

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

Release No. 34-63094; File No. S7-28-10

RIN 3235-AK73

Reporting of Security-Based Swap Transaction Data

AGENCY: Securities and Exchange Commission.

ACTION: Interim final temporary rule; request for comments.

SUMMARY: Section 766 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) requires the Securities and Exchange Commission (“Commission”) to adopt an interim final rule for the reporting of security-based swaps entered into before July 21, 2010, the terms of which had not expired as of that date (“pre-enactment security-based swap transactions”), within 90 days of the enactment of the Dodd-Frank Act. Pursuant to this requirement, the Commission today is adopting an interim final temporary rule that requires specified counterparties to pre-enactment security-based swap transactions to report certain information relating to pre-enactment security-based swaps to a registered security-based swap data repository or to the Commission by the compliance date established in the security-based swap reporting rules required under Sections 3C(e) and 13A(a) of the Securities Exchange Act of 1934 (“Exchange Act”),¹ or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first and report information relating to pre-enactment security-based swaps to the Commission upon request. The Commission also is issuing an Interpretive Note to

¹ All references to the Exchange Act contained in this release refer to the Securities Exchange Act of 1934, as amended by the Dodd-Frank Act.

the rule that states that counterparties that may be required to report to the Commission will need to preserve information pertaining to the terms of these pre-enactment security-based swaps.

DATES: Effective Date: § 240.13Aa-2T is effective October 20, 2010

and will remain in effect until the operative date of the permanent recordkeeping and reporting rules for security-based swap transactions to be adopted by the Commission or January 12, 2012, whichever occurs first.

Comment Date: Comments on the interim final temporary rule should be received on or before December 20, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/final.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-28-10 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 Elizabeth Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-28-10. 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 Web site (<http://www.sec.gov/rules/interim-final-temp.shtml>). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: David Michehl, Senior Special Counsel, at (202) 551-5627, Sarah Albertson, Special Counsel, at (202) 551-5647, Natasha Cowen, Special Counsel, at (202) 551-5652, Yvonne Fraticelli, Special Counsel, at (202) 551-5654, Geoffrey Pemble, Special Counsel, at (202) 551-5628, Brian Trackman, Special Counsel, at (202) 551-5616, Mia Zur, Special Counsel, at (202) 551-5638, Kathleen Gray, Attorney, at (202) 551-5305, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: The Commission is adopting Rule 13Aa-2T under the Exchange Act as an interim final temporary rule. We are soliciting comments on all aspects of this interim final temporary rule. We will carefully consider the comments that we receive and will address them, if applicable, in connection with the permanent reporting rules the Commission is required to adopt under the Dodd-Frank Act.

I. Introduction

On July 21, 2010, the President signed into law the Dodd-Frank Act.² An important element of the Dodd-Frank Act is Title VII, the Wall Street Transparency and Accountability Act of 2010, which directly addresses regulation of over-the-counter derivatives (“OTC derivatives”). Title VII of the Dodd-Frank Act establishes a regulatory framework for OTC derivatives, and makes a number of statutory revisions to the Commodity Exchange Act and the

² The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 11-203, H.R. 4173).

Exchange Act (“Title VII Amendments”). The Title VII Amendments broadly categorize covered products as either swaps, regulated primarily by the Commodity Futures Trading Commission (“CFTC”), security-based swaps, regulated primarily by the Commission, or mixed swaps, jointly regulated by the Commission and the CFTC.

Pursuant to Section 761 of the Dodd-Frank Act, new Section 3(a)(68) of the Exchange Act defines a security-based swap to include a swap, as defined in Section 1a of the Commodity Exchange Act,³ that is based on a narrow-based security index, or a single security or loan, or

³ 7 U.S.C. 1a. Section 721(b) of the Dodd-Frank Act amends Section 1(a) of the Commodity Exchange Act to add paragraph (47) defining swap, subject to enumerated exceptions, as any agreement, contract, or transaction: (i) that is a put, call, cap, floor, collar, or similar option of any kind that is for the purchase or sale, or based on the value, of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind; (ii) that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence; (iii) that provides on an executory basis for the exchange, on a fixed or contingent basis, of 1 or more payments based on the value or level of 1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any agreement, contract, or transaction commonly known as (I) an interest rate swap; (II) a rate floor; (III) a rate cap; (IV) a rate collar; (V) a cross-currency rate swap; (VI) a basis swap; (VII) a currency swap; (VIII) a foreign exchange swap; (IX) a total return swap; (X) an equity index swap; (XI) an equity swap; (XII) a debt index swap; (XIII) a debt swap; (XIV) a credit spread; (XV) a credit default swap; (XVI) a credit swap; (XVII) a weather swap; (XVIII) an energy swap; (XIX) a metal swap; (XX) an agricultural swap; (XXI) an emissions swap; and (XXII) a commodity swap; (iv) that is an agreement, contract, or transaction that is, or in the future becomes commonly known to the trade as a swap; (v) including any security-based swap agreement which meets the definition of ‘swap agreement’ as defined in section 206A of the Gramm-Leach-Bliley Act (15 U.S.C. 78c note) of which a material term is based on the price, yield, value, or volatility of any security or any group or index of securities, or

any interest therein or on the value thereof, or the occurrence or non-occurrence of an event relating to an issuer of a security or the issuers of securities in a narrow-based index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.⁴ Section 761 of the Dodd-Frank Act also adds new definitions in Section 3(a) of the Exchange Act⁵ for entities involved in the security-based swaps markets, including, among others, security-based swap dealer,⁶ major security-based swap participant,⁷

any interest therein; or (vi) that is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of clauses (i) through (v).

⁴ See 15 U.S.C. 78c(a)(68).

⁵ 15 U.S.C. 78c(a).

⁶ Security-based swap dealer is defined in Section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A), to mean any person who: (i) holds themselves out as a dealer in security-based swaps; (ii) makes a market in security-based swaps; (iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps. The term security-based swap dealer does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business. 15 U.S.C. 78c(a)(71)(C). In addition, the Commission shall exempt from designation as a security-based swap dealer an entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. 15 U.S.C. 78c(a)(71)(D).

⁷ Major security-based swap participant is defined in Section 3(a)(67)(A) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A), as any person: (i) who is not a security-based swap dealer; and (ii)(I) who maintains a substantial position in security-based swaps for any of the major security-based swap categories, as such categories are determined by the Commission, excluding both positions held for hedging or mitigating commercial risk and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan; (II) whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or (III) that is a financial entity that (aa) is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking regulator; and (bb) maintains a substantial position in outstanding security-based swaps in any major security-based swap category, as such categories are determined by the Commission. For purposes of subparagraph

security-based swap data repository,⁸ and security-based swap execution facility.⁹ The Commission has issued an advance notice of proposed rulemaking seeking comment on the definitions of key terms relating to the regulation of swaps and security-based swaps.¹⁰

The Dodd-Frank Act requires, among other things, that security-based swaps be reported to a registered security-based swap data repository or the Commission.¹¹ In particular, the Dodd-Frank Act added Section 13A(a)(2)(A) of the Exchange Act, which requires that pre-enactment security-based swaps be reported to a registered security-based swap data repository or the Commission by a date that is not later than: (i) 30 days after issuance of the interim final rule; or (ii) such other period as the Commission determines to be appropriate.¹² Section 13A(a)(2)(B) of the Exchange Act¹³ requires the Commission to promulgate an interim final rule providing for

(A), the Commission shall define, by rule or regulation, the term ‘substantial position’ at the threshold that the Commission determines to be prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States. 15 U.S.C. 78c(a)(67)(B).

