

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90308; File Nos. S7–27–11 and S7–24–11]

### Order Granting Exemptions From Sections 8 and 15(a)(1) of the Securities Exchange Act of 1934 and Rules 3b–13(b)(2), 8c–1, 10b–10, 15a–1(c), 15a–1(d) and 15c2–1 Thereunder in Connection With the Revision of the Definition of “Security” To Encompass Security-Based Swaps and Determining the Expiration Date for a Temporary Exemption From Section 29(b) of the Securities Exchange Act of 1934 in Connection With Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

November 2, 2020.

#### I. Exemptions in Connection With the Revision of the Definition of “Security” To Encompass Security-Based Swaps

##### A. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>1</sup> amended the definition of “security” under the Exchange Act to expressly encompass security-based swaps. The expansion of the definition of the term “security” to include security-based swaps had the effect of changing the scope of the Exchange Act regulatory provisions that apply to security-based swaps and, in doing so, raised certain complex questions that required further consideration. In July 2011, the Commission issued an order, granting temporary exemptions from compliance with certain provisions of the Exchange Act, and the rules and regulations thereunder.<sup>2</sup> The overall

approach of that order was directed toward maintaining the *status quo* during the implementation process for the Dodd-Frank Act.<sup>3</sup>

The Commission in 2011 set the temporary exemptions to expire on the compliance date for final rules defining the terms “security-based swap” and “eligible contract participant,”<sup>4</sup> and since that time periodically has extended this deadline.<sup>5</sup> Notably, in

dealer registered under Section 15(b) of the Exchange Act (other than a broker or dealer registered under Section 15(b)(11) of the Exchange Act), a temporary exemption from certain provisions of the Exchange Act, and the rules and regulations thereunder, solely with respect to security-based swaps. See 2011 Exchange Act Exemptive Order, 76 FR at 39938–39. The 2011 Exchange Act Exemptive Order did not provide exemptive relief for any provisions or rules prohibiting fraud, manipulation, or insider trading (other than prophylactic reporting or recordkeeping requirements such as the confirmation requirements of Exchange Act Rule 10b–10). In addition, the 2011 Exchange Act Exemptive Order did not affect the Commission’s investigative, enforcement, and procedural authority related to those provisions and rules. See 2011 Exchange Act Exemptive Order, 76 FR at 39931 n.34. The 2011 Exchange Act Exemptive Order also did not address Sections 12, 13, 14, 15(d), 16, and 17A of the Exchange Act and the rules and regulations thereunder.

<sup>3</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39929. Under the 2011 Exchange Act Exemptive Order, instruments that were security-based swap agreements before July 16, 2011 (360 days after the enactment of the Dodd-Frank Act) (“Effective Date”) and constituted security-based swaps after the Effective Date were still subject to the application of those Exchange Act provisions. See 2011 Exchange Act Exemptive Order, 76 FR at 39930 nn.24–25.

<sup>4</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39938.

<sup>5</sup> See 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 48208 (Aug. 13, 2012) (“Product Definitions Adopting Release”) (extending the expiration date of the temporary exemptions to February 11, 2013); 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 of the temporary exemptions to February 11, 2014); 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) (“2014 Extension Order”) (extending the expiration dates (i) for certain “linked” temporary exemptions related to then-pending security-based swap rulemakings to the compliance dates for the related rulemakings and (ii) for certain other “unlinked” temporary exemptions not related to then-pending rulemakings to February 5, 2017); 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, Exchange Act Release No. 79833 (Jan. 18, 2017), 82 FR 8467 (Jan. 25, 2017) (“2017 Extension Order”) (extending the expiration date

2014, the Commission extended the expiration date for the temporary exemptions, distinguishing between: (1) The temporary exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”), the expiration dates for which were extended to the compliance dates for the specific rulemakings to which they were “linked”; and (2) the temporary exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”).<sup>6</sup>

for the unlinked temporary exemptions to February 5, 2018); Order Extending Until February 5, 2019 Certain Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revision of the Definition of “Security” to Encompass Security-Based Swaps and Request for Comment, Exchange Act Release No. 82626 (Feb. 2, 2018), 83 FR 5665 (Feb. 18, 2018) (“2018 Extension Order”) (extending the expiration date for the unlinked temporary exemptions to February 5, 2019); Order Granting a Limited Exemption from the Exchange Act Definition of “Penny Stock” for Security-Based Swap Transactions between Eligible Contract Participants; Granting a Limited Exemption from the Exchange Act Definition of “Municipal Securities” for Security-Based Swaps; and Extending Certain Temporary Exemptions under the Exchange Act in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, Exchange Act Release No. 84991 (Jan. 25, 2019), 84 FR 863 (Jan. 31, 2019) (“2019 Extension Order”) (extending the expiration date for the unlinked temporary exemptions to February 5, 2020); Order Extending Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c–1, 10b–16, 15a–1, 15c2–1 and 15c2–5 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, Exchange Act Release No. 87943 (Jan. 10, 2020), 85 FR 2763 (Jan. 16, 2020) (“January 2020 Extension Order”) (extending the expiration date for the unlinked temporary exemptions to November 5, 2020).

<sup>6</sup> See 2014 Extension Order, 79 FR at 7732–35. The 2014 Extension Order identified the Linked Temporary Exemptions as those Expiring Temporary Exemptions related to: (1) Capital and margin requirements applicable to a broker or dealer (Exchange Act Sections 7 and 15(c)(3), Regulation T, and Exchange Act Rules 15c3–1, 15c3–3, and 15c3–4); (2) recordkeeping requirements applicable to a broker or dealer (Exchange Act 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 Exchange Act 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. The remaining Expiring Temporary Exemptions are the Unlinked Temporary Exemptions. The Commission extended the Linked Temporary Exemptions until the compliance date for pending rulemakings concerning, as applicable: Capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants; recordkeeping and reporting requirements for security-based swap dealers and major security-based swap participants; security-based swap trade acknowledgement and verification requirements; and registration requirements for security-based swap execution facilities. The Linked Temporary Exemptions linked to registration requirements for security-based swap execution facilities are not addressed in

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”).

<sup>2</sup> 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) (“2011 Exchange Act Exemptive Order”). The 2011 Exchange Act Exemptive Order included two relevant exemptions. First, the Commission granted to any person who meets the definition of “eligible contract participant” set forth in Section 1a(12) of the Commodity Exchange Act as in effect on July 20, 2010 (*i.e.*, the day prior to the date the Dodd-Frank Act was signed into law) and who is not a registered broker or dealer or a self-regulatory organization a temporary exemption from certain provisions of the Exchange Act, and the rules and regulations thereunder, solely in connection with the person’s activities involving security-based swaps. This temporary exemption was made available to a broker or dealer registered under Exchange Act Section 15(b)(11) and to a self-regulatory organization in limited circumstances. Second, the Commission granted to a broker or

The approach to the Linked Temporary Exemptions was designed to facilitate timely, phased-in application of the relevant provisions of the Exchange Act to security-based swaps based on the Commission's finalization of the relevant rules mandated by the Dodd-Frank Act.<sup>7</sup> The approach to the Unlinked Temporary Exemptions provided the Commission with flexibility, while its relevant rulemaking was still in progress, to determine whether continuing relief should be provided for any of the Exchange Act provisions subject to the Unlinked Temporary Exemptions.<sup>8</sup> In January 2020, the Commission issued an order extending until November 5, 2020, the temporary exemptions related to three commenter requests discussed below.<sup>9</sup> The remainder of the Unlinked Temporary Exemptions expired on February 5, 2020.<sup>10</sup>

The Commission has requested comment on the initial issuance and subsequent extensions of these temporary exemptions several times during consideration of the various exemptive orders.<sup>11</sup> In response, some

this Order and will be separately considered in connection with the rulemaking concerning those requirements. The Commission already has addressed other Linked Temporary Exemptions in the related security-based swap rulemakings. See, e.g., Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, Exchange Act Release No. 86175 (Jun. 21, 2019), 84 FR 43872, 43955–56 (Aug. 22, 2019) (“Capital, Margin and Segregation Adopting Release”); Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers, Exchange Act Release No. 87005 (Sept. 19, 2019), 84 FR 68550, 68601–02 (Dec. 16, 2019) (“Recordkeeping and Reporting Adopting Release”); Trade Acknowledgment and Verification of Security-Based Swap Transactions, Exchange Act Release No. 78011 (Jun. 8, 2016), 81 FR 39807, 39824–25 n.189 (Jun. 17, 2016) (“Trade Acknowledgment and Verification Adopting Release”).

<sup>7</sup> See 2014 Extension Order, 79 FR at 7731.

<sup>8</sup> See 2014 Extension Order, 79 FR at 7731.

<sup>9</sup> See January 2020 Extension Order, 85 FR at 2766.

<sup>10</sup> See January 2020 Extension Order, 85 FR at 2766.

<sup>11</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39938; 2013 Extension Order, 78 FR at 10219–20 (discussion of comments on 2011 Exchange Act Exemptive Order and additional request for comment); 2014 Extension Order, 79 FR at 7734 (additional request for comment); 2017 Extension Order, 82 FR at 8469 (additional request for comment); 2018 Extension Order, 83 FR at 5667–68 (discussion of comments on 2017 Extension Order and additional request for comment). In response to its 2018 request for comment, the Commission received four letters from two different commenters. See letter from Kyle Brandon, Managing Director, Securities Industry and Financial Markets Association (“SIFMA”), dated Nov. 8, 2018 (“SIFMA November 2018 Letter”) (requesting that the Commission further extend the Unlinked Temporary Exemptions, and also

commenters requested that the Commission make permanent some of the Linked Temporary Exemptions and Unlinked Temporary Exemptions.<sup>12</sup> The Commission has addressed some aspects of these requests in two previous orders.<sup>13</sup> Some of the requests for permanent exemptions have been withdrawn<sup>14</sup> or superseded.<sup>15</sup>

On January 8, 2020, the Commission received a letter from SIFMA supplementing its requests regarding the Unlinked Temporary Exemptions.<sup>16</sup> The commenter requested that the Commission make permanent three aspects<sup>17</sup> of the Unlinked Temporary

requesting certain permanent exemptive and other relief; letter from Kyle Brandon, Managing Director, SIFMA, dated Dec. 20, 2018 (“SIFMA December 2018 Letter”) (supplementing the SIFMA November 2018 Letter with additional detail regarding the Unlinked Temporary Exemptions and recommending a twelve-month transition period before expiration of any Unlinked Temporary Exemptions); letter from Walt L. Lukken, President and Chief Executive Officer, Futures Industry Association, dated Nov. 14, 2018 (“FIA November 2018 Letter I”) (expressing support for the permanent exemptions requested in the SIFMA November 2018 Letter); letter from Walt L. Lukken, President and Chief Executive Officer, Futures Industry Association, dated Nov. 29, 2018 (“FIA November 2018 Letter II”) (same). All comments received are available at <https://www.sec.gov/comments/s7-27-11/s72711.shtml>.

