

status as dealer when the contract was created. The amendments to the first two rules are being adopted as proposed. The new exemption is being adopted with minor, technical changes from the proposal. We received no comments on the costs and benefits of the proposed amendments or new exemptions.

1. Benefits

Both of the rule amendments modify the exceptions and the interpretations found in Rules 3a5-1 and 3b-18 in a way that expands the scope of activity in which banks may engage without registering as dealers. The new exemption for banks to engage in securities lending transactions, new Rule 15a-11, also provides increased legal certainty to banks. All of these rule amendments make it easier for banks to conduct these activities in light of the changes to the Federal securities laws. We received no comments directed to this issue.

The amendment to Rule 3a5-1, the *de minimis* exemption, changes the way riskless principal transactions are counted to allow banks to engage in more such transactions before triggering the dealer registration requirement.

Directly engaging in asset-backed transactions without employing a broker-dealer is very unusual for banks. We found only two banks that regularly issue and sell asset-backed securities. Based on staff discussions with these two banks, we believe that the amendments to Rule 3b-18 will permit these two banks to continue to utilize their existing business models with little or no change in their procedures. These amendments modify the definition of "originate" to permit banks to use loan origination channels that would not be permitted under the Rules. We believe that the amendments to the definitions under the asset-backed transactions exception will accommodate these banks' business without sacrificing the statutory limits Congress imposed on banks' dealer activities. In response to the comments on these proposed amendments, we have clarified certain matters in this adopting release.

Lending securities is a highly specialized business for which Congress provided partial relief under the custody exception to broker registration. As discussed above, some banks were concerned about legal certainty for securities lending transactions that may not meet the terms of the custody exception to broker registration and to the extent that some securities lending transactions might be considered to be subject to dealer registration. We believe

that banks provide an important function in this market and that it is in the public interest that they continue to do so. The exemption will provide banks that lend securities with enhanced legal certainty that will permit them to continue to engage in this activity without broker-dealer registration. In the final rule, we are making the securities lending exemption more flexible by eliminating the requirement that these transactions be conducted pursuant to a securities lending agreement.

In addition, we are adopting an amended Rule 15a-8 that will provide 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. This temporary exemption provides banks with relief from being subject to rescission rights while they become accustomed to the new bank exceptions and exemptions from the definition of dealer under the Exchange Act. This relief should provide banks with savings from being spared potential liability under this statutory section.

2. Costs

Although banks may incur certain costs to comply with the GLBA, these costs will be necessary because of the statutory change. Congress determined that all securities activities should be functionally regulated by the expert securities regulator to ensure investor protection, regardless of the entity in which the activities occur. Thus, any regulatory costs arise from Congress's determination that amendment of the Exchange Act was necessary. There are no out-of-pocket costs as a result of these rules and rule amendments. Because all of these amendments make it easier for banks to conduct these activities in light of the changes to the federal securities laws, any costs would be those associated with moving the supervision of these limited securities transactions or products from the regulatory oversight of the Commission and placing them under the banking agencies. We do not believe any such cost to be significant.

In addition, because the types of dealer activities that are the subject of these rules are not the types of activities in which small banks or small broker-dealers participate, there should be no

competitive costs to small broker-dealers due to the way in which these rules modify the terms of the bank exceptions and exemptions. We did not receive any comments on this issue, nor did we receive any comments that identified specific costs related to complying with these rules.

C. Consideration of Burden on Competition, and on Promotion of Efficiency, Competition, and Capital Formation

In accordance with our responsibilities under Section 3(f) of the Exchange Act, we have considered both the protection of investors and whether these rule amendments would promote efficiency, competition, and capital formation in determining whether they are consistent with the public interest.¹²⁴ In addition, Section 23(a)(2) of the Exchange Act¹²⁵ requires us, in adopting rules under the Exchange Act, to consider the anticompetitive effects of such rules, if any, and to refrain from adopting a rule that will impose a burden on competition not necessary or appropriate in furthering the purpose of the Exchange Act. We received no comments on these issues.

We do not believe that the interpretations, definitions, and exemptions contained in these amendments, the interpretation of the term "qualified investor," or the new exemption will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Rules define terms in the statutory exceptions to the definitions of broker and dealer added to the Exchange Act by Congress in the GLBA, and provide guidance to banks regarding the scope of those exceptions. The rule amendments and exemption also do not impose any additional competitive burdens on banks engaging in a securities business, other than those imposed by Congress through functional regulation in the GLBA.

Because the types of dealer activities that are the subject of these rules are not the types of activities in which small banks or small broker-dealers directly participate, there should be no competitive costs to small banks or small broker-dealers due to the way in which these rules modify the terms of the bank exceptions and exemptions.

The new conditional exemption from broker-dealer registration in Rule 15a-11 would provide banks increased legal certainty when they engage in securities lending transactions without any new

¹²⁴ 15 U.S.C. 78c(f).

¹²⁵ 15 U.S.C. 78w(a)(2).