

sion 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 manner to be determined by the Commission) of such submission.

(B) Any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of July 21, 2010, shall be considered submitted to the Commission.

(C) The Commission shall—

(i) make available to the public any submission received under subparagraphs (A) and (B);

(ii) review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared; and

(iii) provide at least a 30-day public comment period regarding its determination whether the clearing requirement under subsection (a)(1) shall apply to the submission.

(3) Deadline

The Commission shall make its determination under paragraph (2)(C) not later than 90 days after receiving a submission made under paragraphs (2)(A) and (2)(B), unless the submitting clearing agency agrees to an extension for the time limitation established under this paragraph.

(4) Determination

(A) In reviewing a submission made under paragraph (2), the Commission shall review whether the submission is consistent with section 78q-1 of this title.

(B) In reviewing a security-based swap, group of security-based swaps or class of security-based swaps pursuant to paragraph (1) or a submission made under paragraph (2), the Commission shall take into account the following factors:

(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.

(ii) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.

(iii) The effect on the mitigation of systemic risk, taking into account the size of

the market for such contract and the resources of the clearing agency available to clear the contract.

(iv) The effect on competition, including appropriate fees and charges applied to clearing.

(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or 1 or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.

(C) In making a determination under subsection (b)(1) or paragraph (2)(C) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.

(5) Rules

Not later than 1 year after July 21, 2010, the Commission shall adopt rules for a clearing agency's submission for review, pursuant to this subsection, of a security-based swap, or a group, category, type, or class of security-based swaps, that it seeks to accept for clearing. Nothing in this paragraph limits the Commission from making a determination under paragraph (2)(C) for security-based swaps described in paragraph (2)(B).

(c) Stay of clearing requirement

(1) In general

After making a determination pursuant to subsection (b)(2), the Commission, on application of a counterparty to a security-based swap or on its own initiative, may stay the clearing requirement of subsection (a)(1) until the Commission completes a review of the terms of the security-based swap (or the group, category, type, or class of security-based swaps) and the clearing arrangement.

(2) Deadline

The Commission shall complete a review undertaken pursuant to paragraph (1) not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap, or group, category, type, or class of security-based swaps, agrees to an extension of the time limitation established under this paragraph.

(3) Determination

Upon completion of the review undertaken pursuant to paragraph (1), the Commission may—

(A) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the security-based swap, or group, category, type, or class of security-based swaps, must be cleared pursuant to this subsection if it finds that such clearing is consistent with subsection (b)(4); or

(B) determine that the clearing requirement of subsection (a)(1) shall not apply to the security-based swap, or group, category, type, or class of security-based swaps.

(4) Rules

Not later than 1 year after July 21, 2010, the Commission shall adopt rules for reviewing,

pursuant to this subsection, a clearing agency's clearing of a security-based swap, or a group, category, type, or class of security-based swaps, that it has accepted for clearing.

(d) Prevention of evasion

(1) In general

The Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this chapter.

(2) Duty of Commission to investigate and take certain actions

To the extent the Commission finds that a particular security-based swap or any group, category, type, or class of security-based swaps that would otherwise be subject to mandatory clearing but no clearing agency has listed the security-based swap or the group, category, type, or class of security-based swaps for clearing, the Commission shall—

(A) investigate the relevant facts and circumstances;

(B) within 30 days issue a public report containing the results of the investigation; and

(C) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the security-based swap or the group, category, type, or class of security-based swaps.

(3) Effect on authority

Nothing in this subsection—

(A) authorizes the Commission to adopt rules requiring a clearing agency to list for clearing a security-based swap or any group, category, type, or class of security-based swaps if the clearing of the security-based swap or the group, category, type, or class of security-based swaps would threaten the financial integrity of the clearing agency; and

(B) affects the authority of the Commission to enforce the open access provisions of subsection (a)(2) with respect to a security-based swap or the group, category, type, or class of security-based swaps that is listed for clearing by a clearing agency.

(e) Reporting transition rules

Rules adopted by the Commission under this section shall provide for the reporting of data, as follows:

(1) Security-based swaps entered into before July 21, 2010, shall be reported to a registered security-based swap data repository or the Commission no later than 180 days after the effective date of this section.

(2) Security-based swaps entered into on or after July 21, 2010, shall be reported to a registered security-based swap data repository or the Commission no later than the later of—

(A) 90 days after such effective date; or

(B) such other time after entering into the security-based swap as the Commission may prescribe by rule or regulation.

(f) Clearing transition rules

(1) Security-based swaps entered into before July 21, 2010, are exempt from the clearing re-

requirements of this subsection if reported pursuant to subsection (e)(1).

(2) Security-based swaps entered into before application of the clearing requirement pursuant to this section are exempt from the clearing requirements of this section if reported pursuant to subsection (e)(2).

