

**SECURITIES AND EXCHANGE COMMISSION**

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

**Release Nos. 33-9232; 34-64800; 39-2476; File No. S7-02-09**

**RIN 3235-AK26**

**EXTENSION OF TEMPORARY EXEMPTIONS FOR ELIGIBLE CREDIT DEFAULT SWAPS TO FACILITATE OPERATION OF CENTRAL COUNTERPARTIES TO CLEAR AND SETTLE CREDIT DEFAULT SWAPS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final temporary rules; extension.

**SUMMARY:** We are extending the expiration dates in our temporary rules that provide exemptions under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Trust Indenture Act of 1939 for certain credit default swaps in order to continue facilitating the operation of one or more central counterparties for those credit default swaps as we consider rules implementing the clearing provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

**DATES:** Effective Date: These amendments are effective [insert date of publication in the Federal Register], and the expiration dates in the temporary rules and amendments published January 22, 2009 (74 FR 3967), extended in a release published on September 17, 2009 (74 FR 47719), and further extended in a release published on November 26, 2010 (75 FR 72660), are further extended from July 16, 2011 to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Andrew Schoeffler, Special Counsel, Office of Capital Market Trends, Division of Corporation Finance, at (202) 551-3860, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We are adopting amendments to the following rules: temporary Rule 239T and Rule 146 under the Securities Act of 1933 (“Securities Act”),<sup>1</sup> temporary Rule 12a-10T and Rule 12h-1(h)T under the Securities Exchange Act of 1934 (“Exchange Act”),<sup>2</sup> and temporary Rule 4d-11T under the Trust Indenture Act of 1939 (“TIA”).<sup>3</sup>

## **I. BACKGROUND**

In January 2009, we adopted interim final temporary Rule 239T and a temporary amendment to Rule 146 under the Securities Act, interim final temporary Rules 12a-10T and 12h-1(h)T under the Exchange Act, and interim final temporary Rule 4d-11T under the TIA (collectively, the “Temporary Rules”), and in September 2009, we extended the expiration dates in these rules from September 25, 2009 to November 30, 2010 and in November 2010, we further extended the expiration dates in these rules to July 16, 2011.<sup>4</sup> We adopted these rules in connection with temporary exemptive orders<sup>5</sup> we issued to clearing agencies acting as central

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

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

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

<sup>4</sup> See Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-8999 (Jan. 14, 2009), 74 FR 3967 (Jan. 22, 2009) (the “Temporary CDS Exemptions Release”); Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009); and Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9158 (Nov. 19, 2010), 75 FR 72660 (Nov. 26, 2010).

<sup>5</sup> See Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of ICE Clear Europe Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-60372 (Jul. 23, 2009), 74 FR 37748 (Jul. 29, 2009), Order

counterparties (“CCP”), which exempted the CCPs from the requirement to register as clearing agencies under Section 17A of the Exchange Act<sup>6</sup> solely to perform the functions of a clearing agency for certain credit default swap (“CDS”) transactions. The CCP exemptive orders also

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Extending Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE Clear Europe, Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of ICE Clear Europe, Limited Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010); Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-60373 (Jul. 23, 2009), 74 FR 37740 (Jul. 29, 2009), Order Extending and Modifying Temporary Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of Eurex Clearing AG Related to Central Clearing of Credit Default Swaps, and Request for Comment, Release No. 34-61975 (Apr. 23, 2010), 75 FR 22641 (Apr. 29, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request on Behalf of Eurex Clearing, AG Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63390 (Nov. 29, 2010), 75 FR 75518 (Dec. 3, 2010); Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. and Citadel Investment Group, L.L.C. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-59578 (Mar. 13, 2009), 74 FR 11781 (Mar. 19, 2009), Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61164 (Dec. 14, 2009), 74 FR 67258 (Dec. 18, 2009), Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61803 (Mar. 30, 2010), 75 FR 17181 (Apr. 5, 2010), and Order Extending Temporary Conditional Exemptions under the Securities Exchange Act of 1934 in Connection with Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63388 (Nov. 29, 2010), 75 FR 75522 (Dec. 3, 2010); Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE US Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-59527 (Mar. 6, 2009), 74 FR 10791 (Mar. 12, 2009), Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request from ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61119 (Dec. 4, 2009), 74 FR 65554 (Dec. 10, 2009); Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, Release No. 34-61662 (Mar. 5, 2010), 75 FR 11589 (Mar. 11, 2010), and Order Extending and Modifying Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps and Request for Comment, Release No. 34-63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010); and Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of LIFFE Administration and Management and LCH.Clearnet Ltd. Related to Central Clearing Of Credit Default Swaps, and Request for Comments, Release No. 34-59164 (Dec. 24, 2008), 74 FR 139 (Jan. 2, 2009). LIFFE A&M and LCH.Clearnet Ltd. allowed their order to lapse without seeking renewal.

