

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82626; File No. S7-27-11)

February 2, 2018

Order Extending Until February 5, 2019 Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps and Request for Comment

I. Introduction

The Securities and Exchange Commission (“Commission”) is (i) extending until February 5, 2019 certain temporary exemptive relief originally provided by the Commission in connection with the revision of the definition of “security” in the Securities Exchange Act of 1934 (“Exchange Act”) to encompass security-based swaps (“Temporary Exemptions”);¹ and (ii) requesting comment on whether continuing such exemptive relief beyond February 5, 2019 is necessary or appropriate in the public interest, and is consistent with the protection of investors.

II. Discussion

A. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act² amended the definition of “security” under the Exchange Act to expressly encompass security-based swaps.³ The expansion of the definition of the term “security” to include security-based swaps

¹ See Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of “Security” to Encompass Security-Based Swaps, Exchange Act Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) (“Exchange Act Exemptive Order”).

² The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124, Stat. 1376 (2010) (“Dodd-Frank Act”).

³ See Section 761(a)(2) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)). The provisions of Title VII generally became effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act) (the “Effective Date”), unless a provision required a rulemaking, in which case the provision would go into effect “not less than” 60 days after publication of the related final rules in

had the effect of changing the scope of the Exchange Act regulatory provisions that apply to security-based swaps and, in doing so, raised certain complex questions that require further consideration.

On July 1, 2011, the Commission issued the Exchange Act Exemptive Order granting temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with the revision of the Exchange Act definition of “security” to encompass security-based swaps.⁴ In general, the Exchange Act Exemptive Order granted temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with security-based swap activity by: (i) any person who meets the definition of “eligible contract participant”

the Federal Register or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act (15 U.S.C. 77b).

⁴ At the time it issued the Exchange Act Exemptive Order, the Commission also adopted interim final Rule 240 under the Securities Act of 1933 (“Securities Act”), interim final Rules 12a-11 and 12h-1(i) under the Exchange Act, and interim final Rule 4d-12 under the Trust Indenture Act (“Trust Indenture Act”). See 17 CFR 230.240, 17 CFR 240.12a-11, 17 CFR 240.12h-1, and 17 CFR 260.4d-12. See also Exemptions for Security-Based Swaps, Securities Act Release No. 9231 (July 1, 2011), 76 FR 40605 (July 11, 2011). This extension order does not address these interim final rules, which are scheduled to expire on February 11, 2018. See Exemptions for Security-Based Swaps, Securities Act Release No. 10305 (Feb. 10, 2017), 82 FR 10703 (Feb. 15, 2017). The Commission recently adopted a rule under the Securities Act to provide that certain communications involving security-based swaps will not be deemed to constitute “offers” of such security-based swaps for purposes of Section 5 of the Securities Act. See Treatment of Certain Communications Involving Security-Based Swaps That May Be Purchased Only By Eligible Contract Participants, Securities Act Release No. 10450 (Jan. 5, 2018), 83 FR 2046 (Jan. 16, 2018).

The Commission also, on June 15, 2011, issued an exemptive order granting temporary relief from compliance with certain provisions added to the Exchange Act by subtitle B of Title VII of the Dodd-Frank Act with which compliance would have otherwise been required as of the Effective Date. In that order, the Commission provided guidance regarding the provisions of the Exchange Act that were added by Title VII with which compliance was required as of the Effective Date. See Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Securities-Based Swaps, Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011).

(“ECPs”) set forth in Section 1a(12) of the Commodity Exchange Act as of July 20, 2010 (i.e., the day prior to the date the Dodd-Frank Act was signed into law) and (ii) a broker or dealer registered under Section 15(b) of the Exchange Act.⁵

The overall approach of the Exchange Act Exemptive Order was directed toward maintaining the status quo during the implementation process for the Dodd-Frank Act.⁶ In the Exchange Act Exemptive Order, the Commission stated that it would accomplish this “by

