

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

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Exemption from the Definition of “Clearing Agency” for Certain Activities of Security-Based Swap Dealers and Security-Based Swap Execution Facilities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting a rule pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) to exempt from the definition of “clearing agency” in Section 3(a)(23) of the Exchange Act certain activities of a registered security-based swap dealer, a registered security-based swap execution facility, and a person engaging in dealing activity in security-based swaps that is eligible for an exception from registration as a security-based swap dealer because the quantity of dealing activity is de minimis.

DATES: Effective date: [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 240.17Ad-24 (“Rule 17Ad-24”) to exempt certain activities of a registered security-based swap execution

facility,¹ a registered security-based swap dealer,² and an entity that is eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b))³ from the definition of “clearing agency.”

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¹ 15 U.S.C. 78c-4(a) (setting forth the registration requirement for security-based swap execution facilities). The Commission has not yet adopted rules regarding the registration of security-based swap execution facilities. The Commission has granted a temporary exemption from the registration requirement for security-based swap execution facilities. See Release No. 34-64678 (June 15, 2011), 76 FR 36287, 36292–93, 36306 (June 22, 2011). This exemption will expire on the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities. See id. at 36292–93, 36306.

² 15 U.S.C. 78o-10(a)(1); see also Release No. 34-75611 (Aug. 5, 2015), 80 FR 48964, 48988 (Aug. 14, 2015). A security-based swap market participant that meets the definition of “security-based swap dealer” as of August 6, 2021 is required to register with the Commission no later than November 1, 2021. See Release No. 34-87780 (Dec. 18, 2019), 85 FR 6270, 6345–46 (Feb. 4, 2020).

³ In contrast to the definition of “dealer” in Section 3(a)(5) of the Exchange Act, Section 3(a)(71)(D) of the Exchange Act and 17 CFR 240.3a71-2(a) thereunder contain an exception from the definition of “security-based swap dealer” for any entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers. See 15 U.S.C. 78c(a)(71)(D); 17 CFR 240.3a71-2(a). In addition, 17 CFR 240.3a71-2(b) provides that a person that has not registered as a security-based swap dealer by virtue of satisfying the requirements of paragraph (a) of the rule, but that no longer can take advantage of the de minimis exception, will be deemed not to be a security-based swap dealer under section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and subject to the requirements of section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder until the earlier of the date on which it submits a complete application for registration pursuant to section 15F(b) (15 U.S.C. 78o-10(b)) or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

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I. Background

The term “clearing agency” is broadly defined in Section 3(a)(23)(A) of the Exchange Act and includes a variety of functions.⁴ Section 3(a)(23)(B) of the Exchange Act excludes a number of entities and activities from the definition of “clearing agency,” including certain activities of, among other types of market intermediaries, national securities exchanges and securities dealers that are also clearing agency functions.⁵ These exclusions are designed to limit

⁴ Specifically, the term “clearing agency” includes, among other things, any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or that provides the facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. The definition also includes any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. 15 U.S.C. 78c(a)(23)(A); see also Release Nos. 34-71699 (Mar. 12, 2014), 79 FR 16865 (Mar. 26, 2014), corrected at 79 FR 29507, 29510–11 (May 22, 2014); 34-68080 (Oct. 22, 2012), 77 FR 66219, 66221–22 (Nov. 2, 2012) (“Clearing Agency Standards adopting release”) (discussing the same).

⁵ See 15 U.S.C. 78c(a)(23)(B).

the potential for overlapping or duplicative requirements that may otherwise be imposed on these regulated entities.⁶

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) created new categories of entities in the security-based swap market that may perform clearing agency functions similar to the functions performed by entities excluded from the definition of “clearing agency” in Section 3(a)(23)(B) of the Exchange Act in the traditional securities markets. However, Title VII did not amend the scope of the term “clearing agency” to address these new types of financial intermediaries for the security-based swap markets or their potential clearing agency functions, even if those new intermediaries perform similar functions as entities excluded from the “clearing agency” definition, such as a national securities exchange or a securities dealer. As a result, certain activities performed for security-based swaps by security-based swap dealers and security-based swap execution facilities are also clearing agency functions that trigger the requirement to either register as a clearing agency or obtain an exemption from registration as a clearing agency, while the same activities performed for securities that are not security-based swaps do not carry the same legal and regulatory implications.⁷

Specifically, Section 3(a)(23)(B)(ii) of the Exchange Act provides that the term “clearing agency” does not include, among other things, any national securities exchange solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities

⁶ Release No. 34-64017 (Mar. 3, 2011), 76 FR 14472, 14531 (Mar. 16, 2011) (“proposing release”).