<sup>6</sup> 15 U.S.C. 78q-1.

exempted certain eligible contract participants<sup>7</sup> and others from certain Exchange Act requirements with respect to certain CDS.<sup>8</sup> Also at that time, we temporarily exempted any exchange that effects transactions in certain CDS from the requirements under Sections 5 and 6 of the Exchange Act<sup>9</sup> to register as a national securities exchange, and any broker or dealer that effects transactions on an exchange in certain CDS from the requirements of Section 5 of the Exchange Act.

We adopted the Temporary Rules and the CCP exemptive orders to help foster the prompt development of CCPs for CDS because we believed and continue to believe that the existence of CCPs for CDS would be important in helping to reduce counterparty risks inherent in the CDS market. Today, CDS agreements generally are negotiated and entered into bilaterally, but eligible trades may be submitted to the CCP for novation, which results in the bilateral contract being extinguished and replaced by two new contracts where the CCP is the buyer to the original seller and the seller to the original buyer.<sup>10</sup> The operation of a well-regulated CCP can significantly reduce counterparty risks by preventing the failure of a single-market participant from having a disproportionate effect on the overall market, since bilateral counterparty risk is eliminated as the creditworthiness of the original counterparties is replaced by the creditworthiness of the CCP.

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<sup>7</sup> See 7 U.S.C. 1a(12).

<sup>8</sup> See generally the actions noted in footnote 5, supra.

<sup>9</sup> 15 U.S.C. 78e and 78f.

<sup>10</sup> “Novation” is a “process through which the original obligation between a buyer and seller is discharged through the substitution of the CCP as seller to buyer and buyer to seller, creating two new contracts.” Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissioners, Recommendations for Central Counterparties (Nov. 2004) at 66.

At the time of the adoption of the Temporary Rules and the CCP exemptive orders, the OTC market for CDS was a source of concern to us and other financial regulators due to the systemic risk posed by CDS, the possible inability of parties to meet their obligations as counterparties under the CDS, and the potential resulting adverse effects on other markets and the financial system.<sup>11</sup> In response, in January 2009, we took action to help foster the prompt development of CCPs for CDS, including granting conditional exemptions from certain provisions of the federal securities laws. Since the adoption of the Temporary Rules and the CCP exemptive orders, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in accordance with our exemptions.

We subsequently extended the expiration dates in the Temporary Rules from September 30, 2009 to November 30, 2010<sup>12</sup> and then from November 30, 2010 to July 16, 2011.<sup>13</sup> The latter extension was adopted to enable the CCPs to continue to clear eligible CDS in accordance with the Temporary Rules and the CCP exemptive orders pending implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”).<sup>14</sup> Title VII of the Dodd-Frank Act (“Title VII”) is intended to address regulatory gaps in the existing regulatory

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<sup>11</sup> In addition to the potential systemic risks that CDS pose to financial stability, we were concerned about other potential risks in this market, including operational risks, risks relating to manipulation and fraud, and regulatory arbitrage risks.

<sup>12</sup> See Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9063 (Sep. 14, 2009), 74 FR 47719 (Sep. 17, 2009). In September 2009, we extended the expiration dates in the Temporary Rules to November 30, 2010 because, among other reasons, a number of legislative initiatives relating to the regulation of derivatives, including CDS, had been introduced by members of Congress and recommended by the United States Department of the Treasury (“Treasury”), and Congress had not yet taken definitive action with respect to any of the legislative initiatives or the Treasury proposals.

<sup>13</sup> See Extension of Temporary Exemptions for Eligible Credit Default Swaps to Facilitate Operation of Central Counterparties to Clear and Settle Credit Default Swaps, Release No. 33-9158 (Nov. 19, 2010), 75 FR 72660 (Nov. 26, 2010).

