

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-87943; File No. S7-27-11)

January 10, 2020

Order Extending Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c-1, 10b-16, 15a-1, 15c2-1 and 15c2-5 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps

I. Introduction

The Securities and Exchange Commission (“Commission”) is extending until November 5, 2020, temporary exemptions from Section 8¹ of the Securities Exchange Act of 1934 (“Exchange Act”) and from Exchange Act Rules 8c-1, 15c2-1, 10b-16, 15c2-5, and 15a-1² in connection with the revision of the definition of “security” to encompass security-based swaps. The Commission is granting this nine-month extension because it believes the temporary exemptions from these provisions warrant further consideration to take into account the finalized regulatory regime for security-based swap dealers and major security-based swap participants, as well as the compliance date for registration of those entities.³

These and other temporary exemptions were originally provided by the Commission in 2011 and periodically extended by the Commission, most recently in January 2019.⁴ The

¹ 15 USC 78h.

² 17 CFR 240.8c-1, 240.15c2-1, 240.10b-16, 240.15c2-5 and 240.15a-1.

³ Because the Commission ultimately may determine not to provide permanent exemptions for security-based swaps from one or more of these provisions, during the extension market participants may wish to consider how they would design and implement appropriate compliance measures and controls.

⁴ 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) (“2011 Exchange Act Exemptive Order”); 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) (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

remainder of the temporary exemptions extended in January 2019, and not extended in this Order, will expire on February 5, 2020.⁵

II. Discussion

A. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁶ amended the definition of “security” under the Exchange Act to expressly encompass security-based swaps.⁷ The expansion of the definition of the term “security” to include security-based swaps had the effect of changing the scope of the Exchange Act regulatory provisions that apply to

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 of the temporary exemptions to February 11, 2014); 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); 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) (extending the expiration date for certain temporary exemptions to February 5, 2018); Order Extending Until February 5, 2019 Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of “Security” to Encompass Security-Based Swaps and Request for Comment, Exchange Act Release No. 82626 (Feb. 2, 2018), 83 FR 5665 (Feb. 18, 2018) (“2018 Extension Order”) (extending the expiration date for certain temporary exemptions to February 5, 2019); Order Granting a Limited Exemption from the Exchange Act Definition of “Penny Stock” for Security-Based Swap Transactions between Eligible Contract Participants; Granting a Limited Exemption from the Exchange Act Definition of “Municipal Securities” for Security-Based Swaps; and Extending Certain Temporary Exemptions under the Exchange Act in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, Exchange Act Release No. 84991 (Jan. 25, 2019), 84 FR 863 (Jan. 31, 2019) (“January 2019 Extension Order”) (extending the expiration date for certain temporary exemptions to February 5, 2020).

⁵ See January 2019 Extension Order, 84 FR at 864-65.

⁶ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

⁷ See Section 761(a)(2) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act, 15 USC 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 the Federal Register or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act, 15 USC 77b note.

security-based swaps and, in doing so, raised certain complex questions that required further consideration.

In July 2011, the Commission issued an order (the “2011 Exchange Act Exemptive Order”), which granted two relevant temporary exemptions from compliance with certain provisions of the Exchange Act, and the rules and regulations thereunder. First, the Commission granted to any person who meets the definition of “eligible contract participant” set forth in Section 1a(12) of the Commodity Exchange Act as in effect on July 20, 2010 (i.e., the day prior to the date the Dodd-Frank Act was signed into law) and who is not a registered broker or dealer⁸ or a self-regulatory organization⁹ a temporary exemption from certain provisions of the Exchange Act, and the rules and regulations thereunder, solely in connection with the person’s activities involving security-based swaps.¹⁰ Second, the Commission granted to a broker or dealer registered under Section 15(b) of the Exchange Act (other than a broker or dealer registered under Section 15(b)(11) of the Exchange Act), a temporary exemption from certain provisions of the Exchange Act, and the rules and regulations thereunder, solely with respect to security-based swaps.¹¹

⁸ This temporary exemption is available to a broker or dealer registered under Section 15(b)(11) of the Exchange Act who meets the other eligibility criteria for this relief. See 2011 Exchange Act Exemptive Order, 76 FR at 39938.

⁹ This temporary exemption is available to a self-regulatory organization in limited circumstances. See 2011 Exchange Act Exemptive Order, 76 FR at 39938-39.

¹⁰ See 2011 Exchange Act Exemptive Order, 76 FR at 39938-39.

