



February 2, 2018

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: *Petition for Rulemaking*
Requesting a Conformance Period for Rule 135d Under the Securities Act of 1933
File No. S7-09-14

Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“**SIFMA**”)¹ represents major dealer participants in the security-based swaps (“**SBS**”) market. Section 768 of the Dodd-Frank Wall Street Reform and Consumer Protection Act introduced SBS into the definition of “security” under the Securities Act of 1933, as amended (the “**Securities Act**”), and since its enactment, SBS dealers have carried on business pursuant to the exemption from Securities Act registration provided by interim Rule 240 thereunder (17 C.F.R. § 230.240). Interim Rule 240 provides an exemption from all provisions (other than antifraud) of the Securities Act for SBS that are entered into solely between eligible contract participants (“**ECPs**”), including an exemption from the registration provisions of Section 5 of the Securities Act. Interim Rule 240 is currently scheduled to expire on February 11, 2018, at which point SBS dealers will need to rely on the Section 4(a)(2) exemption from registration for many if not most SBS transactions with ECPs. This is described more fully in the letter of today’s date (the “**SIFMA Letter**”) to the staff of the Division of Corporation Finance attached hereto as Exhibit A.

On January 5, 2018, the Commission adopted new Rule 135d (17 C.F.R. § 230.135d) under the Securities Act, which became effective on January 16, 2018.² Rule 135d is a safe harbor that conditionally excludes the publication or dissemination of SBS price quotes and SBS-related research from the definition of “offer” for purposes of Section 5 of the Securities Act. As described in the SIFMA Letter, Rule 135d will be

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$18.5 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² 83 Fed. Reg. 2046 (Jan. 16, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-16/pdf/2018-00347.pdf>.

critical to the practical ability of SBS dealers to rely on the Section 4(a)(2) exemption for SBS transactions involving ECPs once the exemption provided by interim Rule 240 expires.

On behalf of its members, SIFMA respectfully requests, for the reasons set forth in the SIFMA Letter, that the Commission establish a conformance period of six months from the date of effectiveness of Rule 135d (i.e., until July 16, 2018) to ensure that the essential protections provided by interim Rule 240 remain in place while SIFMA members undertake the necessary tasks to prepare for the implementation of Rule 135d. In the alternative, SIFMA respectfully requests that the Commission direct the staff of the Division of Corporation Finance to issue guidance to the effect that SBS dealers may continue to rely on interim Rule 240 until July 16, 2018 notwithstanding its February 11, 2018 expiration date.

Thank you for considering our request. Please do not hesitate to contact the undersigned or our counsel at Davis Polk & Wardwell LLP, Annette L. Nazareth (202-962-7075) or Joseph A. Hall (212-450-4565), for any further information the Commission may require.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Kyle Brandon', with a stylized flourish at the end.

Kyle Brandon
Managing Director
Securities Industry and Financial
Markets Association



February 2, 2018

Ms. Amy Starr
Chief, Office of Capital Markets Trends
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: *Conformance Period for Rule 135d Under the Securities Act of 1933*
File No. S7-09-14

Dear Ms. Starr:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ greatly appreciates the efforts of the Securities and Exchange Commission to address the implications of Section 768 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which included security-based swaps (“SBS”) within the definition of “security” under the Securities Act of 1933, as amended (the “Securities Act”). In particular, SIFMA would like to commend the Commission and its staff for the thoughtful approach taken in the adoption, on January 5, 2018, of new Rule 135d under the Securities Act (17 C.F.R. § 230.135d), which became effective on January 16, 2018.²

Last year, the Commission extended interim Rule 240 under the Securities Act (17 C.F.R. § 230.240), which provides an exemption from all provisions (other than antifraud) of the Securities Act for SBS that are entered into solely between eligible contract participants (“ECPs”), including an exemption from the registration provisions of Section 5. The interim rule did not exempt from registration offers or sales of SBS to persons who are not ECPs; such offers and sales would be required by the provisions of Section 5(e) to be registered because no exemption under Section 3 or 4 is available. The interim rule is currently scheduled to expire on February 11, 2018.

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² 83 Fed. Reg. 2046 (Jan. 16, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-01-16/pdf/2018-00347.pdf>.

