

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

**OMB CONTROL NUMBER 3038-NEW**

**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.**

Section 721 of the Dodd-Frank Act (“Dodd-Frank”) added new section 1a(47) to the Commodity Exchange Act (CEA), defining “swap” to include “[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more ... commodities....” Consistent with Dodd-Frank, the Commission adopted new regulation 32.2 directing that commodity option transactions be regulated in the same manner as other swaps (77 FR 25320, at 25338, April 27, 2012). At the same time, the Commission adopted an interim final rule, regulation 32.3, granting an exemption from most of the swaps rules to “trade options.” A trade option is a commodity option purchased by a commercial party that, upon exercise, results in the sale of a physical commodity for immediate (spot) or deferred (forward) delivery. Regulation 32.3(b)(2) requires counterparties to “unreported trade options” (i.e., trade options that are not otherwise reported to a swap data repository pursuant to part 45 of the Commission’s rules) to file an annual report with the Commission on Form TO. The Commission believes that the proposed collection would provide greater transparency regarding the trade options market and improved oversight of the swaps markets, both of which are primary statutory objectives of Title VII of the Dodd-Frank Act.

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

The Commission would use the information generated by Form TO to determine the parties entering into unreported trade options, to determine the approximate volume of, and commodities underlying, such trade options, and, if warranted, to conduct market analysis and investigations and in connection with litigation. That data would, in turn, guide the Commission’s efforts to collect more detailed information, through its authority to inspect books and records, when warranted (e.g., threatened or actual market disruption). The Form TO information would also enable the Commission to determine whether these counterparties should be subject to more frequent and comprehensive reporting obligations in the future.

**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.**

Information generally must be submitted electronically unless reporting via the Commission's web site is impossible. The Commission chose this approach due to its belief that data is more useful in electronic form and less burdensome to submit electronically.

**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 available from any other source because Form TO was designed to capture information not reported to the Commission pursuant to other Commission reporting regulations.

**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.**

Participants in unreported trade options, although they must be commercials, may include some small entities. The Commission has sought to minimize any burdens associated with Form TO by: (1) limiting the filing of the form to once annually; (2) limiting the information regarding commodities involved to four general categories (agricultural, metals, energy and other); (3) limiting the information collected to options actually exercised (i.e., they must report commodities actually bought or sold pursuant to options, but not options that remained open at year's end or that expired unexercised during the year); (4) asking for the value of the commodities received or delivered only within three very broad categories (under \$10 million, \$10 million to \$100 million, and over \$100 million); and (5) requiring very little additional information (i.e., just the name and title of the reporting party, identifying information and contact information).

**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 collect the information annually would adversely affect the Commission's ability to oversee swap markets by significantly delaying its ability to investigate suspected market misconduct or other relevant market events. Collecting information less frequently would limit the enforcement of Commission rules intended to protect market integrity.

**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 information would be collected annually.

- **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. Those required to report on Form TO have 60 days from the end of the year covered by the Form TO.

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

This question does not apply. Form TO does 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;**

Form TO does not impose any requirements requiring respondents to retain records other than health, medical, government contract, grant-in-aid or tax records for more than three years.

- **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. Form TO 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. Form TO 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 final regulations do not make a pledge of confidentiality, let alone an unsupported confidentiality pledge.

- **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 any information collected from respondents. Such regulations are set forth in 17 CFR Part 145. The protection of such information also is governed by section 8 of the Commodity Exchange Act, by

the Trade Secrets Act, and by the Privacy Act of 1974. Form TO includes a Privacy Act Notice on page 1.

