

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 240 and 260

[Release Nos. 33-9383; 34-68753; 39-2489; File No. S7-26-11]

RIN 3235-AL17

EXTENSION OF EXEMPTIONS FOR SECURITY-BASED SWAPS

AGENCY: Securities and Exchange Commission.

ACTION: Interim final rule; extension.

SUMMARY: We are adopting amendments to the expiration dates in our interim final rules that provide exemptions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 for those security-based swaps that prior to July 16, 2011 were security-based swap agreements and are defined as “securities” under the Securities Act and the Exchange Act as of July 16, 2011 due solely to the provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Under the amendments, the expiration dates in the interim final rules will be extended to February 11, 2014.

EFFECTIVE DATE: The amendments are effective [insert date of publication in the Federal Register], and the expiration dates in the interim final rules published July 1, 2011 (76 FR 40605) are extended to February 11, 2014.

FOR FURTHER INFORMATION CONTACT: Andrew Schoeffler, Special Counsel, Office of Capital Markets Trends, Division of Corporation Finance, at (202) 551-3860, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We are adopting amendments to the following rules: interim final Rule 240 under the Securities Act of 1933 (“Securities Act”),¹ interim final Rules

¹ 15 U.S.C. 77a et seq.

12a-11 and 12h-1(i) under the Securities Exchange Act of 1934 (“Exchange Act”),² and interim final Rule 4d-12 under the Trust Indenture Act of 1939 (“Trust Indenture Act”).³

I. AMENDMENT OF EXPIRATION DATES IN THE INTERIM FINAL RULES

In July 2011, we adopted interim final Rule 240 under the Securities Act, interim final Rules 12a-11 and 12h-1(i) under the Exchange Act, and interim final Rule 4d-12 under the Trust Indenture Act (collectively, the “interim final rules”).⁴ The interim final rules provide exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act for those security-based swaps that prior to July 16, 2011 (“Title VII effective date”) were “security-based swap agreements” and are defined as “securities” under the Securities Act and the Exchange Act as of the Title VII effective date due solely to the provisions of Title VII of the Dodd-Frank Act.⁵ The interim final rules exempt offers and sales of security-based swap agreements that became security-based swaps on the Title VII effective date from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as from the Exchange Act registration requirements and from the provisions of the Trust Indenture Act,⁶ provided certain conditions are met.⁷ The interim final rules currently expire on February 11, 2013.⁸

² 15 U.S.C. 78a et seq.

³ 15 U.S.C. 77aaa et seq.

⁴ See 17 CFR 230.240, 17 CFR 240.12a-11, 17 CFR 240.12h-1, and 17 CFR 260.4d-12. See also Exemptions for Security-Based Swaps, Release No. 33-9231 (Jul. 1, 2011), 76 FR 40605 (Jul. 11, 2011) (“Interim Final Rules Adopting Release”).

⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The provisions of Title VII generally were effective on July 16, 2011 (360 days after enactment of the Dodd-Frank Act), unless a provision requires a rulemaking. If a Title VII provision requires a rulemaking, it will go into effect “not less than” 60 days after publication of the related final rule or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act.

⁶ The category of security-based swaps covered by the interim final rules involves those that would have been defined as “security-based swap agreements” prior to the enactment of Title VII. That definition of “security-based swap agreement” does not include security-based swaps that are based on or reference only loans and indexes only of loans. The Division of Corporation Finance

Title VII amended the Securities Act and the Exchange Act to include “security-based swaps” in the definition of “security” for purposes of those statutes.⁹ As a result, “security-based swaps” became subject to the provisions of the Securities Act and the Exchange Act and the rules and regulations thereunder applicable to “securities.”¹⁰ The interim final rules were intended to allow security-based swap agreements that became security-based swaps on the Title

issued a no-action letter that addressed the availability of the interim final rules to offers and sales of security-based swaps that are based on or reference only loans or indexes only of loans. See Cleary Gottlieb Steen & Hamilton LLP (Jul. 15, 2011) (“Cleary Gottlieb No-Action Letter”). The Cleary Gottlieb No-Action Letter will remain in effect for so long as the interim final rules remain in effect.