⁸ Security-based swap data repository is defined in Section 3(a)(75) of the Exchange Act, 15 U.S.C. 78c(a)(75), as any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.

⁹ Security-based swap execution facility is defined in Section 3(a)(77) of the Exchange Act, 15 U.S.C. 78c(a)(77), as a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of security-based swaps between persons; and (B) is not a national securities exchange.

The new definitions in Section 3(a) parallel amendments to Section 1(a) of the Commodity Exchange Act pursuant to Section 721 of the Title VII Amendments.

¹⁰ See Securities Exchange Act Release No. 62717 (August 13, 2010), 75 FR 51429 (August 20, 2010).

¹¹ 15 U.S.C. 78m-1(a)(2)(A).

¹² See id.

¹³ 15 U.S.C. 78m-1(a)(2)(B).

the reporting of these pre-enactment security-based swaps within 90 days of the enactment of the Dodd-Frank Act.¹⁴ Consistent with its responsibilities under Section 13A(a)(2) of the Exchange Act, the Commission is today adopting Rule 13Aa-2T, an interim final temporary rule governing reporting of pre-enactment security-based swaps.

II. Interim Final Temporary Exchange Act Rule 13Aa-2T

The Commission is adopting Rule 13Aa-2T under the Exchange Act to specify the reporting requirements applicable to pre-enactment security-based swaps. Rule 13Aa-2T requires specified counterparties to a pre-enactment security-based swap transaction to: (1) report certain information relating to pre-enactment security-based swaps to a registered security-based swap data repository or to the Commission by the compliance date established in the security-based swap reporting rules required by Section 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first; and (2) report information relating to pre-enactment security-based swaps to the Commission upon request during an interim period. In addition, the Commission is issuing an Interpretive Note to Rule 13Aa2-T that reflects what information the Commission believes reporting parties should retain in order to meet the reporting obligation contained in the rule. Specifically, the Commission believes that counterparties will need to preserve information

¹⁴ The Commission notes that Section 3C of the Exchange Act, added by Section 763(a) of the Dodd-Frank Act, also requires the Commission to adopt rules that provide for the reporting of data for security-based swaps entered into before the date of enactment of the Dodd-Frank Act to a registered security-based data repository or to the Commission no later than 180 days after the effective date of the Dodd-Frank Act (thus, by January 12, 2012). See 15 U.S.C. 78c-3(e). Section 3C is not effective until 360 days after enactment of Dodd-Frank Act. The Commission believes that its action today is consistent with both Sections 13A and Section 3C of the Exchange Act.

pertaining to the terms of such pre-enactment security-based swaps, to the extent and in such form as it currently exists.

We have included several requests for comment in this release. We will carefully consider the comments that we receive and will address them, if applicable, in connection with the permanent reporting rules, which will be published for notice and comment.

As explained above, the Dodd-Frank Act revises Section 3(a) of the Exchange Act to define key terms related to the new regulatory framework for security-based swaps.¹⁵ Rule 13Aa-2T(a) incorporates the definitions of “major security-based swap participant,” “security-based swap,” “security-based swap dealer,” and “security-based swap data repository” from the Dodd-Frank Act. The statutory language reserves to the Commission authority to further define these terms,¹⁶ which the Commission expects to do as rules are developed relating to the regulation of security-based swaps and in response to input from market participants. In addition, the Commission notes that rules governing the registration of security-based swap data repositories will be the subject of another Commission rulemaking. As a result, there currently are no registered security-based swap data repositories able to accept security-based swap data as required under the Dodd-Frank Act.

A. Reporting Obligations

Rule 13Aa-2T(b)(1) requires that a counterparty to a pre-enactment security-based swap transaction shall report, with respect to a pre-enactment security-based swap transaction, to a registered security-based swap data repository or to the Commission: (1) a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no

¹⁵ See supra Section I.

¹⁶ The Title VII Amendments enable the Commission to further define certain terms jointly with the CFTC, in consultation with the Board of Governors of the Federal Reserve System. See Section 712(d) of the Dodd-Frank Act.

electronic copy; and (2) the time, if available, the transaction was executed.¹⁷ Rule 13Aa-2T(b)(1) also establishes the compliance deadline for reporting pre-enactment security-based swap transactions. Pursuant to Rule 13Aa-2T(b)(1), a reporting party shall report the pre-enactment security-based swap transaction by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act¹⁸ or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.¹⁹ The Commission believes it is appropriate to delay the reporting of such transaction information until the time detailed above because, until the registration rule is adopted and implemented, there will not be a registered security-based swap data repository able to accept security-based swap data as required under the Dodd-Frank Act. Rule 13Aa-2T(a)(4) defines a pre-enactment security-based swap transaction as a security-based swap that was entered into prior to, and that had not expired as of, July 21, 2010.²⁰

In addition, pursuant to Rule 13Aa-2T(b)(2), a counterparty to a pre-enactment security-based swap transaction is required to report to the Commission upon request any information relating to these pre-enactment security-based swap transactions during the time that the interim final temporary rule is in effect.²¹ The information that the Commission would request to be

¹⁷ See Rule 13Aa-2T(b)(1). See infra Section II.B for a discussion of which counterparty has the reporting obligation.

¹⁸ The Commission notes that Section 3C(e) of the Exchange Act requires that security-based swaps entered into before the date of enactment shall be reported no later than 180 days after the effective date of the section, i.e., January 12, 2012.

¹⁹ See Rule 13Aa-2T(b)(1). The Commission notes that rulemaking regarding registered security-based swap repositories must be completed within 360 days after the date of enactment of the Dodd-Frank Act.

²⁰ See Rule 13Aa-2T(a)(4).

²¹ See infra Section II.B for a discussion of which counterparty has the reporting obligation.

reported may vary depending upon the needs of the Commission, and may include actual trade data as well as summary trade data. Such summary data may include a description of the types of a security-based swap dealer's counterparties or types of reference entities, or the total number of pre-enactment security-based swap transactions entered into by the dealer and some measure of the frequency and duration of those contracts.²²

The Commission anticipates that Rule 13Aa-2T(b) will facilitate the Commission's ability to understand and evaluate the current market for security-based swaps, and may inform the Commission's analysis of the other required rulemakings under the Dodd-Frank Act. In addition, information requested by the Commission may be used to facilitate other activities of the Commission, such as examinations.

B. Reporting Party

Section 13A(a)(3) to the Exchange Act²³ specifies the party obligated to report a security-based swap – either a security-based swap dealer, a major security-based swap participant, or a counterparty to the swap. These provisions apply for purposes of reporting pursuant to the interim final temporary rule.²⁴ Specifically, Section 13A(a)(3) of the Exchange Act provides that with respect to a security-based swap in which only one counterparty is a security-based swap dealer or major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the security-based swap; with respect to a security-based swap in which one counterparty is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer shall report the

²² See infra Section II.D for a discussion of the treatment of post-enactment security-based swaps.