**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 notice soliciting comments on this collection is attached, as published in the Federal Register.<sup>1</sup> Also, the Commission sought comments from the public and Federal agencies on the subject information collections in the Commodity Options Final Rule and Interim Final Rule (Trade Option IFR), published in the Federal Register.<sup>2</sup> Generally, the five comments received in response to the notice of new information collection argued that the Commission should allow for the expanded use of Form TO for reporting trade options, at the very least when between non-SDs/MSPs. All five commenters argued that it is impractical to report trade options under Part 45 because the data elements associated with trade options are not compatible with the data element structure required by Part 45 reporting. Additionally, commenters generally believed that fewer counterparties to trade options than originally expected would be able to utilize Form TO in lieu of Part 45 reporting, due to the likelihood that a non-SD/MSP counterparty would inevitably become a Part 45 reporting counterparty under the Commission's current rules for at least one swap during the previous calendar year.

Two commenters, however, specifically opined on the Form TO information collection, stating that both the Commission's estimate of annual number of respondents to Form TO and burden hours to complete Form TO were understated. The American Power Association, National Rural Electric Cooperative Association, Edison Electric Institute, and Electric Power Supply Association, writing together ("Joint Electric Associations"), noted that there are over 3,000 electric utilities in the United States, most of whom use trade options, and even more non-utility market participants in the electric industry that may use trade options. The International Energy Credit Association ("IECA") noted that there could be hundreds of respondents in the energy industry alone submitting Form TO annually. As for the Commission's burden hour estimate, the Joint Electric Associations believed two hours to be "unreasonably low," noting that "most potential filers of Form TO will be unlikely to have staff familiar with the Commission and its new jurisdiction over swaps," which will require such filers "to review the relevant provisions of the Commodity Exchange Act and the Commission's rules, amend relevant trade option documentation to validate that the commodity options meet the conditions in Rule 32.3, and keep track of which trade options are unreported." IECA estimated that it would take "much longer than two hours" to capture all unreported trade options for a year, particularly when separating unreported trade options entered into with non-SDs/MSPs from reported trade options entered into with SDs/MSPs.

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<sup>1</sup> See Agency Information Collection Activities: Proposed Collection, Comment Request: Form TO, Annual Notice Filing for Counterparties to Unreported Trade Options, 77 FR 74647 (Dec. 17, 2012).

<sup>2</sup> See 77 FR 25320 (Apr. 27, 2012).

In response to two comments received, the Commission has revised its estimated number of annual respondents to Form TO from 100 to 3,000 based on commenters' estimates—particularly, that of the Joint Electric Associations. Accordingly, the Commission has recalculated its estimated total cost of compliance with the Form TO reporting requirement.

The Commission disagrees, however, with the view as expressed by commenters that it would take much longer than two hours each year to prepare and submit Form TO. The Commission does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours to the Commission, as required under Regulation 32.3(b)(2) and explained in the instructions attached to the document.

**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 sought public comments on the collection of information, through publication of a notice in the Federal Register.<sup>3</sup> Also, the Commission sought comments from the public and federal agencies on the subject information collections in the Commodity Options Final Rule and Interim Final Rule, published in the Federal Register, 77 FR 25320, April 27, 2012.

**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 consultation has occurred because this is a new information collection.

**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 does not provide respondents with any assurance of confidentiality beyond the confidentiality assured by the CEA. 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. The protection of such information also is governed by section 8 of the Commodity Exchange Act, by the Trade Secrets Act, and by the Privacy Act of 1974. Form TO includes a Privacy Act Notice on page 1.

<sup>3</sup> See Agency Information Collection Activities: Proposed Collection, Comment Request: Form TO, Annual Notice Filing for Counterparties to Unreported Trade Options, 77 FR 74647 (Dec. 17, 2012).

**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. Form TO does not require the giving 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. The Commission estimates that 3,000 respondents will file a total of one response each annually. The estimated average number of hours per response is 2. The cost of the hourly burden is estimated to be \$100 per hour. Thus, the total annual cost burden is \$600,000.

**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.**

There are no capital costs or operating and maintenance costs associated with this collection. The Commission believes that, as part of customary and usual business practices, all respondents already create and store basic information on what they purchased or received and how much it cost.

