

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-64796; File No. S7-28-11)

July 1, 2011

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

I. Introduction

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”),¹ amends the Securities Exchange Act of 1934 (“Exchange Act”) to provide for the comprehensive regulation of security-based swaps² by the Securities and Exchange Commission (“Commission”).³ Among other things, Title VII seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the over-the-

¹ Pub. L. No. 111-203.

² Section 761(a)(6) of the Dodd-Frank Act defines a “security-based swap” as any agreement, contract, or transaction that is a “swap,” as defined in section 1a(47) of the Commodity Exchange Act, 7 U.S.C. § 1a(47), that is based on an index that is a narrow-based security index, a single security, or a loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer. See section 3(a)(68) of the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. § 78c(a)(68) (as added by section 761(a)(6) of the Dodd-Frank Act). Section 712(d) of the Dodd-Frank Act provides that the Commission and the Commodity Futures Trading Commission (“CFTC”), in consultation with the Board of Governors of the Federal Reserve System, shall, among other things, jointly further define the terms “swap” and “security-based swap.” See SEC Release No. 9204 (April 29, 2011), 76 FR 32880 (June 7, 2011) (proposing product definitions contained in Title VII of the Dodd-Frank Act).

³ Section 761(a)(2) of the Dodd-Frank Act includes security-based swaps in the definition of “security” in section 3(a)(10) of the Exchange Act, 15 U.S.C. § 78c. See also section 768(a)(1) of the Dodd-Frank Act (amending section 2(a)(1) of the Securities Act of 1933, 15 U.S.C. 77b(a)(1), to include security-based swaps in the definition of “security”).

counter (“OTC”) market are centrally cleared.⁴ One of the key ways in which the Dodd-Frank Act seeks to mitigate risk in the security-based swap market is by requiring that entities that clear and settle security-based swaps be registered with the Commission. Specifically, section 763(b) of the Dodd-Frank Act adds a new section 17A(g) to the Exchange Act, which directs entities that use instrumentalities of interstate commerce to perform clearing agency functions for security-based swaps to register with the Commission.⁵

Section 763(b) of the Dodd-Frank Act also directs the Commission, by adding new sections 17A(i) and (j) of the Exchange Act, to adopt rules for the implementation of the registration requirement in new section 17A(g). The Title VII amendments for which rules are not required generally are effective on July 16, 2011 (360 days after enactment of the Dodd-Frank Act, referred to herein as the “Effective Date”). Provisions that require rules for implementation become effective not less than 60 days after publication of the related final rule or on July 16, 2011, whichever is later.⁶

Section 17A(j) of the Exchange Act requires the Commission to adopt rules governing persons that are registered as clearing agencies for security-based swaps under the Exchange

⁴ See, e.g., Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 34 (stating that “[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.”).

⁵ Pub. L. No. 111-203 § 763(b).

⁶ See section 774 of the Dodd-Frank Act, 15 U.S.C. 77b note. See also Exchange Act Release No. 64678 (June 15, 2011), granting temporary exemptions and other temporary relief, together with information on compliance dates for new provisions of the Exchange Act applicable to security-based swaps.

Act.⁷ Section 17A(i) of the Exchange Act provides that, to be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency must comply with such standards as the Commission may establish by rule.⁸ Consistent with these provisions, as well as provisions in Title VIII of the Dodd-Frank Act,⁹ the Commission on March 3, 2011 proposed rules regarding registration of clearing agencies and the operation and governance of clearing agencies, including clearing agencies that clear security-based swaps.¹⁰ Pursuant to section 774 of the Dodd-Frank Act, discussed above, compliance with section 17A(g) of the Exchange Act will not be required as of the Effective Date because sections 17A(i) and (j) require rulemaking to implement the registration requirement pursuant to section 17A(g) of clearing agencies that clear security-based swap transactions.¹¹ Instead compliance with section 17A(g) of the Exchange Act will be required not less than 60 days after the publication of

⁷ Pub. L. No. 111-203 § 763(b).

⁸ Id.

