

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

### Adaptation of Regulations to Incorporate Swaps – Records of Transactions

**OMB CONTROL NUMBER 3038 -0090**

#### **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.<sup>1</sup> These amendments require the Commodity Futures Trading Commission (“the Commission”) to amend several of its regulations to implement the new framework.

Regulation 1.35(a) is being amended to provide that certain Commission registrants be required to record and keep records of their oral communications that lead to the execution of a commodity interest transaction and their written communications that lead to the execution of a commodity interest or related cash or forward transaction, similar to the requirement that SDs and MSPs keep records of their oral and written communications that lead to the execution of swaps and related cash or forward transactions. Only the oral communications recordkeeping amendments impose new information recordkeeping requirements. These new requirements constitute a collection of information within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>2</sup>

The final rulemaking requires futures commission merchants (“FCMs”), non-Small introducing brokers (“IBs”) (IBs with aggregate gross revenue exceeding \$5 million), retail foreign exchange dealers (“RFEDs”) and certain other registrants that are members of designated contract markets (“DCMs”) or swap execution facilities (“SEFs”) to record all oral communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a transaction in a commodity interest,<sup>3</sup> whether communicated by telephone,

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<sup>1</sup> See 7 USC 1a, 2, 2a, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a-1, 7a-2, 7b, 7b-3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

<sup>2</sup> 44 U.S.C. 3501 et seq.

<sup>3</sup> The term “commodity interest” means: (1) any contract for the purchase or sale of a commodity for future delivery; (2) any contract, agreement or transaction subject to Commission regulation

voicemail, mobile device, or other digital or electronic media (1.35(a), as amended), and to keep those records for one year (1.31(a)(1), as amended). The final rule also requires FCMs, IBs, RFEDs, and all members of a DCM or SEF to record and keep all written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a transaction in a commodity interest or related cash or forward transactions, whether communicated by telephone, voicemail, facsimile, instant messaging, chat rooms, electronic mail, mobile device, or other digital or electronic media (1.35(a), as amended), and to keep those written records for five years (1.31(a)(1), as amended).

The rulemaking also clarifies that the existing requirement under regulation 1.35(a) to keep written records applies to electronic written communications such as emails and instant messages, thus the requirement to record and keep electronic written communications is not a new requirement. The overarching purpose of the Commission's final rules is to promote market integrity and protect customers. Requiring the recording and retention of oral communications will serve as a disincentive for covered entities to make fraudulent or misleading communications to their customers over the telephone and could serve as a meaningful deterrent against violations such as trading ahead of customer orders by providing a record of the time that a customer's telephone order is received. The collection of and access to searchable records, both oral and written, are indispensable tools the Commission needs to ensure market integrity and protect customers.

The information collection burdens are restricted to the costs associated with the recordkeeping and reporting requirements that the final regulations impose upon affected registrants, registered entities, and those registered entities' members covered by the final rules.

**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 records required to be preserved by affected registrants when conducting the Commission's examination and oversight program and when conducting investigations into potential violations of the CEA, including the preparation of market reconstructions to facilitate an understanding of the causes of any unusual market activity. The requirement to keep records current and readily available enables the Commission to pursue potential violations timely and assists the Commission in its efforts to seek to freeze and recover any profits received from illegal activity.

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under section 4c or 19 of the Act; (3) any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act; and (4) any swap as defined in the Act, by the Commission, or jointly by the Commission and the Securities and Exchange Commission. See Adaptation of Regulations to Incorporate Swaps, 77 FR 66288, 66319 (Nov. 2, 2012) ("Final Adaptation Rule") (to be codified at 17 CFR 1.3(yy)).

- 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 required information is not already collected by the Commission for any other purpose, 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 From 83-1), describe the methods used to minimize burden.**

In response to comments received to the notice of proposed rulemaking (the “Proposed Rulemaking”)<sup>4</sup> concerning the activities of small entities and commercial end-users and non-intermediaries, the Commission determined to exclude certain of those entities from the regulation 1.35(a) requirement to record all oral communications. As a result, the Commission has determined to exclude Small IBs (i.e., those IBs that have generated, over the preceding three years, \$5 million or less in aggregate gross revenues from its activities as an IB) from the regulation 1.35(a) requirement to record oral communications. In reaching this result, the Commission has considered that while Small IBs take customer orders, generally they do not execute those orders and thus lack a direct market interface that could affect market integrity, and that they are unlikely to generate the volume of market activity that could affect the integrity of the markets.

- 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 final 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, including the Commission’s examination and investigation efforts. The Commission understands that recent advancements in technology, particularly with respect to capturing records and storing such records, will enable all affected entities to incorporate into their existing recordkeeping programs the enhanced requirements set forth in the regulation 1.31(a)(1) and 1.35(a) amendments that are the subject of this final rulemaking.

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

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<sup>4</sup> Adaptation of Regulations to Incorporate Swaps, 76 FR 33066 (June 7, 2011).

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

This question does not apply. The final regulations do not impose a reporting requirement; rather, they require covered entities to record and keep all oral and written communications.

- **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.

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

This question 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 question does not apply. The final regulations neither 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 final regulations neither 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 final regulations do not make 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.**

The Commission has promulgated regulations to protect the confidentiality of the information collected from the affected registrants. They 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.**

**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's proposal soliciting comments on this Collection was published in the Federal Register (76 FR 33066, June 7, 2011) and is attached.

The Commission responded to commenters' concerns that the scope of the new proposed requirement to record all oral communications was too broad by limiting the oral communications requirement in the final rule to those oral communications that lead to a transaction in a commodity interest. As proposed, the oral communications recordkeeping requirement would have applied to commodity interests and cash commodity transactions.