⁷ The security-based swap that is exempt must be a security-based swap agreement (as defined prior to the Title VII effective date) and entered into between eligible contract participants (as defined prior to the Title VII effective date). See Rule 240 under the Securities Act [17 CFR 230.240]. See also Interim Final Rules Adopting Release.

⁸ The interim final rules currently expire on the later of the compliance dates for final rules we may adopt further defining the terms “security-based swap” and “eligible contract participant,” unless we take further action to modify the expiration dates in the interim final rules. In April 2012, we adopted final rules and interpretations further defining the term “eligible contract participant” and the compliance date of those rules and interpretations was July 23, 2012. In July 2012, we adopted final rules and interpretations further defining the term “security-based swap” and the compliance date of those rules and interpretations is February 11, 2013. See Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9338 (Jul. 18, 2012), 77 FR 48208 (Aug. 13, 2012).

⁹ See Sections 761(a)(2) and 768(a)(1) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act [15 U.S.C. 78c(a)(10)] and Section 2(a)(1) of the Securities Act [15 U.S.C. 77b(a)(1)], respectively).

¹⁰ The Securities Act requires that any offer and sale of a security must be either registered under the Securities Act or made pursuant to an exemption from registration. See Section 5 of the Securities Act [15 U.S.C. 77e]. In addition, certain provisions of the Exchange Act relating to the registration of classes of securities and the indenture qualification provisions of the Trust Indenture Act of 1939 (“Trust Indenture Act”) [15 U.S.C. 77aaa et seq.] also potentially could apply to security-based swaps. The provisions of Section 12 of the Exchange Act could, without an exemption, require that security-based swaps be registered before a transaction could be effected on a national securities exchange. See Section 12(a) of the Exchange Act [15 U.S.C. 78l(a)]. In addition, registration of a class of security-based swaps under Section 12(g) of the Exchange Act could be required if the security-based swap is considered an equity security and held of record by either 2000 persons or 500 persons who are not accredited investors at the end of a fiscal year. See Section 12(g)(1)(A) of the Exchange Act [15 U.S.C. 78l(g)(1)(A)]. Further, without an exemption, the Trust Indenture Act could require qualification of an indenture for security-based swaps considered to be debt. See 15 U.S.C. 77aaa et seq.

VII effective date to continue to trade as they did so prior to the enactment of Title VII.¹¹ We were concerned about disrupting the operation of the security-based swaps market until the compliance date for final rules that we may adopt further defining the terms “security-based swap” and “eligible contract participant.”¹² We recognized that until we further defined such terms, market participants may be uncertain as to how to comply with the registration requirements of the Securities Act applicable to securities transactions, the registration requirements of the Exchange Act applicable to classes of securities, and the indenture provisions of the Trust Indenture Act.¹³

We also needed additional time and market input to evaluate the implications for security-based swaps under the Securities Act, the Exchange Act, and the Trust Indenture Act as a result of the inclusion of the term “security-based swap” in the definition of “security.”¹⁴ We understood from market participants that there were several types of trading platforms being used to effect transactions in security-based swaps, including security-based swap agreements that became security-based swaps on the Title VII effective date, that would likely register as security-based swap execution facilities (“security-based SEFs”)¹⁵ and that the use of trading

¹¹ See Interim Final Rules Adopting Release.

¹² Id.

¹³ Id. See also footnote 10 above.

¹⁴ Id. Prior to the Title VII effective date, security-based swap agreements that became security-based swaps on the Title VII effective date were outside the scope of the federal securities laws, other than the anti-fraud and certain other provisions. See Section 2A of the Securities Act [15 U.S.C. 77b(b)-1] and Section 3A of the Exchange Act [15 U.S.C. 78c-1], each as in effect prior to the Title VII effective date.