<sup>14</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

structure for the over-the-counter (“OTC”) derivatives markets by providing the Commission and the Commodity Futures Trading Commission (“CFTC”) with the authority to regulate OTC derivatives. The primary goals of Title VII, among others, are to increase the transparency, efficiency and fairness of the OTC derivatives markets, improve investor protection and to reduce the potential for counterparty and systemic risk.<sup>15</sup> To this end, Title VII imposes a comprehensive regime for the regulation of “swaps” and “security-based swaps” (as those terms are defined in Title VII), including the clearing, exchange trading, and reporting of transactions in security-based swaps.<sup>16</sup> Certain CDS are security-based swaps as defined under Title VII.

Title VII amends the Exchange Act to require, among other things, that security-based swaps be cleared through a clearing agency that is registered with the Commission or that is exempt from registration if the security-based swap is of a type that the Commission determines is required to be cleared, unless an exception from mandatory clearing applies.<sup>17</sup> Title VII also provides that a depository institution registered with the CFTC that cleared swaps as a multilateral clearing organization or a derivatives clearing organization registered with the CFTC that cleared swaps pursuant to an exemption from registration as a clearing agency prior to the date of enactment of the Dodd-Frank Act is deemed registered as a clearing agency for the purposes of clearing security-based swaps (the “Deemed Registered Provision”).<sup>18</sup> The Deemed

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<sup>15</sup> Id. at preamble.

<sup>16</sup> Section 761(a)(6) of the Dodd-Frank Act defines a “security-based swap” as any agreement, contract, or transaction that is a swap based on a narrow-based security index, a single security or loan, including any interest therein or on the value thereof; or the occurrence, nonoccurrence, or extent of the occurrence of an event relating to a single issuer of a security or the issuers of securities in a narrow-based security index, provided that such event directly affects the financial statements, financial condition, or financial obligations of the issuer.

<sup>17</sup> See Pub L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(a)(1)).

<sup>18</sup> See Pub L. No. 111-203, § 763(b) (adding Exchange Act Section 17A(l)). Section 763(b) of the Dodd-Frank Act provides that certain security-based swap clearing agencies will be deemed registered as clearing agencies for the purpose of clearing security-based swaps. Currently, four security-based swap clearing

Registered Provision and the other general provisions of Title VII become effective on July 16, 2011.<sup>19</sup>

The Dodd-Frank Act also directs us to adopt regulations regarding, among other things clearing agencies for, and the clearing of, security-based swaps, which include CDS. Under Title VII, all security-based swaps, including certain types of CDS, are defined as securities under the Securities Act and the Exchange Act. As part of our review of the applications of the Securities Act, the Exchange Act and the TIA to security-based swaps and the implications for the clearing and exchange trading provisions of the Dodd-Frank Act and our rules implementing them, we are evaluating the necessity and appropriateness of exemptions from the registration requirements of the Securities Act and Exchange Act and the indenture qualification provisions of the TIA for security-based swaps that will be cleared by clearing agencies. To this end, we have proposed exemptions under the Securities Act, the Exchange Act, and the TIA for security-based swaps issued by certain clearing agencies satisfying certain conditions.<sup>20</sup> The Temporary Rules are an interim measure pending final action on the proposed permanent exemptions. However, the Temporary Rules are needed upon the effective date of Title VII to continue

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agencies have temporary conditional exemptions from clearing agency registration under Section 17A solely to perform the functions of a clearing agency for certain CDS, and three of these security-based swap clearing agencies will be subject the Deemed Registered Provision. While the Deemed Registered Provision eliminates the need to extend our temporary exemptive orders relating to registration of clearing agencies, it does not resolve other issues addressed by our temporary exemptive orders relating to Sections 5 and 6 of the Exchange Act.

<sup>19</sup> Pub L. No. 111-203, § 774 states “[u]nless otherwise provided, the provisions of this subtitle shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.”

<sup>20</sup> See Exemptions For Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9222 (June 9, 2011), 76 FR 34920 (June 15, 2011). The permanent exemptions would exempt transactions by clearing agencies in security-based swaps from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provisions, as well as exempt these security-based swaps from Exchange Act registration requirements and from the provisions of the TIA, provided certain conditions are met.

facilitating the operation of the CCPs in clearing eligible CDS as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions.