²³ 15 U.S.C. 78m-1(a)(3).

²⁴ See id.

security-based swap; and with respect to any other security-based swap, the counterparties to the security-based swap shall select a counterparty to report the security-based swap.²⁵

Rule 13Aa-2T(c) incorporates these provisions. Specifically, Rule 13Aa-2T(c) provides that where only one counterparty to a security-based swap transaction is a security-based swap dealer or a major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the transaction; where one counterparty to a security-based swap transaction is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer shall report the transaction; and where neither counterparty to a security-based swap transaction is security-based swap dealer or a major security-based swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.²⁶

C. Interpretive Note on Record Retention

Pre-enactment security-based swaps that must be reported pursuant to Section 13A(a)(2) of the Exchange Act²⁷ and new interim final temporary Rule 13Aa-2T thereunder have already occurred prior to enactment of the Dodd-Frank Act.²⁸ Thus, to support the reporting requirements in Rule 13Aa-2T(b), a Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain information and documents relating to the terms of the

²⁵ See id.

²⁶ See Rule 13Aa-2T(c).

²⁷ 15 U.S.C. 78m-1(a)(2).

²⁸ Pre-enactment security-based swaps are those security-based swaps that were entered into before July 21, 2010, the terms of which had not expired as of that date. See Section 13A(a)(2)(A).

transaction.²⁹ Specifically, the Note requires a counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain in its existing format all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of the security-based swap transaction, including but not limited to: any information necessary to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction. The Commission believes that it is necessary for a counterparty that may be required to report such transaction to retain all information relating to the terms of pre-enactment security-based swaps in order for that counterparty to be able to comply with the reporting requirements of Rule 13Aa-2T. The specific information identified in the Note, as outlined above, is designed to encompass material information about pre-enactment security-based swap transactions that may be the subject of a request by the Commission to report pursuant to Rule 13Aa-2T(b)(2), as well as the information required to be reported pursuant to Rule 13Aa-2T(b)(1). The Commission believes that the information identified above will provide the Commission with access to relevant information to help the Commission perform its oversight functions under the federal securities laws.

The time of execution of a security-based swap transaction is the point at which the parties become irrevocably bound under applicable law.³⁰ For example, in the context of

²⁹ See Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T.

³⁰ The Commission understands that time of execution is not a data element that is consistently captured with respect to security-based swap transactions.

security-based swaps, an oral agreement over the phone will create an enforceable contract, and the time of execution will be when the parties to the telephone call agree to the material terms.³¹ The Commission also understands that the “price” of a security-based swap may be expressed differently for different asset classes.

The Commission envisions that documentation retained pursuant to the need to preserve all information from which the price of the transaction was derived should reflect all information necessary to determine the price including, among other things, the quoting convention (for example, the economic spread, which is variously referred to as the traded spread, quote spread or composite spread, expressed as a number of basis points per annum, for CDS transactions,³² or the LIBOR-based Floating Rate Payment, expressed as a floating rate plus a fixed number of basis points multiplied by the notional amount, for equity or loan total return swaps).

³¹ On the effective date of the Dodd-Frank Act, security-based swaps will be securities and the execution of the transaction will be the sale for federal securities law purposes. For an explanation of when a sale occurs under the Securities Act of 1933 see Securities Act Release No. 8591 and Securities Exchange Act Release No. 52056 (July 19, 2005), 70 FR 44722 (August 3, 2005), notes 391 and 394.

³² Dealers quote prices for entering into credit default swaps as a fixed number of basis points per annum they require to be paid (if they are quoting to sell protection) or that they are willing to pay (if they are quoting to buy protection). This number is variously referred to as the “running spread,” “quoted spread” or “traded spread.” It will be higher to sell protection than to buy protection, allowing the dealer to earn a profit on offsetting transactions for the same reference entity – e.g., 510 basis points bid, 530 basis points asked.

On execution, the running spread is converted, using a standard, publicly available, industry-accepted formula, into an upfront payment plus a standardized coupon – generally 100 basis points for investment grade reference entities, and 500 basis points for high yield reference entities. This conversion does not affect the market value or economics of the transaction, and is done simply to make CDS more fungible, which makes them easier to clear, among other benefits. Because of this conversion, the running spread itself does not appear in the terms of the contract, but is replaced by its economic equivalent.

The interpretation to retain information does not require any counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to create new records with respect to transactions that occurred in the past. By allowing such records to be retained in their existing format, the interpretation is designed to assure that important information relating to the terms of pre-enactment security-based swap transactions is preserved without unnecessary burden on the counterparties. Likewise, to the extent that any information required to be retained pursuant to the Note and reported pursuant to Rule 13Aa-2T(b)(1) or (b)(2) is not information that the counterparty already has prior to the effective date of this proposal, such as the time of execution, the Commission understands that such information could not be retained pursuant to the Note or reported pursuant to Rule 13Aa-2T(b)(1) or (b)(2).

D. Post-Enactment Security-Based Swaps

As noted above, Rule 13Aa-2T applies solely to security-based swap transactions entered into before July 21, 2010, the terms of which had not expired as of that date, and thus does not cover security-based swap transactions entered into on or after July 21, 2010. The Dodd-Frank Act, however, also requires the Commission to adopt reporting rules covering such post-enactment security-based swaps. Specifically, Section 3C(e)(2) of the Exchange Act requires the reporting of security-based swaps entered into on or after such date of enactment to a registered security-based swap data repository or the Commission no later than the later of: (A) 90 days after such effective date; or (B) such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.³³ In addition, Section 13A(a)(1) of the

³³ See 15 U.S.C. 78c-3(e)(2). Section 3(C)(e)(1) also states that security-based swaps entered into before the date of the enactment of this section shall be reported to a

Exchange Act requires that each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to: (A) a security-based swap data repository described in Section 13(n) of the Exchange Act; or (B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission within such time period as the Commission may by rule or regulation prescribe.³⁴ The Commission is directed to adopt rules under Sections 3C(e) and 13A(a) within 360 days of the enactment of the Dodd-Frank Act.³⁵ Parties to security-based swaps could be required under those rules, if adopted, to report information relating to such transactions. In that regard, counterparties could be expected to have access to similar information in order to report post-enactment security-based swaps.

E. Effective Date

Rule 13Aa-2T will be effective as of October 20, 2010 and will remain in effect until the operative date of the permanent recordkeeping and reporting rules for security-based swap transactions to be adopted by the Commission or January 12, 2012, whichever occurs first.³⁶ The Commission believes it is appropriate to make the rule effective upon publication in the Federal Register since the rule applies to information parties to pre-enactment security-based swaps would already have in their possession. In addition, this would provide the Commission the ability to request information on such pre-enactment security-based swaps immediately. Further, the Commission believes the proposed sunset date is appropriate because it will allow the rule to remain in effect until a permanent rule relating to the reporting of

registered security-based swap data repository or the Commission no later than 180 days after the effective date of that section.

³⁴ See 15 U.S.C. 78m-1(a)(1).