<sup>12</sup> See SIFMA November 2018 Letter at 1–4; SIFMA December 2018 Letter at 1–7; see also FIA November 2018 Letter I at 10; FIA November 2018 Letter II at 10–11.

<sup>13</sup> In 2019, the Commission provided limited exemptions from the definition of “penny stock” in Exchange Act Section 3(a)(51) and Exchange Act Rule 3a51–1 for transactions in security-based swaps between eligible contract participants and from the definition of “municipal securities” in Exchange Act Section 3(a)(29) for security-based swaps. See 2019 Extension Order, 84 FR at 867. In response to the commenter's request for guidance regarding the definition of “government securities,” the Commission noted that the Unlinked Temporary Exemptions did not include an exemption from the definition of “government securities” in Section 3(a)(42) of the Exchange Act and noted that the Exchange Act does not permit the Commission to provide such relief. See 2019 Extension Order, 84 FR at 866 & n.40. In response to the commenter's request for exemptions for security-based swap execution facilities, the Commission noted that it would consider the request in connection with the Commission's finalization of rules for security-based swap execution facilities. See 2019 Extension Order, 84 FR at 864 n.10. In January 2020, the Commission allowed all of the Unlinked Temporary Exemptions except for those related to three of the commenter's requests to expire on February 5, 2020. See January 2020 Extension Order, 85 FR at 2766.

<sup>14</sup> See letter from Kyle Brandon, Managing Director, SIFMA, dated Jan. 8, 2020 (“SIFMA January 2020 Letter”), at 5; letter from Kyle L. Brandon, Managing Director, Head of Derivatives Policy, SIFMA, dated September 10, 2020 (“SIFMA September 2020 Letter”), at 8. All comments received are available at <https://www.sec.gov/comments/s7-27-11/s72711.shtml>.

<sup>15</sup> See SIFMA September 2020 Letter at 5–6.

<sup>16</sup> See SIFMA January 2020 Letter.

<sup>17</sup> The commenter confirmed that it was no longer requesting additional extensions for any Unlinked Temporary Exemptions other than for the three

Exemptions: (1) A limited exemption from the hypothecation requirements of Exchange Act Section 8 and in Exchange Act Rules 8c–1 and 15c2–1 for certain securities carried for the account of a customer with respect to a security-based swap transaction,<sup>18</sup> (2) exemptions from broker and dealer disclosure requirements relating to extensions of credit in Exchange Act Rules 10b–16 and 15c2–5 as applied to security-based swaps,<sup>19</sup> and (3) exemptions for security-based swaps from certain limitations on an OTC derivatives dealer's activities in Exchange Act Rule 15a–1.<sup>20</sup> On September 10, 2020, the Commission received a letter supplementing the commenter's requests regarding those three aspects of the Unlinked Temporary Exemptions, as well as three additional aspects of the Linked Temporary Exemptions.<sup>21</sup> In that letter, the commenter requested that the Commission make permanent three aspects of the Linked Temporary Exemptions: (1) an exemption from the broker and dealer registration requirement in Exchange Act Section 15(a)(1)<sup>22</sup> for a foreign broker or dealer, otherwise operating in compliance with Exchange Act Rule 15a–6, solely in connection with security-based swap dealing with or for an eligible contract participant,<sup>23</sup> (2) an exemption from the broker registration requirement in Section 15(a)(1) for a registered security-

issues cited in the letter. See SIFMA January 2020 Letter at 5.

<sup>18</sup> See SIFMA January 2020 Letter at 3–4; SIFMA December 2018 Letter at 5; SIFMA November 2018 Letter at 3; Exchange Act Section 8, 15 U.S.C. 78h; Exchange Act Rule 8c–1, 17 CFR 240.8c–1; Exchange Act Rule 15c2–1, 17 CFR 240.15c2–1. Section 8 of the Exchange Act and Exchange Act Rules 8c–1 and 15c2–1 limit a broker or dealer's ability to hypothecate securities carried for the account of a customer.

<sup>19</sup> See SIFMA January 2020 Letter at 4; SIFMA December 2018 Letter at 5–6; SIFMA November 2018 Letter at 3; Exchange Act Rule 10b–16, 17 CFR 240.10b–16; Exchange Act Rule 15c2–5, 17 CFR 240.15c2–5. Exchange Act Rules 10b–16 and 15c2–5 govern the disclosures that a broker or dealer must provide to customers to whom they extend credit.

<sup>20</sup> See SIFMA January 2020 Letter at 4–5; SIFMA December 2018 Letter at 6–7; SIFMA November 2018 Letter at 4; Exchange Act Rule 15a–1, 17 CFR 240.15a–1. Exchange Act Rule 15a–1 limits an OTC derivatives dealer's ability to engage in dealer activities in listed instruments and in fungible instruments that are standardized as to their material economic terms.

<sup>21</sup> See SIFMA September 2020 Letter.

<sup>22</sup> 15 U.S.C. 78o(a)(1).

<sup>23</sup> See SIFMA September 2020 Letter at 3–4; Exchange Act Section 15(a)(1), 15 U.S.C. 78o(a)(1); Exchange Act Rule 15a–6, 17 CFR 240.15a–6. This request updated the commenter's 2018 request for exemption from registration as a broker or dealer for Rule 15a–6-reliant foreign brokers and dealers that induce or attempt to purchase or sell a security-based swap with or for an eligible contract participant. See SIFMA November 2018 Letter at 2.

based swap dealer that arranges, negotiates or executes a security-based swap with or for an eligible contract participant on behalf of a majority-owned affiliate that is a registered security-based swap dealer,<sup>24</sup> and (3) an exemption from certain confirmation requirements under Exchange Act Rule 10b-10 for a broker or dealer that arranges, negotiates or executes a security-based swap with or for an eligible contract participant on behalf of a majority-owned affiliate that is a registered security-based swap dealer.<sup>25</sup>

The Commission has finalized a majority of the rulemakings under Title VII of the Dodd-Frank Act, including rules regarding the registration and regulation of SBS Entities. The Commission also has set the compliance date for rules regarding registration and regulation of SBS Entities,<sup>26</sup> which will be October 6, 2021. Market participants will be required to assess whether their activities meet the definitions of “security-based swap dealer” or “major security-based swap participant” beginning two months before this compliance date, or August 6, 2021.<sup>27</sup> This Order addresses the commenter’s current requests regarding the Linked Temporary Exemptions and the Unlinked Temporary Exemptions in light of those finalized rules and dates. The remainder of the Unlinked Temporary Exemptions extended in January 2020, and not extended in this Order, will expire on November 5, 2020.<sup>28</sup>

### B. Requests for Exemptions

The Commission has considered the commenter’s six current requests and is providing exemptions in response to five of those requests. Each of the requests is discussed in turn below.

1. Request for an Exemption From Broker and Dealer Registration for a Rule 15a-6-Reliant Foreign Broker or Dealer, Solely in Connection With Security-Based Swap Dealing With or for an Eligible Contract Participant

Exchange Act Section 15(a)(1) requires a person to register as a broker or dealer if the person is a “broker” as defined in Exchange Act Section 3(a)(4)<sup>29</sup> or a “dealer” as defined in Exchange Act Section 3(a)(5)<sup>30</sup> and engages in certain activities in a “security” as defined in Exchange Act Section 3(a)(10),<sup>31</sup> a term that includes security-based swaps. Section 15(a)(1) currently is subject to Linked Temporary Exemptions that exempt from the registration requirement brokerage activities and dealing activities involving security-based swaps with eligible contract participants.<sup>32</sup> These Linked Temporary Exemptions will expire on October 6, 2021.<sup>33</sup>

Dealing in security-based swaps with or for an eligible contract participant is excluded from the definition of the term “dealer,”<sup>34</sup> and that will remain true after the Linked Temporary Exemptions expire. Similarly, market participants that conduct other activities meeting the definitions of “broker” and/or “dealer” may nevertheless avoid registration as a broker or dealer by availing themselves of the exemption from registration in Exchange Act Rule 15a-6. Yet, the commenter expressed concern that if a person combines these types of securities activities—that is, dealing in a security-based swap with or for an eligible contract participant (which is excluded from the definition of the term “dealer”) and Rule 15a-6-compliant securities activities (which cause the person to meet the definition of “broker” and/or “dealer” but that do not require registration as such)—Section 15(a)(1) may require the person to register as a broker and/or dealer. The commenter’s concern is that this result may follow from Section 15(a)(1)’s requirement for any person that meets the definition of “broker” or “dealer”<sup>35</sup>—a category that includes

foreign brokers and dealers relying on Rule 15a-6—to register with the Commission if it makes use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security,<sup>36</sup> including security-based swaps. The commenter requested that foreign brokers and dealers relying on Exchange Act Rule 15a-6 be exempted from Section 15(a)(1)’s broker and dealer registration requirement in connection with any security-based swap dealing with or for an eligible contract participant that is excluded from the definition of “dealer.”<sup>37</sup> The commenter also provided an example unrelated to Rule 15a-6, expressing concern that if a non-U.S. person combines dealing in a security-based swap in the United States with or for an eligible contract participant, on the one hand, with brokerage activity outside the United States, on the other hand, Section 15(a)(1) would require the person to register as a broker and/or dealer.<sup>38</sup>

The Commission agrees that broker-dealer registration should not be required in the circumstances described by the commenter. To provide certainty about this result, the Commission is providing an exemption from Section 15(a)(1) for security-based swap dealing with or for eligible contract participants, available to foreign brokers and dealers whose activities in securities other than security-based swaps with or for an eligible contract participant comply with Rule 15a-6. The Commission believes this exemption would further the purpose of the exclusion of that type of security-based swap dealing from the definition of “dealer.” Similarly, the Commission believes that a limited exemption from Section 15(a)(1) for security-based swap dealing with or for eligible contract participants, available to foreign brokers and dealers whose activities in securities other than security-based swaps with or for an eligible contract participant lack a U.S. jurisdictional nexus, also would further the purpose of the exclusion of that type of security-based swap dealing from the definition of “dealer.” This exemption addresses the commenter’s concern that, without this limited exemptive relief from the registration requirement of

of a national securities exchange. See Exchange Act Section 15(a)(1).

