PAPERWORK REDUCTION ACT SUBMISSION

SUPPORTING STATEMENT
for the Paperwork Reduction Act New Information Collection Submission for Rule 3a68-2 (Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps) and Rule 3a68-4(c) (Process for Determining Regulatory Treatment for Mixed Swaps)

A. Justification

1. Necessity of Information Collection

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") adds to the Commodity Exchange Act ("CEA") and the Securities Exchange Act of 1934 ("Exchange Act") definitions of the terms "swap," "security-based swap," and "mixed swap."[1]

Section 712(d)(1) of the Dodd-Frank Act provides that the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (together with the CFTC, the "Commissions"), in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement."

Under the comprehensive framework for regulating swaps and security-based swaps established in Title VII of the Dodd-Frank Act, the CFTC is given regulatory authority over swaps, the SEC is given regulatory authority over security-based swaps, and the Commissions shall jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII of the Dodd-Frank Act.

In light of the requirements in the Dodd-Frank Act noted above, the Commissions issued a joint Advance Notice of Proposed Rulemaking ("ANPR") on August 13, 2010, requesting public comment regarding the definitions of "swap," "security-based swap," "security-based swap agreement," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant" in Title VII of the Dodd-Frank Act.[2] The Commissions reviewed more than 80 comments in response to the ANPR. The Commissions also informally solicited comments on the definitions on their respective websites. In addition, the staffs of the Commissions have met with many market participants and other interested parties to discuss the definitions.

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[1] Citations to provisions of the CEA and the Exchange Act, 15 U.S.C. 78a et seq., in this document refer to the numbering of those provisions after the effective date of Title VII.

[2] See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Rel. No. 34-62717, 75 FR 51429 (Aug. 20, 2010). The comment period for the ANPR closed on September 20, 2010.

On April 27, 2011, the Commissions jointly proposed rules and interpretative guidance to further define the terms "swap," "security-based swap," and "security-based swap agreement," regarding "mixed swaps," and governing books and records with respect to "security-based swap agreements."[3] Furthermore, on July 10, 2012, the Commissions jointly adopted rules and interpretative guidance to further define the terms "swap," "security-based swap," and "security-based swap agreement," regarding "mixed swaps," and governing books and records with respect to "security-based swap agreements."[4] Section 712(d)(4) of the Dodd-Frank Act provides that any interpretation of, or guidance by, either the CFTC or SEC regarding a provision of Title VII of the Dodd-Frank Act shall be effective only if issued jointly by the Commissions (after consultation with the Board) on issues where Title VII of the Dodd-Frank Act requires the CFTC and SEC to issue joint regulations to implement the provision. The Commissions believe that any interpretation or guidance regarding whether a Title VII of the Dodd-Frank Act instrument is a swap, a security-based swap, or both (i.e., a mixed swap), must be issued jointly pursuant to this requirement.

There may be instruments (or classes of instruments) that are difficult to categorize definitively as swaps or security-based swaps. Further, because mixed swaps are both swaps and security-based swaps, identifying a mixed swap may not always be straightforward. In addition, because mixed swaps are both security-based swaps and swaps, absent a joint rule or order by the Commissions permitting an alternative regulatory approach, persons who desire or intend to list, trade, or clear a mixed swap (or class thereof) would be required to comply with all the statutory provisions in the CEA and the Exchange Act (including all the rules and regulations thereunder) that were added or amended by Title VII of the Dodd-Frank Act with respect to swaps or security-based swaps. Such dual regulation may not be appropriate in every instance and may result in potentially conflicting or duplicative regulatory requirements. Consequently, the SEC adopted rule 3a68-2, which creates a process for interested persons to request a joint interpretation by the Commissions regarding whether a particular instrument (or class of instruments) is a swap, a security-based swap, or both (i.e., a mixed swap), as well as rule 3a68-4(c), which would establish a process for persons to request that the Commissions issue a joint order permitting such persons (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions[5] only, with specified parallel provisions of either the CEA or the

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[3] See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818 (May 23, 2011) ("Proposing Release").

