

# SUPPORTING STATEMENT FOR NEW AND REVISED INFORMATION COLLECTIONS

OMB CONTROL NUMBER 3038-NEW

## Part 44 Interim Final Rule for Reporting Pre-Enactment Swap Transactions

### Justification

1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was enacted.<sup>1</sup> Title VII of the Dodd-Frank Act amends the Commodity Exchange Act (“CEA”)<sup>2</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. Section 729 of the Dodd-Frank Act required the Commodity Futures Trading Commission (“CFTC” or “Commission”) to adopt, within 90 days of enactment of the Dodd-Frank Act, an interim final rule for the reporting of swap transactions entered into before July 21, 2010 whose terms had not expired as of that date (“pre-enactment unexpired swaps”). Accordingly, the CFTC adopted an interim final rule, 17 CFR part 44, which requires specified counterparties to pre-enactment unexpired swaps to report certain information related to those transactions to a registered swap data repository (“SDR”) or the Commission by a compliance date to be established by rules promulgated under Section 2(h)(5) of the Commodity Exchange Act (“CEA”). The provisions of the interim final rule became effective on October 14, 2010, the date of publication in the *Federal Register*.<sup>3</sup> Pursuant to Section 729 of the Dodd-Frank Act, the reporting requirements set forth in the interim final rule will remain in effect until the effective date of permanent recordkeeping and reporting rules to be adopted by the Commission pursuant to Section 2(h)(5) of the CEA.

The Commission has not yet adopted the substantive regulations under CEA section 2(h)(5) which will govern the reporting of pre-enactment unexpired swaps.<sup>4</sup> Thus, the interim final rule merely puts counterparties to pre-enactment swap transactions on notice that they may be subject to reporting obligations to be promulgated by the Commission. Accordingly, the Commission observed in an interpretative note to Regulation 44.02 that in order to comply with Regulation 44.02’s immediate reporting mandate, counterparties to pre-enactment unexpired swaps should retain existing information related to such swaps until such as the Commission adopts substantive reporting rules pursuant to Section 2(h)(5) of the CEA. This implicit retention requirement represents a new collection of information for which the Commission is now seeking an OMB control number.

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<sup>1</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> 7 U.S.C. 1 *et seq.*

<sup>3</sup> 75 FR 63080 (Oct. 14, 2010).

<sup>4</sup> The Commission will estimate the burdens of such requirements as part of its Notice of Proposed Rulemaking.

The estimated numbers of respondents and projected total annual responses and average number of hours per response are provided in Attachment A.

2. Indicate how, by whom, and for what purpose the data would be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

The Dodd-Frank Act was enacted to reduce risk, increase transparency and promote market integrity within the financial system by, among other things, creating robust recordkeeping and reporting regimes for derivatives products. Data relating to unexpired pre-enactment swaps specifically are captured by the legislation, which in Section 729 requires that the Commission, within 90 days of enactment of the Dodd-Frank Act, adopt an interim final rule making clear that this category of swap transaction is subject to recordkeeping and reporting requirements to be subsequently adopted by the Commission. The Commission believes that data relating to such transactions will facilitate its ability to understand and evaluate the current market for swaps—including the size and scope of the market—which in turn will lead to a more robust and transparent environment for the swaps market. Along with other swap transaction data, pre-enactment swap transaction information will be used by the Commission and other regulators to evaluate the current swaps marketplace and support various rulemaking efforts in connection with the Dodd-Frank Act.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

The interim final rule contemplates the use of certain electronic collection protocols such as e-mail and web-based systems depending on the manner in which the current pre-enactment unexpired swaps are maintained. Because the interim final rule eventually will be supplanted by permanent recordkeeping and reporting requirements, the Commission has sought to limit the burden on reporting entities by advising these entities that they may preserve data that is already kept by swap counterparties in their normal course of business and may report it in the format in which it is traditionally kept. Accordingly, to the extent the pre-enactment unexpired swap data are maintained in hard-copy form, the Commission contemplates accepting such hard copies.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

The type of information required to be collected under the interim final rule is not currently collected and is not available for public disclosure through any other source. Prior to enactment of the Dodd-Frank Act, the Commission did not have statutory authority to require the

reporting of swap data by market participants. There are no existing regulations that could be modified to serve a similar purpose.

