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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79833; File No. S7-27-11)

Order Extending Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps and Request for Comment

January 18, 2017

I. Introduction

The Securities and Exchange Commission (“Commission”) is (i) extending certain temporary exemptive relief originally provided by the Commission in connection with the revision of the definition of “security” in the Securities Exchange Act of 1934 (“Exchange Act”) to encompass security-based swaps (“Temporary Exemptions”);¹ and (ii) requesting comment on whether continuing exemptive relief is necessary beyond February 5, 2018. These temporary exemptions were provided by the Commission on July 1, 2011 and most recently extended by the Commission on February 5, 2014.² Certain of the Temporary Exemptions are set to expire on

¹ See Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of “Security” to Encompass Security-Based Swaps, Exchange Act Release No. 64795 (Jul. 1, 2011), 76 FR 39927 (Jul. 7, 2011) (“Exchange Act Exemptive Order”).

² 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, and Request for Comment, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014) (“Extension Order”); see also Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (Jul. 18, 2012), 77 FR 48207 (Aug. 13, 2012) (“Product Definitions Adopting Release”) (extending the expiration date of the Temporary Exemptions to February 11, 2013); and Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment, Exchange Act Release No. 68864 (Feb. 7, 2013), 78 FR 10218 (Feb. 13, 2013) (“2013 Extension Order”) (extending the expiration date to February 11, 2014).

February 5, 2017.³

The expiration dates in the Extension Order distinguished between: (i) the Temporary Exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”); and (ii) the Temporary Exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”). The expiration dates for the Linked Temporary Exemptions established by the Extension Order were the compliance dates for the specific rulemakings to which they were “linked,” and the expiration date for the Unlinked Temporary Exemptions was three years following the effective date of the Extension Order (i.e., February 5, 2017), or such time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate for security-based swaps with respect to any such Unlinked Temporary Exemptions.

As described in more detail below, the Commission is extending the expiration date for the Unlinked Temporary Exemptions until February 5, 2018. This approach provides the Commission flexibility to determine whether continuing relief should be provided for any Unlinked Temporary Exemptions while the Commission continues to consider the relevant rules mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁴ This release has no effect on the expiration dates for the Linked Temporary Exemptions.⁵

³ See Extension Order.

⁴ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124, Stat. 1376 (2010) (“Dodd-Frank Act”).

⁵ The Commission has already addressed some of the Linked Temporary Exemptions. For example, on June 8, 2016, the Commission adopted new rules for trade acknowledgement and verification of security-based swap transactions. See Trade Acknowledgement and Verification of Security-Based Swap Transactions, Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR 39807 (Jun. 17, 2016) (“Trade Acknowledgment Release”). In that release, the Commission described the application of Exchange Act Rule 10b-10 to transactions in security-based swaps and noted that the Linked Exemption relating to

II. Discussion

A. Background

Title VII of the Dodd-Frank Act amended the definition of “security” under the Exchange Act to expressly encompass security-based swaps.⁶ The expansion of the definition of the term “security” changed the scope of the Exchange Act regulatory provisions that apply to security-based swaps and raised certain complex questions that require further consideration.

On July 1, 2011, the Commission issued the Exchange Act Exemptive Order granting temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with the revision of the Exchange Act definition of “security” to encompass security-based swaps.⁷ The Exchange Act Exemptive Order granted temporary exemptive relief from

Exchange Act Rule 10b-10 would expire upon the compliance date of the new Rule 15Fi-2. See Trade Acknowledgement Release at 39824-25, note 189.

⁶ See Section 761(a)(2) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)). The provisions of Title VII generally became effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act) (the “Effective Date”), unless a provision required a rulemaking, in which case the provision would go into effect “not less than” 60 days after publication of the related final rules in the Federal Register or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act.

⁷ At the time it issued the Exchange Act Exemptive Order, the Commission also adopted interim final rules that generally exempted offers and sales of security-based swaps entered into between eligible contract participants that would have been within the definition of “security-based swap agreement” under the Securities Act of 1933 (“Securities Act”) and the Exchange Act prior to the Effective Date from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, the registration requirements of the Exchange Act, and the provisions of the Trust Indenture Act of 1939, provided certain conditions are met. See Exemptions for Security-Based Swaps, Securities Act Release No. 9231, Exchange Act Release No. 64794, Trust Indenture Act Release No. 2475 (Jul. 1, 2011), 76 FR 40605 (Jul. 11, 2011). This extension order does not address these interim final rules, which are scheduled to expire on February 11, 2017. See Extension of Exemptions for Security-Based Swaps, Securities Act Release No. 9545, Exchange Act Release No. 71482, Trust Indenture Act Release No. 2495 (Feb. 5, 2014), 79 FR 7570 (Feb. 10, 2014).