³⁵ See Sections 763(a) and 766(a) of the Dodd-Frank Act.

³⁶ See Rule 13Aa-2T(d).

pre-enactment security-based swaps has become effective and operative, or until the date by which Section 3C of the Exchange Act requires security-based swaps entered into before the date of enactment of the Dodd-Frank Act to be reported to a registered security-based data repository or the Commission.³⁷

III. Request for Comment

We are requesting comments from all members of the public. We will carefully consider the comments that we receive. We seek comment generally on all aspects of the interim final temporary rule. In addition, we seek comment on the following:

1. Should the Commission clarify or modify any of the definitions included in Rule 13Aa-2T? If so, which definitions and what specific modifications are appropriate or necessary?
2. The Commission seeks public comment on what specific information is necessary to derive the “price” of a security-based swap transaction. In other words, what specific information is needed for a third party to value the transaction? How do these data elements vary depending on the type or class of security-based swap? Do current quoting conventions across classes and types of securities-based swaps provide sufficient information from which to derive transaction prices?
3. Is there an industry standard format for information and records regarding security-based swaps? Are there different standard formats depending on the type or class of security-based swap? Please answer with specificity.
4. Rule 13Aa-2T(c) details which counterparty to a security-based swap transaction has the reporting obligation. In cases where counterparties must select which counterparty will

³⁷ See 15 U.S.C. 78c-3(e).

report the transaction, is additional Commission guidance necessary or desirable? Is there a mechanism to allocate the reporting obligation that the Commission should implement in such cases?

5. The Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T provides that counterparties shall retain, in their existing format, all information and documents relating to the terms of a pre-enactment security-based swap transaction, including but not limited to certain specified data elements. What documents and data typically are kept by security-based swap market participants to memorialize their transactions? What documents and data typically are kept to memorialize post-trade events such as novations, assignments, terminations and other events? In what format? How long are such records currently maintained by market participants? How often do market participants record the time of execution of a security-based swap?
6. The Commission requests comment on its interpretation of the types of documents and data needed to be retained in order to satisfy reporting required by the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T. What additional information, if any, should be retained and what burdens or costs would the retention of such information entail? What information and documents, if any, are not needed to be retained while still providing for an understanding of the material terms of a security-based swap?
7. What are the technological or administrative burdens of maintaining the information specified in the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T?
8. The Commission requests comment on the information that is required to be reported pursuant to Rule 13Aa-2T(b)(1). What additional information, if any, should be reported?

9. Rule 13Aa-2T is a temporary rule and is set to expire no later than January 12, 2012.

Should we remove the expiration provision of the rule and make the rule permanent?

Should we extend the expiration date of the rule? If so, for how long? Should we allow the rule to expire?

Title VII of the Dodd-Frank Act requires that the Commission consult and coordinate to the extent possible with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible,³⁸ and states that in adopting rules, the CFTC and Commission shall treat functionally or economically similar products or entities in a similar manner.³⁹

The CFTC has adopted rules related to the reporting of swaps entered into before July 21, 2010, the terms of which had not expired as of that date (“pre-enactment swaps”) as required under Section 729 of the Dodd-Frank Act. Understanding that the Commission and the CFTC regulate different products and markets, and as such, appropriately may be proposing alternative regulatory requirements, we request comments on the impact of any differences between the Commission and CFTC approaches to the regulation of pre-enactment security-based swaps and pre-enactment swaps. Specifically, do the regulatory approaches under the Commission’s proposed rulemaking pursuant to Section 766 of the Dodd-Frank Act and the CFTC’s proposed rulemaking pursuant to Section 729 of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC to regulate pre-enactment security-based swaps and pre-

³⁸ Section 712(a)(2) of the Dodd-Frank Act.

³⁹ Section 712(a)(7) of the Dodd-Frank Act.

enactment swaps are comparable? If not, why? Do commenters believe there are approaches that would make the regulation of pre-enactment security-based swaps and pre-enactment swaps more comparable? If so, what? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one? We request commenters to provide data, to the extent possible, supporting any such suggested approaches.

IV. Other Matters

The Administrative Procedure Act generally requires an agency to publish notice of a proposed rulemaking in the Federal Register.⁴⁰ This requirement does not apply, however, if the agency “for good cause finds . . . that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.”⁴¹ Further, the Administrative Procedure Act also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.⁴² This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.⁴³ The Commission, for good cause, finds that notice and solicitation of comment before the effective date of Rule 13Aa-2T is impracticable, unnecessary, or contrary to the public interest.⁴⁴ Section 766 of the Dodd-Frank Act amended the Exchange Act to add a new Section 13A. Section 13A(a)(2)(B) requires the Commission to adopt, within 90 days of enactment of the Dodd-Frank Act, an interim final rule providing for the reporting of

⁴⁰ See 5 U.S.C. 553(b).

⁴¹ Id.

⁴² See 5 U.S.C. 553(d).

⁴³ Id.

⁴⁴ This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rules to become effective notwithstanding the requirement of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are “impractical, unnecessary or contrary to the public interest,” a rule “shall take effect at such time as the federal agency promulgating the rule determines.”).

each security-based swap entered into before the date of enactment of the Dodd-Frank Act the terms of which were not expired as of that date.⁴⁵ The Commission is adopting Rule 13Aa-2T to fulfill this requirement.

V. Paperwork Reduction Act

Certain provisions of Rule 13Aa-2T contain “collection of information requirements” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).⁴⁶ The Commission has submitted the information to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The title of this collection is “Rule 13Aa-2T – Reporting of Pre-Enactment Security-Based Swap Transactions.” We are applying for a new OMB Control Number for this collection in accordance with 44 U.S.C. 3507(j) and 5 CFR 1320.13.

1. Summary of Collection of Information

As required under Section 13A of the Exchange Act, as provided by Section 766 of the Dodd-Frank Act, the Commission is adopting new Rule 13Aa-2T governing the reporting requirements applicable to security-based swap transactions entered into before July 21, 2010, the terms of which have not expired as of that date, i.e., pre-enactment security-based swap transactions. Rule 13Aa-2T, by its terms, mandates three separate data collections for entities covered by the rule. The Commission believes that new Rule 13Aa-2T will impact more than 10 entities and thus meets the definition of a collection of information under the PRA.

First, pursuant to Rule 13Aa-2T(b)(1), pre-enactment security-based swap transactions must be reported to a registered security-based swap data repository or the Commission by the

⁴⁵ 15 U.S.C. 78m-1(a)(2)(B).

⁴⁶ 44 U.S.C. 3501 et seq.

compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.⁴⁷ The rule specifies that the transaction report shall include a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy, and the time, if available, the transaction was executed.⁴⁸

Second, Rule 13Aa-2T(b)(2) requires reporting to the Commission upon request of any information relating to pre-enactment security-based swap-transactions.⁴⁹ Finally, the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of pre-enactment security-based swap transactions.⁵⁰ The rule specifies that such information shall include, without limitation: any information needed to identify and value the transaction; the time, if available, of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization, and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.⁵¹

⁴⁷ See Rule 13Aa-2T(b)(1).

⁴⁸ Id.