[4] See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR [ ] ([ ], 2012) ("Adopting Release").

[5] For purposes of rule 3a68-4(c) under the Exchange Act, "parallel provisions" means comparable provisions of the CEA and the Exchange Act that were added or amended by Title VII of the Dodd-Frank Act with respect to security-based swaps and swaps, and the rules and regulations thereunder.

Exchange Act, and related rules and regulations (collectively "specified parallel provisions"), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.

Under rule 3a68-2, a person would provide to the Commissions a copy of all material information regarding the terms of, and a statement of the economic characteristics and purpose of, each relevant agreement, contract, or transaction (or class thereof), along with that person's determination as to whether each such agreement, contract, or transaction (or class thereof) should be characterized as a swap, security-based swap, or both (i.e., a mixed swap). The Commissions also may request the submitting person to provide additional information.

Under rule 3a68-4(c), a person would provide to the Commissions a copy of all material information regarding the terms of, and the economic characteristics and purpose of, the specified (or specified class of) mixed swap. In addition, a person would provide the specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for relevant mixed swap (or class thereof), and an analysis of: i) the nature and purposes of the parallel provisions that are the subject of the request; ii) the comparability of such parallel provision; and iii) the extent of any conflicts or differences between such parallel provisions. The Commissions also may request the submitting person to provide additional information.

2. Purpose and Use of the Information Collection

The SEC would use the information collected pursuant to rule 3a68-2 to evaluate an agreement, contract, or transaction (or class thereof) in order to provide joint interpretations or joint notices of proposed rulemaking with the CFTC regarding whether these agreements, contracts, or transactions (or classes thereof) are swaps, security-based swaps, or both (i.e., mixed swaps) as defined in the Dodd-Frank Act.

The SEC would use the information collected pursuant to rule 3a68-4(c) to evaluate a specified, or a specified class of, mixed swaps in order to provide joint orders or joint notices of proposed rulemaking with the CFTC regarding the regulation of that particular mixed swap or class of mixed swap.

The information provided to the SEC pursuant to rules 3a68-2 and 3a68-4(c) also would allow the SEC to monitor the development of new OTC derivatives products in the marketplace and determine whether additional rulemaking or interpretive guidance is necessary or appropriate.

3. Consideration Given to Information Technology

Rules 3a68-2 and 3a68-4(c) would allow persons to submit requests to the Commissions for joint interpretations regarding whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (i.e., a mixed swap), and for joint orders permitting alternative regulatory treatment for particular

mixed swaps. We understand from our staff's discussions with industry participants that information technology is commonly used to assist in the creation and maintenance of documentation as part of their ordinary course business and risk management practices, including documentation required by the rules for a request submitted pursuant to rules 3a68-2 and 3a68-4(c), however, the proposed rule does not mandate how an entity must gather or maintain the documentation required for a submission under rules 3a68-2 and 3a68-4(c).

4. Duplication

The rule would not duplicate existing regulatory requirements. Moreover, we understand from our staff's discussions with industry participants that the persons likely to submit a request under rules 3a68-2 and 3a68-4(c) may currently create and maintain, as part of their ordinary course business and risk management practices, some of the documentation that is required by rules 3a68-2 and 3a68-4(c).[6]

5. Effect on Small Entities

For purposes of SEC rulemaking in connection with the Regulatory Flexibility Act, a small entity includes: (i) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less,[7] or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[8] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[9] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) for entities engaged in credit intermediation and related activities, entities with $175 million or less in assets;[10] (ii) for entities engaged in non-

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6 The information required to be submitted to request an interpretation under proposed rule 3a68-2 is information about the nature of the instrument and the person's own determination, and reasons, regarding the instrument's status as a swap, security-based swap, or mixed swap. The information required to be submitted to request alternative regulatory treatment under proposed rule 3a68-4(c) is information about the nature of the mixed swap and the person's own determination, and reasons, regarding the proposed alternative regulatory treatment of the instrument. In the absence of a request pursuant to proposed rule 3a68-2 or 3a68-4(c), such persons would need to maintain certain information about such instruments, as well as make their own determination regarding the status of and regulatory regime applicable to the instrument, as a part of their ordinary business practices.

