weight to recent observations, would permit NSCC to more effectively measure the risk of a rapid change in market price volatility. The addition of the Gap Risk Measure and the Portfolio Margin Floor would also provide NSCC with additional measurements of the market price volatility of a Member’s Net Unsettled Position, enabling NSCC to assess a VaR Charge that accounts for the risks those charges are designed to address, as described above.

Finally, NSCC is proposing to eliminate the MMD Charge because this component of the Clearing Fund has only a limited application and, as such, does not provide as effective a measurement of the risk presented by Net Unsettled Positions that are concentrated in certain securities as other proposed and existing risk management measures. Therefore, the proposal to eliminate this charge would enable NSCC to remove an unnecessary component from the Clearing Fund calculation, and would help NSCC to rely on an appropriate method of measuring its exposures to this risk.

The proposed changes are designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of portfolios that exhibit idiosyncratic risk attributes, are more susceptible to price volatility caused by gap risk events, and contain concentrated Net Unsettled Positions. Therefore, NSCC believes the proposed change is consistent with the protection of investors.

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend the period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision Act. Comments may be submitted by any of the following methods:

Electronic Comments
- Use the Commission’s internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–NSCC–2017–808 on the subject line.

Paper Comments
- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.
- All submissions should refer to File Number SR–NSCC–2017–808. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC’s website (http://dtcc.com/legal/sec-rule-filings.aspx). All comments received will be posted without change. Persons submitting comments are cautioned that we do not read or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2017–808 and should be submitted on or before February 23, 2018.

By the Commission.

Eduardo A. Aleman,
Assistant Secretary.

SECURITIES AND EXCHANGE COMMISSION


February 2, 2018.

I. Introduction

The Securities and Exchange Commission (“Commission”) is (i) extending until February 5, 2019 certain temporary exemptive relief originally provided by the Commission in connection with the revision of the definition of “security” in the Securities Exchange Act of 1934 (“Exchange Act”) to encompass security-based swaps (“Temporary Exemptions”); and (ii) requesting comment on whether continuing such exemptive relief beyond February 5, 2019 is necessary or appropriate in the public interest, and is consistent with the protection of investors.

II. Discussion

A. Background

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act 4 amended the definition of “security” under the Exchange Act to expressly encompass security-based

swaps.\(^3\) The expansion of the definition of the term “security” to include security-based swaps had the effect of changing the scope of the Exchange Act regulatory provisions that apply to security-based swaps and, in doing so, raised certain complex questions that require further consideration.

On July 1, 2011, the Commission issued the Exchange Act Exemptive Order granting temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with the revision of the Exchange Act definition of “security” to encompass security-based swaps.\(^4\) In general, the Exchange Act Exemptive Order granted temporary exemptive relief from compliance with certain provisions of the Exchange Act in connection with security-based swap activity by: (i) Any person who meets the definition of “eligible contract participant” (“ECPs”) set forth in Section 1a(12) of the Commodity Exchange Act as of July 20, 2010 (i.e., the day prior to the date the Dodd-Frank Act was signed into law) and (ii) a broker or dealer registered under Section 15(b) of the Exchange Act.\(^5\)

The overall approach of the Exchange Act Exemptive Order was directed toward maintaining the status quo during the implementation process for the Dodd-Frank Act.\(^6\) In the Exchange Act Exemptive Order, the Commission stated that it would accomplish this “by preserving the application of particular Exchange Act requirements that already are applicable in connection with instruments that will be ‘security-based swaps’ following the Effective Date [of the Dodd-Frank Act], but deferring the applicability of additional Exchange Act requirements in connection with those instruments explicitly being defined as ‘securities’ as of the Effective Date.”\(^7\)