⁴⁹ See Rule 13Aa-2T(b)(2).

⁵⁰ See Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T.

⁵¹ Id.

2. Proposed Use of Information

The rule makes information available to the Commission that can provide insight into the size and operation of the OTC derivatives market.⁵² The information will provide a starting benchmark against which to assess the development of the security-based swap market over time. The information collected pursuant to Rule 13Aa-2T also will provide the Commission information to assist with its analysis of the permanent reporting and other rules required by the Dodd-Frank Act. Information related to pre-enactment security-based swap transactions may also be used by the Commission to assess activities and risks in the security-based swap markets or securities markets more generally. Requiring such information be reported also should facilitate general market oversight.

3. Respondents

Rule 13Aa-2T requires reporting of all security-based swaps entered into prior to July 21, 2010, the terms of which have not expired as of that date. The rule thus will cover security-based swap dealers, major security-based swap participants, each defined in Section 3(a) of the Exchange Act, and other counterparties when there is no security-based swap dealer or major security-based swap participant involved in the pre-enactment security-based swap transaction.⁵³

The Commission does not know the exact number of security-based swap market participants. Based on the information currently available to the Commission, there are roughly 1,000 entities regularly engaged in the CDS marketplace, consisting primarily of banks, hedge funds, and asset managers. The Commission believes that most of these same entities would likely also participate in other security-based swap markets and that few, if any, other entities

⁵² For example, the information collected could provide the Commission with insight as to the size (in notional value), number of transactions, and number and type of participants, of the security-based swap market.

⁵³ See 15 U.S.C. 78c(a)(68) and (71).

engage in security-based swaps that are not CDSs. Accordingly, the Commission preliminarily believes that it is reasonable to use the figure of 1,000 potential respondents covered by Rule 13Aa-2T for purposes of estimating collection of information burdens under the PRA.

The Commission seeks comment on what entities may be subject to Rule 13Aa-2T, whether specific classes of entities may be impacted, how many entities may be impacted, and whether any such entity or class of entities may be impacted differently than others under the rule. The Commission seeks comment on the accuracy of its estimates as to the number of participants in the security-based swap market that will be required to report information pursuant to Rule 13Aa-2T.

4. Total Initial and Annual Reporting and Recordkeeping Burdens

As described above, pursuant to Rule 13Aa-2T(b)(1), pre-enactment security-based swap transactions must be reported to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first. Additionally, Rule 13Aa-2T(b)(2) requires reporting to the Commission upon request of any information relating to pre-enactment security-based swap-transactions. Finally, the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T requires each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction to retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of pre-enactment security-based swap transactions.

Although a new obligation, the Commission does not believe that Rule 13Aa-2T will require covered entities to materially change their current practices or operations with respect to recordkeeping for pre-enactment security-based swap transactions. The Commission believes that any counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction, as part of its regular business operations, would already maintain records of any such transactions, and that such records likely include the minimum information set out in the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T. Nonetheless, our interpretation that counterparties must retain information relating to the terms of pre-enactment security-based swaps in order to be able to satisfy their reporting obligation is a new burden. Entities subject to the rule may have to implement new document retention and reporting policies.⁵⁴

Based on publicly available information and consultation with industry sources, the Commission estimates there were approximately 2 million CDS contracts outstanding on the date of enactment.⁵⁵ The Commission believes that CDS transactions represent the majority of security-based swap transactions. The Commission preliminarily estimates that CDS transactions represent approximately 85 percent of all security-based swap transactions open on the date of enactment of the Dodd-Frank Act.⁵⁶ Accordingly, the total number of security-based swap transactions subject to Rule 13Aa-2T would be approximately 2,400,000.

⁵⁴ The Commission expects to issue permanent rules regarding the retention and reporting of information about the terms of security-based swaps within the next year in compliance with the Dodd-Frank Act. Any PRA burden contained in those rules will be taken into account in those rulemakings.

⁵⁵ See, e.g., http://www.dtcc.com/products/derivserv/data_table_i.php (data as of July 23, 2010).

⁵⁶ The Commission's estimate is based on internal analysis of available security-based swap market data. The Commission is seeking comment about the overall size of the security-based swap market, and as discussed in this release, believes that Rule 13Aa-2T will, among other things, provide insight about the number of pre-enactment security-based swaps and the overall size of the security-based swap market.

The Commission preliminarily estimates that the requirement to retain information and documents pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T would impose a burden on each respondent of approximately 38 burden hours for an aggregate burden of approximately 38,000 hours, which includes an estimate of the number of potential burden hours required to amend internal procedures, reprogram systems, and implement compliance processes to ensure that pre-enactment security-based swap transaction data is preserved.⁵⁷

Rule 13Aa-2T(b)(1) requires reporting entities to report pre-enactment security-based swap transactions to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first. Reporting entities may have initial costs to establish connectivity with and report the pre-enactment security-based swaps to a registered security-based swap data repository or the Commission. The Commission preliminarily estimates that the cost to establish connectivity to a security-based swap data repository to facilitate the reporting required by Rule 13Aa-2T(b)(1) would impose a burden on each respondent of approximately \$25,000, for an

⁵⁷ This figure is based on discussions with various market participants. It is based on the following: [((Sr. Programmer at 2 hours) + (Sr. Systems Analyst at 4 hours) + (Compliance Manager at 5 hours) + (Compliance Clerk at 20 hours) + (Director of Compliance at 2 hours) + (Compliance Attorney at 5 hours)) x (1000 reporting entities)] = 38,000 burden hours, which is 38 hours per reporting entity. As noted, the Commission preliminarily believes that, given the current nature of the records to be retained, information on security-based swap transactions is currently being retained by market participants in the ordinary course of business, and as a practical matter should not result in any significant new burdens. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa-2T will generate any ongoing burdens beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing burdens.

aggregate burden of approximately \$25,000,000.⁵⁸ In addition, the Commission preliminarily estimates that complying with Rule 13Aa-2T(b)(1) would impose a burden on each respondent of approximately 480 hours, for an aggregate burden of approximately 480,000 burden hours.⁵⁹

Rule 13Aa-2T(b)(2) requires reporting entities to report to the Commission upon request any information relating to pre-enactment security-based swap transactions. Because the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T(d) requires reporting entities to retain their documents and information relating to the terms of pre-enactment security-based swap transactions, the Commission preliminarily believes that responding to a Commission request for such information should not impose a significant additional burden on reporting entities. A reporting entity would need to review the request and gather responsive transaction data and

⁵⁸ This estimate is based on discussions of Commission staff with various market participants, as well as the Commission's experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated expense from the following: (\$25,000 relating to hardware- and software-related expenses) x (1,000 reporting entities) = \$25,000,000. It is the Commission's understanding that many reporting entities already have established linkages to entities that may register as security-based swap data repositories, which may impact the out-of-pocket costs associated with Rule 13Aa-2T(b)(1).