7 See 17 CFR 240.0-10(a).

8 See 17 CFR 240.17a-5(d).

9 See 17 CFR 240.0-10(c).

10 See 13 CFR 121.201 (Subsector 522).

depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts;[11] (iii) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts;[12] (iv) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts;[13] and (v) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[14]

Based on the SEC's existing information about the swap markets, we believe that the swap markets, while broad in scope, are largely dominated by entities such as those that would be covered by the "swap dealer," "security-based swap dealer," "major swap participant," and "major security-based swap participant" definitions.[15] The SEC believes that such entities exceed the thresholds defining "small entities" set out above. Moreover, although it is possible that other persons may engage in swap, security-based swap, and mixed swap transactions, we do not believe that any of these entities would be "small entities" as defined in rule 0-10 under the Exchange Act.[16] Feedback from industry participants about the swap markets indicates that only persons or entities with assets significantly in excess of $5 million (or with annual receipts significantly in excess of $7 million) participate in the swap markets.

To the extent that a small number of transactions did have a counterparty that was defined as a "small entity" under SEC rule 0-10, the SEC believes it is unlikely that the information collections under rules 3a68-2 and 3a68-4(c) would have a significant economic impact on that entity. Rules 3a68-2 and 3a68-4(c) simply would provide a process for such persons, if they desire, to request interpretations of whether agreements, contracts, and transactions are swaps, security-based swaps, or mixed swaps or to request alternative regulatory treatment for mixed swaps.

6. Consequences of Not Conducting the Collection

The collection of information in rule 3a68-2 is designed to provide the Commissions with sufficient information regarding the instrument at issue so that the Commissions can appropriately evaluate whether it is a swap, a security-based swap, or both (i.e., a mixed swap). We believe that, without the information in rule 3a68-2, the

11 See id.

12 See id. at Subsector 523.

13 See id. at Subsector 524.

14 See id. at Subsector 525.

15 See, e.g., CEA section 1a(49), 7 U.S.C. 1a(49) (defining "swap dealer"); section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A) (defining "security-based swap dealer"); CEA section 1a(33), 7 U.S.C. 1a(33) (defining "major swap participant"); section 3(a)(67)(A) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A) (defining "major security-based swap participant"). See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 FR 30596 (May 23, 2012) ("Entity Definitions Release"). Such entities also would include commercial entities that may use swaps to hedge or mitigate commercial risk.

16 See 17 CFR 240.0-10(a).

SEC may not have sufficient information about instruments for which market participants are unsure of the characterization and thus may not be able to issue an interpretation of whether an instrument is a swap, security-based swap, or mixed swap. We further believe that, as a result, there is a possibility that market participants who engage in agreements, contracts, or transactions about which the status as a swap, security-based swap, or mixed swap is uncertain would face greater regulatory uncertainty regarding the status of such instruments.

The collection of information in rule 3a68-4(c) is designed to provide the Commissions with sufficient information regarding the mixed swap at issue so that the Commissions can appropriately evaluate whether alternative regulatory treatment for the mixed swap is warranted. We believe that, without the information in 3a68-4(c), the SEC may not have sufficient information about such mixed swaps to permit alternative regulatory treatment. We further believe that, as a result, there is a possibility that market participants who engage in mixed swaps that might otherwise be appropriate for alternative regulatory treatment would face greater regulatory burdens regarding such instruments.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

There are no special circumstances. These collections are consistent with the guidelines in 5 CFR 1320.5(d)(2), except potentially with respect to the confidentiality of information. There is no requirement that the collections of information in rules 3a68-2 and 3a68-4(c) be provided to the SEC or a third party on a regular, ordinary course basis. However, such information may be considered proprietary financial information regarding an entity's swap, security-based swap, or mixed swap transactions, and thus confidentiality concerns may arise where the SEC has obtained information pursuant to rule 3a68-2 or 3a68-4(c). In a situation where the SEC has obtained such information, the SEC would consider requests for confidential treatment of such information on a case-by-case basis.