compliance with certain provisions of the Exchange Act in connection with security-based swap activity by: (i) any person who meets the definition of “eligible contract participant” (“ECPs”) set forth in Section 1a(12) of the Commodity Exchange Act as of the day prior to the enactment of the Dodd-Frank Act (July 20, 2010) and (ii) a broker or dealer registered under Section 15(b) of the Exchange Act.⁸

The Commission also, on June 15, 2011, issued an exemptive order granting temporary relief from compliance with certain provisions added to the Exchange Act by subtitle B of Title VII of the Dodd-Frank Act with which compliance would have otherwise been required as the Effective Date. In that order, the Commission provided guidance regarding the provisions of the Exchange Act that were added by Title VII with which compliance was required as of the Effective Date. See Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Securities-Based Swaps, Exchange Act Release No. 64678 (Jun. 15, 2011), 76 FR 36287 (Jun. 22, 2011).

⁸ See Exchange Act Exemptive Order. The Exchange Act Exemptive Order did not provide exemptive relief for any provisions or rules prohibiting fraud, manipulation, or insider trading (other than the prophylactic reporting or recordkeeping requirements such as the confirmation requirements of Exchange Act Rule 10b-10). In addition, the Exchange Act Exemptive Order did not affect the Commission’s investigative, enforcement, and procedural authority related to those provisions and rules. See Exchange Act Exemptive Order at 39931, note 34. The Exchange Act Exemptive Order also did not address Sections 12, 13, 14, 15(d), 16, and 17A of the Exchange Act and the rules thereunder. The Commission did, however, issue limited temporary relief from the clearing agency registration requirements under Section 17A(b) for entities providing certain clearing services for security-based swaps. This relief was linked to final rules issued by the Commission relating to the registration of clearing agencies that clear security-based swaps. See Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, Exchange Act Release No. 64796 (Jul. 1, 2011), 76 FR 39963 (Jul. 7, 2011).

The Commission also provided a temporary exemption within the Exchange Act Exemptive Order for Sections 5 and 6 of the Exchange Act and linked the expiration date of that exemptive relief until the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities. See Exchange Act Exemptive Order at 39934-36.

The Exchange Act Exemptive Order further provided that no security-based swap contract entered into on or after July 16, 2011 shall be void or considered voidable by

The overall approach of the Exchange Act Exemptive Order was directed toward maintaining the status quo during the implementation process for the Dodd-Frank Act by preserving the application of particular Exchange Act requirements that were already applicable in connection with instruments that became “security-based swaps” following the Effective Date of the Dodd-Frank Act,⁹ but deferring the applicability of additional Exchange Act requirements in connection with those instruments explicitly being defined as “securities” as of the Effective Date.¹⁰

As described above, the Commission most recently extended the expiration date of the Unlinked Temporary Exemptions until the earlier of the time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate, or until three years after the effective date of the Extension Order.¹¹ This approach was designed to provide the

reason of Section 29(b) of the Exchange Act because any person that is a party to the contract violated a provision of the Exchange Act for which the Commission has provided exemptive relief in the Exchange Act Exemptive Order, until such time as the underlying exemptive relief expires. By extending the underlying Unlinked Temporary Exemptions until February 5, 2018, this order will also extend the relevant Section 29(b) relief until that same date. See Exchange Act Exemptive Order at 39938-39.

⁹ These instruments generally constituted “security-based swap agreements” under the pre-Dodd-Frank Act framework and were already subject to specific antifraud and anti-manipulation provisions under the Exchange Act (including Exchange Act Section 10(b)). Under the Exchange Act Exemption Order, instruments that (before the Effective Date) were security-based swap agreements and (after the Effective Date) constituted security-based swaps were still subject to the application of those Exchange Act provisions. See Exchange Act Exemptive Order at 39930, notes 24-25.

¹⁰ See Exchange Act Exemptive Order at 39929.

¹¹ See Extension Order. The Commission did not receive any comments in response to the request for comment in the Extension Order. However, in 2013, the Commission received a request from market participants to extend certain of the Temporary Exemptions, citing concerns that key issues and questions regarding the application of the federal securities laws remained unresolved and continuing concerns about the potential for unnecessary disruption to the security-based swap market. See SIFMA Request for Extension of the Expiration Date of the SEC’s Exchange Act Exemptive Order and SBS

Commission with flexibility while its Dodd-Frank Act rulemaking is still in progress to determine whether continuing relief should be provided for any of the Unlinked Temporary Exemptions.¹²

B. Extension of Unlinked Temporary Exemptions

Since the issuance of the Extension Order, the Commission has implemented a substantial portion of the regulatory regime for security-based swaps required by Title VII of the Dodd-Frank Act.¹³ However, the Commission is still in the process of considering its rules

Interim final Rules (Dec. 20, 2012), which is available at <http://www.sec.gov/comments/s7-27-11/s72711-12.pdf>.