⁵ See Exchange Act Exemptive Order, 76 FR at 39938–39. The Exchange Act Exemptive Order did not provide exemptive relief for any provisions or rules prohibiting fraud, manipulation, or insider trading (other than the prophylactic reporting or recordkeeping requirements such as the confirmation requirements of Exchange Act Rule 10b-10). In addition, the Exchange Act Exemptive Order did not affect the Commission’s investigative, enforcement, and procedural authority related to those provisions and rules. See Exchange Act Exemptive Order at 39931, note 34. The Exchange Act Exemptive Order also did not address Sections 12, 13, 14, 15(d), 16, and 17A of the Exchange Act and the rules thereunder. The Commission did, however, issue limited temporary relief from the clearing agency registration requirements under Section 17A(b) for entities providing certain clearing services for security-based swaps. This relief was linked to final rules issued by the Commission relating to the registration of clearing agencies that clear security-based swaps. See Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, Exchange Act Release No. 64796 (July 1, 2011), 76 FR 39963 (July 7, 2011).

The Commission also provided a temporary exemption within the Exchange Act Exemptive Order for Sections 5 and 6 of the Exchange Act and linked the expiration date of that exemptive relief until the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities. See Exchange Act Exemptive Order, 76 FR at 39934–36.

The Exchange Act Exemptive Order further provided that no security-based swap contract entered into on or after July 16, 2011 shall be void or considered voidable by reason of Section 29(b) of the Exchange Act because any person that is a party to the contract violated a provision of the Exchange Act for which the Commission has provided exemptive relief in the Exchange Act Exemptive Order, until such time as the underlying exemptive relief expires. By extending the underlying exemptive relief until February 5, 2019, this order will also extend the relevant Section 29(b) relief until that same date. See Exchange Act Exemptive Order, 76 FR at 39938–39.

⁶ See Exchange Act Exemptive Order, 76 FR at 39929.

preserving the application of particular Exchange Act requirements that already are applicable in connection with instruments that will be ‘security-based swaps’ following the Effective Date [of the Dodd-Frank Act], but deferring the applicability of additional Exchange Act requirements in connection with those instruments explicitly being defined as ‘securities’ as of the Effective Date.”⁷

In 2014, the Commission extended the expiration dates for the Temporary Exemptions.⁸ In the 2014 Extension Order, the Commission distinguished between: (i) the Temporary Exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”); and (ii) the Temporary Exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”). The expiration dates for the Linked Temporary Exemptions established by the 2014 Extension Order were the compliance dates for the specific rulemakings to which they were “linked,” and the expiration

⁷ Id. These instruments generally constituted “security-based swap agreements” under the pre-Dodd-Frank Act framework and were already subject to specific antifraud and anti-manipulation provisions under the Exchange Act (including Exchange Act Section 10(b)). Under the Exchange Act Exemption Order, instruments that (before the Effective Date) were security-based swap agreements and (after the Effective Date) constituted security-based swaps were still subject to the application of those Exchange Act provisions. See Exchange Act Exemptive Order, 76 FR at 39930, nn. 24–25.

⁸ See Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014) (“2014 Extension Order”) (extending the expiration date for certain Temporary Exemptions to February 5, 2017). See also Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012) (“Product Definitions Adopting Release”) (extending the expiration date of the Temporary Exemptions to February 11, 2013); Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 68864 (Feb. 7, 2013), 78 FR 10218 (Feb. 13, 2013) (extending the expiration date to February 11, 2014).

date for the Unlinked Temporary Exemptions was three years following the effective date of the 2014 Extension Order (i.e., February 5, 2017), or such time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate for security-based swaps with respect to any such Unlinked Temporary Exemptions. This approach was designed to provide the Commission with flexibility while its Dodd-Frank Act rulemaking is still in progress to determine whether continuing relief should be provided for any of the Unlinked Temporary Exemptions.⁹