(g) Exceptions

(1) In general

The requirements of subsection (a)(1) shall not apply to a security-based swap if 1 of the counterparties to the security-based swap—

- (A) is not a financial entity;
- (B) is using security-based swaps to hedge or mitigate commercial risk; and
- (C) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

(2) Option to clear

The application of the clearing exception in paragraph (1) is solely at the discretion of the counterparty to the security-based swap that meets the conditions of subparagraphs (A) through (C) of paragraph (1).

(3) Financial entity definition

(A) In general

For the purposes of this subsection, the term “financial entity” means—

- (i) a swap dealer;
- (ii) a security-based swap dealer;
- (iii) a major swap participant;
- (iv) a major security-based swap participant;
- (v) a commodity pool as defined in section 1a(10) of title 7;
- (vi) a private fund as defined in section 80b-2(a) of this title;
- (vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 1002 of title 29;
- (viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 1843(k) of title 12.

(B) Exclusion

The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

- (i) depository institutions with total assets of \$10,000,000,000 or less;
- (ii) farm credit system institutions with total assets of \$10,000,000,000 or less; or
- (iii) credit unions with total assets of \$10,000,000,000 or less.

(4) Treatment of affiliates

(A) In general

An affiliate of a person that qualifies for an exception under this subsection (including affiliate entities predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate—

- (i) enters into the security-based swap to hedge or mitigate the commercial risk of

the person or other affiliate of the person that is not a financial entity, and the commercial risk that the affiliate is hedging or mitigating has been transferred to the affiliate;

(ii) is directly and wholly-owned by another affiliate qualified for the exception under this paragraph or an entity that is not a financial entity;

(iii) is not indirectly majority-owned by a financial entity;

(iv) is not ultimately owned by a parent company that is a financial entity; and

(v) does not provide any services, financial or otherwise, to any affiliate that is a nonbank financial company supervised by the Board of Governors (as defined under section 5311 of title 12).

(B) Limitation on qualifying affiliates

The exception in subparagraph (A) shall not apply if the affiliate is—

- (i) a swap dealer;
- (ii) a security-based swap dealer;
- (iii) a major swap participant;
- (iv) a major security-based swap participant;
- (v) a commodity pool;
- (vi) a bank holding company;
- (vii) a private fund, as defined in section 80b-2(a) of this title;
- (viii) an employee benefit plan or government¹ plan, as defined in paragraphs (3) and (32) of section 1002 of title 29;
- (ix) an insured depository institution;
- (x) a farm credit system institution;
- (xi) a credit union;
- (xii) a nonbank financial company supervised by the Board of Governors (as defined under section 5311 of title 12); or
- (xiii) an entity engaged in the business of insurance and subject to capital requirements established by an insurance governmental authority of a State, a territory of the United States, the District of Columbia, a country other than the United States, or a political subdivision of a country other than the United States that is engaged in the supervision of insurance companies under insurance law.

(C) Limitation on affiliates’ affiliates

Unless the Commission determines, by order, rule, or regulation, that it is in the public interest, the exception in subparagraph (A) shall not apply with respect to an affiliate if such affiliate is itself affiliated with—

- (i) a major security-based swap participant;
- (ii) a security-based swap dealer;
- (iii) a major swap participant; or
- (iv) a swap dealer.

(D) Conditions on transactions

With respect to an affiliate that qualifies for the exception in subparagraph (A)—

- (i) such affiliate may not enter into any security-based swap other than for the purpose of hedging or mitigating commercial risk; and

¹ So in original. Probably should be “governmental”.

(ii) neither such affiliate nor any person affiliated with such affiliate that is not a financial entity may enter into a security-based swap with or on behalf of any affiliate that is a financial entity or otherwise assume, net, combine, or consolidate the risk of security-based swaps entered into by any such financial entity, except one that is an affiliate that qualifies for the exception under subparagraph (A).

(E) Transition rule for affiliates

An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 78o-10(e) of this title and the clearing requirement described in subsection (a) with regard to security-based swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on July 21, 2010.

(F) Risk management program

Any security-based swap entered into by an affiliate that qualifies for the exception in subparagraph (A) shall be subject to a centralized risk management program of the affiliate, which is reasonably designed both to monitor and manage the risks associated with the security-based swap and to identify each of the affiliates on whose behalf a security-based swap was entered into.

(5) Election of counterparty

(A) Security-based swaps required to be cleared

With respect to any security-based swap that is subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

(B) Security-based swaps not required to be cleared

With respect to any security-based swap that is not subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant, the counterparty—

- (i) may elect to require clearing of the security-based swap; and
- (ii) shall have the sole right to select the clearing agency at which the security-based swap will be cleared.

(6) Abuse of exception

The Commission may prescribe such rules or issue interpretations of the rules as the Com-

mission determines to be necessary to prevent abuse of the exceptions described in this subsection. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions described in this subsection.