Because SIFMA members did not and do not engage in U.S. SBS transactions except with counterparties who qualify as ECPs, under the interim rule the major SBS dealers were able to carry on business without registering SBS transactions under Section 5 (a process for which there is currently no specific rule or form) and without perfecting an exemption under Section 3 or 4 of the Securities Act. Upon expiration of the interim rule, however, SBS dealers will need to be able to rely on the registration exemption provided by Section 4(a)(2).³

New Rule 135d, which is a safe harbor that conditionally excludes the publication or dissemination of SBS price quotes and SBS-related research from the definition of “offer” for purposes of Section 5 of the Securities Act, is critical to the practical ability of SBS dealers to rely on the Section 4(a)(2) exemption for SBS transactions involving ECPs. This is because without Rule 135d, an SBS dealer would be subject to the practical risk that an ECP counterparty seeking to unwind or deny an unprofitable SBS trade would allege in litigation that the unrestricted publication or dissemination of SBS price quotes or research constituted general solicitation or advertising inconsistent with the Section 4(a)(2) exemption, rendering the exemption unavailable. Without a valid Section 4(a)(2) exemption, many if not most SBS transactions would be subject to challenge under Section 12(a)(1) of the Securities Act, which provides a private right of action for offers or sales in violation of Section 5. Although SBS dealers would have defenses to such challenges, the fact-intensive nature of the defenses and the considerable expense and uncertainty of litigation would, we believe, result in an unnecessary and in many cases impractical need to restrict the public distribution of SBS price information and research – thereby “imped[ing] the continuous flow of essential information into the security-based swaps market and security markets generally,” as the Commission put it in the adopting release for Rule 135d.⁴

Rule 135d establishes conditions to the availability of the safe harbor. For SBS price quotes, the quotes must relate to SBS that are traded or processed on or through a system or platform that is either registered as a national securities exchange or SBS execution facility under the Securities Exchange Act of 1934, or exempt from registration as an SBS execution facility. For SBS research reports, the report cannot represent the initiation or re-initiation of research coverage on the underlying issuer or its securities.

The Commission announced the final terms of the safe harbor on January 5, 2018, and although the conditions of the price-quote safe harbor were first announced in September 2014, the conditions of the research safe harbor were not known to the market until last month. In order to develop and implement compliance systems to conform their practices to the conditions of the safe harbor, SIFMA members respectfully request that

³ Although other registration exemptions may be available for certain transactions, e.g., exemptions provided by Section 3(a)(9) of the Securities Act or Regulation D under the Securities Act, we believe that Section 4(a)(2) provides the exemption that will be most broadly available for market participants to rely upon following expiration of the interim rule.

⁴ 83 Fed. Reg. at 2051-2052.

the Commission establish a conformance period of six months from the date of effectiveness of Rule 135d to ensure that the essential protections from private litigation based on Section 12(a)(1) provided by interim Rule 240 remain in place while implementation efforts are underway.

During the conformance period, SIFMA members would undertake a number of tasks in preparation for the implementation of Rule 135d, which depending on individual members' organizations would include:

- updating written policies and procedures for SBS-related communications;
- reviewing all distribution channels for SBS-related communications;
- reviewing access controls for SBS-related communications on third-party platforms;
- designing and implementing automated review systems and controls for SBS-related communications; and
- training research, legal and compliance staff on the requirements of the safe harbor for SBS-related communications.

In addition, as the Commission noted in the Rule 135d adopting release,⁵ while many of the platforms on which SBS transactions are currently effected may be required to register as SBS execution facilities once Title VII of the Dodd-Frank Act is fully implemented, these platforms are currently exempt from registration. After the Commission's registration rules and swaps cross-border rules are adopted, we anticipate that SBS dealers will need additional guidance on how quotes relating to offshore platforms that are subject to other regulatory regimes such as the European Union's Markets in Financial Instruments Directive II will satisfy the conditions of the safe harbor, particularly in view of pre-trade transparency requirements applying to these offshore platforms. SIFMA members intend to undertake this analysis during the conformance period as well.

We believe that a conformance period expiring July 16, 2018 would provide SBS dealers with the necessary time to develop the systems and controls needed to comply with the conditions of the Rule 135d safe harbor. Such a conformance period would also ensure that the SBS market can continue to operate without a chilling effect on SBS research and the potential negative impact on the SBS market and security markets generally.

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⁵ 83 Fed. Reg. at 2047 n.17.

Thank you for considering our request. Please do not hesitate to contact the undersigned or our counsel at Davis Polk & Wardwell LLP, Annette L. Nazareth (202-962-7075) or Joseph A. Hall (212-450-4565), for any further information you or the Commission may require.

Very truly yours,

/s/ Kyle Brandon

Kyle Brandon
Managing Director
Securities Industry and Financial
Markets Association

cc: Mr. David Fredrickson
Associate Director & Chief Counsel
Division of Corporation Finance

Mr. Andrew Schoeffler
Special Counsel, Office of Capital Markets Trends
Division of Corporation Finance