⁹ Title VIII of the Dodd-Frank Act, entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (“Clearing Supervision Act”), establishes an enhanced supervisory and risk control system for systemically important clearing agencies and other financial market utilities (“FMUs”). It provides that the Commission may prescribe regulations containing risk management standards, taking into consideration relevant international standards and existing prudential requirements, for any designated clearing entities it regulates. See section 805(a)(2) of the Clearing Supervision Act. Those regulations may govern: “(A) the operations related to payment, clearing, and settlement activities of such designated clearing entities; and (B) the conduct of designated activities by such financial institutions.” 12 U.S.C. 5464(a)(2).

¹⁰ Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) (File No. S7-08-11) (the “Clearing Agency Proposing Release”).

¹¹ Securities Exchange Act Release No. 64678 (June 15, 2011) 76 FR 36287 (June 22, 2011) (File No. S7-24-11) (Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps).

final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act.

In contrast to section 17A(g) of the Exchange Act, the registration requirement of section 17A(b) of the Exchange Act, which applies to all clearing agencies, will apply to security-based swap clearing agencies when the provision of the Dodd-Frank Act that amends the definition of “security” under the Exchange Act to include security-based swaps becomes effective, i.e., on the Effective Date.¹² Accordingly, absent relief by the Commission, any entity that functions as a clearing agency for security-based swaps would be required to register with the Commission pursuant to section 17A(b)(1) of the Exchange Act as of the Effective Date.¹³

The Commission notes that the term “clearing agency” under section 3(a)(23)(A) of Exchange Act is defined broadly to include any person who:

- acts as an intermediary in making payments or deliveries or both in connection with transactions in securities;
- provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities;
- acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer

¹² 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)).

¹³ Section 17A(b)(1) provides (with limited exceptions) that it shall be unlawful for any clearing agency, unless registered in accordance with this subsection, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security. 15 U.S.C. 78q-1(b)(1). Upon the effective date of section 761(a)(2), security-based swaps will be included in the definition of a security in section 3(a)(10). See supra note 3.

deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or

- otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository).¹⁴

Based on this broad definition, the Commission indicated in the “Clearing Agency Proposing Release” that it preliminarily believes that certain service providers that facilitate security-based swap contract management may meet the clearing agency definition.¹⁵ The Clearing Agency Proposing Release has only recently been issued and the Commission is still considering these services in the context of the Clearing Agency Proposing Release and the comments received on the proposing release. Specifically, the Commission indicated it preliminarily believes that Collateral Management Services, Trade Matching Services, and Tear Up and Compression Services (as defined below), if engaged in by security-based swap market participants, would qualify these participants as clearing agencies and therefore trigger the statutory requirement to register as clearing agencies:¹⁶

- “Collateral Management Services”: Collateral management generally involves calculating collateral requirements and facilitating the transfer of collateral between counterparties. In the Clearing Agency Proposing Release, the Commission stated

¹⁴ 15 U.S.C. 78c(a)(23)(A).

¹⁵ See Securities Exchange Act Release No. 64017, supra note 9.

¹⁶ The Commission stresses that the functions highlighted herein and in the Clearing Agency Proposing Release are not an exhaustive list and urges each security-based swap service provider to consider whether its functions place it within the clearing agency definition.

- that entities that calculate net payment obligations among counterparties for security-based swaps and provide instructions for payments, including with respect to quarterly interest, credit events, and upfront fees, are likely acting as intermediaries in making payments or deliveries or both in connection with transactions in securities.
- “Trade Matching Services”: Trade matching generally is the process whereby an intermediary compares each market participant’s trade data regarding the terms of settlement of securities transactions, in order to reduce the number of settlements of securities transactions, or to allocate securities settlement responsibilities. This includes activities of an intermediary that captures trade information regarding a securities transaction and performs an independent comparison of that information that results in the issuance of binding matched terms to the transaction.¹⁷
 - “Tear Up and Compression Services”:¹⁸ Based on discussions between the Commission staff and market participants, the Commission understands that tear up and compression service providers generally operate in the following manner:

¹⁷ See also Exchange Act Release No. 39829 (April 6, 1998), 63 FR 17943 (April 13, 1998) (File No. S7-10-98) (“A vendor that provides a matching service will actively compare trade and allocation information and will issue the affirmed confirmation that will be used in settling the transaction.”).