<sup>36</sup> This registration requirement does not apply to activities in an exempted security or commercial paper, bankers’ acceptances or commercial bills. See Exchange Act Section 15(a)(1).

<sup>37</sup> See SIFMA September 2020 Letter at 3-4; SIFMA November 2018 Letter at 2.

<sup>38</sup> See SIFMA September 2020 Letter at 3-4.

<sup>24</sup> See SIFMA September 2020 Letter at 4; Exchange Act Section 15(a)(1), 15 U.S.C. 78o(a)(1).

<sup>25</sup> See SIFMA September 2020 Letter at 4-5; Exchange Act Rule 10b-10, 17 CFR 240.10b-10. This request updated the commenter’s 2018 request for exemption from broker and dealer confirmation requirements. See SIFMA November Letter at 2.

<sup>26</sup> See Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements, Exchange Act Release No. 87780 (Dec. 18, 2019), 85 FR 6270, 6345 (Feb. 4, 2020) (“Cross-Border Adopting Release”).

<sup>27</sup> See Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48963, 48988 (Aug. 14, 2015) (“SBS Entity Registration Adopting Release”).

<sup>28</sup> See January 2020 Extension Order, 85 FR at 2766.

<sup>29</sup> 15 U.S.C. 78c(a)(4).

<sup>30</sup> 15 U.S.C. 78c(a)(5).

<sup>31</sup> 15 U.S.C. 78c(a)(10).

<sup>32</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39938-39; 2014 Extension Order, 79 FR at 7734-35.

<sup>33</sup> See 2014 Extension Order, 79 FR at 7734-35; Recordkeeping and Reporting Adopting Release, 84 FR at 68600; Cross-Border Adopting Release, 85 FR at 6345.

<sup>34</sup> See Exchange Act Section 3(a)(5)(A).

<sup>35</sup> This registration requirement does not apply to a broker or dealer whose business is exclusively intrastate and who does not make use of any facility

Section 15(a)(1), the exclusion of security-based swaps with or for eligible contract participants from the definition of “dealer” might effectively become unavailable to foreign brokers and dealers whose other securities activities either comply with Rule 15a–6 or lack any U.S. jurisdictional nexus. Requiring registration in this circumstance could undermine the market structure for security-based swaps by making it more costly and complex to engage in that type of security-based swap dealing with eligible contract participants in the United States, to the detriment of investors. Accordingly, pursuant to its authority under Exchange Act Section 15(a)(2), the Commission finds that it is consistent with the public interest and the protection of investors to exempt a “foreign broker or dealer,” as such term is defined in Rule 15a–6(b)(3) under the Exchange Act, whose activities in securities other than security-based swaps with or for an eligible contract participant are conducted either in compliance with Rule 15a–6 under the Exchange Act or without the jurisdiction of the United States, from the registration requirement of Exchange Act Section 15(a)(1) solely in connection with the foreign broker or dealer’s security-based swap dealing with or for an eligible contract participant. Consistent with the commenter’s request, this exemption would not extend to foreign brokers’ and dealers’ security-based swap brokerage activity.

## 2. Request for Exemption From Broker Registration for a Registered Security-Based Swap Dealer That Arranges, Negotiates or Executes a Security-Based Swap With or for an Eligible Contract Participant on Behalf of a Majority-Owned Affiliate That Is a Registered Security-Based Swap Dealer

As described above, Exchange Act Section 15(a)(1) requires a person to register as a broker if the person is a “broker” as defined in Exchange Act Section 3(a)(4) and engages in certain activities in a “security” as defined in Exchange Act Section 3(a)(10), a term that includes security-based swaps. Though dealing in security-based swaps with or for an eligible contract participant is excluded from the definition of the term “dealer,”<sup>39</sup> the statutory definition of the term “broker” contains no such exclusion.<sup>40</sup> Section 15(a)(1) currently is subject to Linked Temporary Exemptions that exempt from the registration requirement brokerage activities involving security-

based swaps with eligible contract participants.<sup>41</sup> These Linked Temporary Exemptions will expire on October 6, 2021.<sup>42</sup>

As part of its consideration of cross-border issues in the registration of security-based swap dealers, the Commission recently determined that a limited exemption from the broker registration requirement was appropriate for a registered security-based swap dealer and its associated persons who conduct certain security-based swap “arranging, negotiating or executing” activity (“ANE activity”) with or for a non-U.S. person eligible contract participant on behalf of a non-U.S. majority-owned affiliate that is relying on an exception to the *de minimis* thresholds for registration as a security-based swap dealer.<sup>43</sup> The commenter requested that this limited exemption from the broker registration requirement be extended to situations in which the majority-owned affiliate is not relying on the *de minimis* exception but, rather, is a registered security-based swap dealer.<sup>44</sup> When adopting this limited exemption in the context of the *de minimis* exception, the Commission noted that a security-based swap dealer not dually registered as a broker or dealer and approved to use models to compute deductions for market or credit risk is subject to a minimum net capital requirement of \$20 million and a minimum tentative net capital requirement of \$100 million, versus minimum requirements of \$1 billion and \$5 billion, respectively, for a broker or dealer approved to use models.<sup>45</sup> The Commission adopted that exemption to avoid a situation in which “applying the heightened broker-dealer capital requirements to all security-based swap dealers approved to use models who serve as the registered entity for purposes of the [*de minimis*] exception could limit the usefulness of the exception.”<sup>46</sup> The commenter argued that extending the limited exemption would be appropriate because the same concerns also apply when the majority-owned affiliate is a registered, rather

than unregistered, security-based swap dealer.<sup>47</sup>

The Commission continues to believe that ANE activity generally would constitute activity of a “broker” as that term is defined in Exchange Act Section 3(a)(4).<sup>48</sup> The Commission acknowledges the concerns regarding the heightened capital requirements for brokers approved to use models as applied to the security-based swap ANE activity described in the commenter’s request. At the same time, the statutory definition of “broker” does not contain an exclusion for this activity.<sup>49</sup> Moreover, the Commission also is concerned that an exemption for ANE activity from the broker registration requirement could prompt changes in market structure that make it more difficult for the Commission to oversee that activity. In the Commission’s view, however, a temporary exemption should not encourage such market structure changes, but could provide the Commission an opportunity to consider these concerns in light of market conditions prevailing after registration of security-based swap dealers begins.<sup>50</sup> Accordingly, pursuant to its authority under Exchange Act Section 15(a)(2), the Commission finds that it is consistent with the public interest and the protection of investors to provide a conditional temporary exemption from the broker registration requirement of Section 15(a)(1) until November 1, 2022 (*i.e.*, one year after the earliest due date for applications for registration as a security-based swap dealer) for a registered security-based swap dealer and its associated persons solely in connection with such registered security-based swap dealer or associated person arranging, negotiating or executing a security-based swap transaction with or for a non-U.S. person eligible contract participant on behalf of a non-U.S. person qualified majority-owned affiliate. Consistent with the exemption from broker registration in the context of the *de minimis* exception, this exemption is limited to ANE activity with or for a non-U.S. person eligible contract participant. The Commission continues to believe that requiring broker registration with respect to ANE activity with or for a counterparty that is not an eligible contract participant is consistent with the heightened

<sup>41</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39938–39; 2014 Extension Order, 79 FR at 7734.

<sup>42</sup> See 2014 Extension Order, 79 FR at 7734–35; SBS Entity Registration Adopting Release, 80 FR at 48988; Cross-Border Adopting Release, 85 FR at 6345.

<sup>43</sup> See Exchange Act Rule 3a71–3(d)(4); Cross-Border Adopting Release, 85 FR at 6279–80.

<sup>44</sup> See SIFMA September 2020 Letter at 4.

<sup>45</sup> See Cross-Border Adopting Release, 85 FR at 6279.

<sup>46</sup> See Cross-Border Adopting Release, 85 FR at 6279.

<sup>47</sup> See SIFMA September 2020 Letter at 4.

<sup>48</sup> See Cross-Border Adopting Release, 85 FR at 6279 & n.104.

<sup>49</sup> See Exchange Act Section 3(a)(4).

<sup>50</sup> The Commission welcomes engagement with market participants to discuss developments that may occur in this market after security-based swap dealers begin to register.

<sup>39</sup> See Exchange Act Section 3(a)(5)(A).

<sup>40</sup> See Exchange Act Section 3(a)(4).

protections that Congress applied to security-based swap transactions with or for non-eligible contract participants.<sup>51</sup> For purposes of this exemption, the term “qualified majority-owned affiliate” means a majority-owned affiliate (as such term is defined in Exchange Act Rule 3a71–3(a)(10)) of the registered security-based swap dealer that is itself also a registered security-based swap dealer.