(h) Trade execution

(1) In general

With respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1), counterparties shall—

- (A) execute the transaction on an exchange; or
- (B) execute the transaction on a security-based swap execution facility registered under section 78c-4 of this title or a security-based swap execution facility that is exempt from registration under section 78c-4(e) of this title.

(2) Exception

The requirements of subparagraphs (A) and (B) of paragraph (1) shall not apply if no exchange or security-based swap execution facility makes the security-based swap available to trade or for security-based swap transactions subject to the clearing exception under subsection (g).

(i) Board approval

Exemptions from the requirements of this section to clear a security-based swap or execute a security-based swap through a national securities exchange or security-based swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 78l of this title or that is required to file reports pursuant to section 78o(d) of this title, only if an appropriate committee of the issuer's board or governing body has reviewed and approved the issuer's decision to enter into security-based swaps that are subject to such exemptions.

(j) Designation of chief compliance officer

(1) In general

Each registered clearing agency shall designate an individual to serve as a chief compliance officer.

(2) Duties

The chief compliance officer shall—

- (A) report directly to the board or to the senior officer of the clearing agency;
- (B) in consultation with its board, a body performing a function similar thereto, or the senior officer of the registered clearing agency, resolve any conflicts of interest that may arise;
- (C) be responsible for administering each policy and procedure that is required to be established pursuant to this section;
- (D) ensure compliance with this chapter (including regulations issued under this chapter) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;
- (E) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—

- (i) compliance office review;
- (ii) look-back;
- (iii) internal or external audit finding;
- (iv) self-reported error; or
- (v) validated complaint; and

(F) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) Annual reports

(A) In general

In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—

- (i) the compliance of the registered clearing agency or security-based swap execution facility of the compliance officer with respect to this chapter (including regulations under this chapter); and
- (ii) each policy and procedure of the registered clearing agency of the compliance officer (including the code of ethics and conflict of interest policies of the registered clearing agency).

(B) Requirements

A compliance report under subparagraph (A) shall—

- (i) accompany each appropriate financial report of the registered clearing agency that is required to be furnished to the Commission pursuant to this section; and
- (ii) include a certification that, under penalty of law, the compliance report is accurate and complete.

(June 6, 1934, ch. 404, title I, §3C, as added Pub. L. 111-203, title VII, §763(a), July 21, 2010, 124 Stat. 1762; amended Pub. L. 114-113, div. O, title VII, §705(b), Dec. 18, 2015, 129 Stat. 3027.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(1) and (d)(1), was in the original “this Act”, and this chapter, referred to in subsec. (j)(2)(D), (3)(A)(i), was in the original “this title”. See References in Text note set out under section 78a of this title.

For the effective date of this section, referred to in subsec. (e), see section 774 of Pub. L. 111-203, set out as an Effective Date of 2010 Amendment note under section 77b of this title.

Subsection (c) of that section, referred to in subsec. (g)(4)(B)(v), was in the original “subsection (c) of that Act”, and was translated as meaning subsec. (c) of section 3 of act Aug. 22, 1940, ch. 686, to reflect the probable intent of Congress.

AMENDMENTS

2015—Subsec. (g)(4). Pub. L. 114-113 added subpars. (A) to (D) and (F), redesignated former subpar. (C) as (E), and struck out former subpars. (A) and (B) which related to application of exception to affiliates and prohibition relating to certain affiliates, respectively.

EFFECTIVE DATE

Section 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 rule-making, 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 an Effective Date of 2010 Amendment note under section 77b of this title.

§ 78c-4. Security-based swap execution facilities

(a) Registration

(1) In general

No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.

(2) Dual registration

Any person that is registered as a security-based swap execution facility under this section shall register with the Commission regardless of whether the person also is registered with the Commodity Futures Trading Commission as a swap execution facility.

(b) Trading and trade processing

A security-based swap execution facility that is registered under subsection (a) may—

- (1) make available for trading any security-based swap; and
- (2) facilitate trade processing of any security-based swap.

(c) Identification of facility used to trade security-based swaps by national securities exchanges

A national securities exchange shall, to the extent that the exchange also operates a security-based swap execution facility and uses the same electronic trade execution system for listing and executing trades of security-based swaps on or through the exchange and the facility, identify whether electronic trading of such security-based swaps is taking place on or through the national securities exchange or the security-based swap execution facility.

(d) Core principles for security-based swap execution facilities

(1) Compliance with core principles

(A) In general

To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with—

- (i) the core principles described in this subsection; and
- (ii) any requirement that the Commission may impose by rule or regulation.

(B) Reasonable discretion of security-based swap execution facility

Unless otherwise determined by the Commission, by rule or regulation, a security-based swap execution facility described in subparagraph (A) shall have reasonable discretion in establishing the manner in which it complies with the core principles described in this subsection.

(2) Compliance with rules

A security-based swap execution facility shall—

- (A) establish and enforce compliance with any rule established by such security-based swap execution facility, including—
 - (i) the terms and conditions of the security-based swaps traded or processed on or through the facility; and