⁷ See 17 U.S.C. 78q-1(b)(1).

transactions effected on such exchange.⁸ As noted above, the Dodd-Frank Act did not amend the Exchange Act definition of “clearing agency” to provide a comparable exclusion for a registered security-based swap execution facility. A security-based swap execution facility is a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system.⁹ This function, similar to that provided by a national securities exchange, facilitates the execution of a security-based swap transaction between two counterparties by providing facilities for the comparison of data respecting the terms of settlement of that transaction.¹⁰ Accordingly, although a national securities exchange performing this clearing agency function is excluded under Section 3(a)(23)(B)(ii) from the definition of “clearing agency,” a registered security-based swap execution facility performing this function is not.

Similarly, Section 3(a)(23)(B)(iii) provides that the term “clearing agency” does not include, among other things, any dealer if such dealer would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary brokerage or dealing activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.¹¹ As with security-based swap

⁸ 15 U.S.C. 78c(a)(23)(B).

⁹ The Exchange Act definition of “security-based swap execution facility” states that a security-based swap execution facility is not a national securities exchange. 15 U.S.C. 78c(a)(77).

¹⁰ A registered security-based swap execution facility may facilitate trade processing of any security-based swap. See 15 U.S.C. 78c-4(b)(2).

¹¹ 15 U.S.C. 78c(a)(23)(B).

execution facilities, the Exchange Act definition of “clearing agency” does not provide an exclusion for a registered security-based swap dealer.¹² Section 3(a)(71) of the Exchange Act defines “security-based swap dealer” as any person that: (i) holds itself out as a dealer in security-based swaps; (ii) makes a market in security-based swaps; (iii) regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.¹³ These functions are similar to those provided by a dealer for securities that are not security-based swaps.¹⁴ Accordingly, although a dealer

¹² See 15 U.S.C. 78c(a)(5) (defining “dealer” to exclude a dealer for security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants); see also, *supra*, note 3 (discussing the same).

¹³ 15 U.S.C. 78c(a)(71). In 2012, the Commission and the Commodity Futures Trading Commission further defined a number of terms defining the intermediaries in the swap and security-based swap markets, including “security-based swap dealer.” See Release No. 34-66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (“Entity Definitions adopting release”). Among other things, the release adopted 17 CFR 240.3a71-1 through 3a71-5, which further define “security-based swap dealer.” Furthermore, the definition of “dealer” in Section 3(a)(5) of the Exchange Act provides that an entity transacting as a dealer in security-based swaps would not need to separately register with the Commission as a broker-dealer so long as its security-based swap transactions are solely with persons that satisfy the definition of “eligible contract participant.” See 17 U.S.C. 78c(a)(5) (defining “dealer”); 17 U.S.C. 78(a)(65) (defining “eligible contract participant” by reference to Section 1a(18) of the Commodity Exchange Act (7 U.S.C. 1a(18)).

¹⁴ See *supra* note 3 (noting that, in contrast to the definition of “dealer” in Section 3(a)(5) of the Exchange Act, Section 3(a)(71)(D) of the Exchange Act and 17 CFR 240.3a71-2(a) thereunder contain an exception from the definition of “security-based swap dealer” for any entity that engages in a de minimis quantity of security-based swap dealing in connection with transactions with or on behalf of its customers).

performing these functions is excluded from the definition of “clearing agency,” a registered security-based swap dealer performing the same functions is not.¹⁵