⁵⁹ This figure is based on discussions of Commission staff with various market participants, as well as the Commission's experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated one-time burden from the following: [(2,400,000 estimated total pre-enactment securities-based swap transactions) x (75 percent automated, electronic reporting) x (0.1 hours/transaction)] + [2,400,000 estimated total pre-enactment securities-based swap transactions) x (25 percent manual, electronic reporting) x (Compliance Clerk 0.5 hours/transaction)] = 480,000 burden hours, which is 480 burden hours per respondent. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa-2T will generate any ongoing burdens beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing burdens.

documents. Assuming the Commission requested one report from each reporting entity,⁶⁰ the Commission preliminarily estimates that responding to Commission requests for information and documents pursuant to Rule 13Aa-2T(b)(2) would impose a burden on each respondent of approximately 34 hours, for an aggregate burden of approximately 34,000 burden hours.⁶¹

The Commission seeks comment on the recordkeeping and reporting collection of information burdens associated with Rule 13Aa-2T. In particular, what burdens, if any, will respondents incur with respect to system design, programming, expanding systems capacity, and establishing compliance programs to comply with Rule 13Aa-2T? Will there be different or additional burdens associated with the collection of information under Rule 13Aa-2T that a covered entity does not currently undertake in the ordinary course of business that we have not identified?

5. Retention Period of Recordkeeping Requirements

A covered entity will be required by Rule 13Aa-2T to retain records and information only until such information has been reported to a registered security-based swap data repository or the Commission.⁶² Rule 13Aa-2T(b)(1) provides that the reporting shall occur by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository

⁶⁰ The Commission preliminarily believes it would not request reports from every reporting entity. However, for purposes of estimating the burden, the Commission is assuming it would request one report from each reporting entity.

⁶¹ This figure is based on discussions with various market participants. It is based on the following: [(Compliance Manager at 5 hours) + (Compliance Attorney at 5 hours) + (Programmer Analyst at 1 hour) + (Compliance Clerk at 15 hours) + (Director of Compliance at 3 hours) + (Sr. Database Administrator at 5 hours)] x (1000 reporting entities) = 34,000 burden hours, which is 34 hours per reporting entity.

⁶² The Commission notes that a respondent may well be subject to additional record retention burdens for pre-enactment security-based swaps pursuant to rules to be adopted by the Commission pursuant to Section 3C(e) of the Exchange Act.

commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first.

6. Collection of Information is Mandatory

Any collection of information pursuant to Rule 13Aa-2T will be a mandatory collection of information to permit the Commission to collect accurate information about security-based swap transactions entered into prior to, and not expired as of, the date of enactment of the Dodd-Frank Act.

7. Responses to Collection of Information May Not Be Confidential

Other than information for which a reporting entity requests confidential treatment and that may be withheld from the public in accordance with the provisions of 5 U.S.C. 522 (The Freedom of Information Act (“FOIA”)), the collection of information pursuant to Rule 13Aa-2T will not be kept confidential and will be publicly available. Among other things, FOIA recognizes the confidentiality of commercial information under two exemptions. First, FOIA Exemption 4 provides an exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁶³ Second, FOIA Exemption 8 provides an exemption for matters that are “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.”⁶⁴ The Commission will carefully consider any requests for confidential treatment under either of these exemptions or under other exemptions contained in 5 U.S.C. 522.

8. Request for Comment

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

⁶³ See 5 U.S.C. 552(b)(4).

⁶⁴ See 5 U.S.C. 552(b)(8).

1. Evaluate whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

VI. Cost-Benefit Analysis

Earlier this year, Congress passed the Dodd-Frank Act. The far-reaching legislation was a response to the recent financial crisis. Among other things, it is designed to strengthen oversight, improve consumer protections, and reduce systemic risks throughout the financial system.⁶⁵ Title VII of the Dodd-Frank Act specifically addresses the OTC derivatives markets, including the market for security-based swaps. The swap markets have been described as being opaque.⁶⁶ Transaction-level data is not publicly available. A major source of information is the semi-annual survey conducted by the Bank of International Settlements ("BIS") on the volume

⁶⁵ See H.R. Rep. No. 111-517, at 865 (2010). See, e.g., 156 Cong. Rec. S5878 (July 15, 2010) and 156 Cong. Rec. S5882 (July 15, 2010).

⁶⁶ With respect to CDS, for example, the Government Accountability Office found that "comprehensive and consistent data on the overall market have not been readily available," that "authoritative information about the actual size of the CDS market is generally not available," and that regulators currently are unable "to monitor activities across the market." Government Accountability Office, "Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps," GAO-09-397T (March 2009), at 2, 5, 27. See Robert E. Litan, "The Derivatives Dealers' Club and Derivatives Market Reform," Brookings Institution (April 7, 2010) at 15-20. See also Michael Mackenzie, June 25, 2010, Era of an opaque swaps market ends, FIN. TIMES, June 25, 2010.

of swaps transaction by major categories of swaps.⁶⁷ One of the purposes of the Dodd-Frank Act is to improve the transparency of the OTC derivatives market.⁶⁸

Title VII requires the Commission to undertake a large number of rulemakings to implement the regulatory framework for security-based swaps that is set forth in the Dodd-Frank Act, including the reporting of security-based swap transactions. The interim final temporary rule being issued today is the first step in that process and is designed to provide for reporting of pre-enactment security-based swaps in the framework set up by the Dodd-Frank Act. The rule will provide the Commission the ability to obtain data on pre-enactment security-based swaps. Rule 13Aa-2T also will provide for the preservation of data on pre-enactment security-based swaps until the Commission issues permanent recordkeeping and reporting rules for all security-based swaps. By making records available to the Commission, Rule 13Aa-2T will enable the Commission to begin its review of the size and scope of the security-based swap marketplace. Today's action is designed to ultimately lead to a more robust, transparent environment for the market for security-based swaps.

The Commission is sensitive to the costs and benefits associated with Rule 13Aa-2T. The Commission requests comment on the costs and benefits associated with the rule, and its cost-benefit analysis, including identification and assessments of any costs and benefits not discussed in this analysis. The Commission also seeks comments on the accuracy of any of the

⁶⁷ The BIS semi-annual report on the swap markets summarizes developments in the OTC derivatives markets during the relevant period. The report breaks down trading volumes and other statistics for various classes of derivatives, including credit default swaps, interest rate and foreign exchange derivatives, and equity and commodity derivatives. The report covers derivatives trading within the G10 countries. The most recent report, available at <http://www.bis.org/statistics/derstats.htm>, covers the period through the last quarter of 2009.

⁶⁸ See, e.g., 156 Cong. Rec. S5879 (July 15, 2010) and 156 Cong. Rec. H5252 (June 30, 2010).

benefits identified and also welcomes comments on the accuracy of any of the cost estimates. Finally, the Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits.

A. Benefits

Rule 13Aa-2T, which is being adopted as required by the Dodd-Frank Act, will provide a means for the Commission to gain a better understanding of the security-based swap markets, including the size and scope of that market, by making available transaction data on pre-enactment security-based swaps. In addition, having such data available should help Commission staff to analyze the security-based swap market as a whole and identify risks. In this way, Rule 13Aa-2T will support the Commission's supervisory function over the security-based swap markets as required by Congress in the Dodd-Frank Act. Further, the rule should make available information to the Commission that could inform its decision-making with respect to the rules that it is required to implement under the Dodd-Frank Act. Rule 13Aa-2T also could facilitate the reports the Commission is required to provide to Congress on security-based swaps and the security-based swaps marketplace.⁶⁹

Further, Rule 13Aa-2T will require market participants to inventory their positions in swaps to determine what information needs to be retained and reported. Potentially, this may encourage management review of internal procedures and controls by those market participants.