8. Consultations Outside the Agency

The CFTC and the SEC issued a joint ANPR on August 13, 2010 requesting public comment regarding the definitions of "swap," "security-based swap," "security-based swap agreement," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant" in Title VII of the Dodd-Frank Act.[17] Comments received on the ANPR were taken into account in drafting the April 27, 2011 Proposing Release and are posted on the Commission's public website and made available through http://www.sec.gov/comments/s7-16-10/s71610.shtml.

The SEC worked very closely with the CFTC on the development and drafting of the Proposing Release. Similarly, the SEC worked closely with the CFTC on the development and drafting of the Adopting Release. In addition, the Commissions

[17] See supra note Error: Reference source not found.

consulted and coordinated with representatives from the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency with both the proposing and Adopting Release.

Furthermore, the Commissions consulted with industry participants and other interested parties. Any comments or materials received by the Commissions from industry participants and other interested parties relating to the development of the Proposing Release are posted on the SEC's public website, and made available through http://www.sec.gov/rules/proposed.shtml.

Additionally, in the Proposing Release, the SEC solicited comment on the new "collection of information" requirements and associated paperwork burdens. The SEC received comments on the Proposing Release from registrants, investors, and other market participants. The SEC and staff also participated in ongoing dialogue with representatives of various market participants through public conferences, meetings and informal exchanges. The SEC posted comments received on the proposed rulemaking on the SEC's public website, and made available through http://www.sec.gov/comments/s7-16-11/s71611.shtml. The SEC considered all comments received prior to publishing the final rule, and explained in the Adopting Release how the final rule responds to such comments, in accordance with 5 C.F.R. 1320.11(f). The SEC, however, did not receive any comments in response to the request in the Proposing Release related to the Paperwork Reduction Act and the new "collection of information" requirements and associated paperwork burdens.

9. Payment or Gift

There are no payments or gifts to respondents in the information collection.

10. Confidentiality

There is no requirement that the collections of information in rules 3a68-2 and 3a68-4(c) be provided to the SEC or a third party on a regular, ordinary course basis. No assurances of confidentiality are provided in the rules. In a situation where the SEC has obtained the information, the SEC would consider requests for confidential treatment on a case-by-case basis.

11. Sensitive Questions

No information of a sensitive nature is required under the rule.

12. Burden of Information Collection

Rule 3a68-2

It is difficult to calculate the precise number of requests that would be submitted to the Commissions under rule 3a68-2, given the historical unregulated state of the OTC

derivatives market. Although any person could submit a request under rule 3a68-2, the SEC believes as a practical matter that the relevant categories of such persons would be swap dealers and security-based swap dealers, major swap participants and major security-based swap participants, swap execution facilities ("SEFs"), security-based SEFs, derivatives clearing organizations ("DCOs") clearing swaps, designated contract markets ("DCMs") trading swaps, swap data repositories ("SDRs"), security-based SDRs, and clearing agencies clearing security-based swaps, and the total number of respondents could be 475.[18] However, based on the SEC's experience and information received from commenters to the ANPR[19] and during meetings with the public to discuss the definitions of the terms swap, security-based swap, and mixed swap generally, including the interpretation of whether a transaction is a swap, security-based swap, or both (i.e., a mixed swap), and taking into consideration the certainty provided by the rules and interpretive guidance in this release, the SEC believes that the number of requests that would be submitted by such persons to the Commissions to provide joint interpretations as to whether a given agreement, contract, or transaction is a swap, security-based swap, or both (i.e., a mixed swap), would be small, and therefore expects that only a small number of requests would be submitted pursuant to rule 3a68-2.[20]