The implementation of Title VII is a substantial undertaking and we are working toward fulfilling its requirements in a thorough and deliberative manner that includes significant public input and coordination with other regulators. To date, we have adopted an interim final rule regarding the reporting of outstanding security-based swaps entered into prior to the date of enactment of the Dodd-Frank Act<sup>21</sup> and proposed thirteen other rulemakings required by Title VII, including the permanent exemptions noted above,<sup>22</sup> rules regarding standards for the operation and governance of clearing agencies,<sup>23</sup> the obligations of security-based swap data repositories,<sup>24</sup> the registration and regulation of security-based swap execution facilities,<sup>25</sup> the confirmation of security-based swap transactions,<sup>26</sup> trade reporting, data elements, and public dissemination of trade information for security-based swaps,<sup>27</sup> the exception to the mandatory clearing requirement for end users,<sup>28</sup> the mandatory clearing of security-based swaps,<sup>29</sup>

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<sup>21</sup> See Reporting of Security-Based Swap Transaction Data, Release No. 34-63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010).

<sup>22</sup> See footnote 20, *supra*.

<sup>23</sup> See Clearing Agency Standards for Operation and Governance, Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011).

<sup>24</sup> See Security-Based Swap Data Repository Registration, Duties, and Core Principles, Release No. 34-63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010).

<sup>25</sup> See Registration and Regulation of Security-Based Swap Execution Facilities, Release No. 34-63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011).

<sup>26</sup> See Trade Acknowledgment and Verification of Security-Based Swap Transactions, Release No. 34-63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011).

<sup>27</sup> See Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, Release No. 34-63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010).

<sup>28</sup> See End-User Exception to Mandatory Clearing of Security-Based Swaps, Release No. 34-63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010).



definitions and interpretive guidance for key terms in Title VII,<sup>30</sup> and the mitigation of conflicts of interest involving security-based swaps.<sup>31</sup> We have also proposed anti-fraud and anti-manipulation rules regarding security-based swaps.<sup>32</sup> Title VII also calls for additional rulemakings regarding the registration procedures and external business conduct standards for security-based swap dealers and major security-based swap participants.

At the time of adoption of the Temporary Rules in January 2009, we requested comment on various aspects of the Temporary Rules. We received a total of 15 letters, only two of which commented specifically on the Temporary Rules.<sup>33</sup> Although those two letters generally supported allowing CCPs to clear and settle CDS transactions in accordance with the terms of the Temporary Rules, neither of the commenters specifically addressed the duration of the Temporary Rules and temporary amendments.<sup>34</sup> The other commenters raised issues not directly

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<sup>29</sup> See Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-63557 (Dec. 15, 2010), 75 FR 82490 (Dec. 30, 2010).

<sup>30</sup> See Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”, Release No. 34-63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010); and Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Release No. 33-9204 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011), corrected in Release No. 33-9204A (June 1, 2011), 76 FR 32880 (June 7, 2011).

<sup>31</sup> See Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges with Respect to Security-Based Swaps under Regulation MC, Release No. 34-63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010).

<sup>32</sup> See Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Release No. 34-63236 (Nov. 3, 2010), 75 FR 68560 (Nov. 8, 2010).

<sup>33</sup> The public comments we received are available for website viewing and printing at the Commission’s Public Reference Room at 100 F St. N.E., Washington, DC 20549 in File No. S7-02-09. They are also available online at <http://www.sec.gov/comments/s7-02-09/s70209.shtml>.

<sup>34</sup> See letters from the Yale Law School Capital Markets and Financial Instruments Clinic (Mar. 23, 2009) and from IDX Capital (Mar. 23, 2009).

related to this rulemaking. No comments have been submitted to us regarding the Temporary Rules since that time.

Throughout the entire Title VII implementation process, we have sought to engage in an open and transparent implementation process, seeking input on the various rulemakings from interested parties even before issuing formal rule proposals. We have enhanced our public consultative process by expanding the opportunity for public comment beyond what is required by law. For instance, we have made available to the public a series of e-mail boxes to which interested parties can send preliminary comments before rules are proposed and the official comment periods begin.<sup>35</sup> These e-mail boxes are on the Commission's website, organized by topic. We also specifically solicited comment, along with the CFTC, on the definitions contained in Title VII.<sup>36</sup> In addition, our staff has sought the views of affected parties. This approach has resulted in meetings with a broad cross-section of interested parties. To further this public outreach effort, our staff has held joint public roundtables and hearings with the CFTC staff on select key topics, including most recently discussing the schedule for implementing final rules for swaps and security-based swaps under Title VII.<sup>37</sup>

We are still in the process of proposing and adopting numerous rulemakings relating to the implementation of Title VII, including the provisions relating to the clearing of security-

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<sup>35</sup> See Public Comments on SEC Regulatory Initiatives Under the Dodd-Frank Act, available at <http://www.sec.gov/spotlight/regreformcomments.shtml>.

