

commenter urged caution in applying the expanded definition of “qualified investor” in all circumstances.<sup>95</sup> This commenter stated that while it may be appropriate to utilize a single definition of a “qualified investor” as a means to simplify compliance, the application should be limited to securities lending activities pending more careful and thorough analysis.<sup>96</sup> In contrast, three other commenters advocated using one interpretation of the definition of qualified investor.<sup>97</sup>

We believe that the simplicity of having one interpretation of the statutory definition of “qualified investor” outweighs any risk that it could be overbroad in other circumstances. Thus, we believe that it is appropriate to utilize this interpretation in all circumstances where the term is used in the GLBA exceptions. We continue, however, to apply the statutory requirements to the entities expressly listed in Exchange Act Section 3(a)(54)(A). For example, a government or political subdivision, agency, or instrumentality of a government is required to invest on a discretionary basis at least \$50 million in investments in order to be considered a qualified investor.<sup>98</sup> The statutory requirement for these governmental entities would not be changed by this interpretation.

Similarly, any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, qualifies only if the investment decisions are made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser.<sup>99</sup> GLBA expressly limited the definition of “qualified investor” to these types of employee benefit plans, and this interpretation does not cover other types of employee benefit plans.

In the interest of clarity and legal certainty, two commenters also recommended that the Commission adopt a rule to implement its interpretation of the definition of a qualified investor.<sup>100</sup> We believe the Commission’s interpretation suffices to

enhance legal certainty for entities that are not as precisely described as others in the list of entities expressly listed as “qualified investors.” It, therefore, is not necessary to adopt a general rule at this time.

In the context of the securities lending exemption, we are, however, revising the regulation so that the exemption encompasses not only securities lending transactions with or on behalf of any “qualified investor” (as that term is defined in Exchange Act Section 3(a)(54)(A) and interpreted above), but also securities lending transactions with or on behalf of any employee benefit plan that owns and invests on a discretionary basis not less than \$25,000,000 in investments. Thus, we are amending Rule 15a-11 to add certain employee benefit plans that do not meet the terms of Exchange Act Section 3(a)(54)(A)(v).<sup>101</sup> We are making this change in response to a request by one of the commenters.<sup>102</sup> We believe that this addition to the exemption is appropriate. This addition will permit banks to engage in or effect securities lending transactions, and any securities lending services in connection with such transactions, with or on behalf of a person the bank reasonably believes to be a pension plan that, although it would not meet the qualitative standard set forth in paragraph (v),<sup>103</sup> may own and invest on a discretionary basis, not less than \$25,000,000 in investments.<sup>104</sup>

Two commenters suggested that it would be helpful if the Commission would confirm that banks may enter into securities lending transactions with parties that they reasonably believe are “qualified investors.” These commenters suggested that one non-exclusive means by which a bank should be able to reasonably conclude that a party is a “qualified investor” could be to obtain a representation to that effect by a party, unless reliance on that representation would not be

reasonable under the circumstances.<sup>105</sup> After considering this suggestion, we have modified the definition of “qualified investor” within the context of the securities lending exemption to provide a reasonable belief standard.<sup>106</sup>

With regard to the places where the statutory provisions require that banks deal only with “qualified investors,” we have reviewed the legislative history in this area, as well as the statutory language, and find no indication that it was Congress’ intent to provide a reasonable belief standard with regard to transactions that are limited to qualified investors.<sup>107</sup> Although our exemptive authority would permit us to add a reasonable belief standard if we found that it is necessary or appropriate in the public interest, and consistent with the protection of investors,<sup>108</sup> we believe that this kind of a change should properly be made in a rule that has been subject to public notice and comment. Further, we believe that there are competing interests in this area that should be considered and that banks may be in a position to ascertain whether their customers meet the criteria of qualified investors so that they may engage in transactions that are restricted by statute to qualified investors. We also believe that we should consider whether banks should conduct the transactions that are limited by statute to qualified investors only with persons with which they have a sufficient relationship to know whether those persons are indeed “qualified investors.” For all of these reasons, we will consider this question further to determine whether to propose a

<sup>105</sup> See the Coalition of Banks’ Letter and the NYCH Letter.

<sup>106</sup> For guidance on how to ascertain whether a person is a qualified investor, see Rule 144A(d)(1) under the Securities Act of 1933 [17 CFR 230.144A(d)(1)]. We note that the determination of whether a person is a qualified investor may involve both a qualitative analysis and a quantitative analysis. The source materials listed in Rule 144A would provide information that could be used in both types of determinations.

<sup>107</sup> See H.R. Rep. No. 106–74, pt. 3, at 175 (1999).

<sup>108</sup> Under Exchange Act Section 36(a), “the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” 15 U.S.C. 78mm(a). The Commission also has authority to issue exemptive orders that grant relief from specific provisions of the Exchange Act as well as from specific Commission rules promulgated thereunder. For example, either by rule or by order, the Commission may, pursuant to Section 15(a)(2) of the Exchange Act, conditionally or unconditionally exempt any broker or dealer from the registration provisions of Section 15(a)(1). 15 U.S.C. 78o(a)(1).

<sup>95</sup> See the ICBA Letter.

<sup>96</sup> *Id.*

<sup>97</sup> See the NYCH Letter, the ABA/ABASA Letter, and the Coalition of Banks’ Letter.

<sup>98</sup> Section 3(a)(54)(A)(xiii) of the Exchange Act [15 U.S.C. 78c(a)(54)(C)(xiii)].

<sup>99</sup> Section 3(a)(54)(A)(v) of the Exchange Act [15 U.S.C. 78c(a)(54)(C)(v)].

<sup>100</sup> See the NYCH Letter and the Coalition of Banks’ Letter.

<sup>101</sup> 15 U.S.C. 78c(a)(54)(A)(v).

<sup>102</sup> See the Coalition of Banks’ Letter, which asked for clarification of the status of foreign pension plans.

<sup>103</sup> This provision relates to pension plans that are “any State sponsored employee benefit plan, or any other employee benefit plan, within the meaning of the Employee Retirement Income Security Act of 1974, other than an individual retirement account, if the investment decisions are made by a plan fiduciary, as defined in section 3(21) of that Act, which is either a bank, savings and loan association, insurance company, or registered investment adviser.” 15 U.S.C. 78c(a)(54)(A)(v).

<sup>104</sup> Rule 15a-11(e). [17 CFR 240.15a-11.] When the individual plan participants or beneficiaries of a pension plan make their own investment decisions, the plan itself would not meet the requirement that it invests the plan assets on a discretionary basis. See Section 3(a)(35) of the Exchange Act [15 U.S.C. 78c(a)(35)].