

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 230, 240 and 260

[Release Nos. 33-9545; 34-71482; 39-2495; 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, 2017. If we adopt further rules relating to issues raised by the application of the Securities Act or the other federal securities laws to security-based swaps before February 11, 2017, we may determine to alter the expiration dates in the interim final rules as part of that rulemaking.

DATES: The amendments are effective [insert date of publication in the Federal Register]. See Section I of the **SUPPLEMENTARY INFORMATION** concerning amendment of expiration dates in the interim final rules.

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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 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

A. Background Regarding the Adoption of 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

¹ 15 U.S.C. 77a et seq.

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.

requirements and from the provisions of the Trust Indenture Act,⁶ provided certain conditions are met.⁷ In February 2013, we adopted amendments to the interim final rules to extend the expiration dates in the interim final rules from February 11, 2013 to February 11, 2014.⁸

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

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 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 See Extension of Exemptions for Security-Based Swaps, Release No. 33-9383 (Jan. 29, 2013), 78 FR 7654 (Feb. 4, 2013).

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,

intended to allow security-based swap agreements that became security-based swaps on the Title VII effective date to continue to trade as they did 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 under the Securities Act, the Exchange Act, and the Trust Indenture Act of including 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-

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.

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.

based SEFs”)¹⁵ and that the use of trading 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 The interim final rules thus allow market participants to continue to use trading platforms to publish quotes for security-based swaps and enter into transactions involving security-based swaps that are the subject of individual negotiation without concern that such activities may not comply with the applicable provisions of the federal securities laws.¹⁸

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 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.” Commenters indicated that they were still analyzing the full implications of such expansion of the definition of “security” and 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 The interim final rules do not cover security-based swaps that are not subject to individual negotiation. The interim final rules apply only with respect to a security-based swap that would have been a security-based swap agreement under the definition of that term prior to the Title VII effective date. That definition incorporated the definition of “swap agreement,” which required that the agreement, contract or transaction be “subject to individual negotiation.” See Interim Final Rules Adopting Release.

B. Comments Received on the Interim Final Rules

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:¹⁹ (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.²⁰

¹⁹ 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”).

²⁰ 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 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 Commission and the Commodity Futures Trading Commission (“CFTC”) adopted final rules further defining the term “eligible contract participant.” The CFTC staff 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) (“Intermediary Definitions Adopting Release”).

We received letters from three commenters regarding the interim final rules.²¹ One commenter 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.²² The two other commenters supported the interim final rules.²³ These commenters 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.²⁴ These commenters 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.²⁵ These commenters expressed concerns about the availability of exemptions from the 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.²⁶ 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.²⁷ They also indicated that security-based swap

²¹ 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”).

²² See Nappi Letter.

²³ See SIFMA Letter and SIFMA/ISDA Letter.

²⁴ See SIFMA/ISDA Letter.

²⁵ Id.

²⁶ See SIFMA Letter and SIFMA/ISDA Letter.

²⁷ See SIFMA/ISDA Letter.

dealers publish and distribute communications they characterized as research regarding security-based swap transactions that may be broadly disseminated and could be available on an unrestricted basis.²⁸ 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.²⁹ Based on their concerns regarding the availability of exemptions from the registration requirements of the Securities Act, these commenters requested that we adopt permanent relief from the registration requirements of Section 5 of the Securities Act for offers and sales of security-based swaps³⁰ solely between eligible contract participants.³¹ These commenters also requested relief under the Exchange Act for offers and sales of security-based swaps solely between eligible contract participants.³² They were concerned that ambiguity regarding the definition of a “class” as applied to security-based swaps

²⁸ See SIFMA Letter.

²⁹ See SIFMA Letter and SIFMA/ISDA Letter.

³⁰ 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.

³¹ See SIFMA Letter and SIFMA/ISDA Letter. These commenters limited their request for relief to security-based swap transactions not involving an eligible clearing agency. Id. We 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.