<sup>36</sup> See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Release No. 34-62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (advance joint notice of proposed rulemaking regarding definitions).

<sup>37</sup> Roundtable on Clearing and Listing of Swaps and Security-Based Swaps (Aug. 20, 2010); Roundtable on Swap and Security-Based Swap Matters (Sep. 14-15, 2010); Roundtable to Discuss Issues Related to Clearing of Credit Default Swaps (Oct. 22, 2010); Roundtable to Discuss Issues Related to Capital and Margin for Swaps and Security-Based Swaps (Dec. 10, 2010); and Roundtable on Implementation Phasing for Final Rules for Swaps and Security-Based Swaps Under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (May 2-3, 2011).

based swaps. While we have taken significant steps to implement the rulemaking required by Title VII, we do not expect to complete the rulemaking we are directed to carry out under Title VII before July 16, 2011, the current termination date for the Temporary Rules. Due to the uncertainty of the timing regarding the adoption of final rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions, we believe that it is important that the CCPs continue to be able to clear eligible CDS without concern that the Temporary Rules are unavailable. As such, we have determined that it is necessary and appropriate to extend the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

We are only extending the expiration dates in the Temporary Rules; we are not making any other changes to the Temporary Rules. The Temporary Rules were modeled on other exemptions we have provided in the past to facilitate trading in certain securities.<sup>38</sup> They are limited in scope; in general, they facilitate the operation of the CCPs in clearing eligible CDS.

## **II. AMENDMENT OF EXPIRATION DATES IN THE TEMPORARY RULES**

In January 2009, we adopted the Temporary Rules on a temporary basis until September 25, 2009. We subsequently extended the expiration dates in the Temporary Rules to November 30, 2010 and we further extended the expiration dates to July 16, 2011 to allow CCPs that were clearing and settling CDS transactions in the U.S. and in Europe to continue to clear and settle CDS transactions. Since the adoption of the Temporary Rules and the issuance of the CCP

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<sup>38</sup> See, e.g., Securities Act Section 3(a)(14) [15 U.S.C. 77c(a)(14)], Securities Act Rule 238 [17 CFR 230.238]; Exchange Act Section 12(a) [15 U.S.C. 78l(a)], and Exchange Act Rules 12h-1(d) and (e) [17 CFR 240.12h-1(d) and (e)] (providing similar exemptions from provisions of the federal securities laws for standardized options and securities futures products).

exemptive orders, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in reliance on our exemptions. We believe that the clearing of CDS transactions by these clearing agencies has contributed and we anticipate it will continue to contribute to increased transparency and the reduction of systemic risk in the CDS market.

Since the adoption of the Temporary Rules and issuance of the CCP exemptive orders, ICE Trust U.S. LLC (“ICE Trust”) and ICE Clear Europe, Ltd. (“ICE Clear Europe”) have been actively engaged as CCPs in clearing CDS transactions in reliance on our exemptions. Most cleared CDS transactions have cleared at ICE Trust or ICE Clear Europe.<sup>39</sup> However, Eurex Clearing AG and the Chicago Mercantile Exchange Inc. are also authorized to operate as CCPs pursuant to the CCP exemptive orders.<sup>40</sup> We believe that the clearing of CDS transactions by the CCPs subject to the CCP exemptive orders has contributed and we anticipate will continue to contribute to increased transparency and the reduction of systemic risk in the CDS market.

The extension of the Temporary Rules is designed to facilitate the continued operation of CCPs for eligible CDS, which we believe is in the public interest. Once we adopt final rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions, the Temporary Rules affecting solely eligible CDS will no longer be necessary. However, until such time, the Temporary Rules are needed to continue facilitating the operation of the CCPs in clearing eligible CDS without being required to comply with the registration requirements of the Securities Act and Exchange Act and the indenture qualification provisions of the TIA. Therefore, due to the limited time the Temporary Rules will be needed, and our

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<sup>39</sup> As of June 3, 2011, ICE Trust U.S. LLC has cleared 249,249 CDS transactions with a notional value of \$11.1 trillion. As of June 3, 2011, ICE Clear Europe, Ltd. has cleared 272,612 CDS transactions with a notional value of €5.5 trillion. See <https://www.theice.com/marketdata/reports/ReportCenter.shtml>.