5. If the collection of information involves small business or other small entities (Item 5 of OMB From 83-1), describe the methods used to minimize burden.

Not applicable. The Commission determined “good cause” was established under 5 U.S.C. 553(b) by special order of Congress in the Dodd-Frank Act and, therefore, a “small entity” analysis for purposes of the Regulatory Flexibility Act was not required.

6. Describe the consequence to the Federal Program or policy activities if the collection were conducted less frequently as well as any technical or legal obstacles to reducing burden.

As noted, the interim final rule establishes that reporting requirements to be promulgated by the Commission under section 2(h)(5) of the CEA will apply to pre-enactment unexpired swaps; it thus serves as notice to counterparties of a present obligation to retain data relating to such swaps for reporting at a future time subject to regulations not yet adopted. The frequency of collection of information by way of recordkeeping set forth in the interim final rule, which is ongoing, is essential to provide full and complete records of the swap transaction

7. Explain any special circumstances that require the collection to be conducted in a manner:

- requiring respondents to report information to the agency more often than quarterly;

This does not apply.

- requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt;

In the event that an SDR becomes registered and is able to accept the data for a particular pre-enactment unexpired swap, respondents may be required to respond to the Commission’s request to submit data to the SDR in fewer than 30 days.

- requiring respondents to submit more than an original and two copies of any document;

This does not apply.

- requiring respondents to retain records other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;

This does not apply.

- in connection with a statistical survey that is not designed to produce valid and reliable results that can be generalized to the universe of study;

This does not apply.

- requiring the use of a statistical data classification that has not been reviewed and approved by OMB;

This does not apply.

- that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or

Section 21(c)(6) of the CEA requires that SDRs protect the privacy of the information that is reported to them. In addition, Section 8(a) of the CEA generally prohibits the Commission from separately disclosing the “business transactions or market positions of any person and trade secrets or names of customers.” The Commission also has adopted regulations under the Freedom of Information Act<sup>5</sup> which implement that statute. See 17 C.F.R. §145 Both the Freedom of Information Act and the Commission’s Part 145 regulations make nonpublic information that is exempt from disclosure by another federal statute, including Section 8(a) of the CEA. See 5 U.S.C. § 552(b)(3) and 17 C.F.R. § 145.5(c).

- requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.

Section 8 of the CEA requires the Commission to keep confidential information regarding market positions, business transactions, trade secrets and certain information subject to limited exceptions set forth in Section 8(b) and (e) of the CEA.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice required by 5 C.F.R. 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

The interim final rule specifically did not solicit comments on the information collection. The Commission subsequently published in the Federal Register the notice required by 5 C.F.R. § 1320.8(d)<sup>6</sup> and received one responsive comment. Trade associations comprising the “Not-

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<sup>5</sup> 5 U.S.C. 552 et seq.

<sup>6</sup> 76 FR 1603 (Jan. 11, 2011). The notice is attached to this Statement.

For-Profit End User Coalition” (the “Coalition”) challenged the CFTC’s estimates of the regulatory burdens imposed by the interim final rule. Specifically, the Coalition disputed the Commission’s estimate of 1800 respondents/affected entities, noting that there are approximately 2900 Coalition member-end users, some or all of whom may engage in transactions that will be defined as swaps. In response to this comment, the Commission has adjusted its estimate of the number of respondents/affected entities to include all potential end-user counterparties; the new estimate is 32,000. The Coalition also challenged the Commission’s estimate that the burden per respondent is .5 hour. The Coalition argued that each of its members must review and understand the Dodd-Frank Act and the CEA in order to understand why the Commission has jurisdiction over pre-enactment swaps. Further, at some future date the Commission will require that retained data be submitted to an SDR, and additionally may require that the data be manipulated or interpreted—each of these activities would significantly increase the burden on respondents. The Commission was not persuaded by this argument. The interim final rule requires only that potential reporting entities be prepared to comply with recordkeeping and reporting requirements when they are adopted, which requires only that they retain records kept in the normal course of business; statutory analysis and interpretation may generally be required of entities subject to the CEA, but that activity is not specific to this collection. With respect to the perceived burdens that may be imposed in connection with other rulemakings, those burdens cannot, nor should they be, quantified in the instant collection. Accordingly, the Commission has not amended its estimate of the hour and cost burden.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping disclosure, or reporting format (if any, and on the data elements to be recorded, disclosed, or reported.