¹⁵ A security-based swap execution facility is 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 facilitates the execution of security-based swaps between persons and is not a national securities exchange. See Section 3(a)(77) of the Exchange Act [15 U.S.C. 78c(a)(77)]. See also Section 3D of the Exchange Act [15 U.S.C. 78c-4] and

platforms to effect security-based swap transactions would continue after the Title VII effective date.¹⁶ We also understood from market participants that if parties continued to engage in the same type of trading activities after the Title VII effective date that they were engaging in prior to the Title VII effective date with respect to security-based swap agreements that became security-based swaps on the Title VII effective date, such activities could raise concerns about the availability of exemptions from the registration requirements of the Securities Act and the Exchange Act.¹⁷ Accordingly, at the time of adoption of the interim final rules in July 2011, we requested comment on various aspects of the interim final rules. In particular, we requested comment on the following:¹⁸ (i) whether security-based swaps are transacted or expected to be transacted following the full implementation of Title VII in a manner that would not permit the parties to rely on existing exemptions under the Securities Act and the Exchange Act; and (ii) whether we should consider additional exemptions under the Securities Act and the Exchange Act for security-based swaps traded on a national securities exchange or through a security-based SEF with eligible contract participants.¹⁹

Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (“Security-Based SEF Proposing Release”).

¹⁶ See Interim Final Rules Adopting Release.

¹⁷ Id. We received comments expressing concern regarding the implications of including security-based swaps in the definition of “security.” Commentators indicated that they were still analyzing the full implications of such expansion of the definition of “security,” but that it would take time. Market participants requested temporary relief from certain provisions of the Securities Act and the Exchange Act so that parties could complete their analysis and submit requests for more targeted relief. Id.

¹⁸ Id. We also requested comment on these matters in an earlier proposing release regarding exemptions for security-based swap transactions involving an eligible clearing agency. See Exemptions For Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9222 (Jun. 9, 2011), 76 FR 34920 (Jun. 15, 2011) (“Cleared SBS Exemptions Proposing Release”).

¹⁹ The term “eligible contract participant” is defined in Section 1a(18) of the Commodity Exchange Act [7 U.S.C. 1a(18)]. The definitions of the term “eligible contract participant” in the Securities Act and the Exchange Act both refer to the definition of “eligible contract participant” in the

We received three comment letters from three commentators regarding the interim final rules.²⁰ One commentator opposed any exemptions for security-based swaps, including the exemptions provided in the interim final rules, but did not provide any explanation for the reason.²¹ The other commentators supported the interim final rules.²² These commentators stated their view that the interim final rules were necessary and appropriate steps to prevent disruption of the security-based swaps market and to ensure the orderly implementation of Title VII.²³ These commentators provided a description of the security-based swaps market as it currently functions and how it may function following the full implementation of Title VII.²⁴ These commentators expressed concerns regarding the availability of exemptions from the

Commodity Exchange Act. See Section 5(e) of the Securities Act [15 U.S.C. 77e(e)] and Section 3(a)(65) of the Exchange Act [15 U.S.C. 78c(a)(65)]. The eligible contract participant definition includes several categories of persons: financial institutions; insurance companies; investment companies; commodity pools; business entities, such as corporations, partnerships, and trusts; employee benefit plans; government entities, such as the United States, a State or local municipality, a foreign government, a multinational or supranational government entity, or an instrumentality, agency or department of such entities; market professionals, such as broker dealers, futures commission merchants, floor brokers, and investment advisors; and natural persons with a specified dollar amount invested on a discretionary basis. The SEC and the CFTC recently adopted final rules further defining the term “eligible contract participant.” The CFTC staff recently issued a letter, Staff Interpretations and No-Action Relief Regarding ECP Status: Swap Guarantee Arrangements; Jointly and Severally Liable Counterparties; Amounts Invested on a Discretionary Basis; and “Anticipatory ECPs,” CFTC Letter No. 12-17 (Oct. 12, 2012). Such letter does not interpret or further define the term “eligible contract participant” for purposes of Section 712(d) of the Dodd-Frank Act or the federal securities laws. See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012).

²⁰ See letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, The Securities Industry and Financial Markets Association (“SIFMA”), dated December 21, 2012 (“SIFMA Letter”); letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, and Robert Pickel, Chief Executive Officer, International Swaps and Derivatives Association (“ISDA”), dated Apr. 20, 2012 (“SIFMA/ISDA Letter”); and letter from Tom Nappi, dated Jul. 14, 2011 (“Nappi Letter”).

²¹ See Nappi Letter.

²² See SIFMA Letter and SIFMA/ISDA Letter.

²³ See SIFMA/ISDA Letter.