<sup>40</sup> See footnote 5, *supra*.

ongoing efforts to implement the provisions of Title VII, we are extending the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

### **III. CERTAIN ADMINISTRATIVE LAW MATTERS**

Section 553(b) of the Administrative Procedure Act (“APA”)<sup>41</sup> generally requires an agency to publish notice of a proposed rule making in the Federal Register. This requirement does not apply, however, if the agency “for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>42</sup> For the reasons we discuss throughout this release, we believe that there is good cause to extend the expiration dates in the Temporary Rules to April 16, 2012. If the Commission adopts permanent exemptions for security-based swaps issued by certain clearing agencies before April 16, 2012, the Commission will terminate the effectiveness of the temporary rules as part of that rulemaking.

We sought comment on the Temporary Rules and as noted above, we received little comment when they were originally promulgated. In addition to the specific comments that we sought and received in connection with the Temporary Rules in January 2009, we have sought public input on implementing the provisions of Title VII, which requires extensive public notice and comment rulemaking regarding proposals that will supplant and subsume the exemptive rules we have crafted as a temporary measure.<sup>43</sup> Further, we have sought and will continue to

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<sup>41</sup> 5 U.S.C. 553(b).

<sup>42</sup> 5 U.S.C. 553(b)(B).

<sup>43</sup> See footnote 35, supra. None of these comments addressed the Temporary Rules.

seek public comment in connection with proposed rulemakings to implement the specific provisions of Title VII relating to the treatment of security-based swaps under the Securities Act and the Exchange Act, including any applicable permanent exemptions. Commenters have full opportunity to provide their views on this new comprehensive regulatory regime.

Absent an extension, the Temporary Rules will expire on July 16, 2011. The Temporary Rules have been in place since January 2009, and CCPs have relied on them in clearing eligible CDS. Extending the expiration dates in the Temporary Rules will not affect the substantive provisions of the Temporary Rules. Extending the expiration dates in the Temporary Rules will allow CCPs to continue to clear eligible CDS without compliance with the registration requirements of the Securities Act and Exchange Act and indenture qualification provisions of the TIA as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions. Therefore, we believe there is good cause to extend the expiration dates in the Temporary Rules and find that notice and solicitation of comment on the extension to be impracticable, unnecessary, or contrary to the public interest.<sup>44</sup>

The APA also generally requires that an agency publish an adopted rule in the Federal Register 30 days before it becomes effective.<sup>45</sup> However, this requirement does not apply if the agency finds good cause not to delay the effective date.<sup>46</sup> For reasons similar to those explained above, the Commission finds good cause not to delay the effective date.

#### **IV. PAPERWORK REDUCTION ACT**

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<sup>44</sup> This finding also satisfies the requirements of 5 U.S.C. 808(2), allowing the rule amendments to become effective notwithstanding the requirements of 5 U.S.C. 801 (if a federal agency finds that notice and public comment are “impractical, unnecessary or contrary to the public interest,” a rule “shall take effect at such time as the federal agency promulgating the rule determines.”).

<sup>45</sup> 5 U.S.C. 553(d).

<sup>46</sup> 5 U.S.C. 553(d)(3).

The Temporary Rules do not impose any new “collections of information” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”),<sup>47</sup> nor do they create any new filing, reporting, recordkeeping, or disclosure reporting requirements for a CCP that is or will be issuing or clearing eligible CDS. Accordingly, we did not submit the Temporary Rules to the Office of Management and Budget for review in accordance with the PRA when we adopted them in January 2009.<sup>48</sup> We requested comment on whether our conclusion that there are no collections of information is correct, and we did not receive any comment. The extension of the expiration dates in the Temporary Rules does not change our analysis.