¹¹ See 2011 Exchange Act Exemptive Order, 76 FR at 39939. The 2011 Exchange Act Exemptive Order did not provide exemptive relief for any provisions or rules prohibiting fraud, manipulation, or insider trading (other than prophylactic reporting or recordkeeping requirements such as the confirmation requirements of Exchange Act Rule 10b-10). In addition, the 2011 Exchange Act Exemptive Order did not affect the Commission’s investigative, enforcement, and procedural authority related to those provisions and rules. See 2011 Exchange Act Exemptive Order, 76 FR at 39931 n.34. The 2011 Exchange Act Exemptive Order also did not address Sections 12, 13, 14, 15(d), 16, and 17A of the Exchange Act and the rules and regulations thereunder.

The overall approach of the 2011 Exchange Act Exemptive Order was directed toward maintaining the status quo during the implementation process for the Dodd-Frank Act.¹² In the 2011 Exchange Act Exemptive Order, the Commission stated that it would accomplish this “by 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.”¹³

1. 2014 Extension Order

In 2014, the Commission extended the expiration dates for the temporary exemptions in the 2011 Exchange Act Exemptive Order.¹⁴ The Commission distinguished between: (1) the temporary exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”), the expiration dates for which were extended to the compliance dates for the specific rulemakings to which they were “linked”; and (2) the temporary exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”), the expiration date for which was extended to the earlier of 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

¹² See 2011 Exchange Act Exemptive Order, 76 FR at 39929.

¹³ 2011 Exchange Act Exemptive Order, 76 FR at 39929. Under the 2011 Exchange Act Exemptive 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 2011 Exchange Act Exemptive Order, 76 FR at 39930 nn.24-25.

¹⁴ See 2014 Extension Order, 79 FR at 7734-35.

appropriate for security-based swaps with respect to any such Unlinked Temporary Exemptions.¹⁵ 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.¹⁶

2. *2018 Extension Order and January 2019 Extension Order*

In 2018, the Commission extended the expiration date of the Unlinked Temporary Exemptions until February 5, 2019.¹⁷ The Commission also requested comment on whether continuing exemptive relief was necessary beyond February 5, 2019.¹⁸ The Commission

¹⁵ See 2014 Extension Order, 79 FR at 7732-35.

¹⁶ See 2014 Extension Order, 79 FR at 7731. The 2014 Extension Order referred to the temporary exemptions provided for in the 2011 Exchange Act Exemptive Order as the “Expiring Temporary Exemptions” and noted that the 2011 Exchange Act Exemptive Order generally provided for the following exemptions from the Exchange Act: “(a) temporary exemptions in connection with security-based swap activity by certain ‘eligible contract participants’; and (b) temporary exemptions specific to security-based swap activities by registered brokers and dealers.”

The 2014 Extension Order identified the Linked Temporary Exemptions as those Expiring Temporary Exemptions related to: (1) capital and margin requirements applicable to a broker or dealer (Exchange Act 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 (Exchange Act 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 Exchange Act 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. The remaining Expiring Temporary Exemptions are the Unlinked Temporary Exemptions.

As applicable, the Commission extended the Linked Temporary 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 security-based swap dealers and major security-based swap participants; security-based swap trade acknowledgement and verification; and registration requirements for security-based swap execution facilities. The Linked Temporary Exemptions are not addressed in this order and have been, or will be, separately considered in connection with the related security-based swap rulemakings. See, e.g., Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, Exchange Act Release No. 86175 (June 21, 2019), 84 FR 43872, 43955-56 (Aug. 22, 2019); Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, Exchange Act Release No. 87005 (Sept. 19 2019), 84 FR 68550, 68601-02 (Dec. 16, 2019); Trade Acknowledgement and Verification of Security-Based Swap Transactions, Exchange Act Release No. 78011 (June 8, 2016), 81 FR 39807, 39824-25 n.189 (June 17, 2016).

¹⁷ See 2018 Extension Order.

received four letters from two different commenters in response.¹⁹ One of these comments requested that the Commission make permanent a limited number of the Unlinked Temporary Exemptions.²⁰ The commenter also requested an additional twelve-month transition period before the expiration of the remaining Unlinked Temporary Exemptions.²¹ The commenter argued that market participants would use the additional time to “further analyze the applicability of [Exchange Act provisions and rules] to their [security-based swap] business and design and implement appropriate compliance measures, including, where relevant, controls designed to prevent or detect activity that might potentially trigger these provisions.”²² In response, the Commission provided limited exemptions from the definition of “penny stock” in Section

¹⁸ Comments received are available at <https://www.sec.gov/comments/s7-27-11/s72711.shtml>.