To be eligible for the exemption, the registered security-based swap dealer must comply with two relevant conditions to the parallel exemption from broker registration in the context of the *de minimis* exception. First, the registered security-based swap dealer must create and maintain books and records relating to such ANE activity that are required by Exchange Act Rules 18a–5 and 18a–6. This condition differs slightly from the parallel condition in the context of the *de minimis* exception<sup>52</sup> in that the required books and records relate only to the ANE activity by the registered security-based swap dealer relying on the exemption, rather than to the entire security-based swap transaction subject to the *de minimis* exception. The Commission believes this difference is appropriate because the *de minimis* exception applies to transactions on behalf of an unregistered affiliate, whereas the exemption granted in this Order applies only to ANE activity on behalf of a registered security-based swap dealer affiliate. Because the affiliate also must maintain books and records relating to the transaction, the Commission believes that the exemption should require the registered security-based swap dealer relying on this exemption to create and maintain only those books and records that relate to its own ANE activity. Second, if Exchange Act Rule 10b–10 would apply to such ANE activity, the registered security-based swap dealer also must provide to the customer the disclosures required by Rule 10b–10(a)(2) (excluding Rule 10b–10(a)(2)(i) and (ii)) and Rule 10b–10(a)(8) in accordance with the time and form requirements set forth in Exchange Act Rule 15Fi–2(b) and (c) or, alternatively, promptly after discovery of any defect in such registered security-based swap dealer’s good faith effort to comply with such requirements.<sup>53</sup>

### 3. Request for Exemption From Certain Confirmation Requirements for a Broker or Dealer That Arranges, Negotiates or Executes a Security-Based Swap With or for an Eligible Contract Participant on Behalf of a Majority-Owned Affiliate That Is a Registered Security-Based Swap Dealer

Exchange Act Rule 10b–10<sup>54</sup> requires a broker or dealer to deliver to a customer certain disclosures about transactions in securities, including security-based swaps. Exchange Act Rule 15Fi–2<sup>55</sup> requires an SBS Entity to deliver to a counterparty a trade acknowledgment containing certain terms of the security-based swap or to verify the trade acknowledgment received from the counterparty. Certain information required to be included in a Rule 10b–10 confirmation is not required in the Rule 15Fi–2 trade acknowledgment, such as a description of the broker or dealer’s role as agent for the customer, agent for some other person, agent for both the customer and another person or principal for its own account in the transaction, as well as information about the source and/or amount of certain other remuneration received or to be received by the broker or dealer in connection with the transaction.<sup>56</sup> Rule 10b–10 currently is subject to a Linked Temporary Exemption that exempts brokers and dealers from these disclosure requirements with respect to security-based swaps.<sup>57</sup> This Linked Temporary Exemption will expire on October 6, 2021.<sup>58</sup>

A registered broker that conducts ANE activity pursuant to the *de minimis* exception in Exchange Act Rule 3a71–3(d) is exempt from providing the disclosures described in Rule 10b–10, except for those regarding the broker’s role as agent or principal in the transaction and the broker or dealer’s

swap dealer and thus are not included as conditions to the exemption granted in this Order. For example, registered security-based swap dealers already have to comply with the provisions listed in Exchange Act Rule 3a71–3(d)(1)(ii), provide the Commission with the access to books and records described in Rule 3a71–3(d)(1)(iii)(A) and maintain the books and records and consent to service of process described in Rule 3a71–3(d)(1)(iii)(B)(3)–(4). The conditions described in Rule 3a71–3(d)(1)(iii)(B)(2) and (d)(1)(iv)–(vii) are specific to the operation of the *de minimis* exception and are not relevant to the exemption granted in this Order.

<sup>54</sup> 17 CFR 240.10b–10.

<sup>55</sup> 17 CFR 240.15Fi–2.

<sup>56</sup> See Exchange Act Rule 10b–10(a).

<sup>57</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39939; 2014 Extension Order, 79 FR at 7734.

<sup>58</sup> See 2014 Extension Order, 79 FR at 7734; Trade Acknowledgment and Verification Adopting Release, 81 FR at 39828; Recordkeeping and Reporting Adopting Release, 84 FR at 68600; Cross-Border Adopting Release, 85 FR at 6345.

status as a member of SIPC.<sup>59</sup> In addition, a registered security-based swap dealer that conducts ANE activity pursuant to the *de minimis* exception is exempt from registration as a broker so long as it provides these same Rule 10b–10 disclosures.<sup>60</sup> Because Rule 10b–10 and Rule 15Fi–2 have different form and timing requirements,<sup>61</sup> the *de minimis* exception allows these Rule 10b–10 disclosures to be provided in accordance with the form and timing requirements in Rule 15Fi–2(b) and (c).<sup>62</sup>

The commenter requests that a parallel exemption from Rule 10b–10 apply to situations in which a registered broker or dealer conducts ANE activity not pursuant to the *de minimis* exception but, rather, on behalf of a majority-owned affiliate that is a registered security-based swap dealer.<sup>63</sup> Though Rule 10b–10 requires disclosures not duplicated in the trade acknowledgment required under Rule 15Fi–2, the commenter claims that some of these disclosures are “irrelevant” in the situations covered by its request because a broker or dealer would be “solely compensated by its [security-based swap dealer] affiliate.”<sup>64</sup> Rule 10b–10, however, contains no exemption for transactions in which compensation is paid by an affiliate. Moreover, compensation disclosure is not available through other means, as the trade acknowledgment required by Rule 15Fi–2 would disclose only the terms of the security-based swap transaction, which do not necessarily include compensation regarding the brokerage activity to which Rule 10b–10 applies. Security-based swap trade acknowledgments thus do not duplicate or replace Rule 10b–10 disclosures for brokerage activity.<sup>65</sup> In response to the commenter’s previous request for exemption from Rule 10b–10 for

<sup>59</sup> See Exchange Act Rule 3a71–(d)(5).

<sup>60</sup> See Exchange Act Rule 3a71–3(d)(4)(ii).

<sup>61</sup> Rule 10b–10(a) requires a broker or dealer to give or send a confirmation in the form of a “written notification,” whereas Rule 15Fi–2(c) requires a trade acknowledgment to be provided by “electronic means that provide reasonable assurance of delivery and a record of transmittal.” A broker or dealer must give or send a transaction confirmation under Rule 10b–10(a) “at or before the completion of such transaction,” whereas a trade acknowledgment pursuant to Rule 15Fi–2(b) must be provided “promptly, but in any event by the end of the first business day following the day of execution.”

<sup>62</sup> See Exchange Act Rule 3a71–3(d)(4)(ii), (5)(ii).

<sup>63</sup> See SIFMA September 2020 Letter at 5.

<sup>64</sup> See SIFMA September 2020 Letter at 5.

<sup>65</sup> See Trade Acknowledgment and Verification Adopting Release, 81 FR at 39824–25 (“[Rule 15Fi–2] thus does not apply to brokerage or agency transactions, which are different in structure and involve different activity by a broker than principal transactions by [a security-based swap dealer].”).

<sup>51</sup> See Cross-Border Adopting Release, 85 FR at 6279 & n.109 (citing Exchange Act Section 6(l), 15 U.S.C. 78f(l), and Exchange Act Section 3(a)(5), 15 U.S.C. 78c(a)(5)).

<sup>52</sup> See Exchange Act Rule 3a71–4(d)(1)(iii)(B)(1).

<sup>53</sup> The other conditions to the availability of the exemption from broker registration in the context of the *de minimis* exception are not applicable to ANE activity on behalf of a registered security-based

security-based swap brokerage activity,<sup>66</sup> the Commission stated that, “since Rule 15Fi-2 does not require a trade acknowledgment for an SBS Entity’s brokerage or agency transactions, and therefore would not result in any duplication of efforts by the SBS Entity effecting the brokerage or agency transaction, the Commission does not believe that there is a need to provide an exemption from providing a confirmation under Rule 10b-10 for an SBS Entity’s brokerage or agency transactions.”<sup>67</sup> Indeed, the Commission believes that customers would benefit from disclosure about brokerage costs even when gross costs may be reflected in the transaction price reported in the trade acknowledgment. For these reasons, the Commission is not providing an exemption from Rule 10b-10’s disclosure requirements in connection with a broker or dealer’s security-based swap ANE activity.

In the context described by the commenter—that is, a broker or dealer’s ANE activity on behalf of a majority-owned affiliate that is a registered security-based swap dealer—the broker or dealer may wish to deliver the Rule 10b-10 disclosures regarding the ANE activity in the same document or communication as the trade acknowledgment or verification that its affiliate delivers pursuant to Rule 15Fi-2. The Commission recognizes, however, the potential for the different time and form requirements in Rule 10b-10 and Rule 15Fi-2(b) and (c) to frustrate attempts to deliver a single document or communication and could, as a result, increase the costs and other burdens to investors of responding to multiple communications regarding the ANE activity. As a result, the Commission is granting the commenter’s request for an exemption from Rule 10b-10’s requirement to deliver disclosures to a customer at or before completion of the transaction, so as to allow disclosures related to ANE activity to be provided at the time and in the form of a trade acknowledgment as required by Rule 15Fi-2(b) and (c), except that disclosures requested by the customer as allowed by Rule 10b-10, which are not addressed in Rule 15Fi-2, must be delivered in accordance with the deadlines specified in Rule 10b-10(c).<sup>68</sup>

Consistent with the Rule 10b-10-related exemptions and requirements in the *de minimis* exception, the commenter requested that any relief from Rule 10b-10’s timing requirements also include the ability to avoid violation of Rule 10b-10 so long as the broker or dealer provides the disclosures promptly after discovery of a defect in its good faith efforts to comply.<sup>69</sup> This ability to provide disclosures either at the time specified in the *de minimis* exception or promptly after discovery of a defect in good faith efforts to do so was necessary, in the context of the *de minimis* exception, to avoid a situation in which a “foot fault” in Rule 10b-10 compliance would make the exemption from broker registration unavailable.<sup>70</sup> Because no exemption from broker registration is at risk if the broker or dealer does not comply with the conditions of the Rule 10b-10 exemption in this Order, this “foot fault” relief is not necessary. Rather, the consequence of not complying with either Rule 10b-10’s timing requirements, or Rule 15Fi-2(b) and (c)’s form and timing requirements (and Rule 10b-10(c)’s timing requirements as applicable) if the broker or dealer is relying on this exemption, is that a broker or dealer would find itself out of compliance with Rule 10b-10.

Accordingly, pursuant to its authority under Exchange Act Section 36, the Commission finds that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to exempt a broker or dealer from the requirement to give or send to a customer the disclosures required by Rule 10b-10(a) at or before completion of the transaction solely in connection with such broker or dealer or its associated persons arranging, negotiating or executing a security-based swap transaction on behalf of a qualified majority-owned affiliate, provided that such broker or dealer gives or sends to the customer written notification containing the disclosures required by Rule 10b-10(a) in connection with such arranging, negotiating or executing in accordance with the time and form requirements for a trade acknowledgment set forth in Rule 15Fi-2(b) and (c) under the Exchange Act and, as applicable, Rule 10b-10(c) under the Exchange Act. For purposes of this exemption, the term

“qualified majority-owned affiliate” means a majority-owned affiliate (as such term is defined in Rule 3a71-3(a)(10) under the Exchange Act) of such broker or dealer that is a registered security-based swap dealer.

