

SUPPORTING STATEMENT FOR NEW INFORMATION COLLECTION
PARTS 37 AND 38 – PROCESS FOR A SWAP EXECUTION FACILITY OR DESIGNATED
CONTRACT MARKET TO MAKE A SWAP AVAILABLE TO TRADE

OMB CONTROL NUMBER 3038-0099

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.

The Commission’s regulations implement the trade execution requirement in Section 723 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amended Section 2(h)(8) of the Commodity Exchange Act (“Act”). Section 2(h)(8) requires that swap transactions subject to the clearing requirement must be executed on a designated contract market or swap execution facility unless no designated contract market or swap execution facility makes the swap “available to trade” or the swap transaction is subject to the clearing exception.

The Commission’s regulations establish a process for swap execution facilities and designated contract markets to make a swap “available to trade” for purposes of the trade execution requirement. The regulations require swap execution facilities and designated contract markets to consider certain factors when determining whether to make a swap “available to trade,” and under §§ 37.10(a) or 38.12(a) of the Commission’s regulations, a swap execution facility or designated contract market, respectively, would submit its determination to the Commission pursuant to the rule filing procedures of part 40 of the Commission’s regulations.

Sections 40.5 and 40.6 of the Commission’s regulations establish the procedures for swap execution facilities and designated contract markets to submit rule filings to the Commission. In connection with this rule filing, a swap execution facility and designated contract market must provide an explanation and analysis of the submission and its compliance with statutory provisions of the Act.

This explanation and analysis is necessary for the Commission to approve or certify a swap execution facility’s or designated contract market’s “available to trade” determination before the swap would be subject to the trade execution requirement (*i.e.*, be required to trade only on a swap execution facility or designated contract market). Without this collection of information, certain swaps may inappropriately be subject to the trade execution requirement. In addition, this process allows the Commission to provide market participants with notice as to which swaps are subject to the trade execution requirement.

The Commission did not adopt proposed §§ 37.10(d) and 38.12(d) in the final rule, which would have required swap execution facilities and designated contract markets to submit annual reports to the Commission of their review and assessment of the swaps that they made “available to trade.”

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 requested information is essential to the staff’s review of “available to trade” determinations and the Commission’s oversight of swaps that are subject to the trade execution requirement.

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 Commission’s regulations requires all submissions to be submitted to the Commission 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 regulations require swap execution facilities and designated contract markets to submit certain information – the manner in which the swap execution facility or designated contract market considered the factors under §§ 37.10(b) or 38.12(b), respectively, when determining to make a swap “available to trade” for purposes of the trade execution requirement – that is not available from any other source and is specific to the swap execution facility or designated contract market.

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

This collection of information will not have a significant impact on a substantial number of small entities.

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.

Sections 37.10(a) and 38.12(a) of the Commission’s regulations do not require the submission of information on a periodic basis. Rather, submissions are required only at

such time that a swap execution facility or designated contract market seeks to make a swap “available to trade.”

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;

As noted, under § 37.10(a) or § 38.12(a), a swap execution facility or designated contract market, respectively, is required to submit information to the Commission each time it determines to make a swap “available to trade” for purposes of the trade execution requirement

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

Not applicable.

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

Not applicable.

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

This collection of information does not have provisions concerning the retention of records.

- 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;

Not applicable.

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

Not applicable.

- 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

Not applicable.

- 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.

Not applicable.

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

A Federal Register notice soliciting comments on this collection was published in the Federal Register on December 14, 2011 (76 FR 77728, 77734-35 Dec. 14, 2011). The comment period for this proposal ended on February 13, 2012.

The Commission received comments with respect to the collection of information. Commenters stated that the approach under §§ 37.10(a) and 38.12(a) would be burdensome and require a significant amount of time and resources; therefore, they proposed alternative approaches to determining that a swap is available to trade. The Commission noted in the final rule, however, that the alternative approaches offered by commenters would eliminate a formal determination process that is separate from the clearing requirement determination under § 39.5 of the Commission's regulations. The Commission set forth the reasons for establishing a separate, formal determination process in the preamble to the rule.

Other commenters stated that the Commission's proposed estimate of the burden hours, and corresponding costs, for a SEF or DCM to make a determination was too low based on the additional types of personnel that would be involved in such a process. One commenter estimated that each determination would require 15-20 hours. In response to these comments, the Commission revised the total hourly burden for making a determination from 8 hours to 16 hours. The revised total hourly burden reflects the addition of one personnel to analyze trading data in making a determination over approximately 8 hours on average. The Commission also noted that under the final rule, a SEF or DCM would be required to list the swap for which it submits a determination, and submit that listing for approval, under § 40.2 or § 40.3 of the Commission's regulations. The Commission had estimated this average hourly burden to be 2 hours in a previous final rulemaking.