¹⁹ See letter from Kyle Brandon, Managing Director, SIFMA, dated Nov. 8, 2018 (“SIFMA November 2018 Letter”) (requesting that the Commission further extend the Unlinked Temporary Exemptions, and also requesting certain permanent exemptive and other relief); supplemental letter from Kyle Brandon, Managing Director, SIFMA, dated Dec. 20, 2018 (“SIFMA December 2018 Letter”) (supplementing the SIFMA November 2018 Letter with additional detail regarding the Unlinked Temporary Exemptions and recommending a twelve-month transition period before expiration of any Unlinked Temporary Exemptions); see also letters from Walt L. Lukken, President and Chief Executive Officer, Futures Industry Association, dated Nov. 18 and Nov. 29, 2018 (each expressing support for codifying the exemptions for security-based swaps from inapplicable securities rules).

²⁰ See SIFMA December 2018 Letter at 3 (request for exemption from the definition of “penny stock”); SIFMA December 2018 Letter at 3-4 (request for guidance regarding the definition of “municipal securities”); SIFMA December 2018 Letter at 3-4 (request for guidance regarding the definition of “government securities”); SIFMA December 2018 Letter at 4-5 (request for exemption from fees under Section 31 of the Exchange Act); SIFMA December 2018 Letter at 5 (request for exemption from hypothecation requirements); SIFMA December 2018 Letter at 5-6 (request for exemption from broker-dealer disclosure requirements relating to extensions of credit); SIFMA December 2018 Letter at 6 (request for exemption from qualification requirements for personnel of broker-dealers); SIFMA December 2018 Letter at 6 (request for exemption from fingerprinting requirements for personnel of broker-dealers); SIFMA December 2018 Letter at 6-7 (request for exemption to permit OTC derivatives dealers to transact in centrally cleared or listed security-based swaps); SIFMA December 2018 Letter at 7 (request for exemption to permit exchange members to engage in security-based swap transactions without losing an existing limited exemption from the requirement to be a member of a national securities association); SIFMA December 2018 Letter at 7 (request for exemption from audit and compensation committee requirements).

²¹ See SIFMA December 2018 Letter at 1, 7.

²² See SIFMA December 2018 Letter at 7.

3(a)(51) of the Exchange Act and Rule 3a51-1 for transactions in security-based swaps between eligible contract participants and from the definition of “municipal securities” in Section 3(a)(29) of the Exchange Act for security-based swaps.²³ The Commission also extended the Unlinked Temporary Exemptions until February 5, 2020, providing a twelve-month transition period to allow market participants adequate time to design and implement appropriate compliance measures and controls.²⁴

On January 8, 2020, the Commission received a letter from the same commenter supplementing its earlier request.²⁵ The commenter updated its requests to make permanent the three aspects of the Unlinked Temporary Exemptions: (1) limitations on hypothecation of securities carried for the account of a customer in Section 8 of the Exchange Act and in Exchange Act Rules 8c-1 and 15c2-1,²⁶ (2) broker-dealer disclosure requirements relating to

²³ See January 2019 Extension Order, 84 FR at 867.

In response to the commenter’s request, the Commission noted that the Unlinked Temporary Exemptions did not include an exemption from the definition of “government securities” in Section 3(a)(42) of the Exchange Act and noted that the Exchange Act does not permit the Commission to provide such relief. The Commission further noted that Section 31 fees do not currently apply to security-based swaps but that it may revisit the appropriateness of exempting security-based swaps from Section 31 fees at the time such fees begin to apply. See January 2019 Extension Order, 84 FR at 866 & n.40.

²⁴ See January 2019 Extension Order, 84 FR at 866.

²⁵ See supplemental letter from Kyle Brandon, Managing Director, SIFMA, dated Jan. 8, 2020 (“SIFMA January 2020 Letter”) (requesting permanent exemptive relief for security based-swaps from Section 8 of the Exchange Act and Exchange Act Rules 8c-1, 10b-16, 15a-1, 15c2-1 and 15c2-5 and withdrawing previous requests to make permanent certain other aspects of the Unlinked Temporary Exemptions, including those relating to Sections 15(b)(7), 17(f)(2), and 31 of the Exchange Act and Exchange Act Rules 10A-3, 10C-1 15b7-1, 15b9-1, and 17f-2).

²⁶ See SIFMA January 2020 Letter at 3-4); SIFMA December 2018 Letter at 5; Exchange Act Section 8, 15 USC 78h; Exchange Act Rule 8c-1, 17 CFR 240.8c-1; Exchange Act Rule 15c2-1, 17 CFR 240.15c2-1. Section 8 of the Exchange Act and Exchange Act Rules 8c-1 and 15c2-1 limit a broker-dealer’s ability to hypothecate securities carried for the account of a customer.

extensions of credit in Exchange Act Rules 10b-16 and 15c2-5,²⁷ and (3) certain limitations on an OTC derivatives dealer's activities in Exchange Act Rule 15a-1.²⁸ In the alternative, the commenter requested that the Commission extend the Unlinked Temporary Exemptions relating to these requests for an additional twelve months so that the Commission may further consider the requests.²⁹ The commenter also confirmed that it was no longer requesting additional extensions for any other Unlinked Temporary Exemptions.³⁰