²⁴ Id.

registration requirements of the Securities Act for security-based swap transactions entered into solely between eligible contract participants due to the operation of security-based swap trading platforms and the publication or distribution of other information regarding security-based swaps.²⁵ They indicated that certain communications involving security-based swaps, such as the publication or distribution of price quotes, may be available on or through trading platforms on an unrestricted basis, including following the full implementation of Title VII.²⁶ They also indicated that security-based swap dealers publish and distribute research regarding security-based swap transactions that may be broadly disseminated and could be available on an unrestricted basis.²⁷ They were concerned that unrestricted access to these communications could affect the availability of exemptions from the registration requirements of the Securities Act, such as the exemption in Section 4(a)(2), for security-based swap transactions entered into solely between eligible contract participants.²⁸ Based on their concerns regarding the availability of exemptions from the registration requirements of the Securities Act, these commentators requested that we adopt permanent relief from the registration requirements of Section 5 of the Securities Act for offers and sales of security-based swaps²⁹ solely between eligible contract participants.³⁰ These commentators also requested relief under the Exchange Act for offers and

²⁵ See SIFMA Letter and SIFMA/ISDA Letter.

²⁶ See SIFMA/ISDA Letter.

²⁷ See SIFMA Letter.

²⁸ See SIFMA Letter and SIFMA/ISDA Letter.

²⁹ The category of security-based swaps that would be covered by this request for relief is broader in some ways than the category of security-based swaps covered by the exemptions provided in the interim final rules. As noted in footnote 6 above, the exemptions provided in the interim final rules apply to security-based swaps that were defined as “security-based swap agreements” prior to the Title VII effective date. That definition of “security-based swap agreement” does not include security-based swaps that are based on or reference only loans and indexes only of loans.

³⁰ See SIFMA Letter and SIFMA/ISDA Letter. These commentators limited their request for relief to security-based swap transactions not involving an eligible clearing agency. Id. We recently

sales of security-based swaps solely between eligible contract participants.³¹ They were concerned that ambiguity regarding the definition of a “class” as applied to security-based swaps could raise concerns regarding the registration requirements of Section 12(g) of the Exchange Act.³² Finally, these commentators requested relief from Section 304(d) of the Trust Indenture Act for security-based swaps entered into solely between eligible contract participants.³³ They believed that the protections of the Trust Indenture Act are not necessary in the context of such transactions because such transactions involve contracts between two counterparties who are capable of enforcing obligations under the security-based swaps directly.³⁴

Moreover, although not submitted in connection with the interim final rules, we received two comment letters from four commentators regarding the proposed exemptions for security-based swap transactions involving an eligible clearing agency discussing issues arising with respect to security-based swap transactions not involving an eligible clearing agency.³⁵ One commentator suggested that we provide permanent exemptions under the Securities Act, the

adopted exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act for security-based swap transactions involving an eligible clearing agency. See Rule 239 under the Securities Act [17 CFR 230.239], Rules 12a-10 and 12h-1(h) under the Exchange Act [17 CFR 240.12a-10 and 240.12h-1(h)], and Rule 4d-11 under the Trust Indenture Act of 1939 [17 CFR 260.4d-11]. See also Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012) (“Cleared SBS Exemptions Adopting Release”). These exemptions do not apply to security-based swap transactions not involving an eligible clearing agency, even if the security-based swaps subsequently are cleared in transactions involving an eligible clearing agency. Id.

³¹ See SIFMA/ISDA Letter.

³² Id.

³³ Id.

³⁴ Id.

³⁵ See letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, Robert Pickel, Chief Executive Officer, ISDA, and Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, dated Jan. 31, 2012 (“FSR/ISDA/SIFMA Letter”); and letter from Scott Pintoff, General Counsel, GFI Group Inc., dated Jul. 25, 2011 (“GFI Letter”). These letters were submitted in response to our request for comment in the Cleared SBS Exemptions Proposing Release. See footnote 18 above.