In 2014, the Commission extended the expiration dates for the Temporary Exemptions.\(^8\) In the 2014 Extension Order, the Commission distinguished between: (i) The Temporary Exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”); and (ii) The Temporary Exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”). The expiration dates for the Linked Temporary Exemptions established by the 2014 Extension Order were the compliance dates for the specific rulemakings to which they were “linked,” and the expiration date for the Unlinked Temporary Exemptions was three years following the effective date of the 2014 Extension Order (i.e., February 5, 2017), or such time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate for security-based swaps with respect to any such Unlinked Temporary Exemptions. This approach was designed to provide the Commission with flexibility while its Dodd-Frank Act rulemaking is still in progress to determine whether continuing relief should be provided for any of the Unlinked Temporary Exemptions.\(^9\)

\(^3\) See Section 761(a)(2) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)). The provisions of Title VII generally became effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act) (the “Effective Date”), unless a provision required a rulemaking, in which case the provision would generally become effective on July 16, 2011 (360 days after publication of the final rule in the Federal Register) or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act (15 U.S.C. 77b).

\(^4\) At the time it issued the Exchange Act Exemptive Order, the Commission also adopted interim final Rule 240 under the Securities Act of 1933 (“Securities Act”), interim final Rules 12a–11 and 12h–1 under the Exchange Act, and interim final Rule 4d–4 under the Trust Indenture Act (“Trust Indenture Act”). See 17 CFR 230.240.1, 240.12a–11, 240.12h–1, and 240.264d–12. See also Exemptions for Security-Based Swaps, Exchange Act Release No. 62218 (June 8, 2011), 76 FR 40605 (July 11, 2011). This extension order does not address these interim final rules, which are scheduled to expire on February 11, 2011.

\(^5\) See Section 761(a)(2) of the Dodd-Frank Act (amending Section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)). The provisions of Title VII generally became effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act) (the “Effective Date”), unless a provision required a rulemaking, in which case the provision would generally become effective on July 16, 2011 (360 days after publication of the final rule in the Federal Register) or on July 16, 2011, whichever is later. See Section 774 of the Dodd-Frank Act (15 U.S.C. 77b).

\(^6\) See Exchange Act Exemptive Order, 76 FR at 39938–39. The Exchange Act Exemptive Order did not provide exemptive relief for any provisions or rules prohibiting fraud, manipulation, or insider trading (other than the prophylactic reporting or recordkeeping requirements as the confirmation requirements of Exchange Act Rule 10b–10). In addition, the Exchange Act Exemptive Order did not affect the Commission’s investigative, enforcement, and procedural authority related to those provisions and rules. See Exchange Act Exemptive Order at 39931, note 34. The Exchange Act Exemptive Order also did not address Sections 12, 13, 14(b)(3), and 19(a) of the Exchange Act and the rules thereunder. The Commission did, however, issue limited temporary relief from the clearing agency registration requirements under Section 17A(b) for entities providing certain clearing services for security-based swaps. This relief was linked to final rules issued by the Commission relating to the registration of clearing agencies that clear security-based swaps. See Order Pursuant to Section 36 of the Securities Exchange Act of 1934 Granting Temporary Exemptions from Clearing Agency Registration Requirements under Section 17A(b) of the Exchange Act for Entities Providing Certain Clearing Services for Security-Based Swaps, Exchange Act Release No. 64796 (July 1, 2011), 76 FR 40605 (July 11, 2011). The Commission also provided a temporary exemption within the Exchange Act Exemptive Order for Sections 5 and 6 of the Exchange Act and linked the expiration date of that exemptive relief until the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities. See Exchange Act Exemptive Order, 76 FR at 39934–36.

\(^7\) The Exchange Act Exemptive Order further provided that no security-based swap contract entered into on or after July 16, 2011 shall be void or considered voidable by reason of Section 29(b) of the Exchange Act until such time as the underlying exemptive relief expires. By extending the underlying exemptive relief until February 5, 2019, this order will affect Sections 29(b) relief until that same date. See Exchange Act Exemptive Order, 76 FR at 39938–39.

\(^8\) See Exchange Act Exemptive Order, 76 FR at 39929.

