

“(ii) based on such factors as financial sophistication, net worth, and knowledge and experience in financial matters, have the capability to evaluate the information available, as determined under generally applicable banking standards or guidelines; or

“(6) any swap agreement, including credit and equity swaps, except that an equity swap that is sold directly to any person other than a qualified investor (as defined in section 3(a)(54) of the Securities Act of 1934 [15 U.S.C. 78c(a)(54)]) shall not be treated as an identified banking product.

“(b) DEFINITION OF SWAP AGREEMENT.—For purposes of subsection (a)(6), the term ‘swap agreement’ means any individually negotiated contract, agreement, warrant, note, or option that is based, in whole or in part, on the value of, any interest in, or any quantitative measure or the occurrence of any event relating to, one or more commodities, securities, currencies, interest or other rates, indices, or other assets, but does not include any other identified banking product, as defined in paragraphs (1) through (5) of subsection (a).

“(c) CLASSIFICATION LIMITED.—Classification of a particular product as an identified banking product pursuant to this section shall not be construed as finding or implying that such product is or is not a security for any purpose under the securities laws, or is or is not an account, agreement, contract, or transaction for any purpose under the Commodity Exchange Act [7 U.S.C. 1 et seq.].

“(d) INCORPORATED DEFINITIONS.—For purposes of this section, the terms ‘bank’ and ‘qualified investor’ have the same meanings as given in section 3(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)], as amended by this Act.”

Pub. L. 106-102, title II, §§206A–206C, as added by Pub. L. 106-554, §1(a)(5) [title III, §301(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-449, and amended by Pub. L. 111-203, title VII, §762(a), (b), July 21, 2010, 124 Stat. 1759, provided that:

“SEC. 206A. SWAP AGREEMENT.

“(a) IN GENERAL.—Except as provided in subsection (b), as used in this section, the term ‘swap agreement’ means any agreement, contract, or transaction that—

“(1) is a put, call, cap, floor, collar, or similar option of any kind for the purchase or sale of, or based on the value of, one or more interest or other rates, currencies, commodities, indices, quantitative measures, or other financial or economic interests or property of any kind;

“(2) provides for any purchase, sale, payment or delivery (other than a dividend on an equity security) that is dependent on the occurrence, non-occurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence;

“(3) provides on an executory basis for the exchange, on a fixed or contingent basis, of one or more payments based on the value or level of one or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind, or any interest therein or based on the value thereof, and that transfers, as between the parties to the transaction, in whole or in part, the financial risk associated with a future change in any such value or level without also conveying a current or future direct or indirect ownership interest in an asset (including any enterprise or investment pool) or liability that incorporates the financial risk so transferred, including any such agreement, contract, or transaction commonly known as an interest rate swap, including a rate floor, rate cap, rate collar, cross-currency rate swap, basis swap, currency swap, equity index swap, equity swap, debt index swap, debt swap, credit spread, credit default swap, credit swap, weather swap, or commodity swap;

“(4) provides for the purchase or sale, on a fixed or contingent basis, of any commodity, currency, in-

strument, interest, right, service, good, article, or property of any kind; or

“(5) is any combination or permutation of, or option on, any agreement, contract, or transaction described in any of paragraphs (1) through (4).

“(b) EXCLUSIONS.—The term ‘swap agreement’ does not include—

“(1) any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof;

“(2) any put, call, straddle, option, or privilege entered into on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78f(a)] relating to foreign currency;

“(3) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a fixed basis;

“(4) any agreement, contract, or transaction providing for the purchase or sale of one or more securities on a contingent basis, unless such agreement, contract, or transaction predicates such purchase or sale on the occurrence of a bona fide contingency that might reasonably be expected to affect or be affected by the creditworthiness of a party other than a party to the agreement, contract, or transaction;

“(5) any note, bond, or evidence of indebtedness that is a security as defined in section 2(a)(1) of the Securities Act of 1933 [15 U.S.C. 77b(a)(1)] or section 3(a)(10) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(10)]; or

“(6) any agreement, contract, or transaction that is—

“(A) based on a security; and

“(B) entered into directly or through an underwriter (as defined in section 2(a) of the Securities Act of 1933 [15 U.S.C. 77b(a)]) by the issuer of such security for the purposes of raising capital, unless such agreement, contract, or transaction is entered into to manage a risk associated with capital raising.