#### 4. Request for Relief From the Hypothecation Requirements With Respect to Security-Based Swap Accounts

Exchange Act Section 8 provides, in pertinent part, that it shall be unlawful for any broker or dealer, in contravention of such rules and regulations as the Commission shall prescribe for the protection of investors, to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances: (1) That will permit the commingling of the customer’s securities without the customer’s written consent with the securities of any other customer; (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer; or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect of such securities.<sup>71</sup> Pursuant to this authority, the Commission adopted Exchange Act Rules 8c-1 and 15c2-1. Exchange Act Rule 8c-1 places limitations on the ability of a broker or dealer to hypothecate “any securities carried for the account of any customer.”<sup>72</sup> Exchange Act Rule 15c2-1 defines the phrase “fraudulent, deceptive, or manipulative act or practice” as used in Exchange Act Section 15(c)(2) to include the hypothecation of “any securities carried for the account of any customer” that would be inconsistent with the limitations imposed by Rule 8c-1.<sup>73</sup> The commenter made two requests related to these provisions.

First, the commenter asked the Commission to clarify how the phrase “securities carried for the account of any customer” as used in Exchange Act Rules 8c-1 and 15c2-1 applies to security-based swaps.<sup>74</sup> The commenter stated that, for the purposes of the possession or control requirements of Exchange Act Rule 15c3-3 as applied to security-based swaps, the Commission, among other amendments, added a definition of “excess securities

<sup>66</sup> See letter from Securities Industry and Financial Markets Association, dated Dec. 5, 2011, available at <https://www.sec.gov/comments/s7-27-11/s72711.shtml>.

<sup>67</sup> See Trade Acknowledgment and Verification Adopting Release, 81 FR at 39825.

<sup>68</sup> Rule 10b-10(c) requires a broker or dealer to “give or send to a customer information requested pursuant to [Rule 10b-10] within five business days

of receipt of the request,” except that “in the case of information pertaining to a transaction effected more than 30 days prior to receipt of the request, the information shall be given or sent to the customer within 15 business days.”

<sup>69</sup> See SIFMA September 2020 Letter at 5.

<sup>70</sup> See Cross-Border Adopting Release, 85 FR at 6280 n.113.

<sup>71</sup> 15 U.S.C. 78h.

<sup>72</sup> See 17 CFR 240.8c-1.

<sup>73</sup> See 17 CFR 240.15c2-1.

<sup>74</sup> See SIFMA January 2020 Letter at 3-4.

collateral” to the Rule 15c3–3.<sup>75</sup> Rule 15c3–3 was further amended to require a broker or dealer to promptly obtain and thereafter maintain physical possession or control of all excess securities collateral carried for the security-based swap accounts of security-based swap customers.<sup>76</sup> The commenter requested confirmation that, for the purposes of Exchange Act Rules 8c–1 and 15c2–1, the term “securities carried for the account of any customer” be interpreted in connection with security-based swaps to have the same meaning as “excess securities collateral” has for the purposes of Exchange Act Rule 15c3–3. For the reasons discussed below, the Commission is not issuing the interpretation suggested by the commenter and instead is issuing a conditional exemption from Rules 8c–1 and 15c2–1 for securities and money market instruments carried in a security-based swap account of a security-based swap customer.

The term “excess securities collateral” as used in Exchange Act Rules 15c3–3 and 18a–4<sup>77</sup> with respect to security-based swaps is modelled on the terms “fully paid securities” and “excess margin securities” as used in Exchange Act Rule 15c3–3 with respect to securities that are not security-based swaps.<sup>78</sup> Exchange Act Rule 15c3–3 requires a broker or dealer to promptly obtain and thereafter maintain physical possession or control of all fully paid and excess margin securities carried for the account of customers.<sup>79</sup> Securities that have been hypothecated are not in the physical possession or control of the broker or dealer.<sup>80</sup> However, securities that meet the definition of “margin securities” in Exchange Act Rule 15c3–3 may be hypothecated, subject to the requirements of that rule. Similarly, with respect to security-based swaps, Exchange Act Rules 15c3–3 and 18a–4

require that a broker, dealer or security-based swap dealer promptly obtain and thereafter maintain physical possession or control of securities and money market instruments carried for the account of a security-based swap customer that meet the rules’ definitions of “excess securities collateral.”<sup>81</sup> Securities or money market instruments carried in the accounts of security-based swap customers that do not meet the definition of “excess securities collateral” may be hypothecated subject to the requirements of Exchange Act Rules 15c3–3 and 18a–4. Consequently, while the respective limitations and anti-fraud provisions of Rules 8c–1 and 15c2–1 apply to “any securities carried for the account of any customer,” the possession or control requirements of Rules 15c3–3 and 18a–4 apply to fully paid and excess margin securities and excess securities collateral, respectively.

Because Exchange Act Rules 8c–1 and 15c2–1 apply to any securities carried for the account of any customer, interpreting the term “any securities carried for the account of any customer” in those rules to mean “excess securities collateral” as defined in Rules 15c3–3 and 18a–4 for the purposes of a security-based swap would not be appropriate. Doing so could imply that the hypothecation rules do not apply to certain securities carried for the accounts of customers when the rules, in fact, apply to “any securities carried for the account of any customer.” However, a limited exemption from Rules 8c–1 and 15c2–1 with respect to securities and money market instruments carried in the security-based swap accounts of security-based swap customers would be appropriate for the following reasons.

When adopting the segregation requirements for security-based swaps, the Commission did not contemplate imposing the respective limitations and anti-fraud provisions of Exchange Act Rules 8c–1 and 15c2–1 to securities and money market instruments carried in security-based swap accounts of security-based swap customers. Moreover, the Dodd-Frank Act did not mandate that the Commission implement requirements with respect to security-based swaps that are analogous to Rules 8c–1 and 15c2–1. Further, Rules 8c–1 and 15c2–1 were adopted in 1940 and were not designed to address security-based swaps.<sup>82</sup> Exchange Act

Rule 15c3–3 was adopted in 1972 to provide comprehensive protection to customer funds and securities held by brokers and dealers.<sup>83</sup> The Commission addressed the protection of securities and money market instruments carried in security-based swap accounts of security-based swap customers through the recent amendments to Exchange Act Rule 15c3–3 and the adoption of new Exchange Act Rule 18a–4.<sup>84</sup> The amendments and new rule addressing security-based swaps were modelled on the requirements and limitations in Exchange Rule 15c3–3 applicable to securities that are not security-based swaps. They were not modelled on Exchange Act Rules 8c–1 and 15c2–1. Finally, Rules 8c–1 and 15c2–1 provide OTC derivatives dealers exemptions from their requirements. Therefore, it is not necessary to impose the limitations and anti-fraud provisions of Exchange Act Rules 8c–1 and 15c2–1 to securities and money market instruments carried in security-based swap accounts of security-based swap customers.<sup>85</sup> This approach will achieve the objective sought by the commenter in proposing the interpretation discussed above: That Rules 8c–1 and 15c2–1 not apply to securities and money market instruments carried in a security-based swap account of a security-based swap customer.

However, Rules 8c–1 and 15c2–1 continue to apply to any securities carried for all other customers. For example, as discussed above, the requirement to promptly obtain and thereafter maintain physical possession or control of securities (other than security-based swaps) carried for the account of customers in Exchange Act Rule 15c3–3 does not apply to “margin

<sup>75</sup> *Id.*; see also Capital, Margin and Segregation Adopting Release, 84 FR at 43935–38; 17 CFR 240.15c3–3(p)(1)(ii). Exchange Act Rule 18a–4 imposes segregation requirements on security-based swap dealers that are not brokers or dealers (other than OTC derivatives dealers). 17 CFR 240.18a–4. Exchange Act Rule 18a–4 has a parallel definition of “excess securities collateral.” See 17 CFR 240.18a–4(a)(2).

<sup>76</sup> See 17 CFR 240.15c3–3(p)(2). Exchange Act Rule 18a–4 has a parallel requirement that the security-based swap dealer promptly obtain and thereafter maintain physical possession or control of all excess securities collateral carried for the security-based swap accounts of security-based swap customers. See 17 CFR 240.18a–4(b).

<sup>77</sup> 17 CFR 240.18a–4.

<sup>78</sup> See Capital, Margin, and Segregation Adopting Release, 84 FR at 43935; 17 CFR 240.15c3–3(a)(3), (a)(5) and (p)(1)(ii).

<sup>79</sup> See 17 CFR 240.15c3–3(b).

<sup>80</sup> See 17 CFR 240.15c3–3(c) and (d); see also 17 CFR 240.15c3–3(p)(2); 17 CFR 240.18a–4(b).

<sup>81</sup> See 17 CFR 240.15c3–3(p)(2); 17 CFR 240.18a–4(b).

<sup>82</sup> Hypothecation of Customers’ Securities, 5 FR 4530 (Nov. 19, 1940) (adopting Exchange Act Rule 8c–1); Hypothecation of Customers’ Securities, 5 FR 4531 (Nov. 19, 1940) (adopting Exchange Act Rule 15c2–1).

<sup>83</sup> See Broker-Dealers; Maintenance of Certain Basic Reserves, Exchange Act Release No. 9856 (Nov. 17, 1972), 37 FR 25224 (Nov. 29, 1972) (“Rule 15c3–3 as adopted herein is well fashioned to furnish the protection for the integrity of customer funds and securities as envisioned by Congress when it amended section 15(c) (3) of the [Exchange] Act by adopting section 7(d) of the Securities Investor Protection Act of 1970 . . .”); see also Pub. L. 91–598 (Dec. 30, 1970). The hypothecation rules (Rules 8c–1 and 15c2–1) require that a broker-dealer segregate customer securities from its own proprietary securities and prescribe limits on a broker-dealer’s ability to hypothecate customer securities.

<sup>84</sup> See Capital, Margin, and Segregation Adopting Release, 84 FR at 43930–43, 17 CFR 240.15c3–3(p); 17 CFR 240.18a–4.