\(^9\) Id. These instruments generally constituted “security-based swap agreements” under the pre-Dodd-Frank Act framework and were already subject to specific antifraud and anti-manipulation provisions under the Exchange Act (including some related to: (1) Capital and margin requirements applicable to broker or dealer (Sections 7 and 15(c)(3), Regulation T, and Exchange Act Rules 15c3–1, 15c3–3, and 15c3–4); (2) recordkeeping requirements applicable to a broker or dealer (Sections 17(a) and 17(b) and

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\(^{10}\) Under the 2014 Extension Order, the Commission distinguished between: (i) The Temporary Exemptions related to pending security-based swap rulemakings (“Linked Temporary Exemptions”); and (ii) The Temporary Exemptions that generally were not directly related to a specific security-based swap rulemaking (“Unlinked Temporary Exemptions”). The expiration dates for the Linked Temporary Exemptions established by the 2014 Extension Order were the compliance dates for the specific rulemakings to which they were “linked,” and the expiration date for the Unlinked Temporary Exemptions was three years following the effective date of the 2014 Extension Order (i.e., February 5, 2017), or such time that the Commission issues an order or rule determining whether continuing exemptive relief is appropriate for security-based swaps with respect to any such Unlinked Temporary Exemptions. This approach was designed to provide the Commission with flexibility while its Dodd-Frank Act rulemaking is still in progress to determine whether continuing relief should be provided for any of the Unlinked Temporary Exemptions.
The Commission most recently extended the expiration date of the Unlinked Temporary Exemptions until February 5, 2018.10 In the 2017 Extension Order, the Commission also requested comment on whether continuing exemption relief is necessary beyond February 5, 2018.11 Two commenters expressed support for extending the exemption relief, with one reiterating its prior request that the Commission provide permanent exemption and other relief to security-based swap market participants from the Exchange Act and the Securities Act.12

Exchange Act Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-13; (3) registration requirements under Section 15(a)(1), and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a “broker” or “dealer” that is not registered with the Commission; (4) Exchange Act Rule 10b-10; and (5) Regulation ATS. Accordingly, the Commission extended these exemptions until the compliance date for pending rulemakings concerning: capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants; recordkeeping and reporting requirements for broker-dealers, security-based swap dealers, and major security-based swap participants; security-based swap trade acknowledgments; and registration requirements for security-based swap execution facilities.

The Linked Temporary Exemptions are not addressed in this order and will be separately considered in connection with the related security-based swap rulemakings. The Commission has already addressed some of the Linked Temporary Exemptions. On June 8, 2016, the Commission adopted new rules for trade acknowledgement and verification of security-based swap transactions. See Trade Acknowledgement and Verification of Security-Based Swap Transactions, Exchange Act Release No. 78011 (June 8, 2016), 81 FR 39807 (June 17, 2016) (“Trade Acknowledgement Release”). In that release, the Commission described the application of the Exchange Act Rule 10b-10 to transactions in security-based swaps and noted that the Linked Temporary Exemption relating to Exchange Act Rule 10b-10 would not apply after the compliance date of the new Rule 15FI-2. See Trade Acknowledgement Release, 81 FR at 39824–25, n. 189.


The Commission is not making a determination on whether permanent relief should be provided for the Unlinked Temporary Exemptions. Accordingly, pursuant to its authority under Section 36 of the Exchange Act,16 the Commission believes it is necessary or appropriate in the public interest, and consistent with the protection of investors to extend the expiration of the Unlinked Temporary Exemptions beyond February 5, 2019. The application of certain Exchange Act provisions and rules to security-based swap activities. This approach also will provide the Commission with additional time to consider the potential impact of the revision of the Exchange Act definition of “security.”

As noted above, one commenter has suggested that the Commission extend the expiration date for the Unlinked Temporary Exemptions until a time that the Commission can provide appropriate permanent relief and other relief to security-based swap market participants from the federal securities laws that apply to security-based swaps due to their inclusion in the definition of “security” under the Exchange Act.15 The Commission recognizes that the security-based swap market and corresponding regulatory regime have continued to develop since it originally issued the Exchange Act Exemptive Order in 2011. While the Commission has adopted many of the rules required under Title VII, it has proposed but not yet finalized others, including rules relating to the capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants. Before the Commission considers any permanent exemption relief, the Commission believes that additional time will be beneficial to evaluate the new regulatory regime and its impact on the market for security-based swaps once the Commission has finalized its rulemakings. Therefore, at this time, the Commission is not making a determination on whether permanent relief should be provided for the Unlinked Temporary Exemptions.