Although the SEC does not have precise figures for the number of requests that persons would submit, the SEC believes it is reasonable to estimate that it likely would

[18] This total number includes an estimated 250 swap dealers, 50 major swap participants, 50 security-based swap dealers, 10 major security-based swap participants, 35 SEFs, 20 security-based SEFs, 12 DCOs, 17 DCMs, 15 SDRs, 10 security-based SDRs, and 6 clearing agencies, as set forth by the CFTC and SEC, respectively, in their other Dodd-Frank Act rulemaking proposals. See Entity Definitions Release; Registration of Swap Dealers and Major Swap Participants, 75 FR 71379 (Nov. 23, 2010) (regarding swap dealers and major security-based swap participants); Security-Based Swap Data Repository Registration, Duties, and Core Principles, 75 FR 77306 (Dec. 10, 2010) (regarding SBSDRs); Swap Data Repositories, 75 FR 80898 (Dec. 23, 2010) (regarding SDRs); Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214, Jan. 7, 2011 (regarding SEFs); Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948, Feb. 28, 2011 (regarding security-based SEFs); Financial Resources Requirements for Derivatives Clearing Organizations, 75 FR 63113, Oct. 14, 2010 (regarding DCOs); Information Management Requirements for Derivatives Clearing Organizations, 75 FR 78185, Dec. 15, 2010 (regarding DCOs); Risk Management Requirements for Derivatives Clearing Organizations, 76 FR 3698, Jan. 20, 2011 (regarding DCOs); Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572, Dec. 22, 2010 (regarding DCMs); Clearing Agency Standards for Operation and Governance, 76 FR 14472, Mar. 16, 2011 (regarding clearing agencies).

[19] See supra note Error: Reference source not found.

[20] This estimate is based on comments from and discussions with market participants regarding uncertainty concerning whether certain contracts might be considered swaps, security-based swaps, or both, i.e., mixed swaps, and the size of the mixed swaps category, although the SEC has not received data regarding the specific number of potential transaction types for which there is uncertainty or that are mixed swaps.

be fewer than 50 requests in the first year. The SEC estimates the total paperwork burden associated with preparing and submitting a person's request to the Commissions pursuant to rule 3a68-2 would be 20 hours per request of internal company or individual time to retrieve, review, and submit the information associated with the submission.[21] This 20 hour burden is divided between the SEC and the CFTC with 10 hours per response regarding reporting to the SEC and 10 hours of response regarding third party disclosure to the CFTC. Assuming 50 requests in the first year, the SEC estimates that this would result in an aggregate burden for the first year of 1000 hours of company time (50 requests x 20 hours/request). The burden associated with this request is one –time and will not be on-going.

The SEC believes that as the Commissions provide joint interpretations or joint notices of proposed rulemaking, the number of requests received will decrease over time. Although the SEC does not have precise figures for the number of requests that persons would submit after the first year, the SEC believes it is reasonable to estimate that it likely would be fewer than 10 requests on average in ensuing years. Assuming 10 requests in ensuing years, the SEC estimates that this would result in an aggregate burden in each ensuing year of 200 hours of company time (10 requests x 20 hours/request). This burden is divided between the SEC and the CFTC with half of the hours per response allocated to reporting to the SEC and half of the hours allocated to third party disclosure to the CFTC. The burden associated with this request is one–time and will not be on-going.

Rule 3a68-4(c)

It is difficult to calculate the precise number of requests that would be submitted to the Commissions under rule 3a68-4(c), given the historical unregulated state of the OTC derivatives market. Although any person could submit a request under rule 3a68-4(c), the SEC believes as a practical matter that the relevant categories of such persons would be SEFs, security-based SEFs, and DCMs trading swaps, and the total number of respondents could be 72.

