

Rule 15a-8¹¹⁹ was included in the Rules because we recognized that the amended Exchange Act contains numerous broker-dealer definitional provisions that apply only to banks, which were previously excepted from broker-dealer regulation.¹²⁰ We understand that banks may need to adjust their procedures to shift their securities activities to registered broker-dealers or to comply with the conditions of the specific functional exceptions or exemptions to the definitions of broker and dealer. We also are aware that there may be instances where, despite having reasonable procedures in place, a bank may inadvertently fail to meet the terms and conditions of the specific functional exceptions or exemptions upon which it is relying. This could result in the bank engaging in securities activities in violation of the registration requirements of Exchange Act Section 15 and the rules promulgated under that section. We, therefore, adopted Rule 15a-8.

Now that we are adopting an effective date for the bank dealer rules, banks may need time to adjust to these definitional provisions and exemptions. Thus, we continue to believe that it is appropriate to provide a transitional period before these provisions fully apply.

To provide certainty to banks while they become fully familiar with the operation of the exceptions, we are,

accorded pro se litigants, an investor properly presented an identifiable claim for rescission under Exchange Act Section 29(b) in asserting that the firm operated without director of compliance and thus was not properly registered as securities broker-dealer); *Regional Properties, Inc. v. Financial and Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985) (subject to equitable defenses, real estate developers were entitled to rescind agreement with broker to structure and market limited partnership interest where broker had failed to register as required by the Exchange Act); *Regional Properties v. Financial and Real Estate Consulting Co.*, 678 F.2d 552, 557, 566-67 (5th Cir. 1982), *aff'd* on other grounds, 752 F.2d 178 (5th Cir. 1985) (later appeal) (recognizing that Exchange Act Section 29(b) provides for a private, equitable cause of action for the rescission of a contract where the securities broker was unlicensed); *Eastside Church of Christ v. National Plan, Inc.*, 391 F.2d 357, 362 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968) (churches could void a transaction with broker under Exchange Act Section 29(b) because the broker was unregistered); *Couldock and Bohan, Inc. v. Societe Generale Securities, Corp.*, 93 F. Supp. 2d 220, 233 (D. Conn. 2000) (a contract violating broker registration requirements of the Exchange Act is voidable at the option of the innocent party under Exchange Act Section 29(b)).

¹¹⁹ 17 CFR 240.15a-8.

¹²⁰ In the past, the Commission has been asked for this type of relief and has declined to grant it. See Registration Requirements for Foreign Broker-Dealers, Release No. 34-27017, 54 FR 30013 at 30021 (July 18, 1989). Our research indicates that there was not an increase in suits against foreign broker-dealers under Section 29 of the Exchange Act.

therefore, adopting an amended Rule 15a-8.¹²¹ This amendment provides an exemption for contracts entered into by banks before March 31, 2005 from being considered void or voidable by reason of Exchange Act Section 29 because a bank that is a party to the contract violated the registration requirements of Section 15(a) of the Exchange Act or any applicable provision of this Act and the rules and regulations thereunder based solely on a bank's status as a dealer when the contract was created. Banks may have inadvertent, technical violations as they become accustomed to the new regulatory requirements. This exemption is designed to recognize the unique compliance problems that banks may have by preventing any inadvertent failures by banks to meet the conditions of the functional exceptions from triggering potential rescission under Exchange Act Section 29 during this transitional period.

We note that this provision does not relieve a bank of the obligation to register as a dealer if their securities activities do not fit within a specific functional exception or exemption. We also note that a bank's securities activities continue to be subject to the antifraud provisions of the federal

¹²¹ 17 CFR 240.15a-8. On May 11, 2001, we adopted Rule 15a-8 as part of the Rules and sought comment on it. See Release No. 34-44291, 66 FR 27760 (May 18, 2001). At that time, we provided and anticipated that the general exemption for banks from the definition of dealer would end on October 1, 2001, and that an additional conditional exemption from the definition would end on January 1, 2002. Accordingly, to provide for sufficient transition time, we adopted Rule 15a-8 to provide for exemption from Section 29 rescission liability until January 1, 2003. During the comment period on the Rules, we received no comments suggesting that such an exemption was inappropriate.

Ultimately, however, to allow sufficient time to address concerns raised about the Rules, we further extended the exemption from the definition of dealer until September 30, 2003 (with today's extension). Accordingly, the transition period that we proposed and adopted in Rule 15a-8 has not yet commenced, because the existing Rule includes a specific termination date of January 1, 2003. Thus, the Rule as currently written would provide no adjustment period for banks. Accordingly, the recommended amendment to 15a-8 does nothing more than amend the Rule to establish a transition period commencing on the date that the general exemption from the definition actually expires, exactly as was contemplated when the existing Rule was adopted on an interim basis and published for public comment. Under these circumstances, we find good cause to conclude that this amendment to Rule 15a-8 may be accomplished without our separately and specifically providing notice of and an opportunity to comment on the amendment. We also believe that such notice is "unnecessary" within the meaning of 5 U.S.C. 553(b)(3)(B). Moreover, the proposing Release did include questions seeking input about any necessary accommodations for an orderly transition, and two commenters specifically suggested the accommodation that this amendment to Rule 15a-8 provides.

securities laws, irrespective of the bank's lack of registration or failure to comply with the provisions of the Exchange Act and the rules thereunder that otherwise apply to banks based on their status as broker-dealers. We, therefore, find that this exemption for dealer contracts entered into by banks before March 31, 2005 from being considered void or voidable by reason of Exchange Act Section 29 is appropriate in the public interest and consistent with the protection of investors.¹²²

VI. Procedural Matters

A. Paperwork Reduction Act

These rule amendments and new exemption do not impose recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply.¹²³ We received no comments on this issue.

B. Consideration of Comments on Benefits and Costs

We believe that these rule amendments and the new exemption are consistent with Congress's intent in enacting the GLBA and are responsive to the comments we received. These rule amendments and the new exemption are very limited in scope. The amendments adopt four changes. In particular, we are adopting rules that: (1) Modify the way in which transactions are counted under the exemption from the definition of "dealer" for a bank engaged in riskless principal transactions, which would permit the bank to engage in more transactions under the *de minimis* exception to broker and dealer registration; (2) modify certain definitions under the dealer exception that permits banks to issue and sell asset-backed securities to qualified investors to permit banks to possibly issue and sell more such securities; (3) add a new exemption from the definitions of both "broker" and "dealer" to provide banks with enhanced legal certainty when they engage in securities lending transactions; and (4) extend the exemption from liability under Section 29(b) to contracts entered into before March 31, 2005 based solely on a bank's

¹²² Exchange Act Section 36(a)(1) [15 U.S.C. 78mm(a)(1)].

¹²³ We would expect banks, as a matter of good business practice, to be able to demonstrate that they meet the terms of a particular exemption. We also note that Section 204 of the GLBA specifically requires the bank agencies to promulgate recordkeeping requirements.