## **V. COST-BENEFIT ANALYSIS**

In January 2009, we adopted the Temporary Rules, which exempt eligible CDS that are or will be issued or cleared by a CCP and offered and sold only to eligible contract participants from all provisions of the Securities Act, other than the Section 17(a) anti-fraud provision, as well as from the registration requirements under Section 12 of the Exchange Act and from the provisions of the TIA. In September 2009, we adopted amendments to such rules to extend their expiration date to November 30, 2010. We subsequently adopted amendments to such rules to further extend their expiration date from November 30, 2010 to July 16, 2011. The Temporary Rules were intended to facilitate the operation of one or more CCPs to act as a clearing agency in the CDS market to reduce some of the risks in the CDS market. Today, we are adopting amendments to the Temporary Rules to further extend the expiration dates. Since the adoption of the Temporary Rules and the issuance of the exemptive orders, ICE Trust and ICE Clear

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<sup>47</sup> 44 U.S.C. 3501 et seq.

<sup>48</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Europe have been actively engaged as a CCP in clearing CDS transactions in accordance with our exemptions.

The Dodd-Frank Act was enacted on July 21, 2010. Among other things, the Dodd-Frank Act amends the Exchange Act to require that transactions in security-based swaps be cleared through a clearing agency that is either registered with the Commission or exempt from registration if the transactions are of a type that the Commission determines must be cleared, unless an exemption from mandatory clearing applies. As noted above, the Dodd-Frank Act directs us to regulate, among other things, clearing agencies for, and the clearing of, security-based swaps, which include certain CDS, and in separate rulemakings we have and will propose rules to implement the clearing provisions of the Dodd-Frank Act, among others. Extending the expiration dates in the Temporary Rules will continue to facilitate the operation of the CCPs in clearing eligible CDS as we consider rules implementing the clearing provisions of Title VII, including any applicable permanent exemptions.

**A. Benefits**

Absent the exemptions provided by the Temporary Rules, a CCP may have to file a registration statement covering the offer and sale of eligible CDS that are security-based swaps, may have to satisfy the applicable provisions of the TIA, and may have to register the class of eligible CDS that are security-based swaps that it has issued or cleared under the Exchange Act. The Temporary Rules and the CCP exemptive orders have facilitated the operation of CCPs in the CDS market. Since the adoption of the Temporary Rules, several clearing agencies have been actively engaged as CCPs in clearing CDS transactions in accordance with our exemptions. We believe that extending the expiration dates in the Temporary Rules will continue to facilitate



the operation of CCPs<sup>49</sup> and the use by eligible contract participants of CDS CCPs. We believe that the operation of the CCPs in accordance with our exemptions has increased transparency,<sup>50</sup> increased available information about exposures to particular reference entities or reference securities,<sup>51</sup> and reduced risks to participants in the market for CCP-cleared CDS.<sup>52</sup> Not extending the expiration dates in the Temporary Rules could cause significant disruptions in this market. Therefore, we believe that extending the expiration dates in the Temporary Rules provides important benefits to CDS market participants.

## **B. Costs**

We recognize that a consequence of extending the exemptions will be the unavailability of certain remedies under the Securities Act and the Exchange Act and certain protections under the TIA. While an investor will be able to pursue an antifraud action in connection with the purchase and sale of eligible CDS under Exchange Act Section 10(b),<sup>53</sup> it will not be able to pursue civil remedies under Sections 11 or 12 of the Securities Act.<sup>54</sup> We could still pursue an antifraud action in the offer and sale of eligible CDS issued or cleared by a CCP.<sup>55</sup> We believe

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<sup>49</sup> See Karen Brettell, Banks to submit 95 pct of eligible CDS for clearing (Sep. 1, 2009), available at <http://www.reuters.com/article/euRegulatoryNews/idUSN0150814420090901?pageNumber=1&virtualBrandChannel=10522>.

<sup>50</sup> See Testimony of Mark Lenczowski, Managing Director and Assistant General Counsel at JPMorgan Chase & Co., to the Senate Agriculture Committee (Jun. 4, 2009) (In his testimony, Mr. Lenczowski indicated, in the context of CDS clearing by ICE Trust, that “[c]learing is a highly transparent process...”).

<sup>51</sup> See footnote 35, *supra*. None of these comments addressed the Temporary Rules.

<sup>52</sup> See Press Release, IntercontinentalExchange, ICE Clear Europe Clears Euro 51 Billion in Third Week of European CDS Processing; Announces New CDS Clearing Member (Aug. 17, 2009), available at <http://ir.theice.com/releasedetail.cfm?ReleaseID=403509>. See also, Press Release, Eurex Clearing AG, Eurex Credit Clear Clears First Single Name CDS Worldwide (Aug. 28, 2009), available at [http://www.eurexclearing.com/about/press/press\\_647\\_en.html](http://www.eurexclearing.com/about/press/press_647_en.html).