To address the disparate treatment of similarly situated entities performing potential clearing agency functions, the Commission proposed Rule 17Ad-24 in 2011.¹⁶ The Commission explained that the rule would avoid imposing overlapping or duplicative requirements on these entities with marginal or no benefit to safeguarding securities and funds and protecting investors.¹⁷ As described in the proposing release,¹⁸ Rule 17Ad-24 would provide exemptions from the Exchange Act term “clearing agency” for certain activities of registered security-based swap dealers and registered security-based swap execution facilities that are also clearing agency functions, mirroring the exclusions from the definition described above for national securities exchanges and dealers. A person acting as a security-based swap dealer may make payments or deliveries or both in connection with transactions in securities, in a manner that could require that person to register as a clearing agency under the Exchange Act.¹⁹ In particular, over the life of a security-based swap transaction, a security-based swap dealer may facilitate the transfer of collateral, periodic fixed amount payments, or termination payments between the counterparties to a transaction, which would constitute making payments or deliveries or both in connection with transactions in securities under the “clearing agency” definition. Similarly, a security-based

¹⁵ See supra note 2 (noting the adoption of final rules for security-based swap dealers in 2019 and the compliance date for registration of November 1, 2021).

¹⁶ See proposing release, supra note 6.

¹⁷ Id. at 14531.

¹⁸ See id. at 14494–95.

¹⁹ Compare 15 U.S.C. 78c(a)(71) with 15 U.S.C. 78c(a)(23).

swap execution facility that provides a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system also may provide facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities, in a manner that could require that entity to register as a clearing agency.²⁰

The Commission received one comment regarding the proposed rule,²¹ as discussed in Part II.B below. The Commission is now adopting Rule 17Ad-24, as discussed in Part II.C below.

II. New Rule 17Ad-24

A. Proposed Rule Text

Proposed Rule 17Ad-24 provides that a registered security-based swap dealer and a registered security-based swap execution facility shall be exempt from inclusion in the term “clearing agency,” as defined in section 3(a)(23)(A) of the Act, where such registered security-based swap dealer or registered security-based swap execution facility would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary dealing activities or providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered security-based swap execution facility, respectively, or acting on behalf of a clearing agency or participant therein in connection with the

²⁰ Compare 15 U.S.C. 78c(a)(77) with 15 U.S.C. 78c(a)(23).

²¹ See Letter from Jeff Gooch, Chief Executive Officer, MarkitSERV (Apr. 29, 2011) (“MarkitSERV Letter”). The comment letter is available on the Commission’s website at <https://www.sec.gov/comments/s7-08-11/s70811.shtml>.

furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.

B. Comment Received

One commenter agreed with the Commission's proposed approach that a security-based swap execution facility not be required to register as a clearing agency solely because it performs trade data comparison as part of the trade execution process for security-based swaps.²²

However, the commenter also stated that a security-based swap execution facility should not have a blanket exemption from clearing agency registration for activities related to matching or trade verification services because, in the commenter's view, such an approach would result in the rule applying differently to third-party providers of such services than it would to a security-based swap execution facility.²³

By its terms, proposed Rule 17Ad-24 would not provide a blanket exemption from clearing agency registration to a security-based swap execution facility to provide matching or trade verification services that otherwise are clearing agency functions as defined in the Exchange Act. Rather, the Commission's approach under Rule 17Ad-24 specifies that a registered security-based swap execution facility would not be required to register as a clearing agency solely based upon the fact that such an entity provides facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered security-

²² See MarkitSERV Letter.

²³ See id. at 6.

based swap execution facility.²⁴ As noted in the proposing release and restated here,²⁵ were a security-based swap execution facility to engage in activity that is outside the scope of the exemption provided in Rule 17Ad-24 and that falls within the definition of “clearing agency” under the Exchange Act, it would be required to register as a clearing agency or obtain a separate exemption from clearing agency registration.²⁶

C. Final Rule

Pursuant to the Commission’s authority under Section 36 of the Exchange Act,²⁷ the Commission is adopting Rule 17Ad-24, and the Commission is making two modifications from the proposal. First, since the Commission proposed Rule 17Ad-24, the Commission adopted 17 CFR 240.3a71-2 to provide an exception from the definition of “security-based swap dealer” to any entity that engages in a de minimis quantity of security-based swap dealing activity in connection with transactions with or on behalf of its customers.²⁸ In adopting the de minimis exception, the Commission explained that the exception should be interpreted to address

²⁴ This approach is consistent with the approach that applies to a national securities exchange when performing the same activity for transactions in securities that are not security-based swaps.

²⁵ See proposing release, supra note 6, at 14495.

²⁶ See id. For example, with respect to transactions in securities that are not security-based swaps, the Commission has explained that “matching” is a clearing agency function. Release No. 34-39829 (Apr. 6, 1998), 63 FR 17943 (Apr. 13, 1998).

