SUPPORTING STATEMENT for the Paperwork Reduction Act Information Collection Submission for Proposed Exchange Act Rules 3a71-3

This submission is being made pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Section 3501 et seq.

A. JUSTIFICATION

1. Necessity of Information Collection

Various requirements contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Title VII") apply to cross-border security based swap transactions. However, certain Title VII requirements do not apply to cross-border security-based swap transactions conducted through a foreign branch of a U.S. bank where the foreign branch is the named counterparty to the transaction and no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap on behalf of the foreign branch or its counterparty. For example, in regards to the de minimis threshold in the security-based swap dealer definition, a non-U.S. person would not be required to count its transactions with the foreign branch of a U.S. bank. By contrast, certain Title VII requirements would apply to transactions conducted within the United States, even if both counterparties are non-U.S. persons.

The Commission recognizes that verifying whether a security-based swap transaction falls within the definition of a "transaction conducted through a foreign branch" or a "transaction conducted within the United States" could require significant due diligence by transaction counterparties. The Commission believes that the representations described in Rule 3a71-3 would mitigate the operational difficulties that could arise in connection with investigating the activities of a counterparty to ensure compliance with the rules. When determining whether a security-based swap is a "transaction conducted through a foreign branch," as defined in proposed Rule 3a71-3(a)(4)(i), a party may rely on a representation from its counterparty indicating that "no person within the United States is directly involved in soliciting, negotiating, or executing" the transaction on behalf of the counterparty, unless the party receiving the representation knows that the representation is not accurate. Similarly, when determining whether a security-based swap is a "transaction conducted within the United States," as defined in proposed Rule 3a71-3(a)(5)(i), a party may rely on a representation from its counterparty indicating that the transaction "is not solicited, negotiated, executed, or booked within the United States by or on behalf of such counterparty," unless the party receiving the representation knows that the representation is not accurate.

2. Purpose and Use of the Information Collection

The representations contemplated by Rule 3a71-3 will be relied upon by counterparties to security-based swap transactions in order to determine whether such transaction is (1) a "transaction conducted through a foreign branch," as defined in proposed Rule 3a71-3(a)(4)(i), or (2) a "transaction conducted within the United States," as defined in proposed Rule 3a71-3(a)(5)(i). Counterparties to security-based swap transactions may voluntarily give such

representations to one another to reduce operational costs and allow each party to ascertain whether such transaction is subject to Title VII requirements. Because these representations would constitute voluntary third-party disclosures, the Commission would not typically receive these disclosures.

3. Consideration Given to Information Technology

Rule 3a71-3 does not prescribe any particular method of making representations that a transaction is a "transaction conducted through a foreign branch" or that it is a "transaction conducted within the United States." As discussed more fully below, the Commission believes that respondents may elect to incorporate these representations in trade documentation and that the form of the representations will likely be consistent with current trade documentation practices.

4. Duplication

Rule 3a71-3 is a new rule. There are no existing rules governing cross-border security-based swap dealing activity and, therefore, Rule 3a71-3 would not duplicate any existing information collection.

5. Effect on Small Entities

Not applicable. None of the respondents subject to the information collection will be a small entity.

6. Consequences of Not Conducting Collection

The information collection under Rule 3a71-3 is designed to mitigate the operational difficulties that could arise in connection with investigating the activities of a counterparty to ensure compliance with the rules. Certain Title VII requirements do not apply to cross-border security-based swap transactions conducted through a foreign branch of a U.S. bank where the foreign branch is the named counterparty to the transaction and no person within the United States is directly involved in soliciting, negotiating, or executing the security-based swap on behalf of the foreign branch or its counterparty. If the representations contemplated by Rule 3a71-3 are not obtained, and the corresponding information collection is not conducted, parties to security-based swap transactions could be required to engage in significant due diligence with respect to their counterparties in order to establish whether or not these conditions obtain for any given security-based swap transaction, potentially incurring significant financial and temporal expense.

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

There are no special circumstances. This collection is consistent with the guidelines in 5 CFR 1320.5(d)(2).