<sup>85</sup> A security-based swap dealer that is not also registered as a broker or dealer is not subject to Exchange Act Rules 8c–1 and 15c2–1. Moreover, a security-based swap dealer that is also registered as an OTC derivatives dealer can provide notifications to its counterparties to remove them from the definitions of “customer” in Exchange Act Rules 8c–1 and 15c2–1 and, thereby, avoid the requirement to comply with those rules. See 17 CFR 8c–1(b); 17 CFR 240.15c2–1(b).



securities” as defined in the rule.<sup>86</sup> The commenter did not request that “margin securities,” as defined in Rule 15c3–3, should be exempt from Exchange Act Rules 8c–1 and 15c2–1 or that the Commission interpret the term in a manner that removes them from the requirements of those rules.

For these reasons, the Commission finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors to exempt securities and money market instruments carried in a security-based swap account of a security-based swap customer from the requirements of Exchange Act Rules 8c–1 and 15c2–1; provided the account does not hold “margin securities” as defined in Exchange Act Rule 15c3–3.<sup>87</sup> Further, this exemption does not modify the requirement that a broker, dealer or security-based swap dealer promptly obtain and thereafter maintain physical possession or control of securities or money market instruments carried for the accounts of security-based swap customers that meet the definition of “excess securities collateral” as required by Exchange Act Rules 15c3–3 and 18a–4, as applicable.

Second, the commenter asked the Commission to extend most, but not all, of the Unlinked Temporary Exemptions from the hypothecation requirements for security-based swaps. The current Unlinked Temporary Exemptions from the hypothecation requirements apply without regard to whether these requirements applied to the broker or dealer’s security-based swap positions or activities as of July 15, 2011 (*i.e.*, the day before relevant provisions of the

Dodd-Frank Act became effective),<sup>88</sup> and are set to expire on November 5, 2020.<sup>89</sup> By contrast, the Linked Temporary Exemptions from related customer protection requirements in Exchange Act Rule 15c3–3 are limited to security-based swap positions and activities not subject to that rule as of July 15, 2011, and are set to expire on October 6, 2021, which is the compliance date for the Commission’s security-based swap-related amendments to Rule 15c3–3.<sup>90</sup> The commenter asked the Commission to extend the Unlinked Temporary Exemptions from the hypothecation requirements so that they would expire on the compliance date for these security-based swap-related amendments to Rule 15c3–3.<sup>91</sup> The commenter asked the Commission to extend these exemptions consistent with the scope of the Linked Temporary Exemptions from Rule 15c3–3—that is, only to the extent that the hypothecation requirements did not apply to the broker or dealer’s security-based swap positions or activities as of July 15, 2011.<sup>92</sup> The commenter stated that the policies, procedures, processes, systems and controls that brokers and dealers use to comply with Rules 8c–1 and 15c2–1 are integrated with the policies, procedures, processes, systems and controls that they use to comply with Rule 15c3–3. Therefore, the commenter requested that the Unlinked Temporary Exemptions from Rules 8c–1 and 15c2–1 be extended to align with the expiration date for the Linked Temporary Exemptions from Rule 15c3–3.<sup>93</sup>

For the reasons provided by the commenter, the Commission believes that it would be appropriate to extend the Unlinked Temporary Exemptions from Rules 8c–1 and 15c2–1 so that they expire at the same time as the Linked Temporary Exemptions from Rule 15c3–3. This extension would provide brokers and dealers time to implement a single set of policies, procedures, and controls to comply with Rules 8c–1, 15c2–1 and 15c3–3 as they apply to security-based swap positions. Accordingly, pursuant to its authority under Exchange Act Section 36, the Commission finds that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to extend the

Unlinked Temporary Exemptions from Exchange Act Section 8 and Exchange Act Rules 8c–1 and 15c2–1 until October 6, 2021.

#### 5. Request for Exemptions From Broker and Dealer Disclosure Requirements Relating to Extensions of Credit

Exchange Act Rule 15c2–5(a)(1) imposes disclosure requirements, and Rule 15c2–5(a)(2) imposes suitability requirements, on brokers and dealers that that directly or indirectly offer to extend credit to or arrange any loan for, or extend to or participate in any loan for, any person in connection with the offer or sale of any security to, or the attempt to induce the purchase of any security by, such person, subject to certain exceptions. Exchange Act Rule 10b–16 imposes additional requirements on brokers and dealers that directly or indirectly extend credit to any customer in connection with any securities transaction. Subject to certain exceptions, these brokers and dealers must establish procedures to assure that each customer receives certain lending disclosures.<sup>94</sup> Citing the Commission’s 2002 guidance on the application of certain securities laws to security futures products,<sup>95</sup> the commenter expressed the view that security-based swaps “should not in and of themselves constitute extensions of credit” subject to these suitability and disclosure requirements.<sup>96</sup> The commenter asked the Commission to confirm this view or, in the alternative, exempt security-based swap activity from these extension of credit requirements.<sup>97</sup>

The Commission believes that, based on the facts and circumstances of a particular transaction, an extension of credit subject to the suitability and disclosure requirements of Rules 15c2–5 and 10b–16 may or may not be made in connection with a security-based swap transaction. This belief is consistent with both the Commission’s 2002 guidance<sup>98</sup> on the application of

<sup>86</sup> See 17 CFR 240.15c3–3(a)(3), (a)(4), (a)(5) and (b).

<sup>87</sup> As indicated, the relief does not extend to accounts that hold “margin securities” as that term is defined in Exchange Act Rule 15c3–3. Therefore, the exemption would not apply if the account holds securities positions, other than security-based swaps, that trigger the margin requirements of Regulation T of the Board of Governors of the Federal Reserve System and/or the margin requirements of the self-regulatory organizations applicable to securities that are not security-based swaps (*e.g.*, long securities positions (other than security-based swaps) that have been financed by the broker or dealer, short securities positions (other than security-based swaps), or listed options). However, as discussed above, the exemption applies to securities and money market instruments held in a security-based swap account of a security-based swap customer; provided they are not “margin securities” as defined in Rule 15c3–3. For the purposes of this exemption, a broker or dealer need not treat fully paid securities and money market instruments in a security-based swap account of a security-based swap customer that serve as collateral for security-based swap positions and/or to meet the margin requirements of Exchange Act Rule 18a–3 as “margin securities” as that term is defined in Rule 15c3–3.

<sup>88</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39939.

<sup>89</sup> See January 2020 Extension Order, 85 FR at 2766.

<sup>90</sup> See 2014 Extension Order, 79 FR at 7734.

<sup>91</sup> See SIFMA January 2020 Letter at 3–4; SIFMA December 2018 Letter at 5.

<sup>92</sup> See SIFMA January 2020 Letter at 3–4.

<sup>93</sup> See *id.*

<sup>94</sup> See Exchange Act Rule 10b–16(a).

<sup>95</sup> Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules Thereunder to Trading in Security Futures Products, Exchange Act Release No. 46101 (Jun. 21, 2002), 67 FR 43234 (Jun. 27, 2002) (“Security Futures Release”).

<sup>96</sup> See SIFMA January 2020 Letter at 4.

<sup>97</sup> See SIFMA September 2020 Letter at 6–7; SIFMA January 2020 Letter at 4; SIFMA December 2018 Letter at 5–6; SIFMA November 2018 Letter at 3.

<sup>98</sup> This guidance noted that “Rule 10b–16 applies to all extensions of credit, directly or indirectly, to any customer in connection with any securities transaction, including a security future. Investors in security futures, including those extended credit in connection with margining, should benefit from the transparency of credit terms fostered by this Rule.”



extension of credit requirements to security futures products and the Commission and the Commodity Futures Trading Commission's 2012 joint release<sup>99</sup> on the definition of "security-based swap." The relationship between an extension of credit and a security-based swap thus does not shield the extension of credit from application of Rules 15c2–5 and 10b–16. When an extension of credit is made in connection with a security-based swap transaction, however, brokers and dealers may as appropriate to the facts and circumstances devise a single suitability assessment to satisfy applicable provisions of Rule 15c2–5(a)(2) and Exchange Act Rule 15Fh–3(f),<sup>100</sup> as well as a single set of disclosures to satisfy applicable provisions of Rules 10b–16 and 15c2–5(a)(1) and Exchange Act Rule 15Fh–3(b).<sup>101</sup>

Because an extension of credit may or may not be made in connection with a security-based swap transaction, the Commission believes that a permanent exemption from Rules 10b–16 and 15c2–5 for security-based swap activity is not warranted. The Commission thus is not further extending the Unlinked Temporary Exemptions from Exchange Act Rules 10b–16 and 15c2–5.

#### 6. Request for Exemptions From Certain Limitations on an OTC Derivatives Dealer's Activities

Exchange Act Rule 15a–1 limits the securities activities of an OTC derivatives dealer. The commenter made three requests related to these

limitations. First, Rule 15a–1(a)–(b) permits OTC derivatives dealers to engage in dealer activities when the security is an eligible OTC derivatives instrument. Eligible OTC derivatives instruments are defined to exclude any contract, agreement or transaction that is "one of a class of fungible instruments that are standardized as to their material economic terms."<sup>102</sup> The commenter noted that centrally cleared security-based swaps might not qualify as eligible OTC derivatives instruments and thus Rule 15a–1 might not permit OTC derivatives dealers to deal in them.<sup>103</sup> Based on this specific concern, the commenter requested a permanent exemption for all security-based swaps with or for eligible contract participants from all provisions of Rule 15a–1.<sup>104</sup>

Because centrally cleared security-based swaps typically contain standardized terms, they might be fungible instruments standardized as to their material economic terms and thus might not qualify as eligible OTC derivatives instruments. Though not raised in the commenter's request, the same also is true of security-based swaps that are eligible for central clearing even if they are not in fact centrally cleared. As a result, dealing in these types of security-based swaps could eliminate a market participant's OTC derivatives dealer status and require full registration as a dealer, even if that security-based swap dealing is with an eligible contract participant and thus excluded from the statutory definition of "dealer."<sup>105</sup> Because

Exchange Act Section 3(a)(5) excludes security-based swap dealing with or for an eligible contract participant from the definition of "dealer," the Commission believes that this same dealing activity should not cause an OTC derivatives dealer to lose its eligibility for Rule 15a–1's exemption from full dealer registration. Such a result could be avoided if eligible OTC derivative instruments included security-based swaps with or for an eligible contract participant whose terms are standardized to be eligible for central clearing. Because including these security-based swaps within the scope of eligible OTC derivative instruments would address the commenter's concern about OTC derivatives dealers' ability to deal in centrally cleared security-based swaps (and also allows OTC derivatives dealers to deal in security-based swaps whose terms are standardized to be eligible for central clearing but that are not in fact centrally cleared), the Commission does not believe that an exemption for these security-based swaps from all provisions of Rule 15a–1 is necessary. Accordingly, pursuant to its authority under Exchange Act Section 15(a)(2) and Exchange Act Rule 15a–1(b)(2), the Commission finds that it is consistent with the public interest and the protection of investors to determine that security-based swaps with or for an eligible contract participant whose terms are standardized to be eligible for central clearing are within the scope of an "eligible OTC derivative instrument" as defined in Rule 3b–13(b)(2).