³² See SIFMA/ISDA Letter.

could raise concerns about the registration requirements of Section 12(g) of the Exchange Act.³³ Finally, these commenters requested relief from Section 304(d) of the Trust Indenture Act for security-based swaps entered into solely between eligible contract participants.³⁴ They believed that the protections of the Trust Indenture Act are not necessary for these transactions because they involve contracts between two counterparties who are capable of enforcing obligations under the security-based swaps directly.³⁵

Moreover, although not submitted in connection with the interim final rules, we received two comment letters from four commenters regarding the exemptions for security-based swap transactions involving an eligible clearing agency.³⁶ These letters discussed issues arising with respect to security-based swap transactions not involving an eligible clearing agency and requested exemptions under the Securities Act, the Exchange Act, and the Trust Indenture Act for security-based swap transactions entered into between eligible contract participants.³⁷ In

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ 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 19 above.

³⁷ See GFI Letter and FSR/ISDA/SIFMA Letter. The GFI Letter suggested that we provide permanent exemptions under the Securities Act, the 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. This commenter did not provide any explanation as to why such exemptions were 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. The FSR/ISDA/SIFMA Letter requested relief under the Exchange Act and the Trust Indenture Act, but did not request relief under the Securities Act. However, two of these commenters subsequently submitted the SIFMA Letter

adopting the exemptions for security-based swap transactions involving an eligible clearing agency, we indicated that these commenters' suggestions were more appropriate to be considered in connection with the interim final rules.³⁸

We subsequently extended the expiration dates in the interim final rules from February 11, 2013 to February 11, 2014 to enable us to continue our evaluation of the implications for security-based swaps as securities and determine whether other regulatory action is appropriate before the expiration date of the interim final rules.³⁹ We indicated at that time that we were carefully considering the comments we had 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.⁴⁰ We also indicated that we were in the process of implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs.⁴¹ We had proposed rules to implement these provisions, but the particular characteristics of trading platforms that security-based SEFs will be permitted to operate would not be known until we adopted final rules for security-based SEFs. We indicated that we were evaluating the comments we had received on these proposed rules, but that we had not yet adopted final rules implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs.⁴²

and the SIFMA/ISDA Letter to request relief under the Securities Act. See footnote 31 above and accompanying text.

³⁸ See Cleared SBS Exemptions Adopting Release.

³⁹ See footnote 8 above. We had received a request from a commenter to extend the expiration dates in the interim final rules. See letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, SIFMA, dated December 20, 2012.

⁴⁰ Id.

⁴¹ Id.

⁴² Id.

Moreover, we indicated that we were evaluating such comments in connection with our consideration of the comments we have received on the interim final rules given commenters' concerns regarding the operation of security-based swap trading platforms.⁴³

C. Extension of the Interim Final Rules

In this release, we are extending the expiration dates in the interim final rules from February 11, 2014 to February 11, 2017. We are still in the process of implementing Title VII, which imposes a comprehensive regime for the regulation of security-based swaps under the federal securities laws, including the clearing, exchange trading, and reporting of security-based swap transactions. We have adopted some rules under Title VII, including joint rules with the CFTC further defining certain Title VII definitions,⁴⁴ rules establishing the procedure by which clearing agencies submit security-based swaps for determination as to whether those instruments should be subject to mandatory clearing under Title VII,⁴⁵ and rules establishing standards for how registered clearing agencies should manage their risks and run their operations.⁴⁶ We also have issued a policy statement proposing the sequencing of compliance dates for final rules that we may adopt to complete the implementation of the security-based swaps regulatory regime (“sequencing policy statement”).⁴⁷ While we are working toward fulfilling the requirements of

⁴³ Id.

⁴⁴ See Intermediary Definitions Adopting Release and 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).

⁴⁵ See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-67286 (Jun. 28, 2012), 77 FR 41602 (Jul. 13, 2012).

⁴⁶ See Clearing Agency Standards, Release No. 34-68080 (Oct. 22, 2012), 77 FR 66219 (Nov. 2, 2012).