⁹ See 2014 Extension Order, 79 FR at 7731. The 2014 Extension Order also linked the expiration date of the Linked Temporary Exemptions to the compliance date for such rulemakings. The 2014 Extension Order identified the Linked Temporary Exemptions as those related to: (1) capital and margin requirements applicable to a broker or dealer (Sections 7 and 15(c)(3), Regulation T, and Exchange Act Rules 15c3-1, 15c3-3, and 15c3-4); (2) recordkeeping requirements applicable to a broker or dealer (Sections 17(a) and 17(b) and Exchange Act Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-13); (3) registration requirements under Section 15(a)(1), and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a “broker” or “dealer” that is not registered with the Commission; (4) Exchange Act Rule 10b-10; and (5) Regulation ATS. Accordingly, as applicable, the Commission extended these exemptions until the compliance date for pending rulemakings concerning: capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants; recordkeeping and reporting requirements for broker-dealers, security-based swap dealers, and major security-based swap participants; security-based swap trade acknowledgements; and registration requirements for security-based swap execution facilities.

The Linked Temporary Exemptions are not addressed in this order and will be separately considered in connection with the related security-based swap rulemakings. The Commission has already addressed some of the Linked Temporary Exemptions. For example, on June 8, 2016, the Commission adopted new rules for trade acknowledgement and verification of security-based swap transactions. See Trade Acknowledgement and Verification of Security-Based Swap Transactions, Exchange Act Release No. 78011 (June 8, 2016), 81 FR 39807 (June 17, 2016) (“Trade Acknowledgement Release”). In that release, the Commission described the application of Exchange Act Rule 10b-10 to transactions in security-based swaps and noted that the Linked Temporary Exemption relating to Exchange Act Rule 10b-10 would expire upon the compliance date of the new Rule 15Fi-2. See Trade Acknowledgement Release, 81 FR at 39824-25, n. 189.

The Commission most recently extended the expiration date of the Unlinked Temporary Exemptions until February 5, 2018.¹⁰ In the 2017 Extension Order, the Commission also requested comment on whether continuing exemptive relief is necessary beyond February 5, 2018.¹¹ Two commenters expressed support for extending the exemptive relief, with one reiterating its prior request that the Commission provide permanent exemptive and other relief to security-based swap market participants from the Exchange Act and the Securities Act.¹²

B. Extension of Unlinked Temporary Exemptions

Since the issuance of the 2014 Extension Order, the Commission has implemented a substantial portion of the regulatory regime for security-based swaps set forth in Title VII of the

¹⁰ See Order Extending Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps and Request for Comment, Exchange Act Release No. 79833 (Jan. 18, 2017), 82 FR 8467 (Jan. 25, 2017) (“2017 Extension Order”).

¹¹ Comments received are available at <https://www.sec.gov/comments/s7-27-11/s72711.shtml>. The Commission did not receive any comments in response to the request for comment in the 2014 Extension Order. However, in 2012, the Commission received a request from market participants to extend certain of the Temporary Exemptions, citing concerns that key issues and questions regarding the application of the federal securities laws remained unresolved and continuing concerns about the potential for unnecessary disruption to the security-based swap market. See SIFMA Request for Extension of the Expiration Date of the SEC’s Exchange Act Exemptive Order and SBS Interim final Rules (Dec. 20, 2012), which is available at <http://www.sec.gov/comments/s7-27-11/s72711-12.pdf>.

¹² See comment from Layla Spencer, dated January 30, 2017; and letters from Kyle Brandon, Managing Director, SIFMA, dated February 2, 2017 (“SIFMA Letter I”) and January 11, 2018 (“SIFMA Letter II”) (requesting that the Commission further extend the exemptive relief for the Unlinked Temporary Exemptions). For details regarding SIFMA’s request for permanent exemptive and other relief, see Draft SIFMA SBS Exemptive Relief Request (Oct. 20, 2011), which is available at <https://www.sec.gov/comments/s7-27-11/s72711-7.pdf>, and SIFMA SBS Exemptive Relief Request (Dec. 5, 2011), which is available at <https://www.sec.gov/comments/s7-27-11/s72711-10.pdf>. Two other commenters provided statements that are not germane to the consideration of the extension.

