

## **SECURITIES AND EXCHANGE COMMISSION**

### **17 CFR PARTS 230, 240 and 260**

**[Release Nos. 33-10305; 34-80023; 39-2515; File No. S7-26-11]**

**RIN 3235-AL17**

### **EXEMPTIONS FOR SECURITY-BASED SWAPS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Interim final rule.

**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 February 11, 2018.

**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.

**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”),<sup>1</sup> interim final Rules

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<sup>1</sup> 15 U.S.C. 77a et seq.

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

## **I. AMENDMENT OF EXPIRATION DATES IN THE INTERIM FINAL RULES**

### **A. Background Regarding 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”).<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> provided certain conditions are

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<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 15 U.S.C. 77aaa *et seq.*

<sup>4</sup> 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”).

<sup>5</sup> 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.

<sup>6</sup> 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

met.<sup>7</sup> We have adopted amendments to the interim final rules to extend the expiration dates in the interim final rules, first from February 11, 2013 to February 11, 2014,<sup>8</sup> and then from February 11, 2014 to February 11, 2017.<sup>9</sup>

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.<sup>10</sup> 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.”<sup>11</sup> The interim final rules were

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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). The Cleary Gottlieb No-Action Letter will remain in effect for so long as the interim final rules remain in effect.

<sup>7</sup> 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.

<sup>8</sup> See Extension of Exemptions for Security-Based Swaps, Release No. 33-9383 (Jan. 29, 2013), 78 FR 7654 (Feb. 4, 2013).

<sup>9</sup> See Extension of Exemptions for Security-Based Swaps, Release No. 33-9545 (Feb. 5, 2014), 79 FR 7570 (Feb. 10, 2014) (“Extension Adopting Release”).

<sup>10</sup> 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).

<sup>11</sup> 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.*

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.<sup>12</sup> We adopted the interim final rules because, among other things, we were concerned about disrupting the operation of the security-based swaps market while we evaluated the implications for security-based swaps under the Securities Act and the Exchange Act as a result of the inclusion of the term “security-based swap” in the definition of “security” for purposes of those statutes.<sup>13</sup>

At the time of adoption of the interim final rules in July 2011, we requested comment on various aspects of the interim final rules.<sup>14</sup> In response to the request for comment, commenters expressed concerns regarding the availability of exemptions from the registration requirements of the Securities Act, including the exemption in Section 4(a)(2), for security-based swap transactions entered into solely between eligible contract participants (“ECPs”) due to the operation of certain trading platforms and the publication or distribution of other information regarding security-based swaps.<sup>15</sup> Commenters indicated that the publication or distribution of certain communications involving security-based swaps on an unrestricted basis could be viewed as offers of those security-based swaps within the meaning of Section 2(a)(3) of the Securities

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<sup>12</sup> See Interim Final Rules Adopting Release.

<sup>13</sup> 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.

<sup>14</sup> See Interim Final Rules Adopting Release. The Commission also requested comment on certain of 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).

<sup>15</sup> See Extension Adopting Release.

Act,<sup>16</sup> and such communications would require compliance with the registration provisions of Section 5 of the Securities Act unless there is an available exemption from such registration requirements.<sup>17</sup> Further, such communications may be considered offers to persons who are not ECPs, even if such persons are not permitted to purchase the security-based swaps.<sup>18</sup> Under Section 5(e) of the Securities Act, it is unlawful to make offers or sales of security-based swaps to persons who are not ECPs unless the security-based swaps are registered under the Securities Act.<sup>19</sup> Commenters indicated that if there is no Securities Act exemption available with respect to a security-based swap transaction, the required registration of such transactions could negatively impact the security-based swaps market.<sup>20</sup>

As noted above, we twice have extended the expiration dates in the interim final rules.<sup>21</sup> These extensions have enabled us to continue our evaluation of the implications for security-based swaps as securities and determine whether other regulatory action is appropriate. We indicated when we extended the expiration dates 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

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<sup>16</sup> See 15 U.S.C. 77b(a)(3).