⁴⁷ See Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934

Title VII in a thorough and deliberative manner that includes significant public input and coordination with other regulators, we have not yet adopted final rules completing the implementation of the security-based swaps regulatory regime.

Subsequent to the extension of the expiration dates in the interim final rules in February 2013, we completed proposing nearly all of the rules required to be adopted by Title VII to implement the security-based swaps regulatory regime.⁴⁸ Most recently, we proposed rules and interpretations addressing the application of the security-based swap provisions of Title VII to cross-border security-based swap transactions and to non-U.S. persons that act in capacities regulated under the Dodd-Frank Act.⁴⁹ In light of the substantially complete picture of the proposed security-based swaps regulatory regime, as well as the fact that the CFTC has adopted nearly all of its rules required by Title VII to implement the swaps regulatory regime,⁵⁰ we reopened the comment period for the proposals implementing the security-based swaps regulatory regime and the sequencing policy statement to provide the public with an additional

and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34-67177 (Jun. 11, 2012), 77 FR 35625 (Jun. 14, 2012).

⁴⁸ We have not yet proposed rules regarding the reporting and recordkeeping requirements to which security-based swap dealers and major security-based swap participants will be subject pursuant to Section 15F(f) of the Exchange Act. 15 U.S.C. 78o-10(f).

⁴⁹ See Cross-Border Application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-69490 (May 1, 2013), 78 FR 30967 (May 23, 2013).

⁵⁰ CFTC Chairman Gary Gensler has noted that the CFTC has “largely completed the swaps market rulemaking, with 80 percent behind us...” Gary Gensler, Chairman, CFTC, Opening Remarks at CFTC Public Roundtable on “Futurization of Swaps” (Jan. 31, 2013) (transcript available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-130>).

opportunity to analyze and comment upon the proposed security-based swaps regulatory regime.⁵¹

As we consider final rules completing implementation of the security-based swaps regulatory regime, we are evaluating the additional comments we received after reopening the comment period. We also are considering the CFTC's experiences with implementation of the swaps regulatory regime and the extent to which our final rules should harmonize with the CFTC's final rules implementing the swaps regulatory regime. However, we do not expect to complete such evaluation and adopt final rules before February 11, 2014, the current expiration date of the interim final rules. We do not believe that we can complete our evaluation of the implications for security-based swaps and determine whether other regulatory action is appropriate until we progress further in our consideration of final rules completing the implementation of the security-based swaps regulatory regime.

For example, we are considering final rules implementing the Title VII statutory provisions governing the registration and regulation of security-based SEFs. We have proposed rules to implement these provisions, 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. As discussed above, we received comments on the interim final rules that expressed concerns regarding the implications for security-based swaps under the Securities Act as a result of the possible operation of security-based SEFs.⁵² We believe that our determination about possible regulatory action for security-based swaps is directly affected by our

⁵¹ See Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34-69491 (May 1, 2013), 78 FR 30800 (May 23, 2013).

⁵² See footnote 16 above and accompanying text.

consideration of final rules completing the implementation of the Title VII statutory provisions governing the registration and regulation of security-based SEFs.⁵³

If the interim final rules expire before we complete our evaluation of the implications for security-based swaps as securities and determine whether other regulatory action is appropriate, market participants entering into security-based swap transactions will have to consider whether they need to register the offer and sale of the security-based swaps under the Securities Act. Market participants also will have to consider whether they 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 evaluate the implications for security-based swaps as securities and determine whether other regulatory action is appropriate could have an impact on the operation of the security-based swaps market. Thus, 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 applicable provisions of the Securities Act, the Exchange Act, and 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.

⁵³ Moreover, under the swaps regulatory regime as implemented, we are considering issues that may arise under the federal securities laws from the possible trading of security-based swaps on swap execution facilities.