Exchange Act, and the Trust Indenture Act for security-based swap transactions entered into between eligible contract participants and effected through any trading platform similar to the proposed exemptions for security-based swap transactions involving an eligible clearing agency.³⁶ The other commentators suggested that we provide exemptions under Section 12(g) of the Exchange Act and the Trust Indenture Act for security-based swap transactions entered into solely between eligible contract participants similar to the proposed exemptions for security-based swap transactions involving an eligible clearing agency.³⁷ In adopting the exemptions for security-based swap transactions involving an eligible clearing agency, we indicated that these commentator's suggestions were more appropriate to be considered in connection with the interim final rules.³⁸

We are carefully considering the comments we have received on the interim final rules as part of our evaluation of the implications for security-based swaps resulting from the inclusion of the term "security-based swap" in the definition of "security" under the Securities Act and the Exchange Act. We also are in the process of implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs. We have proposed rules to implement these provisions,³⁹ but the particular characteristics of trading platforms that security-based SEFs will be permitted to operate will not be known until we adopt final rules for security-based SEFs. We currently are evaluating the comments we received regarding these proposed

³⁶ See GFI Letter. This commentator did not provide any explanation as to why such exemption was needed, including how security-based swap trading platforms operate, that would enable us to evaluate whether relief is necessary or appropriate. See Cleared SBS Exemptions Adopting Release.

³⁷ See FSR/ISDA/SIFMA Letter. These commentators requested relief under the Exchange Act and the Trust Indenture Act, but did not request relief under the Securities Act. However, two of these commentators subsequently submitted the SIFMA Letter and the SIFMA/ISDA Letter to request relief under the Securities Act. See footnote 30 above and accompanying text.

³⁸ See Cleared SBS Exemptions Adopting Release.

³⁹ See Security-Based SEF Proposing Release.

rules, but we have not yet adopted final rules implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs. We also are evaluating such comments in connection with our consideration of the comments we have received on the interim final rules given commentators' concerns regarding the operation of security-based swap trading platforms.

We do not expect to complete our evaluation of the implications for security-based swaps as securities, including our consideration of the comments we have received on the interim final rules, and implement any appropriate regulatory relief before February 11, 2013, the current expiration date of the interim final rules. If the interim final rules expire before we complete such evaluation, market participants entering into security-based swap transactions may need to register the offer and sale of the security-based swaps under the Securities Act. Market participants also may be required to comply with the registration provisions of the Exchange Act applicable to classes of securities and the indenture provisions of the Trust Indenture Act. We believe that requiring compliance with these provisions while we consider the comments we have received on the interim final rules likely would disrupt the operation of the security-based swaps market. Moreover, we have received a request from a commentator to extend the expiration dates in the interim final rules.⁴⁰ This commentator stated its belief that key issues and questions regarding the application of the federal securities laws to security-based swaps remain unresolved and, as a result, pending resolution of those issues and questions, all of the exemptions in the interim final rules are needed to avoid the potential for significant disruption

⁴⁰ See letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, dated December 20, 2012. This commentator requested that the Commission extend the expiration dates in the interim final rules to July 17, 2013.

in the security-based swaps market.⁴¹ Thus, while we consider the comments we have received on the interim final rules, the interim final rules are needed to allow market participants that meet the conditions of the interim final rules to continue to enter into security-based swap transactions without concern that such activities may not comply with the registration requirements of the Securities Act applicable to securities transactions, the registration requirements of the Exchange Act applicable to classes of securities, and the indenture provisions of the Trust Indenture Act.

Based on the foregoing, we believe that it is necessary and appropriate in the public interest and consistent with the protection of investors to continue providing the exemptions from all provisions of the Securities Act (other than the Section 17(a) antifraud provisions), the registration requirements of the Exchange Act relating to classes of securities, and the indenture provisions of the Trust Indenture Act for those security-based swaps that prior to the Title VII effective date were security-based swap agreements, provided certain conditions are met.

Accordingly, due to the limited time the interim final rules will be needed, and our consideration of comments we have received on the interim final rules, we have determined that it is necessary and appropriate to extend the expiration dates in the interim final rules to February 11, 2014.⁴² If we adopt further rules relating to issues raised by the application of the Securities Act and other federal securities laws to the security-based swaps market before February 11, 2014, we may determine to alter the expiration dates in the interim final rules as part of that rulemaking. We only are extending the expiration dates in the interim final rules; we are not making any other changes to the interim final rules.

II. CERTAIN ADMINISTRATIVE LAW MATTERS

⁴¹ Id.

⁴² The Cleary Gottlieb No-Action Letter will remain in effect for so long as the interim final rules remain in effect. See footnote 6 above.