III. Solicitation of Comments

The Commission is providing interested parties the opportunity to comment on whether any relief should be granted with respect to any specific Unlinked Temporary Exemption(s) beyond February 5, 2019.
Commission recognizes that the security-based swap market and corresponding regulatory regime have developed in the period of time since the Commission originally issued the Exchange Act Exemptive Order, and will continue to do so. As such, to determine whether permanent exemptive relief is necessary or appropriate in the public interest, and consistent with the protection of investors, the Commission invites comments on the relief and requests that interested parties provide detailed and updated information relating to the Unlinked Temporary Exemptions.

To the extent that interested parties request specific relief for any of the Unlinked Temporary Exemptions beyond February 5, 2019, the Commission encourages any such interested parties to be detailed in any request as to the circumstances in which the Exchange Act provision or rule applies to security-based swaps or security-based swap market participants, and why relief would be necessary.

Comments may be submitted by any of the following methods:

- Use the Commission’s internet comment form (http://www.sec.gov/rules/exorders.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number S7–27–11 on the subject line; or
- Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments

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

All submissions should refer to File Number S7–27–11 on the subject line. Your comments should be submitted on or before February 5, 2019. Persons submitting comments are encouraged to review the Commission’s Statement of the Terms of Substance of the Proposed Rule Change that is available on the Exchange’s website (http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

III. Self-Regulatory Organization’s Statement of the Purpose of, and Statistical Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statistical Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to make certain revisions to Rules 24A.4.02, which contains certain requirements for a FLEX Option that has the exact same terms as a Non-FLEX Option. FLEX Options with quarterly expirations, short term expirations, weekly expirations,2 and End of Month (“EOM”) expirations are currently fungible with Non-FLEX Options with identical terms. Such expirations were not originally intended to be fungible.3

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2 The Exchange notes that Rule 24.9(e) no longer uses the term End of Week (EOW) expirations. The Exchange added Monday and Wednesday expirations to Rule 24.9(e), and Monday, Wednesday, and Friday expirations are termed weekly expirations in Rule 24.9(e). See Rule 24.9(e).

3 See, e.g., Securities Exchange Act Release Nos. 59060 (December 5, 2008), 73 FR 76075 (December 15, 2008)(SR–CBOE–2008–0115 proposal notice); 59417 (February 18, 2009), 74 FR 8591 (February 25, 2009) (SR–CBOE–2008–115 approval order); and Securities Exchange Act Release No 59075 (April 1, 2009), 74 FR 15794 (April 7, 2009)(SR–CBOE–2009–05)(SR–CBOE–2009–05). FLEX Options with non-Expiration Friday expiration dates that coincide with other Non-FLEX option expiration dates and with terms identical to those Non-FLEX Options were permitted before, and were not originally intended by the Exchange to become subject to, the fungibility provisions adopted through SR–CBOE–2008–115 (e.g., a FLEX Option that expires on the last day of a quarter and that has terms identical to a Non-FLEX Option series is not fungible with that Non-FLEX Option series, however, certain position limit aggregation requirements apply under Rules 24A.7(d)(1)–(2) and 24B.7(d)(1)–(2)). See also, e.g., Securities Exchange Act Release Nos. 62658 (August 5, 2010), 75 FR 46901 (August 12, 2010)(SR–CBOE–2009–075 proposal notice) and 62911 (September 14, 2010), 75 FR 57539 (September 21, 2010) (SR–CBOE–2009–075 approval order)(footnote 8 of the proposal notice indicates that FLEX Options do not become fungible with subsequently introduced Non-FLEX structured quarterly and short term options and that, because of the similarities between EOW and EOM expirations and existing Non-FLEX structured quarterly and short term options, FLEX Options will similarly not become fungible with EOW and EOM expirations listed for trading). As previously noted, Rule 24.9(e) was amended to include