²⁷ 15 U.S.C. 78mm. Section 36 of the Exchange Act authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class of classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.

²⁸ See supra notes 3 and 14 and accompanying text.

amounts of dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by the regulations governing swap dealers and security-based swap dealers.²⁹ The Commission similarly noted in proposing Rule 17Ad-24 that the exemptions in the rule are intended to avoid imposing requirements with marginal or no benefit to safeguarding securities and funds and protecting investors.³⁰ Accordingly, the Commission is adding persons eligible for this exception under 17 CFR 240.3a71-2 to the exemption in Rule 17Ad-24 because imposing clearing agency registration on persons solely to regulate functions performed by such persons as part of customary dealing activity for security-based swaps, and where that dealing activity is sufficiently small that it does not warrant registration as a security-based swap dealer, would present only marginal or no benefit to safeguarding securities and funds and protecting investors. Second, to improve clarity and readability, the Commission is dividing the rule text into subparagraphs (a) and (b).

Accordingly, new Rule 17Ad-24 provides that a registered security-based swap dealer, a registered security-based swap execution facility, or an entity engaging in dealing activity in security-based swaps that is eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b))³¹ is exempt from inclusion in the term “clearing agency,” as defined in Section 3(a)(23)(A) of the Exchange Act, where such registered security-based swap dealer, registered security-based swap execution facility, or entity engaging in

²⁹ See Entity Definitions adopting release, supra note 13, at 30626.

³⁰ See proposing release, supra note 6, at 14531.

³¹ See supra note 3 (providing the text of 17 CFR 240.3a71-2(a) and (b)). Accordingly, an entity subject to the period set forth in 17 CFR 240.3a71-2(b) will continue to be exempt from inclusion in the term “clearing agency” during the period after it is no longer able to rely on the de minimis exception but before it is deemed to be a security-based swap dealer.

dealing activity in security-based swaps that is eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b)) would be deemed to be a clearing agency solely by reason of: (a) functions performed by such institution as part of customary dealing activities or providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered security-based swap execution facility, respectively, or (b) acting on behalf of a clearing agency or participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.

In addition, as noted above, the Commission has granted a temporary exemption from the registration requirement for security-based swap execution facilities. The temporary exemption from the registration requirement for security-based swap execution facilities will expire on the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities.³² To the extent an entity relying on the temporary exemption from the registration requirement for security-based swap execution facilities also performs the activities of a registered security-based swap execution facility as described in Rule 17Ad-24, the Commission notes that it has provided a separate, temporary exemption from clearing agency registration for entities providing certain clearing services for security-based swaps, including trade matching services.³³

III. Economic Analysis

The Commission is sensitive to the economic consequences and effects of the adopted amendments, including their benefits and costs. Under Section 3(f) of the Exchange Act,

³² See supra note 1.

³³ See Release No. 34-64796 (July 1, 2011), 76 FR 39963, 39964 (July 7, 2011).

whenever the Commission engages in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, it must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.³⁴ Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.³⁵

The Commission is exempting entities engaging in dealing activity in security-based swaps and registered security-based swap execution facilities from inclusion in the term “clearing agency” under the Exchange Act for the following functions: (a) performing customary dealing activities or providing facilities for the comparison of data respecting the settlement of securities transactions; or (b) acting on behalf of a clearing agency or participant in connection with the furnishing of clearing services.³⁶ Section 3(a)(23)(B) of the Exchange Act excludes national securities exchanges and securities dealers from the definition of “clearing agency,” to limit the potential for overlapping or duplicative requirements that may otherwise be imposed on these regulated entities. Entities engaging in dealing activity in security-based swaps and security-based swap execution facilities perform similar functions for the security-based swap market as securities dealers and national securities exchanges perform for the general securities

³⁴ See 15 U.S.C. 78c(f).

³⁵ See 15 U.S.C. 78w(a)(2).