Section 553(b) of the Administrative Procedure Act⁴³ generally requires an agency to publish notice of a proposed rulemaking in the Federal Register. This requirement does not apply, however, if the agency “for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁴⁴ 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.⁴⁵ This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.⁴⁶ We, for good cause, find that notice and solicitation of comment before adopting the amendments to the interim final rules is impracticable, unnecessary, or contrary to the public interest. We also find good cause not to delay the effective date of the amendments to the interim final rules.

For the reasons we discuss throughout this release, we believe that we have good cause to act immediately to adopt the amendments to the interim final rules to extend the expiration dates in the interim final rules. The extension of the expiration dates in the interim final rules is intended to minimize disruptions and costs to the security-based swaps market that could occur on the current expiration date of the interim final rules. The interim final rules are needed to allow market participants that meet the conditions of the interim final rules to continue to enter into security-based swap transactions without concern that such activities will be subject to the registration requirements of the Securities Act and the Exchange Act and the indenture

⁴³ 5 U.S.C. 553(b).

⁴⁴ Id.

⁴⁵ See 5 U.S.C. 553(d).

⁴⁶ Id.

qualification provisions of the Trust Indenture Act while we consider the comments we have received on the interim final rules.

As noted above, we sought and received comments on the interim final rules.⁴⁷ Although one commentator did not support the interim final rules, this commentator did not provide any explanation for the reason. The other commentators supported the interim final rules and stated their view that the interim final rules were necessary and appropriate steps to prevent disruption of the security-based swaps market and to ensure the orderly implementation of Title VII. These commentators provided detailed responses to our requests for comment on the interim final rules and expressed concerns regarding the treatment of certain communications involving security-based swaps under the Securities Act. These commentators also stated their view that permanent relief was needed for security-based swap transactions and requested that we adopt permanent exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act, similar to the exemptions provided in the interim final rules, for security-based swap transactions entered into solely between eligible contract participants. We also received comments on the proposed exemptions for security-based swap transactions involving an eligible clearing agency that were responsive to the request for comment on the interim final rules.⁴⁸ We are carefully considering all of these comments as we evaluate the implications for security-based swaps resulting from the inclusion of the term “security-based swap” in the definition of “security” under the Securities Act and the Exchange Act.

Moreover, we are in the process of implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs. As noted above, we have proposed rules to implement these provisions, but the particular characteristics of trading

⁴⁷ See footnotes 18 and 20 above and accompanying text.

⁴⁸ See footnote 35 above and accompanying text.

platforms that security-based SEFs will be permitted to operate will not be known until we adopt final rules for security-based SEFs. We currently are evaluating the comments we received regarding these proposed rules, but we have not yet adopted final rules implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs. We also are evaluating such comments in connection with our consideration of the comments we have received on the interim final rules given commentators' concerns regarding the operation of security-based swap trading platforms. However, we may not complete our evaluation of the comments we have received on the interim final rules or our evaluation of the comments received and our rulemaking relating to the implementation of the Title VII statutory provisions governing the registration and regulation of security-based SEFs before February 11, 2013, the current expiration date of the interim final rules.

Absent an extension, the interim final rules will expire on February 11, 2013. The interim final rules have been in place since July 2011 and market participants have relied on them to enter into security-based swap transactions. Extending the expiration dates in the interim final rules will not affect the substantive provisions of the interim final rules. Extending the expiration dates in the interim final rules will allow market participants that meet the conditions of the interim final rules to continue to enter into security-based swap transactions without concern that such activities will be subject to the registration requirements of the Securities Act and the Exchange Act and the indenture qualification provisions of the Trust Indenture Act while we consider the comments we have received on the interim final rules. Based on the foregoing and for the reasons we discuss throughout this release, we find that there is good cause to have the amendments to the interim final rules effective upon publication in the Federal Register and that notice and solicitation of comment in advance of the effectiveness of

the amendments to the interim final rules is impracticable, unnecessary and contrary to the public interest.⁴⁹

III. ECONOMIC ANALYSIS

In July 2011, we adopted the interim final rules to provide exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act for those security-based swaps that prior to the Title VII effective date were security-based swap agreements and are defined as “securities” under the Securities Act and the Exchange Act as of the Title VII effective date due solely to the provisions of Title VII. In this release, we are adopting amendments to the interim final rules to extend the expiration dates in the interim final rules. Extending the expiration dates in the interim final rules is intended to minimize disruptions and costs to the security-based swaps market that could occur on the current expiration date of the interim final rules. The interim final rules are needed to allow market participants that meet the conditions of the interim final rules to continue to enter into security-based swap transactions without concern that such activities will be subject to the registration requirements of the Securities Act and the Exchange Act and the indenture qualification provisions of the Trust Indenture Act while we consider the comments we have received on the interim final rules.