<sup>17</sup> See Extension Adopting Release.

<sup>18</sup> Id.

<sup>19</sup> See Section 5(e) of the Securities Act [15 U.S.C. 77e(e)] (Notwithstanding the provisions of section 3 or 4, unless a registration statement meeting the requirements of section 10(a) is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant).

<sup>20</sup> See Extension Adopting Release.

<sup>21</sup> See footnotes 8 and 9 above and accompanying text.

definition of “security” under the Securities Act and the Exchange Act.<sup>22</sup> We continue to consider those comments as we evaluate whether other regulatory action is appropriate, including the proposal discussed in the next section.

## **B. SBS Communications Proposal**

Subsequent to the most recent extension of the expiration dates in the interim final rules, we proposed a rule under the Securities Act to provide that certain communications involving security-based swaps that may be purchased only by ECPs would not be deemed for purposes of Section 5 of the Securities Act to constitute offers of the security-based swaps that are the subject of such communications or any guarantees of such security-based swaps that are securities (“SBS Communications Proposal”).<sup>23</sup> The SBS Communications Proposal would cover the dissemination of price quotes that relate to security-based swaps that may be purchased only by ECPs and are traded or processed on or through certain trading platforms. The SBS Communications Proposal would enable price quotes relating to security-based swaps to be disseminated on an unrestricted basis without concern that such dissemination could jeopardize the availability of exemptions from the registration requirements of the Securities Act for transactions involving the security-based swaps that are the subject of such communications. The Commission requested comment on all aspects of the SBS Communications Proposal, including whether it should cover types of communications other than price quotes, such as

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<sup>22</sup> See Extension Adopting Release.

<sup>23</sup> See Treatment of Certain Communications Involving Security-Based Swaps That May Be Purchased Only By Eligible Contract Participants, Release No. 33-9643 (Sep. 8, 2014), 79 FR 54224 (Sep. 11, 2014) (“SBS Communications Proposing Release”).

communications characterized as research that relate to or discuss security-based swaps.<sup>24</sup> The Commission is evaluating the comments received and has not yet taken final action as to the SBS Communications Proposal.

### C. Extension of the Interim Final Rules

In this release, we are extending the expiration dates in the interim final rules from February 11, 2017 to February 11, 2018. We believe that the interim final rules are needed to avoid disruption in the security-based swaps market while we continue to consider in a thorough and deliberative manner whether other regulatory action is appropriate. If the interim final rules expire on February 11, 2017, 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 continue to evaluate the implications for security-based swaps as securities and determine whether other regulatory action, including the SBS Communications Proposal, 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.

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<sup>24</sup> Id. The SBS Communications Proposing Release discussed the types of communications covered and not covered by the proposal and included an extensive request for comment about communications characterized as research that relate to security-based swaps.

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 interrelationship between the interim final rules and our continuing evaluation of further appropriate regulatory action, we have determined that it is necessary and appropriate to extend the expiration dates in the interim final rules from February 11, 2017 to February 11, 2018.<sup>25</sup> If we adopt further rules relating to issues raised in the SBS Communications Proposing Release about the application of the Securities Act or the other federal securities laws to security-based swaps before February 11, 2018, 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.

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<sup>25</sup> In conjunction with the extension of the expiration dates in the interim final rules, we also extended certain of the temporary relief we adopted in July 2011 that provided exemptions from compliance with certain provisions of the Exchange Act to February 5, 2018. This relief was set to expire on February 5, 2017 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 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, Release No. 34-79833 (Jan. 18, 2017), 82 FR 8467 (Jan. 25, 2017). 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).

## **II. CERTAIN ADMINISTRATIVE LAW MATTERS**

Section 553(b) of the Administrative Procedure Act<sup>26</sup> 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.”<sup>27</sup> 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.<sup>28</sup> This requirement does not apply, however, if the agency finds good cause for making the rule effective sooner.<sup>29</sup> 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

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<sup>26</sup> 5 U.S.C. 553(b).