³⁶ See supra Part II.C (setting forth the final rule text). For purposes of this economic analysis, “entities engaging in dealing activity in security-based swaps” includes both registered security-based swap dealers and entities engaging in dealing activity in security-based swaps that are eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b)).

industry. Accordingly, new Rule 17Ad-24 is intended to avoid imposing requirements on these entities with marginal or no benefit to safeguarding securities and funds and protecting investors by mirroring the existing exemption from the definition of “clearing agency” for entities engaging in dealing activity in security-based swaps and security-based swap execution facilities.³⁷ Under new Rule 17Ad-24, these entities will not have to expend additional resources determining their registration requirements, registering as a clearing agency, or meeting the standards required of registered clearing agencies as long as their activities do not fall outside the scope of the exemption in new Rule 17Ad-24. Excluding either entities engaging in dealing activity in security-based swaps or security-based swap execution facilities from the requirements applicable to clearing agencies should not hinder the Dodd-Frank Act’s goals of greater transparency and financial stability of the security-based swap market because the Commission has or will have a regulatory framework for these entities targeted to dealing activity in security-based swaps or the functions performed by security-based swap execution facilities, rather than incidental functions that may be similar to those performed by a clearing agency. Just as de minimis amounts of dealing activity are sufficiently small so as not to warrant registration to address concerns implicated by the regulations governing security-based swap dealers, they are also sufficiently small such that they do not implicate the concerns underpinning the regulations governing clearing agencies.

A. Baseline

To assess the economic impact of new Rule 17Ad-24, the Commission is using as its baseline the security-based swap market as it exists at the time of this release. This analysis uses existing Commission analyses of security-based swap market in rules adopted pursuant to Title

³⁷ See supra note 5 and accompanying text.

VII of the Dodd-Frank Act, updated using data from the DTCC Derivatives Repository Limited Trade Information Warehouse (“TIW”) to calendar year 2019.³⁸ The data available to the Commission from TIW do not encompass those transactions that both: (i) do not involve U.S. counterparties, and (ii) are based on non-U.S. reference entities.

The Commission estimates, based on an analysis of TIW data that out of more than 4,000 entities engaged in single name CDS activity worldwide in 2019, potentially 50 entities may engage in dealing activity that would exceed the de minimis threshold, and thus ultimately have to register as security-based swap dealers.³⁹ Ten entities that engaged in dealing activity had less than \$3 billion of notional transacted in single-name credit default swaps, so they could use the de minimis exception for the definition of “security-based swap dealer.”⁴⁰

In addition, eighteen swap execution facilities have permanent or temporary registration with the Commodity Futures Trading Commission.⁴¹ Of those, nine allow trading of credit default swap indices; if these nine allow trading of single-name credit default swaps, they would be required to register as security-based swap execution facilities with the Commission.⁴²

³⁸ See, e.g., infra note 40; supra note 13.

³⁹ See Release No. 34-75611 (Aug. 14, 2015), 80 FR 48963, 49000 (Aug. 14, 2015). The estimate has been updated for data for calendar year 2019.

⁴⁰ See Entity Definitions adopting release, supra note 13, at 30636. To identify dealing activity, the Commission counted the number of entities that had three or more counterparties in a calendar year that were not recognized as dealers by the International Swaps and Derivatives Association. The estimate has been updated with data for calendar year 2019.

⁴¹ CFTC, Trading Organizations - Swap Execution Facilities (SEF), <https://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities>.

⁴² Compare BGC Swap Execution Facility, <http://www.bgcsef.com/>; Bloomberg Professional Swap Execution Facility Historical Data, <https://data.bloombergsef.com/>; GFI Swaps Exchange Trade Data, <http://www.gfigroup.com/markets/gfi-sef/trade-data/>; ICE Swap Trade, <https://www.theice.com/swap-trade>; MarketAxess Credit Default Swaps,

Security-based swap dealers must register with the Commission and comply with prudential and conduct standards of the Dodd-Frank Act.⁴³ Security-based swap dealers are subject to a registration and regulatory framework that is tailored to the functions they serve and risks they pose. These risks, and the corresponding Commission analysis of costs and benefits of the ensuring requirements, are discussed in the Security-Based Swap Entity Registration, Security-Based Swap Recordkeeping and Reporting, Security-Based Swap Capital, Margin, and Segregation, and Security-Based Swap Business Conduct Standards releases.⁴⁴ Entities that engage in dealing activity in security-based swaps below the de minimis threshold of \$3 billion of notional activity in a twelve-month period are excepted from the definition of “security-based swap dealer.”⁴⁵ The Dodd-Frank Act also requires security-based swap-execution facilities, as