We are sensitive to the costs and benefits imposed by our rules. The discussion below attempts to address the amendments to the interim final rules extending the expiration dates in the interim final rules, including the costs and benefits of the amendments as well as the effect of the amendments on efficiency, competition, and capital formation.⁵⁰

⁴⁹ This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendment 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”).

⁵⁰ Section 23(a)(2) of the Exchange Act requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. See 15 U.S.C. 78w(a)(2).

Absent the extension of the expiration dates in the interim final rules, the offer and sale of those security-based swaps that prior to the Title VII effective date were defined as security-based swap agreements may have to be registered under the Securities Act, certain of those security-based swaps may have to be registered as a class under the Exchange Act, and the indenture provisions of the Trust Indenture Act may need to be complied with. We believe that requiring compliance with these provisions at this time for security-based swap transactions between eligible contract participants likely would disrupt and impose unnecessary costs on this segment of the security-based swaps market.⁵¹ We also believe that because security-based swap transactions that qualify for the exemptions under the interim final rules generally involve individualized negotiations, extending the expiration date of such exemptions is not likely to impose a substantial informational cost on the market participants involved in such transactions. Further, absent the action we are taking in this release, we believe that certain market participants could incur additional costs due to compliance with the registration requirements of the Securities Act and the Exchange Act, as well as compliance with the provisions of the Trust Indenture Act. It also is possible that without the extension of the expiration dates in the interim final rules, a market participant may not continue to participate in these types of transactions if compliance with these provisions were infeasible (economically or otherwise). Not extending

Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. *Id.* In addition, Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

⁵¹ If market participants are not required to register the offer and sale of these security-based swaps, they will not have to incur the additional costs of such registration, including legal and accounting costs. The availability of the exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act also would mean that market participants would not incur the costs of preparing disclosure documents describing these security-based swaps and would not incur the costs of preparing indentures and arranging for the services of a trustee.

the expiration dates in the interim final rules could cause disruptions in the security-based swaps market. Therefore, we believe that extending the expiration dates in the interim final rules provides important benefits to market participants in the security-based swaps market.

Because the extension of the expiration dates in the interim final rules would maintain the status quo with respect to the ability of market participants to engage in transactions in those security-based swaps that prior to the Title VII effective date were defined as security-based swap agreements, we do not believe that our actions in this release will have an impact on the current state of competition. We also believe that the extension of the expiration dates in the interim final rules will promote efficiency by minimizing disruptions and costs to the security-based swaps market that could occur on the current expiration date of the interim final rules. To the extent that those security-based swaps that prior to the Title VII effective date were defined as security-based swap agreements are used to hedge risks, including those related to the issuance of the referenced securities (as occurs with equity swaps and the issuance of convertible bonds, for example), the extension of the expiration dates in the interim final rules will prevent potential impairment of the capital formation process. For example, if registration of these transactions is required under our existing Securities Act registration scheme, this might result in the issuers of security-based swaps providing disclosure regarding their security-based swap positions that might not otherwise be disclosed to the market. This position disclosure could lead to a decreased use of security-based swaps by these market participants, which could potentially affect capital formation to the extent counterparties might use security-based swaps for hedging their exposure to issuers of referenced securities.