Second, Rule 15a–1(c) generally requires that all securities transactions of an OTC derivatives dealer, including OTC derivatives transactions, be effected through a full-purpose broker or dealer or full-purpose broker or dealer affiliate.<sup>106</sup> Further, Rule 15a–1(d) requires OTC derivatives dealers to conduct certain customer-facing contacts through registered representatives of a full-purpose broker or full-purpose broker or dealer affiliate. These requirements do not apply to transactions with a registered broker or dealer, a bank acting in a dealer capacity, a foreign broker or dealer, or any affiliate of the OTC derivatives dealer.<sup>107</sup> The commenter requested that

<sup>99</sup> See Security Futures Release, 67 FR at 43246. An extension of credit could be part of a transaction involving a security future.

<sup>100</sup> The Commissions noted that, depending on the facts and circumstances, a loan participation may be a security but not a "security-based swap," the definition of which excludes certain agreements, contracts and transactions that provide for the purchase or sale of 1 or more securities on a fixed or contingent basis and that are subject to the Securities Act of 1933 and the Exchange Act. See Product Definitions Adopting Release, 77 FR at 48251; Exchange Act Section 3(a)(68)(A)(i) (a security-based swap must be a "swap" as defined in certain provisions of Section 1a of the Commodity Exchange Act); Commodity Exchange Act Section 1a(47)(B)(v)–(vi) (exclusion of these agreements, contracts and transactions from the definition of "swap"). Alternatively, a loan participation could be a security-based swap if the grantor of the loan participation extends financing to the participant. See Product Definitions Adopting Release, 77 FR at 48251. This "leverage could be indicative of an instrument that is merely an exchange of payments and not a transfer of the ownership of the underlying loan or commitment, such as may be the case with a . . . security-based swap." Product Definitions Adopting Release, 77 FR at 48251. An extension of financing could be part of a transaction classified as a security-based swap.

<sup>100</sup> 17 CFR 240.15Fh–3(f).

<sup>101</sup> 17 CFR 240.15Fh–3(b).

<sup>102</sup> See Exchange Act Rule 3b–13(b)(2), 17 CFR 240.3b–13(b)(2).

<sup>103</sup> See SIFMA September 2020 Letter at 7; SIFMA January 2020 Letter at 4–5. In earlier requests, the commenter also noted that "some [security-based swaps] might, in the future, be listed or traded on an exchange." See SIFMA December 2018 Letter at 6–7; SIFMA November 2018 Letter at 4. Because eligible OTC derivatives also exclude any contract, agreement or transaction that is listed or traded on a national securities exchange or registered national securities association or facility or market thereof, in earlier letters the commenter also requested an exemption from Rule 15a–1 to allow OTC derivatives dealers to deal in those instruments. See Exchange Act Rule 3b13(b)(2); SIFMA December 2018 Letter at 6–7; SIFMA November 2018 Letter at 4. The Commission is not providing an exemption or guidance regarding the application of Rule 15a–1 to those security-based swaps because at this time no security-based swap is listed or traded on a national securities exchange or registered national securities association or facility or market thereof. If a security-based swap becomes so listed or traded in the future, the Commission would consider a request for exemption from or guidance regarding Rule 15a–1 for those instruments based on the facts and circumstances at that time.

<sup>104</sup> See SIFMA January 2020 Letter at 4–5.

<sup>105</sup> See Exchange Act Rule 15a–1(a)(1)(i) (securities activities of an OTC derivatives dealer must be limited, in relevant part, to engaging in dealer activities in eligible OTC derivatives

instruments that are securities). Rule 15a–1's requirement that OTC derivatives dealers limit their securities dealing to eligible OTC derivatives instruments does not contain an exception for security-based swaps with an eligible contract participant that are not eligible OTC derivatives instruments.

<sup>106</sup> See Exchange Act Rule 15a–1(c).

<sup>107</sup> See Exchange Act Rule 15a–1(c)–(d).

the Commission exempt OTC derivatives dealers from the requirement in Rule 15a-1(d) because standalone and bank-affiliated SBS Entities are not required to employ registered representatives for customer-facing SBS transactions.<sup>108</sup> The commenter also requested a permanent exemption for all security-based swaps with or for eligible contract participants from all provisions of Rule 15a-1.<sup>109</sup>

SBS Entities are subject to the Title VII regulatory framework, while standalone OTC derivatives dealers are not. The Commission thus does not believe that it is necessary or appropriate to exempt standalone OTC derivatives dealers from Rule 15a-1 simply because its requirements do not apply to other market participants that are subject to a separate, comprehensive regulatory framework. By contrast, however, a dually-registered OTC derivatives dealer and SBS Entity would be subject to the Title VII regulatory framework in relation to its security-based swap transactions. Such a dually-registered entity could find that Rule 15a-1 requires it either to effect security-based swap transactions through a registered broker or dealer (in the case of Rule 15a-1(c)) or utilize registered representatives for certain customer-facing security-based swap transactions (in the case of Rule 15a-1(d)), on the one hand, or to register as a full-purpose dealer, on the other hand, even if the security-based swap is with or for an eligible contract participant and thus excluded from the definition of “dealer.” To avoid this result, the Commission believes that a dually-registered OTC derivatives dealer and SBS Entity’s security-based swap transactions with or for an eligible contract participant, and its communications and contacts with an eligible contract participant concerning a security-based swap transaction, should be exempt from Rules 15a-1(c) and (d), respectively.

Accordingly, pursuant to its authority under Exchange Act Section 15(a)(2), the Commission finds that it is consistent with the public interest and the protection of investors to exempt a registered OTC derivatives dealer that is also a registered SBS Entity from Rule 15a-1(c) solely in connection with security-based swap transactions with or for an eligible contract participant, and from Rule 15a-1(d) solely in connection with communications and contacts with an eligible contract participant concerning a security-based swap transaction.

Third, the commenter asked the Commission to extend the Unlinked Temporary Exemptions from Rule 15a-1 until the compliance date for the Commission’s SBS Entity registration requirements,<sup>110</sup> which is October 6, 2021.<sup>111</sup> The current Unlinked Temporary Exemptions from Rule 15a-1 are set to expire on November 5, 2020.<sup>112</sup>

As discussed above, the Commission is exempting a registered OTC derivatives dealer that is also a registered SBS Entity from Rules 15a-1(c) and (d) for certain security-based swap-related communications and contacts. OTC derivatives dealers will not, however, begin counting transactions towards the SBS Entity registration thresholds until August 6, 2021. The Commission believes that requiring OTC derivatives dealers to implement policies, procedures and controls to comply with Rules 15a-1(c) and (d) for the short period until they begin to register as SBS Entities potentially could impose undue cost and resource burdens and cause unnecessary market disruption. Rather, extending the Unlinked Temporary Exemptions from Rule 15a-1(c) and (d) until October 6, 2021, would allow market participants to implement policies, procedures and controls that take into account this new limited exemptive relief from Rule 15a-1(c) and (d) at the time when that relief can be utilized. Accordingly, pursuant to its authority under Exchange Act Section 36, the Commission finds that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to extend the Unlinked Temporary Exemptions from Rules 15a-1(c) and (d) until October 6, 2021. This limited temporary exemption addresses the commenter’s concern about OTC derivatives dealers’ ability to conduct customer-facing contacts without a registered representative until they can begin to register as SBS Entities.

#### 7. Exchange Act Section 29(b)

Exchange Act Section 29(b)<sup>113</sup> generally provides that contracts made in violation of any provision of the Exchange Act or the rules or regulations thereunder shall be void “(1) as regards the rights of any person who, in violation of any such provision . . . shall have made or engaged in the performance of any such contract, and

(2) as regards the rights of any person who, not being a party to such contracts, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contracts in violation of any such provision.” In 2011, the Commission provided temporary exemptive relief from Section 29(b) in connection with the temporary exemptions that include the Linked Temporary Exemptions and Unlinked Temporary Exemptions discussed in this Order. By its terms, that exemption from Section 29(b) will expire on November 5, 2020 (for the Unlinked Temporary Exemptions discussed but not extended in this Order) or October 6, 2021 (for the remaining Linked Temporary Exemptions and Unlinked Temporary Exemptions discussed in this Order).<sup>114</sup> The Commission made clear that it did not believe that Section 29(b) would apply to provisions subject to those temporary exemptions, and that it provided the exemption from Section 29(b) only to make that view clear to market participants and “to eliminate any possible legal uncertainty or market disruption.”<sup>115</sup> Likewise, the Commission believes that Section 29(b) would not apply to circumstances in which a market participant complies with the permanent exemptive relief provided in this Order, and therefore, for the reasons discussed above, is not providing further exemptive relief from Section 29(b).

#### II. Exemption in Connection With Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants

Also in 2011, the Commission issued an order providing separate temporary exemptive relief from Section 29(b) in connection with the portion of the Dodd-Frank Act’s security-based swap-related amendments to the Exchange Act for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission provided an exception or exemptive relief.<sup>116</sup> By its terms, most of

<sup>114</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39940 (Section 29(b) exemptive relief in connection with temporary exemptive relief from other Exchange Act provisions expires at “such time as the underlying exemptive relief expires”).

<sup>115</sup> See 2011 Exchange Act Exemptive Order, 76 FR at 39926.

<sup>116</sup> 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 Security-Based Swaps, Exchange Act Release No. 64678 (Jun. 15, 2011), 76 FR 36287, 36307 (“2011 Compliance Date Order”).

<sup>108</sup> See SIFMA January 2020 Letter at 5.

<sup>109</sup> See SIFMA January 2020 Letter at 4–5.

<sup>110</sup> See SIFMA December 2020 Letter at 6.

<sup>111</sup> See Cross-Border Adopting Release, 85 FR at 6345.