<https://www.marketaxess.com/trade/credit-default-swaps>; tpSEF CDS Data, <https://www.tpinformation.com/In-Depth-Data/Credit/Credit-Default-Swaps>; Tradeweb and Dealerweb Swap Execution Facilities, <https://www.tradeweb.com/our-markets/market-regulation/sef/>; TraditionSEF Daily Activity, <http://www.traditionsef.com/market-activity/> (which allow trading of credit default swap indices), with 360T Swap Execution Facility, <https://www.360t.com/trading-solutions/sef/>; Cboe Swap Execution Facility, <https://markets.cboe.com/global/fx/sef/>; Clearmarkets CM-SEF Center, <https://www.clearmarkets.com/cm-sef-centre/>; LatAmSEF Market Activity, <http://latamsef.com/marketactivity.phtml>; LedgerX, <https://www.ledgerx.com/>; NEX SEF Data, <http://www.nexsef.com/>; Refinitiv SEF Volumes, <https://www.refinitiv.com/en/products/sef-swap-execution-facility#sef-volumes>; SwapEx, <http://www.swapex.com/swapex/market-data/NDF/>; TeraExchange Instruments, <https://teraexchange.com/Home/Instruments> (which do not host trading of credit default swap indices).

⁴³ Id.

⁴⁴ See Release Nos. 34-756711 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015) (“Security-Based Swap Entity Registration”); 34-87782 (Dec. 18, 2019), 85 FR 6270 (Feb. 4, 2020) (“Risk Mitigation Techniques”); 34-87005 (Sep. 19, 2019), 84 FR 68550 (Dec. 16, 2019) (“Security-Based Swap Recordkeeping and Reporting”); 34-86175 (Jun. 21, 2019), 84 FR 43872 (Aug. 22, 2019) (“Security-Based Swap Capital, Margin, and Segregation”); 34-77617 (Apr. 14, 2016), 81 FR 29959 (May 13, 2016) (“Security-Based Swap Business Conduct Standards”).

⁴⁵ See Entity Definitions adopting release, supra note 13, at 30639.

therein defined, to be registered with and comply with prudential and conduct standards to be set forth by the Commission.⁴⁶

B. Consideration of Benefits, Costs, and the Effect on Competition, Efficiency, and Capital Formation

The exemption in new Rule 17Ad-24 is designed to avoid imposing requirements with marginal or no benefit to safeguarding securities and funds and protecting investors on entities engaging in dealing activity in security-based swaps and security-based swap execution facilities, which will benefit these entities since they will not be required to register as a clearing agency or comply with the Commission's requirements for clearing agencies. Since these types of entities also each have their own registration and regulatory frameworks or are exempt due to a de minimis level of activity,⁴⁷ the Commission does not expect new Rule 17Ad-24 to impose substantial costs, and there should be minimal impacts on transparency and financial stability. Lastly, new Rule 17Ad-24 may improve competition and efficiency in the security-based swap dealer and security-based swap execution facility markets.

The cost savings to both entities engaging in dealing activity in security-based swaps and security-based swap execution facilities under new Rule 17Ad-24 are likely to be significant. New Rule 17Ad-24 will benefit entities engaging in dealing activity in security-based swaps and security-based swap execution facilities to the extent that additional clarity regarding registration requirements reduces the costs they may incur to determine which requirements apply to their activities. Furthermore, although no entities engaging in dealing activity in security-based swaps or security-based swap execution facilities are currently registered as clearing agencies with the

⁴⁶ See 15 U.S.C. 78c-4.

⁴⁷ See supra notes 44, 46, and accompanying text.

Commission, exempted entities engaging in dealing activity in security-based swaps and future exempted security-based swap execution facilities and security-based swap dealers will not have to incur registration and compliance costs for clearing agencies.⁴⁸ Many of the costs of complying with requirements for clearing agencies involve collecting information, and the Commission has estimated the monetized burden of these standards per clearing agency at \$0.5 million in initial costs and \$1.2 million in annual ongoing costs, adjusted to 2020 dollars.⁴⁹ Absent the exemption, entities engaging in dealing activity in security-based swaps and security-based swap execution facilities may have to incur these costs. However, as existing clearing agencies follow the Principles for Financial Market Infrastructures, many of the Commission’s requirements for clearing agencies had minimal additional per-entity costs.⁵⁰ Since these requirements are not common practice for entities engaging in dealing activity in security-based swaps and security-based swap execution facilities, applying the Commission’s clearing agency requirements to these entities would likely have higher per-entity costs than the Commission’s

⁴⁸ Though a registered clearing agency may be affiliated with a security-based swap execution facility, none of the registered clearing agencies are either a registered security-based swap dealer or security-based swap execution facility.

