SUPPORTING STATEMENT for the
Paperwork Reduction Act New Information Collection Submission for
Rule 3Cg-1 Notice to the Commission [and Financial Entity Exemption]

A. JUSTIFICATION

1. Necessity for the Information Collection

This collection is necessary in order for the Securities and Exchange Commission ("Commission") to implement Section 763(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] Section 763(a) of the Dodd-Frank Act adds new Section 3C(g)(1)(C) to the Securities Exchange Act of 1934 ("Exchange Act"), which requires any counterparty to a security-based swap that seeks to rely on the Dodd-Frank Act's statutory exception from mandatory clearing of security-based swaps to notify the Commission "how it generally meets its financial obligations associated with entering into non-cleared security-based swaps."[2] Section 3C(g)(1)(C) contemplates that the Commission may establish the manner of notification and Exchange Act Section 3C(g)(6) provides that the Commission may prescribe such rules as may be necessary to prevent abuse of this statutory exception, referred to herein as the "end-user clearing exception." Proposed Rule 3Cg-1(a) under the Exchange Act would require a counterparty to a security-based swap transaction to meet the requirements of Exchange Act Section 3C(g)(1)(C) by delivering certain specified items of information to a swap data repository ("SDR") in the manner required by proposed Regulation SBSR.[3] Whenever the end-

---

[1] See Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, § 763(a) (2010). The applicable statutory text is provided in Appendix A hereto.

[2] Id. (adding Exchange Act Section 3C(g)(1)(C)).

[3] See Exchange Act Release No. 63346 (Nov. 18, 2010), 75 FR 75208 (Dec. 2, 2010) ("Regulation SBSR Proposing Release"). Proposed Regulation SBSR would specify who reports security-based swap transactions, where such transactions are to be reported, what information is to be reported, and in what format. The information required under proposed Exchange Act Rule 3Cg-1 would be in addition to these

user clearing exception is invoked, ten additional items of information would be required to be produced. If the counterparty invoking the end-user clearing exception is also an issuer of securities under Exchange Act Section 12 or required to file periodic reports with the Commission pursuant to Exchange Act Section 15(d) then two additional items of information would also be required for a total of twelve items of information required to be produced. In either case, this additional information collected in the form and manner required by Regulation SBSR would serve as the official notice to the Commission of a security-based swap transaction that is made in reliance on the end-user clearing exception.[4]

2. Purpose and Use of the Information Collection

The collection of information in proposed Rule 3Cg-1(a) serves two purposes contemplated by the Dodd-Frank Act. First, the proposed Rule identifies what a party to a security-based swap transaction must do to satisfy the statutory requirement in Exchange Act 3C(g)(1)(C) to provide notice to the Commission if it invokes the end-user clearing exception.[5] Second, the Commission expects the empirical data collected under Rule 3Cg-1(a) will aid efforts to prevent abuse of the end-user clearing exception by allowing it to evaluate how the end-user clearing exception is being used, identify areas of potential concern, and take prompt action to limit abuses in appropriate circumstances.[6]

---

requirements but would be delivered to the SDR by the reporting party in the same manner as required by proposed Regulation SBSR. Regulation SBSR contemplates that information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted by Regulation SBSR, such delivery would also meet the end-user clearing exception notice requirement.

4 See Pub. L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(g)(1)(C)).

5 Id.

6 See Pub. L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(g)(6)).

3. Consideration Given to Information Technology

After giving consideration to the reduced burden that may be associated with using information technology for this collection, we have permitted the information for this collection to be submitted electronically. Specifically, the information that is part of this collection would be delivered to the SDR by the reporting party defined in proposed Regulation SBSR[7] together with other information regarding the security-based swap separately required by proposed Regulation SBSR. Under the applicable requirements of proposed Regulation SBSR, the additional information required by proposed Rule 3Cg-1(a) would be delivered to the SDR in the same electronic format established by the SDR for purposes of proposed Regulation SBSR.[8] We believe that relying on the electronic reporting format in proposed Regulation SBSR provides the most efficient method of collecting the required information and the best use of information technology to reduce the burden associated with this collection.