¹⁸ Tear-up or multilateral portfolio trade compression services for OTC derivatives seek to eliminate unnecessary or duplicative trades from the market while maintaining a market participant’s overall exposure or risk in the market. This allows dealers to reduce operational risk, freeing up liquidity and capital. By reducing the gross notional outstanding of OTC derivatives in normal times, portfolio trade compression provides effective measures to address the risk to individual dealers associated with uncoordinated, disorderly close-out transactions of the positions of a defaulting major dealer. Compression is offered by several vendors, and major market participants are now engaged in regular compression exercises. See Financial Stability Board, Implementing OTC Derivatives Market Reforms, (October 25, 2010), available at http://www.Financialstabilityboard.org/publications/r_101025.pdf.

- The providers execute an algorithm seeking to reduce the gross notional value of trades and the total number of trades but do not alter the counterparty risk or market risk associated with the trades beyond specified parameters.
- When using a tear up and compression service, the users send all transactions they are willing to terminate to the service. Each user sets tolerances for counterparty exposures it is willing to absorb and how much money it is willing to pay in trade termination costs. The submitted transactions are matched using an algorithm and tolerances specified by the user.
- The service then proposes terminations across all parties who participated, including payments for termination. The users consider the proposal, check their own records, and, if they choose to accept the proposal, fax or otherwise notify their acceptance to the service. If the service receives acceptances from all users, the transaction is considered binding, and the relevant transactions are considered terminated.
- The users generally exchange payments and confirmations outside the service. The tear up and compression service provider sends the completed files to a third party service provider for matching, and the “torn up” transactions are terminated in bulk at the security-based swap data repository, which maintains a record of which parties terminated the “torn up” trades.

The Commission is using its authority under section 36 of the Exchange Act¹⁹ to provide a conditional temporary exemption, until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and

¹⁹ 15 U.S.C. 78mm.

(j) of the Exchange Act, from the registration requirement in section 17A(b)(1) of the Exchange Act to any clearing agency that may be required to register with the Commission solely as a result of providing Collateral Management Services, Trade Matching Services, Tear Up and Compression Services, and/or substantially similar services for security based swaps (the “Exempted Activities”). As discussed below, the Commission believes that such action is necessary and appropriate in the public interest and consistent with the protection of investors because this conditional temporary exemption would avoid the potential for disruption of these important services to investors pending the implementation of the registration framework and related standards and operational requirements contemplated under sections 17A(g), (i), and (j) of the Exchange Act, and pending further consideration of the appropriate regulatory treatment of persons conducting Exempted Activities. The Commission also believes that the temporary conditional exemption is necessary and appropriate because it will provide legal certainty to the security-based swap market and security-based swap market participants.

II. Discussion

Our action today provides a temporary exemption, until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act, from section 17A(b)(1) of the Exchange Act to persons conducting Exempted Activities. This temporary exemption is subject to a condition that is designed to provide greater information regarding persons that are using this exemption to conduct Exempted Activities and the nature of these activities.²⁰ Specifically, entities relying on

²⁰ The Paperwork Reduction Act of 1993 (“PRA”), 44 U.S.C. 3501 *et seq.*, defines a “collection of information” as “the obtaining, causing to be obtained, soliciting or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for ... answers to identical questions posed

the temporary exemption must provide notice to the Commission with identifying information consisting of the full legal name of the person, a description of the person's corporate structure, contact person and contact information. Such identifying information is needed to provide the Commission with information regarding who is seeking to use the exemption and how to contact such persons. In addition, they must provide the Commission with a detailed description of the Exempted Activities they conduct, including the nature of services performed, number and nature of parties to whom services are provided, and the volume of transactions conducted in connection with the services performed for each of the last two years. The Commission is requiring this information in order to better understand the types of services that are being provided pursuant to this exemption and the role such services play in the security-based swap market. The notice must be provided to the Commission within twenty-one days of relying on this exemption. The Commission believes twenty-one days should provide sufficient time for an entity to prepare the information required in the notice, including a detailed description of the Exempted Activities it provides.