We recognize that a consequence of extending the expiration dates in the interim final rules will be the unavailability of certain remedies under the Securities Act and the Exchange

Act and certain protections under the Trust Indenture Act for an interim period to the extent that any of these security-based swap transactions otherwise would be subject to the registration requirements of the Securities Act and the Exchange Act. Absent the extension of the expiration dates in the interim final rules, a market participant may have to file a registration statement covering the offer and sale of the security-based swaps, may have to register the class of security-based swaps that it has issued under the Exchange Act, which would provide investors with civil remedies in addition to antifraud remedies, and may have to satisfy the applicable provisions of the Trust Indenture Act. A registration statement covering the offer and sale of security-based swaps may provide certain information about the market participants, the security-based swap contract terms, and the identification of the particular reference securities, issuers, or loans underlying the security-based swap. As a result of the extension of the expiration dates in the interim final rules, while an investor would be able to pursue an antifraud action in connection with the purchase and sale of security-based swaps under Section 10(b) of the Exchange Act, it would not be able to pursue civil remedies under Sections 11 or 12 of the Securities Act. The Commission could still pursue an antifraud action in the offer and sale of security-based swaps under Section 17(a) of the Securities Act.

IV. PAPERWORK REDUCTION ACT

The interim final rules do not impose any new “collections of information” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”),⁵² nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, we did not submit the interim final rules to the Office of Management and Budget for review in accordance with the

⁵² 44 U.S.C. 3501 et seq.

PRA.⁵³ We requested comment on whether our conclusion that there are no collections of information is correct, and we did not receive any comment.

V. REGULATORY FLEXIBILITY ACT CERTIFICATION

We hereby certify pursuant to 5 U.S.C. 605(b) that extending the expiration dates in the interim final rules will not have a significant economic impact on a substantial number of small entities.⁵⁴ The interim final rules apply only to counterparties that may engage in security-based swap transactions in reliance on the interim final rule providing an exemption under the Securities Act. The interim final rule under the Securities Act provides that the exemption is available only to security-based swaps that are entered into between eligible contract participants, as that term is defined in Section 1a(12) of the Commodity Exchange Act as in effect prior to the Title VII effective date, and other than with respect to persons determined by the CFTC to be eligible contract participants pursuant to Section 1a(12)(C) of the Commodity Exchange Act. Based on our existing information about the participants in the security-based swaps market, including our existing information about participants in the security-based swaps market, we believe that the interim final rules apply to few, if any, small entities.⁵⁵ For this reason, the extension of the expiration dates in the interim final rules should not have a significant economic impact on a substantial number of small entities.

VI. STATUTORY AUTHORITY AND TEXT OF THE RULES AND AMENDMENTS

⁵³ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

⁵⁴ We certified pursuant to 5 U.S.C. 605(b) that the interim final rules will not have a significant economic impact on a substantial number of small entities. See Interim Final Rules Adopting Release. We received no comments on that certification.

⁵⁵ For example, as revealed in a current survey conducted by Office of the Comptroller of the Currency, 100.0% of credit default swap positions held by U.S. commercial banks and trust companies are held by those with assets over \$10 billion. See Office of the Comptroller of the Currency, “Quarterly Report on Bank Trading and Derivatives Activities Third Quarter 2012” (2012).

The amendments described in this release are being adopted under the authority set forth in Sections 19 and 28 of the Securities Act, Sections 12(h), 23(a) and 36 of the Exchange Act, and Section 304(d) of the Trust Indenture Act.

List of Subjects in 17 CFR Parts 230, 240 and 260

Reporting and recordkeeping requirements, Securities.

TEXT OF THE RULES AND AMENDMENTS

We are amending 17 CFR parts 230, 240, and 260 as follows and the expiration dates in the interim final rules published July 11, 2011 (76 FR 40605) are extended to February 11, 2014.

PART 230 - GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

§ 230.240 [Amended]

2. In §230.240(c), in the first sentence, remove the words “the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*” and add, in their place, the words “February 11, 2014”.

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

3. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1,

78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 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., 12 U.S.C. 5221(e)(3), 15 U.S.C. 8302, and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

§§ 240.12a-11 and 240.12h-1 [Amended]

4. In §240.12a-11(b), in the first sentence, remove the words “the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*” and add, in their place, the words “February 11, 2014”.

5. In §240.12h-1(i), in the second sentence, remove the words “the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*” and add, in their place, the words “February 11, 2014”.

PART 260 - GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

6. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11.

* * * * *

§ 260.4d-12 [Amended]

7. In §260.4d-12, in the second sentence, remove the words “the compliance date for final rules that the Commission may adopt further defining both the terms *security-based swap* and *eligible contract participant*” and add, in their place, the words “February 11, 2014”.

By the Commission.

Elizabeth M. Murphy
Secretary

January 29, 2013