

Proposed Rulemaking: *ADAPTATION OF REGULATIONS TO INCORPORATE
SWAPS* (76 F.R. 33066, June 7, 2011)

**SUPPORTING STATEMENT FOR NEW AND
REVISED INFORMATION COLLECTIONS**

OMB CONTROL NUMBER 3038-_____

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.**

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, Pub L. No. 111-203, 124 Stat. 1376 (2010)) amended the Commodity Exchange Act (CEA) to establish a comprehensive new statutory framework for swaps. These amendments require the Commodity Futures Trading Commission (“the Commission”) to amend several of its regulations to implement the new framework.

The information collection obligations imposed by the proposed regulations are necessary to implement section 721 of the Dodd-Frank Act, which amended the definitions of futures commission merchant and introducing broker to permit these intermediaries to trade swaps on behalf of customers. They are also necessary to implement section 733 of the Dodd-Frank Act which introduced swap execution facilities as a new trading platform for swaps. As a result, the Commission needed to amend certain recordkeeping regulations (1.31, 1.33, 1.35, 1.37, and 1.39) so that records of swap transactions are kept analogously to how futures transactions are presently maintained. In addition, in light of the Commission’s recently proposed rulemaking that would require swap dealers and major swap participants to keep records of oral communications (75 F.R. 76666), the Commission is proposing that futures commission merchants, introducing brokers, retail foreign exchange dealers, members of designated contract markets, and members of swap execution facilities have the same requirement.

The information collection burdens are restricted to the costs associated with the recordkeeping and reporting requirements that the proposed regulations impose upon affected registrants, registered entities, and their members.

- 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.**

Commission staff would use the information required to be preserved when conducting the Commission’s examination and oversight program with respect to the affected registrants and when conducting investigations into potential violations of the CEA.

- 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 proposed regulations require that recordkeeping generally be performed in accordance with Commission Regulation 1.31, which permits the use of electronic storage media.

- 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 recordkeeping regulations amended in this rulemaking are the only recordkeeping regulations affecting futures commission merchants and introducing brokers. The information collected pursuant to these regulations is not collected by any other agency or available for public disclosure through any other source.

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

All entities subject to the amended regulations, except for introducing brokers, will be large financial institutions. With respect to introducing brokers, the Commission conducted a Regulatory Flexibility Analysis and determined that minimizing the burden for introducing brokers likely would create an unacceptable opportunity for regulatory arbitrage.

- 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.**

Failure to maintain the records required by the proposed regulations would adversely affect the Commission's ability to ensure the affected registrants' and their members' compliance with their obligations under the CEA and Commission regulations to document swap transactions.

- 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 question does not apply. The proposed regulations do not impose any reporting requirements to the agency.

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

This question does not apply.

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

This question does not apply. The proposed regulations do not impose any requirements that would obligate a respondent to submit more than an original and two copies of any document.

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

Commission regulation 1.31 expressly requires that:

All books and records required to be kept by the [CEA] or by [Commission] regulations shall be kept for a period of five years from the date thereof and shall be readily accessible during the first two years of the five-year period. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice.

In addition, in this proposed rulemaking, the Commission proposes to amend Regulation 1.31 so that records of any swap or related cash or forward transaction shall be kept until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction and for a period of five years after such date. In addition, swap records must be open to inspection not only to the Commission or the Department of Justice but also to applicable prudential regulators, as that term is defined in section 1a(39) of the Act. Finally, those security-based swap agreements described in section 1a(47)(A)(v) of the Act must also be open to inspection by the United States Securities and Exchange Commission.

- **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 question does not apply. The proposed regulation does not require nor involve any statistical surveys.

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

This question does not apply. The proposed regulation does not require nor involve the use of any statistical data classification.

- **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**

This question does not apply. The proposed regulation does not require a pledge of confidentiality.

- **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.**

This question does not apply. In any event, the Commission has promulgated regulations to protect the confidentiality of any information collected from respondents. Such regulations are set forth in 17 CFR Part 145.

- 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 CFR 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.**

A copy of the proposed rulemaking has been submitted to the Federal Register for publication and public comment. The Commission is affirmatively seeking comment from the public:

-on the potential costs and benefits of requiring registrants to record and maintain oral communications as provided in the proposed rule and

-on whether the retention period for any communication medium (e.g., oral communications) should be shorter than the retention period applicable to other required records.

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).

None.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 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.

No such circumstances are anticipated.

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

This question does not apply. No decision to provide any payment or gift to respondents has been made.