<sup>27</sup> Id.

<sup>28</sup> See 5 U.S.C. 553(d).

<sup>29</sup> Id.

Trust Indenture Act while we continue to evaluate the implications for security-based swaps as securities and determine whether other regulatory action, including the SBS Communications Proposal, is appropriate.

Absent an extension, the interim final rules will expire on February 11, 2017. 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 continue to evaluate the implications for security-based swaps as securities and determine whether other regulatory action, including the SBS Communications Proposal, 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.<sup>30</sup>

### **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,

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<sup>30</sup> 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”).

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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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, 2018. 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.

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

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<sup>31</sup> See 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

<sup>32</sup> See 15 U.S.C. 78w(a)(2).

<sup>33</sup> Id.

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,<sup>34</sup> 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 rules, 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 provisions at this time for security-based swap transactions between ECPs 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

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<sup>34</sup> See 15 U.S.C. 77q(a).

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. Such a decrease in the use of security-based swaps also could lead to reduced liquidity of the underlying securities, which could raise the costs of capital for issuers of those securities.

We also recognize that there may be certain benefits 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,<sup>35</sup> 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.<sup>36</sup>

#### **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”),<sup>37</sup> 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 PRA.<sup>38</sup> We requested comment on whether our conclusion that there are no collections of information is correct, and we did not receive any comment.

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<sup>35</sup> See 15 U.S.C. 78j(b).

<sup>36</sup> 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.

<sup>37</sup> 44 U.S.C. 3501 *et seq.*

<sup>38</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

## **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.<sup>39</sup> 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. 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**

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.

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<sup>39</sup> 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.

## **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), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

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#### **§ 230.240 [Amended]**

2. §230.240 is revised to read as follows:

#### **§230.240 Exemption for certain security-based swaps.**

- (a) Except as expressly provided in paragraph (b) of this section, the Act does not apply to the offer or sale of any security-based swap that is:
  - (1) A *security-based swap agreement*, as defined in Section 2A of the Act (15 U.S.C. 77b(b)-1) as in effect prior to July 16, 2011; and
  - (2) Entered into between eligible contract participants (as defined in Section 1a(12) of the Commodity Exchange Act (7 U.S.C. 1a(12)) as in effect prior to July 16, 2011, other than a person who is an eligible contract participant under Section 1a(12)(C) of the Commodity Exchange Act as in effect prior to July 16, 2011).
- (b) The exemption provided in paragraph (a) of this section does not apply to the provisions of Section 17(a) of the Act (15 U.S.C. 77q(a)).

(c) This section will expire on February 11, 2018.

**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, 7201 et seq. and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

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**§ 240.12a-11 [Amended]**

4. §240.12a-11 is revised to read as follows:

**§ 240.12a-11 Exemption of security-based swaps sold in reliance on Securities Act of 1933**

**Rule 240 (§230.240) from section 12(a) of the Act.**

(a) The provisions of Section 12(a) of the Act (15 U.S.C. 78l(a)) do not apply to any security-based swap offered and sold in reliance on §230.240 of this chapter.

(b) This section will expire on February 11, 2018.

**§ 240.12h-1 [Amended]**

5. §240.12h-1(i) is revised to read as follows:

**§ 240.12h-1 Exemptions from registration under section 12(g) of the Act.**

\* \* \* \* \*

(i) Any security-based swap offered and sold in reliance on §230.240 of this chapter.

This section will expire on February 11, 2018.

**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. 77c, 77ddd, 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11, unless otherwise noted.

\* \* \* \* \*

**§ 260.4d-12 [Amended]**

7. §260.4d-12 is revised to read as follows:

**§ 260.4d-12 Exemption for security-based swaps offered and sold in reliance on Securities Act of 1933 Rule 240 (§230.240).**

Any security-based swap offered and sold in reliance on §230.240 of this chapter, whether or not issued under an indenture, is exempt from the Act. This section will expire on February 11, 2018.

By the Commission.

Brent J. Fields  
Secretary

February 10, 2017