<sup>53</sup> 15 U.S.C. 78j(b).

<sup>54</sup> 15 U.S.C. 77k and 77l.

<sup>55</sup> See 15 U.S.C. 77q and 78j(b).

that the incremental costs from the extension of the expiration dates in the Temporary Rules will be minimal because the amendments are merely an extension of the expiration dates in the Temporary Rules and such extension will not affect information and remedies available to investors as a result of the Temporary Rules.

## **VI. CONSIDERATION OF IMPACT ON THE ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION**

Section 23(a)(2) of the Exchange Act<sup>56</sup> requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b)<sup>57</sup> of the Securities Act and Section 3(f)<sup>58</sup> of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Temporary Rules we are extending today exempt eligible CDS issued or cleared by a CCP from all provisions of the Securities Act, other than the Section 17(a) antifraud provision, as well as from the registration requirements under Section 12 of the Exchange Act and the provisions of the TIA. Because these exemptions are available to any registered or deemed registered CCP offering and selling eligible CDS, we do not believe that extending the exemptions imposes a burden on competition. We also anticipate that extending the ability to

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<sup>56</sup> 15 U.S.C. 78w(a)(2).

<sup>57</sup> 15 U.S.C. 77b(b).

<sup>58</sup> 15 U.S.C. 78c(f).

settle CDS through CCPs will continue to improve the transparency of the CDS market and provide greater assurance to participants as to the capacity of the eligible CDS counterparty to perform its obligations under the eligible CDS. ICE Trust, for example, makes available on its website information about open interests, or net exposure, volume and pricing of CDS transactions. We believe that increased transparency in the CDS market could help to minimize market disruption and thereby facilitate the capital formation process.

## **VII. REGULATORY FLEXIBILITY ACT CERTIFICATION**

The Commission hereby certifies pursuant to 5 U.S.C. 605(b) that extending the Temporary Rules will not have a significant economic impact on a substantial number of small entities. The Temporary Rules exempt eligible CDS that are or will be issued or cleared by a CCP. None of the entities that are eligible to meet the requirements of these exemptions is a small entity.

## **VIII. STATUTORY AUTHORITY AND TEXT OF THE RULES AND AMENDMENTS**

The amendments described in this release are being adopted under the authority set forth in Sections 18, 19 and 28 of the Securities Act; Sections 12(h), 23(a) and 36 of the Exchange Act; and Section 304(d) of the TIA.

### **List of Subjects in 17 CFR Parts 230, 240 and 260**

Reporting and recordkeeping requirements, Securities.

### **TEXT OF THE RULES AND AMENDMENTS**

We are temporarily amending 17 CFR parts 230, 240, and 260 as follows and the expiration dates in the temporary rules and amendments published January 22, 2009 (74 FR 3967), extended in a release published on September 17, 2009 (74 FR 47719), and further extended in a release published on November 26, 2010 (75 FR 72660), are further extended from July 16, 2011 to April 16, 2012.

**PART 230 - GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933**

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

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**§§ 230.146 and 230.239T [Amended]**

2. In §230.146(c)T, in the last sentence, remove the words “July 16, 2011” and add, in their place, the words “April 16, 2012”.

3. In §230.239T(e), remove the words “July 16, 2011” and add, in their place, the words “April 16, 2012”.

**PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES**

**EXCHANGE ACT OF 1934**

4. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3) unless otherwise noted.

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**§§ 240.12a-10T and 240.12h-1 [Amended]**

5. In §240.12a-10T(b), remove the words “July 16, 2011” and add, in their place, the words “April 16, 2012”.

6. In §240.12h-1(h)T, in the last sentence, remove the words “July 16, 2011” and add, in their place, the words “April 16, 2012”.

**PART 260 - GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939**

7. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78ll(d), 80b-3, 80b-4, and 80b-11.

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**§ 260.4d-11T [Amended]**

8. In §260.4d-11T, in the last sentence, remove the words “July 16, 2011” and add, in their place, the words “April 16, 2012”.

By the Commission.

Elizabeth M. Murphy  
Secretary

Date: July 1, 2011