⁴⁹ See Clearing Agency Standards adopting release, supra note 4, at 66273. The estimates were updated on a per entity basis using SIFMA’s Management & Professional Earnings in the Securities Industry 2013, modified to account for an 1,800-hour work year; multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

Because the exempted activities are not among the core central counterparty or central securities depository functions of a clearing agency, security-based swap execution facilities and security-based swap dealers would not unduly benefit from avoiding the higher standards of a “covered clearing agency.” See generally Release No. 34-78961 (Apr 9, 2020), 85 FR 28853 (May 14, 2020) (adopting an amendment to the definition of “covered clearing agency” such that “covered clearing agency” means a clearing agency that provides the services of a central counterparty or central securities depository).

⁵⁰ See Clearing Agency Standards adopting release, supra note 4, at 66274.

past estimates for clearing agencies.⁵¹ The Commission does not expect either security-based swap execution facilities or security-based swap dealers will face new costs from relying on new Rule 17Ad-24.

The Commission also does not expect new Rule 17Ad-24 to impose costs on security-based swap markets. Many of the requirements that apply to registered security-based swap dealers, such as recordkeeping, governance, margin, and capital requirements, cover risks that overlap with those facing clearing agencies.⁵² Other aspects of clearing agency regulation, such as standards addressing settlement risk or participation requirements, are either not applicable to entities engaging in dealing activity in security-based swaps or may place an undue burden on access to this market.⁵³ In crafting the security-based swap dealer requirements, the Commission has considered the benefits for financial stability as well as the burden on competition and the promotion of efficiency, competition, and capital formation.⁵⁴ As such, in the Commission's

⁵¹ However, many of the clearing agency requirements would not apply to entities engaging in dealing activity and security-based swap execution facilities because these entities are not likely to provide central counterparty or central securities depository services, which are the focus of the compliance costs associated with the SEC's regulatory framework for registered clearing agencies.

⁵² The Commission has exempted entities that engage in security-based swap dealing activity below the de minimis threshold from these requirements since these entities do not implicate the concerns that these requirements address.

⁵³ See Clearing Agency Standards adopting release, supra note 4, at 66242–43. In particular, security-based swap dealers do not have members like clearing agencies do. Requiring that they accept any participant that has net capital above \$50 million may unduly restrict their ability to mitigate risks and function as a dealer.

⁵⁴ See, e.g., Risk Mitigation Techniques adopting release, supra note 44, at 6390 (requiring certain risk mitigation techniques for registered security-based swap dealers who hold uncleared swaps because “the risks of the counterparties’ failure to manage credit risk adequately may not become apparent until the onset of a financial crisis,” as well as discussing the rule’s burden on competition and promotion of efficiency, competition, and capital formation).

view, applying requirements for clearing agencies to entities engaging in dealing activity in security-based swaps for performing customary dealing activity is not necessary to achieve the goals of the Dodd-Frank Act.

Similarly, security-based swap execution facilities will have to register with the Commission and abide by the standards listed in the Dodd-Frank Act, as implemented by future Commission rules.⁵⁵ Providing data to participants to compare settlement terms or acting on behalf of a clearing agency to facilitate clearing services to the security-based swap execution facilities' customers, while related to clearing and settlement, does not expose the security-based swap execution facility to market volatility, so the Commission does not believe that these activities alone justify requiring security-based swap execution facilities to adopt the risk management practices required of clearing agencies.

The cost savings associated with new Rule 17Ad-24 may promote competition among entities engaging in dealing activity in security-based swaps and security-based swap execution facilities. For example, new Rule 17Ad-24 may lower barriers to entry for entities engaging in dealing activity in security-based swaps, promoting competition among liquidity providers in the security-based swap market. Similarly, lower costs for security-based swap execution facilities that provide trade processing services should increase competition in providing these services, which may reduce the price and/or increase the quality of these services. To the extent that new Rule 17Ad-24 increases the availability of and competition between either liquidity providers or trade execution services, it may marginally improve efficiency of these services. The Commission does not anticipate new Rule 17Ad-24 to have a substantial impact on capital formation.