The Commission did not solicit general comments from the public regarding the interim final rule prior to the publication of such regulations in 75 FR 63080 (Oct. 14, 2010). Nine (9) comments were received in connection with the IFR. These comments addressed the merits of the rulemaking and did not focus on data or collection issues.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every three years—even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

This does not apply. The interim final rule advises counterparties to pre-enactment swaps that recordkeeping and reporting rules to be adopted by the Commission will apply to those transactions. The rule does not separately impose a reporting obligation.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

This question does not apply.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulations, or agency policy.

See the response to Question 7. Section 8(a) of the CEA generally prohibits the Commission from separately disclosing the “business transactions or market positions of any person and trade secrets or names of customers.” The Commission also has adopted Freedom of Information Act regulations, 17 C.F.R. Part 145, which implements the federal statute set forth in 5 U.S.C. §552. Both the Freedom of Information Act and the Commission’s Part 145 regulations make nonpublic information that is exempt from disclosure by another federal statute, including

Section

8(a) of the CEA. See 5 U.S.C. § 552(b)(3) and 17 C.F.R. § 145(c).

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

The regulations covered by the collections do not require the reporting of sensitive information as that term is used in Question 11.

12. Provide estimates of the hour burden of the collection of information. The Statement should:

- Indicate the number of respondents, frequency of response, annual hour burden and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than ten) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.
- If the request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.
- Provide estimates of annualized cost to respondents for the hours burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.

See Attachment A. In calculating the cost figures in Attachment A, the Commission based its calculations on an hourly wage rate<sup>7</sup> of \$42.05 to comply with the interim final rule.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14).

- The cost estimate should be split into two components; (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major costs factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software, monitoring, sampling, drilling and testing equipment, and record storage facilities.
- If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate, agencies may consult with a sample of respondents (fewer than ten), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.
- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

See Attachment A.

14. Provide estimates of the annualized costs to the Federal Government. Also provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing and support staff), and any other expense that would not have been incurred without this collection of

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<sup>7</sup> In arriving at a wage rate for the hourly costs imposed, Commission staff used the Management & Professional Earnings in the Securities Industry Report, published in 2010 by the Securities Industry and Financial Markets Associations (2010 Report). The wage rate used the median salary of a Programmer as published in the 2010 report and dividing that figure by 2000 annual working hours to arrive at the hourly rate of \$42.05. Because the interim final rule requires only that the existing data be maintained in current form, a programmer will be able to sufficiently perform this task.

information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

The Federal Government will expend no additional costs as a result of this collection of information.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB Form 83-I.

This question does not apply.

16. For collection of information whose results are planned to be published for statistical use, outline plans for tabulation, statistical analysis, and publication. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

This question does not apply.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

This question does not apply.

18. Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submissions," of OMB Form 83-I.

No exceptions exist.



**Attachment A**

**Reporting (Recordkeeping) for Pre-Enactment Swap Transactions under Section 729 of the  
Dodd-Frank Act**

**Estimated Annual Hour and Cost Burden of the Collection of Information**

Est'd # of Covered Entities (a)	Est'd Avg. # of Hrs. to Burden Hours Report	Est'd Total Annual Burden Hrs.	Est'd Total Start-up Costs (\$)	Est'd Avg. Total Operational Cost per year (\$)	Est'd Annual Total Costs (\$)
32,000 <sup>8</sup>	.5 <sup>9</sup>	16,000	\$0	\$0	\$672,800 <sup>10</sup>

Estimated Total Annual Burden Hours:      900 Annual Burden Hours

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<sup>8</sup> The number of entities was estimated based on the current estimate of the number of Swap Dealers (250), Major Swap Participants (50), and other counterparties, including end-users (31,700). Because the Commission has not regulated the swap market, it has not collected data relevant to this estimate. Additionally, while staff believes that there are likely approximately 200 swap dealers, we have taken a conservative approach in estimating that there will be 250 swap dealers for Paperwork Reduction Act purposes. Therefore, the Commission requests comment on this estimate.

<sup>9</sup> The interim final rule requires only that the counterparties maintain data in its current form. This will require a de minimis hourly burden.

<sup>10</sup> \$42.05 per hour x 16,000 hours