Because the SEC believes that both the category of mixed swap transactions and the number of market participants that engage in mixed swap transactions are small, the SEC believes that the pool of potential persons requesting a joint order regarding the regulation of a specified, or specified class of, mixed swap pursuant to rule 3a68-4(c) would be small (approximately 10). Also, those requests submitted pursuant to rule 3a68-2 that result in an interpretation that the agreement, contract, or transaction (or class thereof) is not a mixed swap would reduce the pool of possible persons submitting a request regarding the regulation of particular mixed swaps (or class thereof) pursuant to rule 3a68-4(c). In addition, not only the requesting party, but also any other person or persons that subsequently lists, trades, or clears that mixed swap, would be subject to, and must comply with, the joint order regarding the regulation of the specified, or

[21] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products were securities, which the SEC believes is a process similar to the process under proposed rule 3a68-2, was approximately 20 hours.

specified class of, mixed swap, as issued by the Commissions. Therefore, the SEC believes that the number of requests for a joint order regarding the regulation of mixed swaps, particularly involving specified classes of mixed swaps, would decrease over time.

As discussed above, the SEC believes the number of requests that persons would submit pursuant to rule 3a68-4(c) is quite small given the limited types of agreements, contracts, or transactions (or class thereof) the Commissions believe would constitute mixed swaps. In addition, depending on the characteristics of a mixed swap (or class thereof), a person may choose not to submit a request pursuant to rule 3a68-4(c). The SEC also notes that any joint order issued by the Commissions would apply to any person that subsequently lists, trades, or clears that specified, or specified class of, mixed swap, so that requests for joint orders could diminish over time. Also, persons may submit requests for an interpretation under rule 3a68-4(c) that do not result in an interpretation that the agreement, contract, or transaction (or class thereof) is a mixed swap. Therefore, although the SEC does not have precise figures for the number of requests that persons would submit, the SEC believes it is reasonable to estimate that it likely would be fewer than 20 requests in the first year. The SEC estimates that 90% of these requests (18 requests) will have also made a request for a joint interpretation pursuant to 3a68-2. The SEC estimates the total paperwork burden associated with preparing and submitting a party's request to the Commissions pursuant to rule 3a68-4(c) would be 30 hours per request for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68-2 was not previously made. This 30 hour burden is divided between the SEC and the CFTC with 15 hours per response regarding reporting to the SEC and 15 hours of response regarding third party disclosure to the CFTC. Assuming 2 requests in the first year (2 requests = 20 total requests – 18 requests for which a joint interpretation pursuant to 3a68-2 was previously made), the SEC estimates that this would result in an aggregate burden for the first year of 60 hours of company time (2 requests x 30 hours/request). The burden associated with this request is one – time and will not be on-going.

For mixed swaps for which a request for a joint interpretation pursuant to rule 3a68-2 was previously made, the SEC estimates the total paperwork burden associated with preparing and submitting a party's request to the Commissions pursuant to rule 3a68-4(c) would be 10 hours fewer than for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68-2 was not previously made because certain, although not all, of the information required to be submitted and necessary to prepare pursuant to rule 3a68-4(c) would have been required to be submitted and necessary to prepare pursuant to rule 3a68-2. This burden is divided between the SEC and the CFTC with 10 hours per response regarding reporting to the SEC and 10 hours of response regarding third party disclosure to the CFTC. Although certain requests made pursuant to rule 3a68-4(c) may be made without a previous request for a joint interpretation pursuant to rule 3a68-2, the SEC believes that most requests under rule 3a68-2 that result in the interpretation that an agreement, contract, or transaction (or class thereof) is a mixed swap will result in a subsequent request for alternative regulatory treatment pursuant to

rule 3a68-4(c). Assuming, therefore, that 90 percent, or 18 of the estimated 20 requests pursuant to rule 3a68-4(c) in the first year, as discussed above, would be such "follow-on" requests, the SEC estimates that this would result in an aggregate burden in the first year of 360 hours of company time (18 requests x 20 hours/request). This burden is divided between the SEC and the CFTC with half of the hours per response allocated to reporting to the SEC and half of the hours allocated to third party disclosure to the CFTC. The burden associated with this request is one –time and will not be on-going.