8. Consultations Outside the Agency

The Commission has issued a release soliciting comment on the new "collection of information" requirements and associated paperwork burdens. A copy of the release is attached. Comments on Commission releases are generally received from registrants, investors, and other market participants. In addition, the Commission and staff participate in ongoing dialogue with representatives of various market participants through public conferences, meetings and informal exchanges. Any comments received on this proposed rulemaking will be posted on the Commission's public website, and made available through http://www.sec.gov/comments/s7-02-13/s70213.shtml. The Commission will consider all comments received prior to publishing the final rule, and will explain in any adopting release how the final rule responds to such comments, in accordance with 5 C.F.R. 1320.11(f).

9. Payment or Gift

Not applicable.

10. Confidentiality

The Commission would not typically receive confidential information as a result of the collection of information relating to the representations described in Rule 3a71-3 because these representations would be provided voluntarily between counterparties to certain security-based swap transactions. However, to the extent that the Commission receives confidential information described in Rule 3a71-3 through our examination and oversight program, an investigation, or some other means, such information would be kept confidential, subject to the provisions of applicable law (e.g., Freedom of Information Act, 5 U.S.C. 552).

11. Sensitive Questions

Because the Commission is not prescribing the particular form of any representation made pursuant to Rule 3a71-3, the associated collection of information does not expressly include Personally Identifiable Information ("PII").[1] At the same time, however, Commission staff understands that there are instances when certain information (including, but not limited to, a person's name, email, phone number, and address) could be required by counterparties or inadvertently provided by a counterparty on company letterhead or a similar document. Commission staff does not envision any circumstance in which social security numbers would be provided pursuant to this collection of information.

Further, any such information would not be collected, stored, or used by the Commission,

[1] The term "Personally Identifiable Information" refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc.

nor would it be retrievable on a Commission system or database. As such, we believe that the treatment of any PII provided with the collection of information associated with this proposed rule, once it is ultimately adopted, is not likely to implicate the Federal Information Security Management Act of 2002 or the Privacy Act of 1974.

12. Burden of Information Collection

Pursuant to proposed Rule 3a71-3, parties to security-based swaps are permitted to rely on certain representations from their counterparties when determining whether a transaction falls within the definition of a "transaction conducted through a foreign branch" or a "transaction conducted within the United States." The Commission staff estimates that 50 entities may include a representation that a security-based swap is a "transaction conducted through a foreign branch" in their trading relationship documentation (e.g., the schedule to a master agreement). The Commission estimates that 250 entities may include a representation that a security-based swap is not a "transaction conducted within the United States." In total, there will be approximately 300 entities that will have to comply with proposed Rule 3a71-3. These estimates are based on our understanding of the over-the-counter (OTC) derivatives markets, including the size of the market, the number of counterparties that are active in the market, and how market participants currently structure security-based swap transactions.

The following estimates reflect the Commission's experience with burden estimates for similar requirements and discussions between the Commission staff and market participants. The Commission believes that the representations contemplated by Rule 3a71-3 would, in most cases, be made through amendments to the parties' existing trading documentation (e.g., the schedule to a master agreement). The Commission believes that, because trading relationship documentation is established between two counterparties, whether a counterparty is able to represent that it is entering into a "transaction conducted through a foreign branch" or a "transaction conducted within the United States" would not change on a transaction-by-transaction basis and, therefore, such representations would generally be made in the schedule to a master agreement, rather than in individual confirmations. Because these representations relate to new regulatory requirements, the Commission anticipates that counterparties may elect to develop and incorporate these representations in trading documentation soon after the effective date of the Commission's security-based swap regulations, rather than incorporating specific language on a transactional basis. The Commission believes that counterparties would be able to adopt standardized language across all of their security-based swap trading relationships, where appropriate. The Commission believes that this standardized language may be developed by individual respondents or through a combination of trade associations and industry working groups.