The Commission also reduced the retention period from five years to one year for all records of oral communications that lead to the execution of a transaction in a commodity interest in response to commenters' concerns that a five-year retention period was too long.

Additionally, in response to comments asserting that the cost of implementing and maintaining an oral communication recording system would be overly burdensome for small entities and the commercial end-user, non-intermediary members of a DCM or SEF, the Commission has determined to exclude the following entities from the new requirement to record oral communications: Small IBs; the oral communications of a floor broker who is a member of a DCM or SEF that do not lead to the purchase or sale for any person other than the floor broker of any commodity for future delivery, security futures product, swap, or commodity option authorized under section 4c of the Act; and certain members of a DCM or SEF, including floor traders, CPOs, SDs, MSPs, and members of a DCM or SEF that are not registered or required to be registered with the Commission in any capacity.

**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. The Commission has neither considered nor made any payment or gift to a respondent.

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

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. These regulations are 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 final regulations do not request or require the provision of sensitive information, as that term is used in Item 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.**

The recordkeeping requirements in this final rule only contain start-up costs, to the extent that entities that will be required to record oral communications will not have to spend any time each

day to ensure the operation of the system because the Commission expects that outside vendors would maintain the system.

**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, which uses the information below to calculate the \$211,124,700 “Estimated Aggregate Annual Cost Burden” representing start-up costs associated with the requirement that an estimated 6,000 covered registrants establish a system to record all oral communications.

The Commission estimates that 6,000 covered registrants will be required to establish a system to record oral communications.

The Commission estimates that the covered registrants might incur certain one-time start-up costs in connection with establishing a system to record oral communications. The Commission estimates that the cost for establishing a system to record oral communications on mobile phones using a cloud-based solution would be \$90 per phone line and that the cost for establishing a system to record oral communications on a landline using a cloud-based solution would be \$50 per phone line. The Commission estimates further that a small entity required to comply will have 10 phone lines and that a large entity required to comply will have 1,000 phone lines.

Thus, to figure out the initial cost of establishing a system for recording oral communications, an entity will have to multiply the number of phone lines by the cost per line (\$50 per landline and \$90 per mobile phone). The Commission estimates each entity to have 50% landlines and 50% mobile phone lines. Therefore, the initial cost for a small firm (10 phone lines) to establish a system for recording oral communications would be  $(5 \times \$50) + (5 \times \$90)$  or \$700, and the initial cost for a large firm (1,000 phone lines) would be  $(500 \times \$50) + (500 \times \$90)$  or \$70,000. For purposes of the PRA calculations in Attachment A, the Commission has chosen to use an average initial start-up cost of \$35,000 per registrant.

In the Proposed Rulemaking, the Commission estimated that the burden hours associated with these start-up costs would be 135 hours for any entity that does not already have a system in place. Following publication of the Proposal, the Commission researched the issue further and now estimates that a covered registrant will not have to spend any time setting up a cloud-based solution for recording oral communications on a mobile phone or landline because the registrant's Compliance Officer will merely have to contract for services from an outside vendor. It is estimated that a covered registrant will spend an estimated range of 1 to 10 hours arranging for such services. If the covered registrant chooses to negotiate the vendor's contract, the burden hours will be towards the higher end of the range. For purposes of calculating the estimated aggregate hourly cost burden to contract the services from an outside vendor, the Commission is using an average of five hours per covered registrant. To determine the hourly wage of a Compliance Officer for purposes of calculating the aggregate hourly cost burden, the Commission reviewed Bureau of Labor Statistics data, which lists \$37.49 as the mean hourly wage of a "Compliance Officer" (occupation code 13-1041) that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry. Thus, the estimated aggregate hourly cost burden for contracting services from an outside vendor per covered registrant is \$187.45 (five hours, on average, per registrant, multiplied by \$37.49/hr.).

The Commission also estimated in the Proposed Rulemaking that one employee from each affected covered entity would have to devote one hour per trading day to ensure the operation of the system to record oral communications. Based on the Commission's further research after issuance of the Proposed Rulemaking, the Commission now estimates that employees of those entities that will be required to record oral communications will not have to spend any time each day to ensure the operation of the system because the Commission expects that outside vendors would maintain the system.

- 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 final regulations will 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.**

Not applicable.

- 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.**

Not applicable.

- 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(a)(1) and 1.35(a)

*See also responses to Question 13, above.*

#### OMB Collection File 3038-0090

Requirement	1 Estimated Number of Registrants Per Year	2 Number of Responses Per Registrant Annually	3 Aggregate Number of Responses Annually (Column 1 x Column 2)	4 Estimated Average Number of Hours Per Response	5 Estimated Aggregate Hourly Cost Burden Per Registrant	6 Estimated Aggregate Annual Cost Burden
<b>Recordkeeping:</b> 1.35(a) (Development of recordkeeping system to record all oral communications) (Start-Up Cost)	6,000	1 (1 time only)	6,000	5 hours (average of estimated range of 1 – 10 hours per registrant to contract the services of an outside vendor)	\$187.45 (\$37.49 per hour x 5 hours per registrant to contract the services of an outside vendor)	\$211,124,700 [ <b>\$210,000,000</b> ((\$35,000 average start-up costs per registrant to establish a system to record oral communications using mobile phones and landlines x 6,000 estimated registrants) + <b>\$1,124,700</b> (\$187.45 estimated hourly cost burden per registrant to contract services of outside vendor x 6,000 estimated registrants)]  (One-time cost)