As discussed above, the SEC believes that as the Commissions provide joint orders regarding alternative regulatory treatment, the number of requests received will decrease over time. The SEC believes it is reasonable to estimate that it likely would be fewer than 5 requests on average in ensuing years. The SEC estimates that 4 of these 5 requests will be for requests where a joint interpretation pursuant to rule 3a68-2 has previously been made. Accordingly, assuming 5 requests in ensuing years, the SEC estimates that this would result in an aggregate burden in each ensuing year of 30 hours of company time for requests where a joint interpretation pursuant to rule 3a68-2 was not previously made (1 request x 30 hours/request). As discussed above, assuming that approximately 90 percent, or 4 of the estimated 5 requests pursuant to rule 3a68-4(c) in ensuing years would be "follow-on" requests to requests for joint interpretation from the Commissions under rule 3a68-2, the SEC estimates that this would result in an aggregate burden in each ensuing year of 80 hours of company time (4 requests x 20 hours/request). This burden is divided between the SEC and the CFTC with half of the hours per response allocated to reporting to the SEC and half of the hours allocated to third party disclosure to the CFTC. The burden associated with this request is one –time and will not be on-going.

13. Costs to Respondents

Rule 3a68-2

The SEC estimates that the total annual costs resulting from a submission under rule 3a68-2 would be approximately $12,000 for the services of outside professionals that the SEC believes would consist of services provided by attorneys to retrieve, review, and submit the information associated with the submission.[22] This cost is divided between the SEC and the CFTC with $6,000 per response regarding reporting to the SEC and $6,000 per response regarding third party disclosure to the CFTC. Assuming 50 requests in the first year, as discussed above, the SEC estimates that this would result in aggregate costs for the first year of $600,000 for the services of outside professionals (e.g., attorneys) (50 requests x 30 hours/request x $400). Assuming, as discussed above, 10 requests in each

[22] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the identification of whether certain products are securities, which the SEC believes is a process similar to the process under rule 3a68-2 under the Exchange Act, is approximately 20 hours and associated costs of $12,000. Assuming these costs correspond to legal fees, which the SEC estimates at an hourly cost of $400, the SEC estimates that this cost is equivalent to approximately 30 hours ($12,000/$400).

ensuing year, the SEC estimates that this would result in aggregate costs in each ensuing year of $120,000 for the services of outside professionals (e.g., attorneys) (10 requests x 30 hours/request x $400).

Rule 3a68-4(c)

The SEC estimates that the total annual costs resulting from a submission under rule 3a68-4(c) would be approximately $20,000 for the services of outside professionals that the SEC believes would consist of services provided by attorneys to retrieve, review, and submit the information associated with the submission.[23] This cost is divided between the SEC and the CFTC with $10,000 per response regarding reporting to the SEC and $10,000 per response regarding third party disclosure to the CFTC. Assuming 2 requests in the first year for which a request for a joint interpretation pursuant to rule 3a68-2 was not previously made, as discussed above, the SEC estimates that this would result in aggregate costs for the first year of $40,000 for the services of outside professionals (e.g., attorneys) (2 requests x 50 hours/request x $400).