B. Temporary Exemptions

The Commission has finalized a majority of the rulemakings under Title VII of the Dodd-Frank Act.³¹ Specifically, the Commission has finalized the registration and regulatory regime for security-based swap dealers and major security-based swap participants and set the

²⁷ See SIFMA January 2020 Letter at 4; SIFMA December 2018 Letter at 5-6; Exchange Act Rule 10b-16, 17 CFR 240.10b-16; Exchange Act Rule 15c2-5, 17 CFR 240.15c2-5. Exchange Act Rules 10b-16 and 15c2-5 govern the disclosures that a broker-dealer must provide to customers to whom they extend credit.

²⁸ See SIFMA January 2020 Letter at 4-5 (requesting relief to permit OTC derivatives dealers to transact in centrally cleared or listed security-based swaps); SIFMA December 2018 Letter at 6-7; Exchange Act Rule 15a-1, 17 CFR 240.15a-1. Exchange Act Rule 15a-1 limits an OTC derivatives dealer's ability to engage in dealer activities in listed instruments and in fungible instruments that are standardized as to their material economic terms.

²⁹ See SIFMA January 2020 Letter at 2-3.

³⁰ See SIFMA January 2020 Letter at 5.

³¹ 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); Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 78321 (July 14, 2016), 81 FR 53545 (Aug. 12, 2016); 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. 84858 (Dec. 19, 2018), 84 FR 4906 (Feb. 19, 2019); Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, Exchange Act Release No. 86175 (June 21, 2019), 84 FR 43872 (Aug. 22, 2019); Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, Exchange Act Release No. 87005 (Sept. 19, 2019), 84 FR 68550 (Dec. 16, 2019); Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, Exchange Act Release No. 87780 (Dec. 18, 2019).

compliance date for registration of those entities (“Registration Compliance Date”). The Commission believes that it would be appropriate to provide market participants limited additional time to consider the impact of the expiration of the Unlinked Temporary Exemptions, with respect to the commenter’s three remaining requests.

The Commission is extending, for a further nine months, the Unlinked Temporary Exemptions that relate to three requests for permanent exemptions for security-based swaps from limitations on hypothecation of securities carried for the account of a customer in Section 8 of the Exchange Act and in Exchange Act Rules 8c-1 and 15c2-1, from broker-dealer disclosure requirements relating to extensions of credit in Exchange Act Rules 10b-16 and 15c2-5, and from certain limitations on an OTC derivatives dealer’s activities in Exchange Act Rule 15a-1. This additional time extends the transition period for the Exchange Act provisions and rules relevant to these three requests to allow time to further consider the requests taking into account the finalized regulatory regime for security-based swap dealers and major security-based swap participants, as well as the compliance date for registration of those entities.³² The Commission believes that an additional nine months will provide sufficient time for this further consideration.

The Commission is not extending any other of the Unlinked Temporary Exemptions.³³ The Commission continues to believe that market participants will have had adequate time to consider the impact of the expiration of the remainder of the Unlinked Temporary Exemptions when they expire on February 5, 2020.

³² See note 3, *supra*.

³³ As always, the Commission may, however, consider tailored relief in the future under particular facts and circumstances.

III. Commission Findings

Accordingly, pursuant to its authority under Section 36 of the Exchange Act, the Commission finds that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to extend for a period of nine months, until November 5, 2020, the Unlinked Temporary Exemptions from Section 8 of the Exchange Act and from Exchange Act Rules 8c-1, 15c2-1, 10b-16, 15c2-5, and 15a-1, in connection with the revision of the Exchange Act definition of “security” to encompass security-based swaps, in each case contained in the 2011 Exchange Act Exemptive Order and extended in the January 2019 Extension Order. This extension will allow time to further consider the requests taking into account the finalized regulatory regime for security-based swap dealers and major security-based swap participants, as well as the compliance date for the registration of those entities.

The remainder of the Unlinked Temporary Exemptions will expire on February 5, 2020, as provided in the January 2019 Extension Order.

* * * * *

IV. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36 of the Exchange Act, that the Unlinked Temporary Exemptions from Section 8 of the Exchange Act and from Exchange Act Rules 8c-1, 15c2-1, 10b-16, 15c2-5 and 15a-1 in connection with the revision of the Exchange

Act definition of “security” to encompass security-based swaps, in each case contained in the 2011 Exchange Act Exemptive Order and extended in the January 2019 Extension Order, are extended until November 5, 2020.

By the Commission.

Vanessa A. Countryman
Secretary