities lending services that may be conducted in connection with a securities lending transaction within a definition of “securities lending services.”

Two commenters urge that replacement transactions for a conduit lender should be permitted under this exemption.⁷⁷ One of these commenters states that “[p]ermitting a replacement transaction would maintain the bank’s matched loan and borrow of securities.”⁷⁸ We proposed an exemption that did not permit conduit lenders to replace transactions, because we believed that these bank conduit transactions should be riskless principal transactions as evidenced by being entered into contemporaneously. We considered limiting the number of substitutions of parties that could occur. Although we continue to have some reservations about the risk that we may be permitting banks to have a book of matched securities loans, we have become convinced that limiting the number of substitutions of parties that could occur would require banks to prepare additional documentation without necessarily limiting their dealer transactions. We continue to believe, however, that any substitution of parties to securities lending transactions should occur within one business day of the termination of the securities lending contract by the other party. We are, therefore, adopting this change to the rule.

We also proposed amendments providing only for substitutions of collateral on the securities borrowing side of the transaction. In re-evaluating the language of Rule 15a-11(d), however, we are deleting the words, “on the securities borrowing side of the transaction” to permit substitutions of collateral to occur on both sides of the securities lending transaction as suggested by one of the commenters.⁷⁹ We have been persuaded that we should permit a conduit lender to replace collateral on either side of a conduit transaction under this rule.

This same commenter stated that the position of the word “solely” in the

⁶⁴ *Id.*

⁶⁵ See the Coalition of Banks’ Letter.

⁶⁶ See the General Counsels’ Letter.

⁶⁷ See e.g., Rule 15c3-3(b)(3) [17 CFR 240.15c3-3(b)(3)].

⁶⁸ See the General Counsels’ Letter, the NYCH Letter, and the Coalition of Banks’ Letter.

⁶⁹ See the NYCH Letter.

⁷⁰ See the General Counsels’ Letter.

⁷¹ See the ICBA Letter.

⁷² See e.g., the Coalition of Banks’ Letter and the NYCH Letter.

⁷³ See the Coalition of Banks’ Letter.

⁷⁴ See the Coalition of Banks’ Letter and the NYCH Letter.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See the Coalition of Banks’ Letter and the NYCH Letter.

⁷⁸ See the NYCH Letter.

⁷⁹ See the NYCH Letter.