**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.**

Annualized costs to the Commission would include the costs for reviewing and analyzing the information provided in Form TO, incurred by Commission staff. The Commission estimates that on average it will take approximately 2 hours of staff time to review the Form TO. Based on the staff estimate that there will be one Form TO submitted annually, the average aggregate hourly burden to review and analyze the information for all Forms TO submitted would be approximately 6,000 hours at the CT-14 level of \$91 an hour, for the total estimated aggregate cost of \$546,000.<sup>4</sup>

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

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<sup>4</sup> Using the average salary (base plus locality pay) for the CT-14 pay grade for Commission employees in Washington, D.C. as of June 15, 2012, or \$149,438, multiplied by 1.271 to account for benefits, the annual cost to the Commission for each GS-14 employee would be \$189,936. Based on a work year for all Federal employees of 2,087 hours, the average hourly wage rate is \$91.00. It will therefore cost the Commission \$180 (2 hours x \$90) per Form TO, and a total of \$18,200 (\$180 x 200 hours) to analyze all Forms TO submitted annually.

As noted above in our answer to question 8, in response to two comments received, the Commission has revised its estimated number of annual respondents to Form TO from 100 to 3,000, based on commenters' estimates—particularly, that of the Joint Electric Associations. Accordingly, the Commission has recalculated its estimated total cost of compliance with the Form TO reporting requirement.

The Commission disagrees, however, with the view as expressed by commenters that it would take much longer than two hours each year to prepare and submit Form TO. The Commission does not believe that an intricate knowledge of the Commodity Exchange Act or the agency's procedures, personnel, and implementing regulations is necessary in order to accurately prepare and submit a Form TO in approximately two hours to the Commission, as required under Regulation 32.3(b)(2) and explained in the instructions attached to the document.

**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.**

This question does not apply.

**Attachment A**

Estimated Annual Reporting Burden Hours and Burden Hour Costs					
17	Annual	Frequency of	Hours	Total	Total Hours
C.F.R.	Number of	Response	per	Annual	Cost
	Respondent	per	Respons	Response	
	s	Respondent	e and	s	
			cost		



Part 32, Appendix A, Form TO	3,000	Annually	2 hours at \$200 per response <sup>5</sup>	3,000 (one form per otherwise unreported trade option participant )	\$600,000 (3,000 responses times 2 hours per response, based on \$100/hour.)
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Respondents/Affected Entities: 3,000.

Estimated average number of responses: 3,000 (one form per year per respondent).

Estimated total average annual burden on respondents: 2 hours

Frequency of collection: annually

Average total cost: \$400

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<sup>5</sup> The Commission estimates that entities will spend \$100 per hour. The \$100 per hour estimate was used as the average hourly wage rate in the PRA section of the Internal Business Conduct Standards for Swap Dealers and Major Swap Participants final rule (See Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128, 20194 (Apr. 3, 2012)) and the wage rate for CCOs under the DCO final rules (See Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69344, 69428 (Nov. 8, 2011)). As the Commission explained in the Internal Business Conduct Standards final rule, the estimate of \$100 per hour was based on recent Bureau of Labor Statistics findings, including the mean hourly wage of an employee under occupation code 23-1011, "Lawyers," that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage Industry," which is \$82.22. The mean hourly wage of an employee under occupation code 11-3031, "Financial Manager," in the same industry is \$74.41. Additionally, SIFMA's "Report on Management & Professional Earnings in the Securities Industry – 2010" estimates the average wage of a compliance attorney and a compliance staffer in the U.S. at only \$46.31 per hour. As in those rules, the Commission is using a \$100 per hour wage rate in calculating the cost burdens imposed by this collection of information and requests comment on the accuracy of its estimate.

There are no capital costs or operating and maintenance costs associated with this collection. The Commission believes that, as part of customary and usual business practices, all respondents already create and store basic information on what they purchased or received and how much it cost.