The Commission's rules on reporting pre-enactment security-based swap transaction data also may have benefits to the OTC derivatives market. For example, the introduction of the Trade Reporting and Compliance Engine (TRACE) system helped substantially increase the

⁶⁹ See Section 719 of the Dodd-Frank Act.

transparency of, and decrease transaction costs in, the bond market.⁷⁰ This interim final temporary rule represents a first step toward a more transparent market for security-based swaps. Market participants also will be able to begin planning how security-based swap data can be maintained, consolidated, and reported in anticipation of permanent rules to be issued by the Commission pursuant to the requirements set forth in the Dodd-Frank Act. The initial experience in the context of Rule 13Aa-2T may help market participants and the Commission assess alternatives for permanent security-based swap transaction reporting requirements.

B. Costs

The Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T requires the retention of records relating to security-based swap transactions entered into before July 21, 2010, the terms of which had not expired as of that date. Although there are recordkeeping costs associated with the retention of existing pre-enactment security-based swap transaction information, the Commission preliminarily does not believe that they will be significant. The information that is required to be reported pursuant to Rule 13Aa-2T(b)(1)(A) – a copy of the transaction confirmation – should be information that respondents already keep in their normal course of business. In addition, that information can be reported in the form in which it is kept, either electronic or written form. Further, respondents must report the time of execution pursuant to Rule 13Aa-2T(b)(1)(B) only to the extent that the information is available.

The Commission preliminarily estimates that the interim final temporary rule could affect more than 1,000 market participants and cover approximately 2.4 million security-based swap transactions, although identification of the exact number of respondents and covered transactions

⁷⁰ Michael, Goldstein, Edith Hotchkiss and Erik Sirri, Transparency and Liquidity: A Controlled Experiment on Corporate Bonds, Review of Financial Standards (2007); Amy Edwards, Lawrence Harris and Michael Piwowar, Corporate Bond Market Transaction Costs and Transparency, J. of Fin. (2007).

is impossible to determine at this time.⁷¹ As stated above, however, the Commission preliminarily believes that information about open security-based swap transactions should already be maintained by covered entities as part of their day-to-day operations. Further, the rule does not require market participants to modify the data that they have for retention purposes. Rule 13Aa-2T requires only that parties retain records of the terms of the transactions in the form and to the extent that they already exist; parties are not required retroactively to supplement or otherwise alter transaction information.

The Commission recognizes that the permanent reporting rules that it is required to adopt under Section 3C(e) of the Exchange Act also will apply to pre-enactment security-based swaps. Therefore, in adopting Rule 13Aa-2T, the Commission sought to limit the burden on potential respondents by not imposing substantial and potentially conflicting affirmative reporting requirements that would require respondents to make system and other changes that may be different from the changes they will need to make pursuant to the permanent reporting rules.⁷²

The Commission preliminarily estimates that amending internal procedures, reprogramming systems, and implementing compliance processes to ensure that pre-enactment security-based swap transaction data is preserved pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T could result in a cost to each respondent of approximately \$6,236 and an

⁷¹ See supra Section V.

⁷² The Commission believes that it is practical to require this reporting after rules for registration of security-based data repositories are in place, to allow the choice of reporting to an entity that has experience receiving this type of information. The Commission will have access to the data it determines is most useful for understanding and analyzing the market for security-based swaps as it develops final reporting and other rules required under the Dodd-Frank Act by being able to require information to be reported upon request to the Commission under Rule 13Aa-2T(b)(2).

aggregate cost of approximately \$6,236,000.⁷³ The Commission preliminarily does not believe that there will be additional costs attributable to the record retention requirements of Rule 13Aa-2T beyond the initial cost of ensuring that such records are maintained.

The Commission preliminarily estimates that the requirement to report the transaction confirmation and time, if available, of execution pursuant to Rule 13Aa-2T(b)(1) could result in a cost to each reporting entity of approximately \$43,900 and an aggregate cost of approximately \$43,900,000.⁷⁴ This cost figure includes two main components. These are, first, an estimate of the cost to establish connectivity to a security-based swap data repository; and second, an estimate of the cost to complete the reporting process.

⁷³ This figure is based on discussions with various market participants. The Commission derived the total estimated initial annualized expense from the following: ((Sr. Programmer (2 hours) at \$292 per hour + (Sr. Systems Analyst (4 hours) at \$244 per hour) + (Compliance Manager (5 hours) at \$258 per hour) + (Compliance Clerk (20 hours) at \$63 per hour) + (Director of Compliance (2 hours) at \$388 per hour) + (Compliance Attorney (5 hours) at \$270 per hour)) x (1000 reporting entities) = \$6,236,000, which is \$6,236 per reporting entity. Hourly figures cited in this release are from SIFMA's Management & Professional Earnings in the Securities Industry 2008 and SIFMA's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa-2T will generate any ongoing costs beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing costs.

⁷⁴ This figure is based on discussions of Commission staff with various market participants, as well as the Commission's experience regarding connectivity between securities market participants, including alternative trading systems and self-regulatory organizations for data reporting purposes. The Commission derived the total estimated one-time burdens from the following: [(\$25,000 / reporting entity to establish connectivity) x (1000 reporting entities)] + [2,400,000 estimated total pre-enactment securities-based swap transactions) x (25 percent manual, electronic reporting) x (Compliance Clerk (0.5 hours/transaction) at \$63 per hour)] = \$43,900,000, which is \$43,900 per reporting entity. This estimate is intended to include the costs of system development that will facilitate reporting the majority (estimated 75 percent) of security-based swap transactions. Because the Commission expects to adopt permanent reporting rules within one year, the Commission does not believe that Rule 13Aa-2T will generate any ongoing costs beyond the first 12 months. Accordingly, our estimates do not distinguish initial and ongoing costs.

As stated above, the Commission estimates that it may make one request from each reporting entity pursuant to Rule 13Aa-2T(b)(2). The Commission preliminarily estimates that responding to Commission requests for information and documents could result in a cost to each reporting entity of approximately \$6,352 and an aggregate cost of approximately \$6,352,000.⁷⁵

C. Request for Comment

The Commission requests comment on the costs and benefits of Rule 13Aa-2T discussed above, as well as any costs and benefits not already described that could result. The Commission also requests data to quantify any potential costs or benefits.

- How can the Commission accurately estimate the costs and benefits?
- What are the costs currently borne by entities covered by this rule with respect to the retention of records on security-based swap transactions?
- How many entities will be affected by the rule? How many transactions will be subject to the rule?
- Are there additional costs involved in complying with the rule that have not been identified? What are the types, and amounts, of the costs?
- Are there additional benefits from the rule that have not been identified?

