

reasonable belief standard applicable to transactions other than securities lending.

### E. Temporary Exemption

#### 1. Discussion of Comments on the Temporary Exemption

Several commenters stated that the final implementation of the rules pertaining to the bank exceptions from the definition of dealer should be coordinated with the upcoming revisions to the rules pertaining to the bank exceptions from the definition of broker. These commenters expressed concern that banks would have to contend with multiple implementation dates.<sup>109</sup> None of the comments we received were supported by specific examples or references to any specific costs that would be incurred by any bank. We received only one comment from a bank stating that the dealer rules should be delayed until the broker rules were finalized.<sup>110</sup> Moreover, the bank commenter offered no indication that it engages in significant dealer activities.

We have carefully considered this view in light of the few banks that actually conduct dealer activities other than as riskless principal. We note that the provisions of Section 16 of the Glass-Steagall Act continue to prohibit national banks from underwriting, selling, or dealing in most securities.<sup>111</sup> After extensive discussions with the banks that conduct significant dealer activities, and our efforts to accommodate existing practices, we continue to believe that this rule will not require banks to make significant changes to their existing dealer activities, except in connection with riskless principal transactions, and that a longer phase-in period will not be necessary. Moreover, based on our discussions with banks engaged in limited dealer activities, other than riskless principal transactions, we believe that there is insignificant overlap in the broker and dealer activities conducted by banks, and that most riskless principal transactions can be restructured as agency transactions, which remain exempt under the blanket broker exception. In addition, because the broker and dealer activities are

sufficiently distinct, we believe that there would not be a significant compliance benefit to banks in coordinating the effective dates of the broker and dealer rules.

Implementing the dealer rule first will permit banks to use the entire 500-transaction limit set forth in the *de minimis* exception to broker for riskless principal transactions under the dealer exemption. We believe that having this much room available to banks to conduct riskless principal transactions will give banks an opportunity to realistically assess their use of the *de minimis* exemption in an environment that provides them with the maximum flexibility to do so. Later, when the broker rules also are effective, banks will have to consider their use of the *de minimis* exception for broker transactions as well as any riskless principal transactions they may conduct while utilizing the same 500-transaction limit. We believe that this transition period when only the dealer requirements, exceptions, and exemptions are effective will permit banks to gain experience in identifying securities transactions in the most forgiving environment, not only because of the full availability of the 500 transactions for riskless principal transactions but also because the temporal exemption for broker transactions remains in place. Thus, transactions that may previously have been done on a principal basis in the bank may instead be carried out by the bank on an agency basis, until the blanket broker exemption ends.

This experience may lead some banks to conclude that other arrangements, such as affiliating with a broker-dealer or shifting transactions to a broker-dealer, may be necessary when all of the broker-dealer exceptions and exemptions become effective. In those instances, we believe that the banks will benefit from having this knowledge sooner and may be able to use this knowledge to take steps that will make their transition smoother.

In addition, we believe that implementing the dealer exceptions and exemptions will permit banks to gain experience in identifying securities transactions before they are required to implement compliance with the broker exceptions and exemptions. Thus, we believe that staggering the implementation dates may actually enhance compliance and permit banks to achieve a more orderly transition to conducting their securities activities in accordance with the mandates of the GLBA.

We are, however, sympathetic to individual banks that may have specific

transactions in progress for which they may need an extension of the implementation date of these rules. We urge those banks to contact our staff to determine if specific relief may be available to any such bank on a case-by-case basis for specified transactions for which a demonstrated burden could be avoided or alleviated through a reasonable short extension of the compliance date, or during any period when additional specific exemption requests are being considered.<sup>112</sup>

#### 2. Adoption of Temporary Exemption and Effective Date of Dealer Rules

Concurrent with this release, the Commission, through separate order, is further extending the temporary exemption from the definition of "dealer" for banks until September 30, 2003. On that date, the rules we are adopting today will apply to dealer transactions of banks, savings associations, and savings banks.

#### F. Extension of Rule 15a-8—Section 29 Liability Exemption

Two commenters asked the Commission to extend the exemption from liability under Exchange Act Section 29, since it applied only to contracts made before January 1, 2003.<sup>113</sup> Other commenters asked for some type of regulatory "safe harbor," or cure period.<sup>114</sup> Exchange Act Section 29(b)<sup>115</sup> provides that any contract made in violation of the Exchange Act or rules adopted under the Exchange Act shall be void as regards the rights of any person who made or engaged in the performance of any such contract.<sup>116</sup> Private parties have invoked this equitable remedy rarely<sup>117</sup> in instances involving broker-dealer registration violations by the opposite party.<sup>118</sup>

<sup>112</sup> See *supra* note 109.

<sup>113</sup> See the ABA/ABASA Letter and the NYCH Letter.

<sup>114</sup> See the General Counsels' Letter, the ABA/ABASA Letter, the NYCH Letter, the Coalition of Banks' Letter, and the Roundtable Letter.

<sup>115</sup> 15 U.S.C. 78cc(b).

<sup>116</sup> Exchange Act Section 29(b) does not make the contract automatically a nullity. Rather, the contract is voidable at the option of the innocent party. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 387 (1970). In this manner, "the interests of the victim are sufficiently protected by giving him the right to rescind; to regard the contract as void where he has not invoked the right would only create the possibility of hardships to him or others without necessarily advancing the statutory policy of disclosure." *Id.* at 388.

<sup>117</sup> *Id.* at 388; see also *Occidental Life Ins. Co. v. Pat Ryan and Assoc.*, 496 F.2d 1255, 1267 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974) (principles of equity, like estoppel and waiver, apply to actions brought under Exchange Act Section 29(b)).

<sup>118</sup> See *Boguslavsky v. Kaplan*, 159 F.3d 715, 722 (2nd Cir. 1998) (under the liberal pleading standard

<sup>109</sup> See the ABA/ABASA Letter, the General Counsels' Letter, the IIB Letter, the Commerce Banc Letter, and the Roundtable Letter.

<sup>110</sup> See the Commerce Banc Letter.

<sup>111</sup> This section excepted certain bank-eligible securities such as U.S. government securities. Section 5(c) of the Glass-Steagall Act also applied the same Section 16 restrictions to state-chartered banks that are members of the Federal Reserve System. Savings Associations and savings banks did not have the exemption from broker-dealer registration until we adopted the Rule 15a-9 as part of the Interim Final Rules.