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

If the proposed regulations are adopted, the Commission will protect proprietary information according to the Freedom of Information Act and the regulations that the Commission has promulgated to protect the confidentiality of collected information contained in 17 CFR 145, "Commission Records and Information." In addition, section 8(a) of the CEA provides for the confidentiality of data and information, except under the limited circumstances delineated therein. The Commission also is required to protect certain information pursuant to the Privacy Act of 1974.

- 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.**

This question does not apply. The proposed regulations do not request or require the provision 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.

Aggregate burdens for certain of the proposed amendments cannot reasonably be estimated. Explanations follow. Those proposed amendments do *not* appear on Attachment A.

Also following is an explanation of the hourly burden for the proposed amendment to Regulation 1.33, which is summarized on Attachment A.

Requirement that futures commission merchants (“FCMs”) prepare swap confirmations and monthly statements describing customers’ swap positions (1.33)

Number of registrants: **141 FCMs.**

Frequency of collection: **As needed.**

Estimated number of annual responses per registrant: **1,191 swap confirmations and 99 monthly statements.**

Explanation:

2016 hrs. of swap trading per yr. [252 trading days x 8 hrs./day] x 250 estimated swap dealers (“SDs”) = 504,000 total hrs. of swaps

Estimated that 1/3 of swaps will be cleared and therefore handled by FCMs = 168,000 hrs. of cleared swaps

168,000 hrs. / 141 FCMs = 1,191 hrs. per yr of swaps for *each* FCM

1,191 hrs. / 1 hr per swap = 1,191 swaps will be cleared by FCMs each year

1,191 swaps cleared by each FCM will yield:

1,191 swap confirmations and
99 monthly statements (1,191/12 mos.) to be completed by each FCM.

Estimated aggregate number of annual responses: 1,191 x 141 FCMs = **167,931** aggregate swap confirmations and 99 x 141 FCMs = **13,959** aggregate monthly statements

Estimated annual hour burden per registrant: 1 hr. for each swap confirmation and 1 hr. for each monthly statement

Estimated aggregate annual hour burden: 1 hr. x 167,931 = **167,931** aggregate hrs. for swap confirmations and 1 hr x 13,959 = **13,959** aggregate hrs. for monthly statements

Requirement that FCMs, IBs, and DCM members comply with Regulation 1.35 for any swap transactions they enter into:

This proposed amendment requires FCMs, IBs, and DCM members to comply with those transaction recordkeeping requirements, which they currently adhere to with respect to futures transactions, for swap transactions. As described in the Federal Register document, the

Commission has estimated it will take each of the aforementioned entities approximately ½ hour to fulfill the recordkeeping requirement for each swap transaction.

As described above, it is estimated that each FCM will enter into 1,191 swaps per year, which would create an aggregate burden of 596 hrs. per year $[1,191 / 2]$ for all 141 FCMs to comply with Regulation 1.35 in respect of swap transactions.

The Commission cannot estimate how many IBs (1,582 total) and DCM members (11,500 in the aggregate) will enter into swaps. Whereas an FCM is required for a cleared swap to be cleared, it is not necessary that an IB be involved. In addition, an FCM typically will be a member of at least one DCM. Therefore, the 11,500 aggregate DCM members includes a significant number of FCMs. It is possible that a DCM member who is not an FCM may be involved in a cleared swap transaction, but the Commission cannot estimate the number.

Requirement that SEF members comply with Regulation 1.35 for any swap transactions they enter into:

The Commission estimates it will take a SEF member ½ hour to comply with Regulation 1.35's transaction recordkeeping requirements with respect to each swap. While the Commission is able to estimate the number of swaps that will be cleared, the Commission cannot presently estimate the percentage of swaps that will be traded on SEFs as opposed to DCMs. In addition, certain SEF members may also be FCMs. Therefore, the Commission cannot estimate the annual aggregate burden for SEF members to comply with Regulation 1.35.

Requirement that each FCM, IB and DCM member keep records showing a customer's name, address, occupation or business, and the name of any other person guaranteeing the account or exercising any trading control over it for each swap transaction entered into (1.37(a))

This proposed amendment requires FCMs, IBs, and DCM members to comply with a recordkeeping requirement, which they currently adhere to with respect to futures transactions, for swap transactions. As described in the Federal Register document, the Commission has estimated it will take each of the aforementioned entities approximately .4 hours to fulfill this recordkeeping requirement for each swap transaction.

As described above, it is estimated that each FCM will enter into 1,191 swaps per year, which would create an aggregate burden of 476 hrs. per year $[1,191 \times .4]$ for all 141 FCMs to comply with Regulation 1.37(a) in respect of swap transactions.