¹² See *id.* at 7731. The Extension Order also linked the expiration date of the Linked Temporary Exemptions until the compliance date for such rulemakings. The Extension Order identified the Linked Temporary Exemptions as those related to: (1) capital and margin requirements (Sections 7 and 15(c)(3), Regulation T, and Exchange Act Rules 15c3-1, 15c3-3, and 15c3-4); (2) recordkeeping requirements (Sections 17(a) and 17(b) and Exchange Act Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-13); (3) registration requirements under Section 15(a)(1) and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a “broker” or “dealer” that is not registered with the Commission; (4) Exchange Act Rule 10b-10; and (5) Regulation ATS. Accordingly, as applicable, the Commission extended these exemptions until the compliance date for pending rulemakings concerning: capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants; recordkeeping and reporting requirements for broker-dealers, security-based swap dealers, and major security-based swap participants; security-based swap trade acknowledgements; and registration requirements for security-based swap execution facilities. The Linked Temporary Exemptions are not addressed in this order and will be separately considered in connection with the related security-based swap rulemakings. See *supra* note 5.

¹³ See, e.g., Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 (Mar. 19, 2015); Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14437 (Mar. 19, 2015); Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015); Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception, Exchange Act Release No. 77104 (Feb. 10, 2016), 81 FR 8597

under Title VII of the Dodd-Frank Act.¹⁴ Therefore, the Commission believes it is necessary or appropriate in the public interest, and consistent with the protection of investors to extend the Unlinked Temporary Exemptions until February 5, 2018 to avoid any potential market disruption stemming from the application of certain existing Exchange Act provisions and rules to security-based swap activities. This approach also will provide the Commission with additional time to consider the potential impact of the revision of the Exchange Act definition of “security” on the scope of the Exchange Act provisions and rules applicable to security-based swaps, as well as the appropriateness of applying certain Exchange Act provisions and rules to security-based swap activities in light of the Commission’s continuing rulemaking efforts.

Accordingly, pursuant to its authority under Section 36 of the Exchange Act,¹⁵ the Commission believes it is necessary or appropriate in the public interest, and consistent with the

(Feb. 19, 2016); Trade Acknowledgement Release; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release 77617 (Apr. 14, 2016), 81 FR 29960 (May 13, 2016); Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 78321 (Jul.14, 2016), 81 FR 53545 (Aug. 12, 2016); and Access to Data Obtained by Security-Based Swap Data Repositories, Exchange Act Release No. 78716 (Aug. 29, 2016), 81 FR 60585 (Sep. 2, 2016).

¹⁴ See e.g., Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011); Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213 (Nov. 23, 2012); Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers; Proposed Rules, Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194 (May 2, 2014); and Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Person To Effect or Be Involved in Effecting Security-Based Swaps, Exchange Act Release No. 75612 (Aug 5, 2015), 80 FR 51684 (Aug. 25, 2015).

¹⁵ 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt, by rule, regulation, or order any person, security, or transaction (or any class or classes of persons, securities, or transactions)

protection of investors to extend the expiration of the Unlinked Temporary Exemptions until February 5, 2018.

III. Solicitation of Comments

The Commission is providing interested parties the opportunity to comment on whether any relief should be granted with respect to any specific Unlinked Temporary Exemption(s) beyond February 5, 2018. To the extent that interested parties request specific relief for any of the Unlinked Temporary Exemptions beyond February 5, 2018, any request should be detailed as to the circumstances in which the Exchange Act provision or rule applies to security-based swaps or security-based swap market participants, and why relief would be necessary.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/exorders.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-27-11 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-27-11. This file number should be included on

from any provision of the Exchange Act or any rule or regulation thereunder, to the extent such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/exorders.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F St. NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

IV. Conclusion

IT IS HEREBY ORDERED, pursuant to Section 36 of the Exchange Act, that the Unlinked Temporary Exemptions contained in the Exchange Act Exemptive Order and extended in the Extension Order in connection with the revisions of the Exchange Act definition of "security" to encompass security-based swaps are extended until February 5, 2018.

By the Commission.

Eduardo A. Aleman
Assistant Secretary

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