4. Duplication

This collection does not result in the duplication of any information that is already available. Prior to the enactment of the Dodd-Frank Act, security-based swaps were unregulated bilateral agreements, and thus counterparties to security-based swaps were not required to report or publicly disclose the data points that are required to be reported under the proposed rule. As a result, the information required for this collection is not currently available from any public source or other agency.

---

[7] Proposed Exchange Act Rule 901(a) under Regulation SBSR defines which of the parties to a security-based swap will be designated the reporting party for these purposes. See Regulation SBSR Proposing Release, supra note 3.

[8] See id. (proposed Rules 901(h) and 907(a)(2) of proposed Regulation SBSR).

Additionally, although the Commodity Futures Trading Commission ("CFTC") will be collecting similar information with respect to swap transactions that it regulates, this collection only relates to security-based swaps, which are a distinct set of products from those regulated by the CFTC. Thus the information required for this collection could not be shared with the CFTC and is not a duplication of the information that may be collected under a comparable CFTC rule on the end-user clearing exception.

5. Reducing the Burden on Small Entities

For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act[9] ("RFA"), a small business includes an issuer or person, other than an investment company, that on the last day of its most recent fiscal year had total assets of $5 million or less.[10] Based on input from security-based swap market participants and its own information, the Commission preliminarily believes that currently there is very little use of security-based swaps by non-financial entities that would be eligible to use the end-user clearing exception, and that the non-financial entities eligible to invoke the end-user clearing exception and transacting in security-based swaps would be corporations, partnerships and trusts with assets in excess of $10 million.[11]

[9] See Pub. L. No. 96-354, 94 Stat. 1164 (1980), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

[10] 17 CFR 230.157. See also 17 CFR 240.0-10(a).

[11] The Commodity Futures Modernization Act of 2000 introduced the concept of "eligible contract participant" that the Commission preliminarily believes is a standard frequently referenced by market participants and which may act to limit the ability of non-financial entities with assets less than $10 million to transact in security-based swaps. See Pub. L. No. 106-554, 114 Stat. 2763 (Dec. 21, 2000). See also Section 1(a)(18) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(18) as re-designated and amended by Section 721 of the Dodd-Frank Act (defining "eligible contract participant"). The Dodd-Frank Act added a definition of eligible contract participant to the Exchange Act which references the equivalent definition in the CEA, and created new standards to limit the ability of persons who are not eligible contract participants to transact in security-based swaps. See Pub. L. No. 111-203, § 761(a) (adding Exchange Act Section 3(a)(65)). See also Pub. L. No. 111-203, § 761(e) (adding Exchange Act Section 6(l))

On this basis, the Commission preliminarily believes that the number of security-based swap transactions involving a small entity as that term is defined for purposes of the RFA would be de minimis. Moreover, the Commission does not believe that any aspect of proposed Rule 3Cg-1 would be likely to alter the type of counterparties presently engaging in security-based transactions. Therefore, the Commission preliminarily believes that proposed Rule 3Cg-1, and the collection requirements set forth in this rule, would have a de minimis impact on small entities.

6. Consequences of Not Conducting Collection

The Dodd-Frank Act mandates that a non-financial entity invoking the end-user clearing exception must notify the Commission of "how it generally meets its financial obligations associated with non-cleared security-based swaps."[12] The first five data points required under the collection fulfill this notice requirement mandated by the Dodd-Frank Act. Not conducting this collection would result in a failure by the Commission to implement the regulatory oversight mandated by Congress in the Dodd-Frank Act. Additionally, we believe that receiving a notification for each transaction may provide for a more complete picture regarding how end-users meet their financial obligations based on the transactions in which they engage.

The remaining items of information required by proposed Rule 3Cg-1(a), specifically proposed Rules 3Cg-1(a)(1), (2), (3), (4) and (6), are designed to affirm compliance with particular requirements of Exchange Act Section 3C(g) or otherwise produce information necessary to aid the Commission in its efforts to prevent abuse of the end-user clearing exception

---

(making it unlawful for any person to effect a transaction in a security-based swap for a person that is not an eligible contract participant, unless such transaction is conducted on a registered national securities exchange).