The Commission estimates the maximum one-time third-party disclosure burden associated with developing the new representations contemplated by Rule 3a71-3 would be, for each respondent, no more than approximately five hours of in-house counsel time (because the representations will be short and based on facts that should be known and readily available to the entity making the representation), assuming little or no reliance on standardized disclosure language. Thus, the maximum total burden associated with developing the new representations

contemplated by Rule 3a71-3 would be 1,500[2] hours across all respondents during the first year. This estimate assumes little or no reliance on standardized disclosure language.

Moreover, the Commission estimates each respondent would have an additional one-time third-party disclosure burden associated with incorporating new disclosure language of no more than approximately five hours of in-house counsel time per counterparty. The Commission staff estimates that the average respondent will have no more than 10 active counterparties able to represent that a transaction is conducted through a foreign branch, not conducted within the United States, or both. Accordingly, the Commission staff estimates the total burden associated with incorporating new disclosure language into the relevant trading documentation would be 15,000[3] hours across all respondents during the first year.

The Commission expects that the majority of the third-party disclosure burden associated with the new disclosure requirements will be experienced during the first year, as language is developed and trading documentation is amended. After the new representations are developed and incorporated into trading documentation, the Commission believes that the ongoing annual burden associated with this requirement would be no more than approximately 10 hours per respondent for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 3,000[4] hours across all applicable respondents. The Commission staff estimates that this annual burden would consist of 10 hours of in-house counsel time for each respondent.

Based on these calculations, the annualized three-year estimate of the hourly burden across all respondents is 7,500 hours.[5] Thus, the annualized three-year estimate is 25[6] hours per respondent on an annual basis.

13. Costs to Respondents

The Commission believes that some of the entities that will have to comply with proposed Rule 3a71-3 would seek outside counsel to help them develop new representations

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[2] 300 (estimated number of respondents developing the new representations contemplated by Rule 3a71-3) * 5 hours = 1,500.

[3] 300 (estimated number of respondents developing the new representations contemplated by Rule 3a71-3) * 5 hours per counterparty * 10 applicable security-based swap counterparties = 15,000.

[4] 300 (estimated number of respondents developing the new representations contemplated by Rule 3a71-3) * 10 hours = 3,000.

[5] 22,500 hours across all respondents for three years (first year: 16,500 hours (1,500 + 15,000); second year: 3,000 hours; third year: 3,000 hours) ÷ 3 years = 7,500.

[6] 7,500 ÷ 300 respondents = 25.

contemplated by Rule 3a71-3. For PRA purposes, the Commission assumes that all 300 respondents would seek outside legal for the first year only and would, on average, consult with outside counsel for no more than approximately five hours, which would cost $600,000.[7] The Commission also assumes that none of the 300 respondents would seek outside legal services for year two or year three. Thus, the cost over the three-year period would be $600,000[8] or $200,000[9] per year when annualized over three years. The total labor cost per respondent would be approximately $666.667[10] when annualized over three years.

14. Cost to Federal Government

Not applicable. The Commission does not anticipate any contracting, IT, or development costs, and does not anticipate hiring new employees in connection with the information collection.

15. Changes in Burden

Not applicable. The Commission is proposing Rule 3a71-3 for the first time.

16. Information Collections Planned for Statistical Purposes

Not applicable. The information collections above are not planned for statistical purposes.

17. Approval to Omit OMB Expiration Date

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

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

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[7] 300 (estimated number of entities that would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3) × 5 hours (average estimated time spent by outside counsel to help each entity comply develop new representations contemplated by Rule 3a71-3) × $400 (hourly rate for an outside attorney) = $600,000. The hourly cost estimate of $400 on average for an attorney is based on Commission staff conversations with law firms that regularly assist regulated financial firms with compliance matters. See Proposal, 78 FR 30967, 31108.

[8] 1,500 hours across all respondents for three years ((first year: five hours; second year: 0 hours; third year: 0 hours) * 300 respondents) * $400 = $600,000.

[9] $600,000 (cost over three years) ÷ 3 years = $200,000.

[10] $200,000 (total labor cost to seek outside counsel per year) ÷ 300 (estimated number of entities that would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3) = $666.667.

B. Collection of Information Employing Statistical Methods

This collection does not involve statistical methods.