Accordingly, due to the interrelationship between the interim final rules and the ongoing implementation of the security-based swaps regulatory regime, and based on our consideration of comments we have received to date on these matters, we have determined that it is necessary and appropriate to extend the expiration dates in the interim final rules from February 11, 2014 to February 11, 2017.⁵⁴ If we adopt further rules relating to issues raised by the application of the Securities Act or the other federal securities laws to security-based swaps before February 11, 2017, 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

Section 553(b) of the Administrative Procedure Act⁵⁵ 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.”⁵⁶ Further, the Administrative

⁵⁴ In conjunction with the extension of the expiration dates in the interim final rules, we also are extending certain of the temporary relief we adopted in July 2011 that provided exemptions from compliance with certain provisions of the Exchange Act. This relief also is set to expire on February 11, 2014 and exempts security-based swap activities from the application of the Exchange Act other than certain antifraud and anti-manipulation provisions, all Exchange Act provisions related to security-based swaps added or amended by Title VII of the Dodd-Frank Act, including the amended definition of “security” in Section 3(a)(10), and certain other Exchange Act provisions. See Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, Release No. 34-71485 (Feb. 5, 2014). See also Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of “Security” to Encompass Security-Based Swaps, Release No. 34-64795 (Jul. 1, 2011), 76 FR 39927 (Jul. 7, 2011).

⁵⁵ 5 U.S.C. 553(b).

⁵⁶ Id.

Procedure Act also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.⁵⁷ This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.⁵⁸ 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 if the interim final rules expire. 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 complete our evaluation of the implications for security-based swaps and determine whether other regulatory action is appropriate.

As noted above, we currently are considering final rules completing the implementation of the security-based swaps regulatory regime. As part of such consideration, we are evaluating the additional comments we received after reopening the comment period for the proposals implementing the security-based swaps regulatory regime and the sequencing policy statement and the CFTC's experiences with implementation of the swaps regulatory regime. However, we

⁵⁷ See 5 U.S.C. 553(d).

⁵⁸ Id.

do not expect to complete such evaluation and adopt final rules before February 11, 2014, the current expiration date of the interim final rules. We do not believe that we can complete our evaluation of the implications for security-based swaps and determine whether other regulatory action is appropriate until we progress further in our consideration of final rules completing the implementation of the security-based swaps regulatory regime. We believe that our determination regarding possible regulatory action for security-based swaps is directly affected by our consideration of final rules completing the implementation security-based swaps regulatory regime. Moreover, under the swaps regulatory regime as implemented, we are considering issues that may arise under the federal securities laws from the possible trading of security-based swaps on swap execution facilities.

Absent an extension, the interim final rules will expire on February 11, 2014. 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 and 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 complete our evaluation of the implications for security-based swaps as securities and determine whether other regulatory action is appropriate. 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 or contrary to the public interest.⁵⁹

III. ECONOMIC ANALYSIS

We are mindful of the costs imposed by, and the benefits to be obtained from, our rules. Section 2(b) of the Securities Act and Section 3(f) of the Exchange Act require 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, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.⁶⁰ In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.⁶¹ Section 23(a)(2) of the Exchange Act 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.⁶²

As discussed above, we are adopting amendments to the interim final rules to extend the expiration dates in the interim final rules to February 11, 2017. 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

⁵⁹ 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”).

⁶⁰ See 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

⁶¹ See 15 U.S.C. 78w(a)(2).

⁶² Id.

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.

The interim final rules currently in effect serve as the economic baseline against which the costs and benefits, as well as the impact on efficiency, competition, and capital formation, of the amendments are measured. Because the extension of the expiration dates in the interim final rules maintains the status quo, we do not expect additional significant costs or benefits to result from the extension. We also do not expect the extension to have additional significant effects on efficiency, competition, or capital formation. The interim final rules will continue to exempt certain security-based swaps from all provisions of the Securities Act, other than the Section 17(a) antifraud provisions,⁶³ as well as exempt these security-based swaps from Exchange Act registration requirements, and from the provisions of the Trust Indenture Act, provided certain conditions are met.