12 See Pub. L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(g)(1)(C)).

as contemplated by Exchange Act Section 3C(g)(6).[13] Similar to the arguments noted in the prior paragraph, not conducting this collection could result in a failure by the Commission to implement the regulatory oversight mandated by Congress in the Dodd-Frank Act, and could also inhibit the Commission's efforts to prevent abuse of the end-user clearing exception. We believe that requiring this collection each time a counterparty seeks to rely on the end-user clearing exception is necessary to enable the Commission to carry out the level of oversight contemplated in the Dodd-Frank Act.

7. Inconsistencies with Guidelines in 5 CFR 1320.8(d)

This collection is consistent with the guidelines in 5 CFR 1320.8(d), except with respect to the following three points. First, under the proposed rule a respondent must provide notice to the Commission each time that it relies on the end-user exception from mandatory clearing. Given that end-user clearing exception is a transaction-based exception that market participants may elect to use whenever they enter into a qualifying security-based swap transaction, and that some respondents may choose to rely on the end-user clearing exception on a frequent basis, respondents may be required to report information to the Commission more often than quarterly. The Commission believes that receiving a notification for each transaction may provide for a more complete picture regarding how end-users meet their financial obligations based on the transactions in which they engage.

Second, information collected pursuant to proposed Rule 3Cg-1(a) would be required to be retained for not less than five years. The Commission recently proposed to adopt rules to regulate the operation of SDRs, which include recordkeeping requirements for security-based

[13] See Pub. L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(g)(6)). See also Pub. L. No. 111-203, § 764 (adding Exchange Act Section 15F of the Exchange Act creating new business conduct standards applicable to interactions of security-based swap dealers and major security-based swap participants with other counterparties).

swap transaction data reported to a registered SDR pursuant to proposed Regulation SBSR. Specifically, proposed Rule 13n-5(b)(5) would require registered SDRs to maintain the transaction data for not less than five years after the applicable security-based swap expires and historical positions and historical market values for not less than five years.[14] Exchange Act Section 13A(c)[15] requires each party to a non-cleared security-based swap to maintain records of the security-based swaps held by such party in the form required by the Commission, and Exchange Act Section 13A(d)[16] mandates that these records must be in a form not less comprehensive than required to be collected by SDRs. These records are available for inspection by the Commission and other specified authorities pursuant to Exchange Act Section 13A(c)(2).[17] Accordingly, security-based swap transaction reports received by a registered SDR pursuant to proposed Rule 3Cg-1(a) and proposed Rule 901 of Regulation SBSR would be required to be retained for not less than five years.

Finally, this collection may require the submission of proprietary financial information regarding a counterparty's security-based swap transactions. However, any such confidential information pursuant this collection would be kept confidential, subject to the provisions of the Freedom of Information Act ("FOIA"). Exemption 4 of FOIA provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential"[18] Thus any proprietary financial information required to be submitted to the

[14] See Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10 , 2010) ("Regulation SDR Release"). See also Pub. L. No. 111-203, § 763(i) (adding Exchange Act Section 13(n)(5)).

[15] See Pub. L. No. 111-203, § 766(a) (adding Exchange Act Section 13A(c)).

[16] See Pub. L. No. 111-203, § 766(a) (adding Exchange Act Section 13A(d)).

[17] See Pub. L. No. 111-203, § 766(a) (adding Exchange Act Section 13A(c)(2)).

[18] 5 U.S.C. 552(b)(4).

Commission under proposed Rule 3Cg-1(a) would be kept confidential and would be subject to protection from disclosure under Exemption 4 of the FOIA.

8. Consultations Outside the Agency

The Commission has been coordinating extensively with the CFTC as well as various participants in the swaps industry in formulating proposed Rule 3Cg-1(a). Further, the Commission has consulted with industry participants for many of the collections of information that would be required by this proposed rule and has incorporated what it has learned as a result of these consultations into its burden estimates.