Accordingly, the Commission also revised the associated cost burden, which also includes the cost of submitting a product filing under § 40.2 or § 40.3 of the Commission's regulations, to be \$938.40. See Attachment A for further detail.

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 shared its proposed regulations with the Securities and Exchange Commission. The Commission also invited the public to submit comments and any data, quantitative or qualitative, concerning the costs and benefits of the proposed regulations. The Commission further invited the public and other federal agencies to comment on the information collection requirements in its proposal. The Commission evaluated comments received and accordingly provided responses to those comments in the final rule.

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

Not applicable.

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

Not applicable.

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 an assurance of confidentiality. However, the Commission must comply with Section 8(a)(1) of the Act, which strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” Sections 40.8 and 145.9 allow swap execution facilities and designated contract markets to request confidential treatment of information submitted pursuant to part 40.

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.

None of the regulations require the submission 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.

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. The proposed regulations do not require new start-up or operation and maintenance costs.

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.

See Attachment A.

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

See Attachment A.

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.

Not applicable.

Attachment A

Parts 37 and 38 – Process for a Swap Execution Facility or Designated Contract Market to Make a Swap Available to Trade

OMB Collection File 3038-0099

Sections 37.10(a) and 38.12(a) would require swap execution facilities and designated contract markets to submit determinations to the Commission that a swap is “available to trade” pursuant to the rule filing procedures under part 40 of the Commission’s regulations.

Estimated number of respondents:	50
Estimated average hours per response:	16.00

The Commission estimated the number of respondents based on entities that indicated that they may register as swap execution facilities and designated contract markets that indicated that they may list swaps for trading. The Commission estimated the average hours per response based on the previously estimated hours of burden under part 40 and factoring in additional time for swap execution facilities and designated contract markets to review swap transaction data and to consider the factors in proposed §§ 37.10(b) or 38.12(b) when determining whether a swap is “available to trade.” In the proposed rule, the Commission had estimated the average hours per response to be 8 hours. In response to comments received with respect to this estimate, the Commission revised its estimate in the final rule to reflect the addition of other personnel, *i.e.*, an economist, that would process and analyze trading data in the process. The Commission estimated that the additional personnel would add an additional 8 hours per response, thereby resulting in a total estimate of 16 hours per response.

In the proposed rule, the Commission estimated the cost for each swap execution facility or designated contract market to comply with proposed §§ 37.10(a) or 38.12(a) to be \$346.00 per rule submission filing. In calculating this cost, the Commission estimated that one compliance personnel would perform the filing at a cost per hour of \$43.25. In the final rule, the Commission revised the cost estimate per rule submission filing to be \$938.40 per rule submission filing. This cost estimate consists of (1) 8 hours for a compliance personnel to perform the filing, based on a revised estimated wage of \$ 42.16 per hour; and (2) 8 hours for one economist to analyze trading data in the process, based on an estimated wage of \$64.60 per hour.

The Commission also noted that under the final rule, a SEF or DCM would be required to list the swap for which it submits a determination, and submit that listing for approval, under § 40.2 or § 40.3 of the Commission’s regulations. The Commission had estimated this average hourly burden to be 2 hours in a previous final rulemaking. The revised cost estimate, therefore, also includes the cost for a compliance personnel, at an estimated wage of \$42.16 per hour, to submit a product listing to the Commission.

The Commission estimated the cost to the Federal Government to review the submissions under proposed §§ 37.10(a) or 38.12(a) to be \$808.88 per rule submission filing. In calculating this

cost, the Commission estimated that one attorney would review the filing at a cost per hour of \$101.11. The Commission estimated the time of review for each response to be 8.00 hours.

The Commission recognizes that swap execution facilities and designated contract markets may submit several rule submission filings per year. At this time, it is not feasible to estimate the number of rule submission filings per year, on average, per swap execution facility or designated contract market because the number of swap contracts that will be traded on a swap execution facility or designated contract market and the number of those swaps that a swap execution facility or designated contract market will determine to make “available to trade” is presently unknown.

The Commission did not adopt proposed §§ 37.10(d) and 38.12(d) in the final rule, which would have required swap execution facilities and designated contract markets to submit annual reports to the Commission of their review and assessment of the swaps that they made “available to trade.”