In the alternative, we could allow the interim final rules to expire by not extending their expiration date. In this scenario, market participants who continue to effect security-based swap transactions would have to determine whether another exemption from the registration requirements of the Securities Act is available so that they may be able to rely on that exemption. If no Securities Act exemptions are available for a security-based swap transaction following the expiration of the interim final exemptions, such a transaction would have to be registered under the Securities Act. The counterparties to such a transaction also would have to consider whether they need to comply with the registration requirements of the Exchange Act and the indenture provisions of the Trust Indenture Act. We believe that requiring compliance with these

⁶³ See 15 U.S.C. 77q(a).

provisions at this time for security-based swap transactions between eligible contract participants likely would disrupt and impose new costs on this segment of the security-based swaps market. For example, if market participants are required to register the offer and sale of these security-based swaps under the Securities Act, they would have to incur the additional costs of such registration, including legal and accounting costs, as well as the costs associated with preparing the disclosure documents describing these security-based swaps. Market participants also may incur costs associated with the registration of these security-based swaps under the Exchange Act and compliance with the Trust Indenture Act, including preparing indentures and arranging for the services of a trustee.

It is also possible that if we were to allow the interim final rules to expire, efficiency and capital formation may be impaired. Failing to extend the expiration dates in the interim final rules may result in disruptions and costs to the security-based swaps market that could impede efficiency. Additionally, some market participants may not continue to participate in certain security-based swap transactions if compliance with these provisions were infeasible (economically or otherwise). In that case, capital formation may be impaired to the extent that some market participants use these security-based swap transactions to hedge risks, including those related to the issuance of the referenced securities (as may occur with equity swaps and the issuance of convertible bonds). For example, if registration of these transactions is required under our existing Securities Act registration scheme, issuers of security-based swaps may be forced to provide disclosure about 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 impair capital formation to the

extent counterparties might use security-based swaps for hedging their exposure to issuers of referenced securities.

We also recognize that there would be other effects associated with letting the interim final rules expire. Without the exemptions provided for 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, and may have to satisfy the applicable provisions of the Trust Indenture Act, which would provide investors with additional information and in certain cases civil remedies. For example, a registration statement covering the offer and sale of the 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. Additionally, although investors currently may pursue antifraud actions in connection with the purchase and sale of security-based swaps under Section 10(b) of the Exchange Act,⁶⁴ if market participants were required to file registration statements under the Securities Act, investors may also be able to pursue civil remedies under Sections 11 or 12 of the Securities Act.⁶⁵

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”),⁶⁶ nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, we did not submit

⁶⁴ See 15 U.S.C. 78j(b).

⁶⁵ See 15 U.S.C. 77k-1. Regardless of the extension, however, we can always pursue an antifraud action in the offer and sale of security-based swaps under Section 17(a) of the Securities Act. See 15 U.S.C. 77q.

⁶⁶ 44 U.S.C. 3501 *et seq.*

the interim final rules to the Office of Management and Budget for review in accordance with the PRA.⁶⁷ 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.⁶⁸ 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 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.⁶⁹ 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.

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

⁶⁸ 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.

⁶⁹ 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 2013” (2013).

VI. STATUTORY AUTHORITY AND TEXT OF THE RULES AND AMENDMENTS

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

For the reasons set out in the preamble, the Commission amends 17 CFR parts 230, 240, and 260 as follows:

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, 77d note, 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, and Pub. L. 112-106, sec. 201(a), 126 Stat. 313 (2012), unless otherwise noted.

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§ 230.240 [Amended]

2. In §230.240(c), in the first sentence, remove the words “February 11, 2014” and add, in their place, the words “February 11, 2017”.

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, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 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.; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

§ 240.12a-11 [Amended]

4. In §240.12a-11(b), in the first sentence, remove the words “February 11, 2014” and add, in their place, the words “February 11, 2017”.

§ 240.12h-1 [Amended]

5. In §240.12h-1(i), in the second sentence, remove the words “February 11, 2014” and add, in their place, the words “February 11, 2017”.

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 “February 11, 2014” and add, in their place, the words “February 11, 2017”.

By the Commission.

Elizabeth M. Murphy
Secretary

February 5, 2014