“(c) RULE OF CONSTRUCTION REGARDING MASTER AGREEMENTS.—As used in this section, the term ‘swap agreement’ shall be construed to include a master agreement that provides for an agreement, contract, or transaction that is a swap agreement pursuant to subsections (a) and (b), together with all supplements to any such master agreement, without regard to whether the master agreement contains an agreement, contract, or transaction that is not a swap agreement pursuant to subsections (a) and (b), except that the master agreement shall be considered to be a swap agreement only with respect to each agreement, contract, or transaction under the master agreement that is a swap agreement pursuant to subsections (a) and (b).”

[SECS. 206B, 206C. Repealed. Pub. L. 111-203, title VII, §762(a), July 21, 2010, 124 Stat. 1759.]

[Amendment by section 762(a), (b) of Pub. L. 111-203 to sections 206A–206C of Pub. L. 106-102, set out above, effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761–774) of title VII of Pub. L. 111-203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B.]

§ 78c-1. Swap agreements

(a) [Reserved]

(b) Security-based swap agreements

(1) The definition of “security” in section 78c(a)(10) of this title does not include any security-based swap agreement.

(2) The Commission is prohibited from registering, or requiring, recommending, or suggesting, the registration under this chapter of any security-based swap agreement. If the Com-

mission becomes aware that a registrant has filed a registration application with respect to such a swap agreement, the Commission shall promptly so notify the registrant. Any such registration with respect to such a swap agreement shall be void and of no force or effect.

(3) Except as provided in section 78p(a) of this title with respect to reporting requirements, the Commission is prohibited from—

(A) promulgating, interpreting, or enforcing rules; or

(B) issuing orders of general applicability;

under this chapter in a manner that imposes or specifies reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading with respect to any security-based swap agreement.

(4) References in this chapter to the “purchase” or “sale” of a security-based swap agreement shall be deemed to mean the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap agreement, as the context may require.

(June 6, 1934, ch. 404, title I, §3A, as added Pub. L. 106-554, §1(a)(5) [title III, §303(a)], Dec. 21, 2000, 114 Stat. 2763, 2763A-452; amended Pub. L. 111-203, title VII, §762(d)(1), July 21, 2010, 124 Stat. 1760.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(2) to (4), was in the original “this title”. See References in Text note set out under section 78a of this title.

AMENDMENTS

2010—Subsec. (a). Pub. L. 111-203, §762(d)(1)(A), struck out subsec. (a) and reserved that subsec. Prior to amendment, text read as follows: “The definition of ‘security’ in section 78c(a)(10) of this title does not include any non-security-based swap agreement (as defined in section 206C of the Gramm-Leach-Bliley Act).”

Subsec. (b). Pub. L. 111-203, §762(d)(1)(B), struck out “(as defined in section 206B of the Gramm-Leach-Bliley Act)” after “security-based swap agreement” wherever appearing.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111-203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B (§§761-774) of title VII of Pub. L. 111-203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle B, see section 774 of Pub. L. 111-203, set out as a note under section 77b of this title.

§ 78c-2. Securities-related derivatives

(a) Any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission pursuant to section 6(c)(1) of title 7 with the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof) shall be deemed a security for purposes of the securities laws.

(b) With respect to any agreement, contract, or transaction (or class thereof) that is exempted by the Commodity Futures Trading Commission pursuant to section 6(c)(1) of title 7 with

the condition that the Commission exercise concurrent jurisdiction over such agreement, contract, or transaction (or class thereof), references in the securities laws to the “purchase” or “sale” of a security shall be deemed to include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under such agreement, contract, or transaction, as the context may require.

(June 6, 1934, ch. 404, title I, §3B, as added Pub. L. 111-203, title VII, §717(b), July 21, 2010, 124 Stat. 1651.)

EFFECTIVE DATE

Section effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle A (§§711-754) of title VII of Pub. L. 111-203 requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of subtitle A, see section 754 of Pub. L. 111-203, set out as an Effective Date of 2010 Amendment note under section 1a of Title 7, Agriculture.

§ 78c-3. Clearing for security-based swaps

(a) In general

(1) Standard for clearing

It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this chapter or a clearing agency that is exempt from registration under this chapter if the security-based swap is required to be cleared.

(2) Open access

The rules of a clearing agency described in paragraph (1) shall—

(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

(B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.

(b) Commission review

(1) Commission-initiated review

(A) The Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared.

(B) The Commission shall provide at least a 30-day public comment period regarding any determination under subparagraph (A).

(2) Swap submissions

(A) A clearing agency shall submit to the Commission each security-based swap, or any group, category, type, or class of security-based swaps that it plans to accept for clearing and provide notice to its members (in a