Dodd-Frank Act.¹³ However, the Commission is still in the process of finalizing its rules under Title VII of the Dodd-Frank Act.¹⁴ Therefore, the Commission believes it is necessary or appropriate in the public interest, and consistent with the protection of investors to extend the Unlinked Temporary Exemptions until February 5, 2019 to avoid any potential market disruption stemming from the application of certain Exchange Act provisions and rules to security-based swap activities. This approach also will provide the Commission with additional time to consider the potential impact of the revision of the Exchange Act definition of “security.”

¹³ See, e.g., Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015); Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14437 (Mar. 19, 2015); Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015); Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception, Exchange Act Release No. 77104 (Feb. 10, 2016), 81 FR 8597 (Feb. 19, 2016); Trade Acknowledgement Release; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release 77617 (Apr. 14, 2016), 81 FR 29960 (May 13, 2016); Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 78321 (July 14, 2016), 81 FR 53545 (Aug. 12, 2016); Access to Data Obtained by Security-Based Swap Data Repositories, Exchange Act Release No. 78716 (Aug. 29, 2016), 81 FR 60585 (Sept. 2, 2016).

¹⁴ See, e.g., Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011); Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213 (Nov. 23, 2012); Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers; Proposed Rules, Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194 (May 2, 2014); Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Person To Effect or Be Involved in Effecting Security-Based Swaps, Exchange Act Release No. 75612 (Aug 5, 2015), 80 FR 51684 (Aug. 25, 2015).

As noted above, one commenter has suggested that the Commission extend the expiration date for the Unlinked Temporary Exemptions until a time that the Commission can provide appropriate permanent relief and other relief to security-based swap market participants from the federal securities laws that apply to security-based swaps due to their inclusion in the definition of “security” under the Exchange Act.¹⁵ The Commission recognizes that the security-based swap market and corresponding regulatory regime have continued to develop since it originally issued the Exchange Act Exemptive Order in 2011. While the Commission has adopted many of the rules required under Title VII, it has proposed but not yet finalized others, including rules relating to the capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants. Before the Commission considers any permanent exemptive relief, the Commission believes that additional time will be beneficial to evaluate the new regulatory regime and its impact on the market for security-based swaps once the Commission has finalized its rulemakings. Therefore, at this time, the Commission is not making a determination on whether permanent relief should be provided for the Unlinked Temporary Exemptions.

Accordingly, pursuant to its authority under Section 36 of the Exchange Act,¹⁶ the Commission believes it is necessary or appropriate in the public interest, and consistent with the protection of investors to extend the expiration of the Unlinked Temporary Exemptions until February 5, 2019.

¹⁵ See SIFMA Letter I and SIFMA Letter II.

¹⁶ 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt, by rule, regulation, or order any person, security, or transaction (or any class or classes of persons, securities, or transactions) from any provision of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

III. Solicitation of Comments

The Commission is providing interested parties the opportunity to comment on whether any relief should be granted with respect to any specific Unlinked Temporary Exemption(s) beyond February 5, 2019. The Commission recognizes that the security-based swap market and corresponding regulatory regime have developed in the period of time since the Commission originally issued the Exchange Act Exemptive Order, and will continue to do so. As such, to determine whether permanent exemptive relief is necessary or appropriate in the public interest, and consistent with the protection of investors, the Commission invites comments on the relief and requests that interested parties provide detailed and updated information relating to the Unlinked Temporary Exemptions.

To the extent that interested parties request specific relief for any of the Unlinked Temporary Exemptions beyond February 5, 2019, the Commission encourages any such interested parties to be detailed in any request as to the circumstances in which the Exchange Act provision or rule applies to security-based swaps or security-based swap market participants, and why relief would be necessary.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/exorders.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-11 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7-27-11. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet website (<http://www.sec.gov/rules/exorders.shtml>). Comments are also available for website viewing and printing in the Commission’s Public Reference Room, 100 F St. NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that the Commission does not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

IV. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36 of the Exchange Act, that the Unlinked Temporary Exemptions contained in the Exchange Act Exemptive Order and extended in the 2017 Extension Order in connection with the revisions of the Exchange Act definition of “security” to encompass security-based swaps are extended until February 5, 2019.

By the Commission.

Brent J. Fields
Secretary