In light of the condition to this exemptive order and the temporary duration of the relief, the Commission believes this exemption should help to facilitate the aim of the Dodd-Frank Act to ensure that clearing functions are appropriately utilized to reduce risk in the OTC market for derivatives.²¹ Entities that conduct Exempted Activities can play an important role in facilitating risk reduction in the security-based swap market, including by helping to reduce the outstanding

to, or identical reporting or recordkeeping requirements imposed on, ten or more persons ...” 44 U.S.C. 3502(3)(A). The Commission preliminarily does not believe that the reporting and recordkeeping provisions in this Order contain “collection of information requirements” within the meaning of the PRA because fewer than ten persons are expected to rely on the exemption based on our discussions with industry participants regarding entities engaged in Exempted Activities.

²¹ See supra note 4 and accompanying text.

number of trades and providing useful operational functions for clearing security-based swaps. Persons conducting Exempted Activities, to the extent they are required to register under section 17A(g), will need time to consider and come into compliance with requirements yet to be adopted by the Commission pertaining to clearing agencies that clear security-based swaps. As a result, absent the exemption granted by this order, the ability of such entities to continue to provide these services may be disrupted, resulting in potential lapses in the provision of these services.²²

The exemption will be effective until the compliance date for the final rules relating to registration of clearing agencies that clear security-based swaps pursuant to sections 17A(i) and (j) of the Exchange Act. This limited duration will permit the Commission to implement the statutory provisions pertaining to the registration of clearing agencies that clear security-based swaps without disrupting existing services. It will also permit the Commission to gain more information concerning the number and types of entities that conduct Exempted Activities, to learn more about how those activities contribute to a national system for the clearance and settlement of security-based swap transactions, and to evaluate the appropriate regulatory treatment of those entities. The limited duration of the exemption will also permit the entities conducting Exempted Activities to review their operations, procedures and processing requirements in the context of the new requirements stemming from the Dodd-Frank Act.

III. Solicitation of Comments

The Commission requests comment on this exemption for clearing agencies that may be

²² Entities that act as central counterparties for security-based swaps will need to be registered with the Commission as clearing agencies. However, the entities that currently perform the vast majority of central counterparty services with respect to security-based swaps will be deemed registered with the Commission pursuant to Exchange Act section 17A(l). See Pub. L. No. 111-203 § 763(b).

required to register with the Commission solely as a result of their conducting the Exempted Activities. The Commission is soliciting public comment on all aspects of this exemption, including whether the condition to the temporary exemption is appropriate or alternatively whether the Commission should consider modifying this condition in the future. Why or why not? Should other conditions apply? If so, what conditions and why?

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-28-11 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov/>). Follow the instructions for submitting comments.

Paper Comments:

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

All submissions should refer to File Number S7-28-11. This file number should be included on 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 Web site (<http://www.sec.gov/rules/other.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; we do 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(a) of the Exchange Act, that, until the compliance date for final rules issued by the Commission pursuant to sections 17A(i) and (j) of the Exchange Act relating to registration of clearing agencies that clear security-based swaps:

Any person that would otherwise be required to register with the Commission as a clearing agency under section 17A(b)(1) of the Exchange Act solely as a result of conducting Exempted Activities with respect to security based swaps shall be exempt from section 17A(b)(1) of the Exchange Act, provided that such person shall submit, within twenty-one days of relying on this exemption, a notice to the Commission²³ that includes the full legal name of the person, a description of the person's corporate structure, contact person and contact information, and a detailed description of the Exempted Activities for security-based swaps conducted by the person, including the nature of services performed, number and nature of parties to whom services are provided, and the volume of transactions conducted in connection with the services performed for each of the last two years.

By the Commission.

Elizabeth M. Murphy
Secretary

²³ Any such notice should be sent to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549, and be noted as regarding this "File No. S7-28-11."