⁵⁵ See 15 U.S.C. 78c-4.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (“PRA”) imposes certain requirements on federal agencies in connection with the conducting or sponsoring of any “collection of information.”⁵⁶ An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Further, 44 U.S.C. 3507(a) provides that, before adopting or revising a collection of information requirement, an agency must, among other things, publish notice in the Federal Register stating that the agency has submitted the proposed collection of information to the Office of Management and Budget (“OMB”) and setting forth certain required information, including (i) a title for the collection of information; (ii) a summary of the collection of information; (iii) a brief description of the need for the information and the proposed use of the information; (iv) a description of the likely respondents and proposed frequency of response to the collection of information; (v) an estimate of the paperwork burden that shall result from the collection of information; and (vi) notice that comments may be submitted to the agency and director of OMB.⁵⁷

The proposing release provided notice that Rule 17Ad-24 does not impose recordkeeping or information collection requirements and would not be a “collection of information” within the meaning of the PRA. The Commission received no comments in response, and the Commission continues to believe that Rule 17Ad-24 does not impose a recordkeeping burden.

⁵⁶ See 44 U.S.C. 3501 et seq.; 44 U.S.C. 3502(3).

⁵⁷ See 44 U.S.C. 3507(a)(1)(D); see also 5 CFR 1320.5(a)(1)(iv).

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (“RFA”) requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.⁵⁸ Section 603(a) of the Administrative Procedure Act,⁵⁹ as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on “small entities.”⁶⁰ The Commission certified in the proposing release, pursuant to Section 605(b) of the RFA, that Rule 17Ad-24 would not, if adopted, have a significant impact on a substantial number of small entities.⁶¹ The Commission received no comments on this certification.

Because the exemptions provided in Rule 17Ad-24 ensure that certain activities of registered security-based swap dealers, registered security-based swap execution facilities, and entities engaging in dealing activity in security-based swaps that are eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b) do not trigger the requirement to register as a clearing agency,⁶² the Commission certifies that Rule 17Ad-24 will not have a significant economic impact on a substantial number of small entities.

⁵⁸ See 5 U.S.C. 601 et seq.

⁵⁹ 5 U.S.C. 603(a).

⁶⁰ Section 601(b) of the RFA permits agencies to formulate their own definitions of “small entities.” See 5 U.S.C. 601(b). The Commission has adopted definitions for the term “small entity” for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0-10.

⁶¹ See 5 U.S.C. 605(b).

⁶² See supra Part III.

VI. Other Matters

If any of the provisions of this rule, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,⁶³ the Office of Information and Regulatory Affairs has designated these rules as not a “major rule,” as defined by 5 U.S.C. 804(2).

VII. Statutory Authority

Pursuant to the Exchange Act, particularly Sections 17A and 36 thereof, 15 U.S.C. 78q-1 and 15 U.S.C. 78mm, the Commission is adopting Rule 17Ad-24.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendment

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et. seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C.

⁶³ 5 U.S.C. 801 et seq.

5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

2. Section 240.17Ad-24 is added to read as follows:

§ 240.17Ad-24 Exemption from clearing agency definition for certain registered security-based swap dealers, registered security-based swap execution facilities, and entities engaging in dealing activity in security-based swaps that are eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b)).

A registered security-based swap dealer, a registered security-based swap execution facility, or an entity engaging in dealing activity in security-based swaps that is eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b)) shall be exempt from inclusion in the term “clearing agency,” as defined in section 3(a)(23)(A) of the Act, where such registered security-based swap dealer, registered security-based swap execution facility, or entity engaging in dealing activity in security-based swaps that is eligible for an exception under 17 CFR 240.3a71-2(a) (or subject to the period set forth in 17 CFR 240.3a71-2(b)) would be deemed to be a clearing agency solely by reason of:

(a) Functions performed by such institution as part of customary dealing activities or providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered security-based swap execution facility, respectively, or

(b) Acting on behalf of a clearing agency or participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.

By the Commission.

Date: December 16, 2020.

Vanessa A. Countryman
Secretary