As described above, the Commission cannot estimate how many IBs (1,582 total) and DCM members (11,500 in the aggregate) will enter into swaps. Whereas an FCM is required for a cleared swap to be cleared, it is not necessary that an IB be involved. In addition, an FCM typically will be a member of at least one DCM. Therefore, the 11,500 aggregate DCM members includes a significant number of FCMs. It is possible that a DCM member who is not

an FCM may be involved in a cleared swap transaction, but the Commission cannot estimate the number.

Requirement that each FCM carrying an omnibus account for another FCM, a foreign broker, a member of a DCM or any other person maintain a daily record for such account of the total open long contracts and the total open short contracts in each swap (1.37(b))

This proposed amendment requires FCMs to comply with a recordkeeping requirement, which they currently adhere to with respect to futures transactions, for swap transactions. As described in the Federal Register document, the Commission has estimated it will take each FCM .4 hours to fulfill this recordkeeping requirement for each swap transaction.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* swap transactions will involve an FCM carrying an omnibus account for another FCM, a foreign broker, DCM member, or any other person.

Requirement that swap execution facilities (“SEFs”) keep a record showing the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange (1.37(c))

This proposed amendment requires SEFs to comply with a recordkeeping requirement currently applicable to DCMs. As described in the Federal Register document, the Commission has estimated it will take each SEF .4 hours to fulfill this recordkeeping requirement each time a foreign trader executes a transaction.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* swap transactions will be executed on SEFs by foreign traders.

Requirement that SEFs record those buy- and sell-orders of different principals that SEF members have executed simultaneously (1.39)

This proposed amendment requires SEFs to comply with a recordkeeping requirement currently applicable to DCMs. As described in the Federal Register document, the Commission has estimated it will take each SEF .1 hours to capture the required information each time SEF members simultaneously execute buy and sell orders of different principals.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* buy and sell orders will be executed simultaneously on SEFs.

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. There will be start-up costs associated with the proposed amendments to section 1.35 (maintenance of records of oral communications). Hardware costs for all entities that will be subject to 1.35 are estimated to be \$55,000 for an average large entity that does not already have systems in place, and \$10,00 for each small entity that does not already have systems in place. Start-up labor costs were estimated for all of these entities at \$6,750. The Commission has estimated that each entity will have to devote one hour per trading day of information technology specialists in order to ensure the operation of the system to retain oral records.

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

It is not anticipated that the proposed regulations would impose any additional costs to the Federal Government.

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

The program changes or adjustments are required by the Dodd-Frank Act, which established a new regulatory scheme.

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.

None.

Attachment A

Amendments to Adapt CFTC Regulations to the Dodd-Frank Act: Regulations 1.31, 1.33, 1.35, 1.37, and 1.39

See also responses to Questions 12 and 13, above.

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Requirement	Estimated Number of Registrants Per Year	Number of Responses Per Registrant Annually	Aggregate Number of Responses Annually	Estimated Average Number of Hours Per Response	Estimated aggregate burden
Recordkeeping: 1.31(b)(3)(ii) (Development of “audit system”)	3,500 members of swap execution facilities (“SEF members”)	1 (1 time only)	3,500 (1 time only)	100 hrs.	350,000 hrs.
Recordkeeping: 1.31(c) (Representation to the Commission concerning audit system)	3,500 SEF members	1 (1 time only)	3,500 (1 time only)	1 hr.	3,500 hrs.
Recordkeeping: 1.35(a)(Maintaining records of oral communications)	16,583 ¹	1 time only to establish system and 252 times/yr. (1 hr. for each trading day) to ensure the operation of the system (“maintenance”)	16,583 for the start-up and 4,178,916 (16,583 x 252 days) for maintenance	135 hrs. for start-up and 1 hr./day for maintenance	2,238,705 hrs. (16,583 x 135 hrs.) for start-up and 16,583 hrs. (16,583 x 1 hr.) for maintenance
Recordkeeping: 1.33 (preparation of swap confirmations and monthly statements describing customers’ swap positions)	141 futures commission merchants (“FCMs”)	1,191 swap confirmations and 99 monthly statements ²	167,931 swap confirmations and 13,959 monthly confirmations	1 hr for each confirmation and 1 hr for each monthly statement	167,931 hrs. for swap confirmations and 13,959 hrs. for monthly confirmations

¹ 16,583 represents the total number of FCMs (141), introducing brokers (“IBs”) (1,582), members of designated contract markets (“DCM members”) (11,500), SEF members (3,500), and retail foreign exchange dealers (“RFEDs”) (1). The number of FCMs is not included in the total because each FCM is typically a member of at least one DCM. Therefore, it would be duplicative to count both the number of FCMs and the number of DCM members.

² See response to question 12 for an explanation of these numbers.