<sup>112</sup> See January 2020 Extension Order, 85 FR at 2766.

<sup>113</sup> 15 U.S.C. 78cc(b).

this exemptive relief expires on such date as the Commission specifies.<sup>117</sup>

The Commission made clear then that it did not believe that Section 29(b) would apply to the Dodd-Frank Act's security-based swap-related amendments to the Exchange Act for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission provided an exception or exemptive relief, and that it provided the exemption from Section 29(b) only "to avoid possible legal uncertainty or market disruption."<sup>118</sup> The Commission granted this temporary exemptive relief, however, "to avoid possible legal uncertainty or market disruption."<sup>119</sup> The Commission believes now, more than nine years after the relevant amendments to the Dodd-Frank Act took effect, that the opportunity for possible legal uncertainty or market disruption related to the effective date of these amendments has passed. To provide market participants with certainty about when this separate temporary exemptive relief from Section 29(b) will expire, the Commission now believes that all of this exemptive relief from Section 29(b) should expire on the same date. Because some of this relief is

already scheduled to expire on the compliance date for rules regarding registration and regulation of SBS Entities,<sup>120</sup> which will be October 6, 2021, the Commission thus believes that it is appropriate for all of this Section 29(b) relief to expire on that date. Accordingly, the Commission has determined that this exemption from Section 29(b) shall expire on October 6, 2021.

### III. Conclusion

*It is hereby ordered*, pursuant to Section 15(a)(2) of the Exchange Act, that a "foreign broker or dealer," as such term is defined in Rule 15a-6(b)(3) under the Exchange Act, whose activities in securities other than security-based swaps with or for an eligible contract participant are conducted either in compliance with Rule 15a-6 under the Exchange Act or without the jurisdiction of the United States, shall be exempt from the registration requirement of Section 15(a)(1) of the Exchange Act solely in connection with the foreign broker or dealer's security-based swap dealing with or for an eligible contract participant.

*It is hereby ordered*, pursuant to Section 15(a)(2) of the Exchange Act, that until November 1, 2022, a registered security-based swap dealer and its associated persons shall be exempt from the broker registration requirement of Section 15(a)(1) of the Exchange Act solely in connection with such registered security-based swap dealer or associated person arranging, negotiating or executing a security-based swap transaction with or for a non-U.S. person eligible contract participant on behalf of a non-U.S. person qualified majority-owned affiliate; provided that (A) such registered security-based swap dealer creates and maintains books and records relating to such arranging, negotiating or executing activity that are required by Rules 18a-5 and 18a-6 under the Exchange Act and (B) if Rule 10b-10 under the Exchange Act would apply to such arranging, negotiating or executing activity, such registered security-based swap dealer provides to the customer the disclosures required by Rule 10b-10(a)(2) (excluding Rule 10b-10(a)(2)(i) and (ii)) and Rule 10b-10(a)(8) in accordance with the time and form requirements set forth in Rule 15Fi-2(b) and (c) under the Exchange Act or, alternatively, promptly after discovery of any defect in such registered security-based swap dealer's good faith effort to

comply with such requirements. For purposes of this exemption, the term "qualified majority-owned affiliate" means a majority-owned affiliate (as such term is defined in Rule 3a71-3(a)(10) under the Exchange Act) of such registered security-based swap dealer that is itself also a registered security-based swap dealer.

*It is hereby further ordered*, pursuant to Section 36 of the Exchange Act, that a broker or dealer shall be exempt from the requirement to give or send to a customer the disclosures required by Rule 10b-10(a) under the Exchange Act at or before completion of the transaction solely in connection with such broker or dealer or its associated persons arranging, negotiating or executing a security-based swap transaction on behalf of a qualified majority-owned affiliate; provided that such broker or dealer gives or sends to the customer written notification containing the disclosures required by Rule 10b-10(a) under the Exchange Act in connection with such arranging, negotiating or executing in accordance with the time and form requirements for a trade acknowledgment set forth in Rule 15Fi-2(b) and (c) under the Exchange Act and, as applicable, Rule 10b-10(c) under the Exchange Act. For purposes of this exemption, the term "qualified majority-owned affiliate" means a majority-owned affiliate (as such term is defined in Rule 3a71-3(a)(10) under the Exchange Act) of such broker or dealer that is a registered security-based swap dealer.

*It is hereby further ordered*, pursuant to Section 36 of the Exchange Act, that brokers and dealers are exempt from the requirements of Rules 8c-1 and 15c2-1 under the Exchange Act with respect to securities and money market instruments carried in a security-based swap account of a security-based swap customer; provided the account does not hold "margin securities" as defined in Rule 15c3-3 under the Exchange Act.

*It is hereby further ordered*, pursuant to Section 15(a)(2) of the Exchange Act and Rule 15a-1(b)(2) under the Exchange Act, that a security-based swap with or for an eligible contract participant whose terms are standardized to make the security-based swap eligible for central clearing shall be within the scope of an "eligible OTC derivative instrument" as defined in Rule 3b-13 under the Exchange Act.

*It is hereby further ordered*, pursuant to Section 15(a)(2) of the Exchange Act, that a registered OTC derivatives dealer also registered with the Commission as a security-based swap dealer or major security-based swap participant shall be exempt from Rule 15a-1(c) under the

<sup>117</sup> See 2011 Compliance Date Order, 76 FR at 36307. The Section 29(b) exemption related to exemptions from Exchange Act Sections 3E(f) and 15F(b)(6) provided in the 2011 Compliance Date Order expire on the compliance date for rules governing the registration of SBS Entities, which will be October 6, 2021. See Order Pursuant to Sections 15F(b)(6) and 36 of the Securities Exchange Act of 1934 Extending Certain Temporary Exemptions and a Temporary and Limited Exception Related to Security-Based Swaps, Exchange Act Release No. 75919 (Sep. 15, 2015), 80 FR 56519 (Sep. 18, 2015). The exemption from Exchange Act Section 6(l) provided in the 2011 Compliance Date Order expired 60 days after the August 13, 2012, publication of the Product Definitions Adopting Release in the **Federal Register**. See Order Extending Temporary Conditional Exemption in Connection with the Effectiveness of the Definition of Eligible Contract Participant, Exchange Act Release No. 67480 (Jul. 20, 2012), 77 FR 43878, 43879 (Jul. 26, 2012). In a later release, the Commission implied that the 2011 Compliance Date Order had specified that the Section 29(b) exemption related to this exemption from Section 6(l) would expire at the same time as the exemption from Section 6(l). See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596, 30700 n.1248 (May 23, 2012). Rather, the 2011 Compliance Date Order specified that this Section 29(b) exemption would expire on such date as the Commission specifies. See 2011 Compliance Date Order, 76 FR at 36307. Market participants thus may be uncertain whether this portion of the 29(b) exemption has expired.

<sup>118</sup> See 2011 Compliance Date Order, 76 FR at 36305.

<sup>119</sup> See *id.*

<sup>120</sup> See Cross-Border Adopting Release, 85 FR at 6345.

Exchange Act solely in connection with security-based swap transactions with or for an eligible contract participant and Rule 15a-1(d) under the Exchange Act solely in connection with communications and contacts with an eligible contract participant concerning a security-based swap transaction.

*It is hereby further ordered*, pursuant to Section 36 of the Exchange Act, that the Unlinked Temporary Exemptions from Section 8 of the Exchange Act and from Rules 8c-1, 15c2-1, 15a-1(c) and 15a-1(d) under the Exchange Act in connection with the revision of the Exchange Act definition of “security” to encompass security-based swaps, in each case contained in the 2011 Exchange Act Exemptive Order and extended in the January 2020 Extension Order, are extended until October 6, 2021.

*It is hereby further ordered*, pursuant to Section 36 of the Exchange Act, that the exemption from Section 29(b) of the Exchange Act contained in the 2011 Compliance Date Order shall expire on October 6, 2021.

By the Commission.

**Vanessa A. Countryman**,  
Secretary.

[FR Doc. 2020-24598 Filed 11-4-20; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting; Cancellation

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 85 FR 69375, November 2, 2020.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Wednesday, November 2, 2020 at 2 p.m.

**CHANGES IN THE MEETING:** The Open Meeting scheduled for Wednesday, November 4, 2020 at 2 p.m., has been cancelled.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

Dated: November 2, 2020.

**Vanessa A. Countryman**,  
Secretary.

[FR Doc. 2020-24665 Filed 11-3-20; 11:15 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90292; File No. SR-CboeBZX-2020-070]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To List and Trade Shares of the -1x Short VIX Futures ETF, a Series of VS Trust, Under BZX Rule 14.11(f)(4) (Trust Issued Receipts)

October 30, 2020.

On September 4, 2020, Cboe BZX Exchange, Inc. (“BZX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares of the -1x Short VIX Futures ETF, a series of VS Trust, under BZX Rule 14.11(f)(4) (Trust Issued Receipts). The proposed rule change was published for comment in the **Federal Register** on September 23, 2020.<sup>3</sup> The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act<sup>4</sup> provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is November 7, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> designates December 22, 2020 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed

rule change (File No. SR-CboeBZX-2020-070).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**Jill M. Peterson**,

Assistant Secretary.

[FR Doc. 2020-24501 Filed 11-4-20; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90288; File No. SR-CboeBYX-2020-021]

### Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 2, To Introduce Periodic Auctions for the Trading of U.S. Equity Securities

October 30, 2020.

On July 17, 2020, Cboe BYX Exchange, Inc. (“Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to introduce periodic auctions in U.S. equity securities. The proposed rule change was published for comment in the **Federal Register** on August 4, 2020.<sup>3</sup>

On September 10, 2020, pursuant to Section 19(b)(2) of the Exchange Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> On October 27, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, and on October 28, 2020 the Exchange filed Amendment No. 2 to the proposed rule change, which replaced in its entirety the proposed rule change as modified by Amendment No. 1.<sup>6</sup> The

<sup>1</sup> 17 CFR 200.30-3(a)(31).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 89424 (July 29, 2020), 85 FR 47262 (“Notice”).

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 89820, 85 FR 57891 (September 16, 2020). The Commission designated November 2, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>7</sup> Comments on the proposal, including Amendments No. 1 and No. 2, can be found on the Commission’s website at: <https://www.sec.gov/>

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 89901 (September 17, 2020), 85 FR 59836.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> *Id.*