

context of the exemption may be confusing because it might be interpreted as attempting to narrow in certain respects the statutory custodial lending exception by imposing a restriction to “qualified investors.”⁸⁰ This commenter asks that we replace “solely to engage in or effect” with “to the extent that it engages in or effects.” We agree that the language suggested by the commenter avoids this ambiguity and have incorporated this suggestion into the final rule we are adopting today.⁸¹

Another commenter stated that the use of the word “solely” in the securities lending exemption could be read to mean that a bank may not provide any other services in connection with non-custodial securities lending transactions.⁸² That commenter asked that we clarify that the securities lending exemption and fiduciary exception could both be used for the same client. Although both the exemption and the exception could be used for the same client, each transaction would have to meet all of the elements of one of them.⁸³

Two commenters recommended adding the words “or on behalf of” prior to the words “qualified investor” in two instances in paragraph (a) with conforming language in paragraph (c) to more closely track the statutory language found in the custody exception.⁸⁴ We agree that the language suggested by these commenters avoids this ambiguity and have incorporated this suggestion in the final rule.

Two commenters recommended deleting the words “[e]xcept as otherwise provided in paragraph (d) of this section * * *” as an unnecessary reference to the definition of “conduit

lender.”⁸⁵ We agree that this technical suggestion would improve the clarity of the rule and have incorporated this suggestion in the final rule.

These same two commenters also made two other technical suggestions with which we agree. First, they recommended that we clarify that a bank may *direct* the receipt and delivery of loaned securities and collateral by third parties in Rule 15a-11(c)(2) and (3). Second, they suggested that we revise the rule language to refer to a bank *investing or directing* the investment of cash collateral, rather than to the reinvesting of such collateral in Rule 15a-11(c)(5).

In sum, we are adopting the exemption for securities lending, Rule 15a-11, with the technical changes described above. We continue to believe that, because it is limited to qualified investors,⁸⁶ the exemption is appropriate in the public interest and is consistent with the protection of investors.

D. Definition of “Qualified Investor”

Exchange Act Section 3(a)(54) expressly defines the term “qualified investor,” and provides authority to the Commission by rule or order to expand the definition to include any other person, taking into consideration such factors as the person’s financial sophistication, net worth, and knowledge and experience in financial matters.⁸⁷

The definition of “qualified investor” was added to the Exchange Act by the GLBA and has application to several of the bank exceptions from broker-dealer registration, including:⁸⁸ (1) The broker

exception for identified banking products when the product is an equity swap agreement;⁸⁹ (2) the dealer exception for identified banking products when the product is an equity swap agreement;⁹⁰ and (3) the dealer exception for asset-backed securities.⁹¹ Under these exceptions, banks may sell certain securities to qualified investors.

Exchange Act Section 3(a)(54)(A) enumerates an extensive list of persons that are “qualified investors.”⁹² Some of these entities meet the definition by merely being certain types of entities, while other entities must both be a certain type of entity and meet an ownership and investment test. For example, Subsection (xi) of Section 3(a)(54)(A) provides that “any corporation, company, or partnership that owns and invests on a discretionary basis, not less than \$25,000,000 in investments” is a qualified investor.

In considering this definition, we first looked to Exchange Act Section 3(a)(9), which defines the term “person” to mean “a natural person, company, government, or political subdivision, agency, or instrumentality of a government.”⁹³ We also looked to Investment Company Act Section 2(a)(8), which provides that the term “company” means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such.”⁹⁴

In light of these other definitions, for the purposes of the GLBA provisions in the Exchange Act, we interpreted the term “company” as used in the definition of “qualified investor” in subsection (xi) of Section 3(a)(54)(A) to have a broad meaning that encompasses types of entities other than those specifically listed in Section 3(a)(54)(A).

We asked for comment on our interpretation of this term. One

purchaser. See Section 206(a)(5) of Public Law 106-102 [15 U.S.C. 78c note] as incorporated into Exchange Act Section 3(a)(4)(B)(ix) [15 U.S.C. 78c(a)(4)(B)(ix)] and Section 3(a)(5)(C)(iv) [15 U.S.C. 78c(a)(5)(C)(iv)].

⁸⁹ Section 206(a)(6) of Public Law 106-102 [15 U.S.C. 78c note] as incorporated into Exchange Act Section 3(a)(4)(B)(ix) [15 U.S.C. 78c(a)(4)(B)(ix)].

⁹⁰ Section 206(a)(6) of Public Law 106-102 [15 U.S.C. 78c note] as incorporated into Exchange Act Section 3(a)(5)(C)(iv) [15 U.S.C. 78c(a)(5)(C)(iv)].

⁹¹ Exchange Act Section 3(a)(5)(C)(iii) [15 U.S.C. 78c(a)(5)(C)(iii)].

⁹² Subsections (i) through (xiv) of Section 3(a)(54)(A) list entities that are qualified investors.

⁹³ Exchange Act Section 3(a)(9) [15 U.S.C. 78c(a)(9)].

⁹⁴ Investment Company Act Section 2(a)(8) [15 U.S.C. 80a-2(a)(8)].

⁸⁰ *Id.*

⁸¹ For consistency, we made a similar change in the language of Rule 3a5-1.

⁸² See the ABA/ABASA Letter.

⁸³ This issue arises only in the context of the “broker” exception for trust and fiduciary activities. The issue does not arise in the context of the “dealer” exception for fiduciary transactions because the “dealer” exception for trustee and fiduciary transactions only applies when the bank buys or sells securities for investment purposes for the bank, or in accounts for which the bank acts as a trustee or fiduciary. We note, however, that in giving meaning to the term “fiduciary” in Section 3(a)(5)(C)(ii), we look to the legislative history. The legislative history states that [Exchange Act Section 3(a)(5)] “excepts a bank from the definition of ‘dealer’ when it buys and sells securities for investment purposes for the bank or for accounts for which the bank acts as trustee or fiduciary. This mirrors existing law distinguishing between investors and dealers, and is limited to the portfolio trading of the bank and accounts for which it makes investment decisions.” H.R. Rep. No. 106-74, pt. 3, at 170-171 (1999).

⁸⁴ See the Coalition of Banks’ Letter and the NYCH Letter.

⁸⁵ See the Coalition of Banks’ Letter and the NYCH Letter.

⁸⁶ See additional discussion of “qualified investors” at Section D, *infra*.

⁸⁷ 15 U.S.C. 78c(a)(54)(A). Under this definition qualified investors include persons such as investment companies, banks, small business investment companies, any State sponsored employee benefit plan, institutional trusts, market intermediaries, and natural persons, corporations or partnerships that own and invest on a discretionary basis more than \$25,000,000. 15 U.S.C. 78c(a)(54)(C) gives the Commission additional authority to define a “qualified investor.”

⁸⁸ In addition to these three provisions, a participation in a loan, to be an “identified banking product,” also must either be sold to: (1) A qualified investor; or (2) to other persons that have an opportunity to review and assess any material information regarding the borrower’s creditworthiness and based on such factors as financial sophistication, net worth, and knowledge and experience in financial matters, have the capability to evaluate the information available, as determined under generally applicable banking standards or guidelines. Thus, a bank utilizing the exceptions to broker and dealer registration to sell a participation interest would either have to sell such an interest to a qualified investor or undertake a more extensive factual assessment of the