For mixed swaps for which a request for a joint interpretation pursuant to rule 3a68-2 was previously made, the SEC estimates the total paperwork burden associated with preparing and submitting a party's request to the Commissions pursuant to rule 3a68-4(c) would be $6,000 less per request than for mixed swaps for which a request for a joint interpretation pursuant to rule 3a68-2 was not previously made because, as discussed above, certain, although not all, of the information required to be submitted and necessary to prepare pursuant to rule 3a68-4(c) would have been required to be submitted and necessary to prepare pursuant to rule 3a68-2. This cost is divided between the SEC and the CFTC with $7,000 per response regarding reporting to the SEC and $7,000 per response regarding third party disclosure to the CFTC. Assuming that 90 percent, or 18 of the estimated 20 requests pursuant to rule 3a68-4(c) in the first year, as discussed above, would be such "follow-on" requests, the SEC estimates that this would result in an aggregate burden in the first year of $252,000 for the services of outside professionals (18 requests x 35 hours/request x $400).

Assuming, as discussed above, 5 requests in ensuing years (with 4 of the 5 request involving a request where a joint interpretation pursuant to rule 3a68-2 was previously

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[23] This estimate is based on information indicating that the average burden associated with preparing and submitting a no-action request to the SEC staff in connection with the regulatory treatment of certain securities products, which the SEC believes is a process similar to the process under rule 3a68-4(c) under the Exchange Act, is approximately 30 hours and associated costs of $20,000. Assuming these costs correspond to legal fees, which the SEC estimates at an hourly cost of $400 as discussed above, the SEC estimates that this cost is equivalent to approximately 50 hours ($20,000/$400). As with rule 3a68-2 under the Exchange Act, the estimated internal or company time burdens for rule 3a68-4(c) under the Exchange Act have not changed from those included in the Proposing Release, but the estimated burdens of the cost for outside professionals for rule 3a68-4(c) under the Exchange Act have been revised from those included in the Proposing Release to reflect updated data regarding hourly costs for the services of outside professionals.

made, the SEC estimates that this would result in an aggregate burden in each ensuing year of $20,000 for the services of outside professionals (1 requests x 50 hours/request x $400). As discussed above, assuming that approximately 90 percent, or 4 of the estimated 5 requests pursuant to rule 3a68-4(c) in ensuing years would be "follow-on" requests to requests for joint interpretation from the Commissions under rule 3a68-4(c), the SEC estimates that this would result in an aggregate burden in each ensuing year of $56,000 for the services of outside professionals (4 requests x 35 hours/request x $400). This cost burden is divided between the SEC and the CFTC, with half of the cost burden per response being a reporting burden to the SEC, and half of the cost burden being a third party disclosure burden to the CFTC.

14. Costs to Federal Government

There are no estimated operation costs to the federal government associated with this rule.

15. Reason for Change

The Costs to Respondents changed from that originally submitted with the Proposing Release, based upon an increase in the estimate of hourly cost of legal fees. In the Paperwork Reduction Act supporting statement for the Proposing Release the SEC estimated hourly cost to be $316 per hour. This estimate of the dollar burden for rules 3a68-2 and 3a68-4(c) under the Exchange Act was based on data from SIFMA's "Management & Professional Earnings in the Securities Industry 2009." See Proposing Release at 29876, note 345. In the Adopting Release the SEC increased the hourly cost to $400 per hour, which is based on an estimate used by the SEC for these services in similar releases. See Exemptions for Security-Based Swaps Issued By Certain Clearing Agencies, Release No. 33-9308 (Mar. 30, 2012), 77 FR 20536 (Apr. 5, 2012). Additionally, the hourly burden for Rule 3a68-4(c) changed solely due to rounding in the prior submission made with the Proposing Release. In this submission with the Adopting Release, the SEC is not rounding the number of hours.

16. Information Collection Planned for Statistical Purposes

There is no intention to publish information for statistical purposes.

17. Display of OMB Approval Date

The Commission is not seeking approval to not display the OMB approval expiration date.

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

B. Collection of Information Employing Statistical Methods

The collection of information does not employ statitstical methods, nor would the implementations of such methods reduce the burden or improve the accuracy of results.