⁷⁵ This figure is based on the following: [((Compliance Manager (5 hours) at \$258 per hour) + (Compliance Attorney (5 hours) at \$271 per hour) + (Programmer Analyst (1 hour) at \$193) + (Compliance Clerk (15 hours) at \$63 per hour) + (Director of Compliance (3 hours) at \$388 per hour) + (Sr. Database Administrator (5 hours) at \$281 per hour)) x (1 Commission request per reporting entity) x (1000 reporting entities)] = \$6,352,000, which is \$6,352 per reporting entity. Hourly figures are from SIFMA's Management & Professional Earnings in the Securities Industry 2008 and SIFMA's Office Salaries in the Securities Industry 2008, modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 or 2.93, as appropriate, to account for bonuses, firm size, employee benefits, and overhead.

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

Section 3(f) of the Exchange Act⁷⁶ requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act⁷⁷ requires the Commission, when making rules under the Exchange Act, to consider the impact of such rules on competition. Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

As discussed above, Rule 13Aa-2T will require counterparties to a pre-enactment security-based swap transaction to report: (1) to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swaps, whichever occurs first, a copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy, and the time, if available, the transaction was executed; and (2) to the Commission upon request any information relating to the security-based swap transactions.⁷⁸ In addition, pursuant to the Note to paragraphs (b)(1) and (2) of Rule 13Aa-2T, any counterparty to a pre-enactment security-based swap transaction shall retain, in its existing format, all information and documents, if available, to the

⁷⁶ 15 U.S.C. 78c(f).

⁷⁷ 15 U.S.C. 78w(a)(2).

⁷⁸ See supra Section II.B for a discussion of which counterparty has the reporting obligation.

extent and in such form as they currently exist, relating to the terms of a pre-enactment security-based swap transaction.⁷⁹

Although the Commission is required to promulgate rules governing the reporting of pre-enactment security-based swap transactions, the Commission believes that by requiring the reporting of information about pre-enactment security-based swap transactions, this rule is an important first step in providing increased transparency to the market for security-based swaps, both to the participants or potential participants in the market and to regulators charged with overseeing a segment of the market that was previously not regulated. This increased transparency ultimately should provide the opportunity for increased competition among market participants and thus contribute to a more efficient market. This added visibility also should aid the Commission in carrying out its regulatory responsibilities by providing information that can be used to better understand and analyze the market. Further, a well-regulated security-based swap market may increase the confidence of market participants in the soundness of the market, potentially drawing additional participants into the market, increasing efficiency. The Commission also notes that all similarly situated respondents will be subject to the same requirements under the rule, and thus no participant should be at an unfair competitive advantage compared to others.

The Commission requests comment on all aspects of this analysis and, in particular, on whether Rule 13Aa-2T will place a burden on competition, as well as the effect of the proposal

⁷⁹ This information will include, but is not limited to: any information needed to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

on efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views, if possible.

VIII. Regulatory Flexibility Certification

The Commission hereby certifies that pursuant to 5 U.S.C. 605(b) that the interim final temporary rules contained in this release will not have a significant economic impact on a substantial number of small entities. The interim final temporary rules apply only to counterparties that may engage in security-based swap transactions. Prior to the effective date of the Dodd-Frank Act, only an eligible contract participant (as defined in Section 1(a)(12) of the Commodity Exchange Act) may enter into security-based swap transactions. For this reason, the interim final temporary rule should not have a significant economic impact on a substantial number of small entities.

IX. Statutory Basis and Text of Amendments

The Commission is adopting Rule 13Aa-2T pursuant to Section 13A of the Exchange Act, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, the Securities and Exchange Commission is amending Title 17, chapter II of the Code of Federal Regulations as follows:

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 is amended by adding authorities for §240.13Aa-2T to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-

5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 240.13Aa-2T is also issued under sec. 943, Pub. L. No. 111-203, 124 Stat. 1376.

* * * * *

2. Section 240.13Aa-2T is added to read as follows:

§ 240.13Aa-2T Interim rule for reporting pre-enactment security-based swap transactions.

(a) Definitions. For purposes of this rule, the following definitions shall apply:

(1) Clearing agency shall have the same meaning as set forth in Section 3(a)(23) of the Exchange Act;

(2) Exchange Act shall mean the Securities Exchange Act of 1934, as amended;

(3) Major security-based swap participant shall have the meaning provided in Section 3(a)(67) of the Exchange Act and any rules or regulations thereunder;

(4) Pre-enactment security-based swap transaction shall mean a security-based swap that was entered into prior to, and that had not expired as of, July 21, 2010;

(5) Security-based swap shall have the meaning provided in Section 3(a)(68) of the Exchange Act and any rules or regulations thereunder;

(6) Security-based swap dealer shall have the meaning provided in Section 3(a)(71) of the Exchange Act and any rules or regulations thereunder; and

(7) Security-based swap data repository shall have the meaning provided in Section 3(a)(75) of the Exchange Act and any rules or regulations thereunder.

(b) Reporting of pre-enactment security-based swap transactions. A counterparty to a pre-enactment security-based swap transaction as provided in paragraph (c) below shall:

(1) Report to a registered security-based swap data repository or the Commission by the compliance date established in the reporting rules required under Sections 3C(e) and 13A(a)(1) of the Exchange Act, or within 60 days after a registered security-based swap data repository commences operations to receive and maintain data concerning such security-based swap, whichever occurs first, the following information with respect to the pre-enactment security-based swap transaction:

(A) A copy of the transaction confirmation, in electronic form, if available, or in written form, if there is no electronic copy; and

(B) The time, if available, the transaction was executed; and

(2) Report to the Commission, in a form and manner as prescribed by the Commission, upon request any information relating to the security-based swap transaction.

Note to paragraphs (b)(1) and (2): In order to comply with the above reporting requirements, each counterparty to a pre-enactment security-based swap transaction that may be required to report such transaction shall retain, in its existing format, all information and documents, if available, to the extent and in such form as they currently exist, relating to the terms of a pre-enactment security-based swap transaction, including but not limited to: any information necessary to identify and value the transaction; the date and time of execution of the transaction; all information from which the price of the transaction was derived; whether the transaction was accepted for clearing by any clearing agency or derivatives clearing organization and, if so, the identity of such clearing agency or derivatives clearing organization; any modification(s) to the terms of the transaction; and the final confirmation of the transaction.

(c) Reporting party: The counterparties to a pre-enactment security-based swap transaction shall report the information required under paragraph (b) of this section as follows:

(1) Where only one counterparty to a pre-enactment security-based swap transaction is a security-based swap dealer or a major security-based swap participant, the security-based swap dealer or major security-based swap participant shall report the transaction;

(2) Where one counterparty to a pre-enactment security-based swap transaction is a security-based swap dealer and the other counterparty is a major security-based swap participant, the security-based swap dealer shall report the transaction; and

(3) Where neither counterparty to a pre-enactment security-based swap transaction is security-based swap dealer or a major security-based swap participant, the counterparties to the transaction shall select the counterparty who will report the transaction.

(d) Effective Date. This interim final temporary rule shall be effective beginning October 20, 2010 until the operative date of the permanent recordkeeping and reporting rules for security-based swap transactions to be adopted by the Commission or January 12, 2012, whichever occurs first.

By the Commission.

Elizabeth M. Murphy
Secretary

Dated: October 13, 2010