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 have been posted on the Commission's public website, available at http://www.sec.gov/comments/s7-43-10/s74310.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). That said, as at the time of this submission, the comment period had closed and no comments received related specifically to the PRA burdens associated with this proposed rulemaking.

9. Payment or Gift

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

10. Confidentiality

A registered SDR would be under a general obligation to maintain the confidentiality of all information obtained pursuant to this collection, and proposed Rule 901 of Regulation SBSR, subject to limited exceptions under proposed Regulation SDR.[19] The Commission also preliminarily believes that the additional information collected pursuant to proposed Rule 3Cg-1(a) would either fall under the exception to public dissemination contained in proposed Rule 902(c)(2), or otherwise should be excluded from the publicly-disseminated transaction report.[20] Accordingly, the Commission preliminarily believes the collection of information pursuant to proposed Rule 3Cg-1(a) would be confidential and would not be publicly available.

To the extent that the Commission receives confidential information pursuant this collection of information, such information would be kept confidential, subject to the provisions FOIA. Exemption 4 of FOIA provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential"[21] The information required to be submitted to the Commission under proposed Rule 3Cg-1(a) may contain proprietary financial information regarding security-based swap transactions and therefore be subject to protection from disclosure under Exemption 4 of the FOIA.

11. Sensitive Questions

There are no sensitive questions in the information collection.

12. Burden of Information Collection

---

19 See Regulation SDR Release, supra note 14.

20 See Regulation SBSR Proposing Release, supra note 3. Proposed Rule 902(c)(2) of Regulation SBSR would prohibit disclosure of any information disclosing the business transactions and market positions of any person with respect to a security-based swap that is not cleared.

21 5 U.S.C. 552(b)(4).

The total reporting burden for proposed Rule 3Cg-1 for all respondents is an initial on-time burden of 44,000 hours, with a total annual burden thereafter of 93,000 hours. This burden is described in detail below.

a. Respondents

The proposed collection of information in proposed Rule 3Cg-1(a) would apply to transactions that qualify for the end-user clearing exception under Exchange Act Section 3C(g)(1) where at least one of the parties to the security-based swap is not included in the definition of financial entity and is using the security-based swap to hedge or mitigate commercial risk. For an entity to determine whether it is not a financial entity and whether it is using the security-based swap transaction to hedge or mitigate commercial risk, the party must first make an assessment under the applicable definition of financial entity in Exchange Act Section 3C(g)(3)[22] and then consider whether the definition of hedging or mitigating commercial risk in proposed Rule 3a67-4 applies to the security-based swap in question.[23] In addition, those entities that may be considered Identified Financial Institutions and therefore fall within the exemption under the proposed alternative language in Rule 3Cg-1(b) and (c) would be required to conduct an assessment under the proposed alternative language to determine whether they are entitled to elect to use the end-user clearing exception.

Based on the information currently available to the Commission, the Commission preliminarily estimates there are roughly 5,000 entities in the credit default swaps marketplace.[24] The Commission preliminarily estimates that 1,000 of these entities regularly participate in the

---

22 See Pub. L. No. 111-203, § 763(a) (adding Exchange Act Section 3C(g)(3)(A)(i)-(viii)).

23 See Exchange Act Release No. 63452 (Dec. 7, 2010) ("Definitions Proposing Release").

24 See Regulation SBSR Proposing Release, supra note 3.

market for credit default swaps and other security-based swaps to an extent that may lead them to be reporting persons for purposes of proposed Regulation SBSR. In addition, the Commission estimates that there may be up to another 4,000 security-based swap counterparties[25] that transact security-based swaps much less frequently.[26] The Commission preliminarily believes the 1,000 regular participants in the security-based swaps market are likely to be entities that are financial entities for purposes of the Dodd-Frank Act and would therefore not qualify for the end-user clearing exception, while the 4,000 less frequent counterparties to security-based swaps could, for purposes of the end-user clearing exception, be non-financial entities using security-based swaps to hedge or mitigate commercial risk. These 4,000 counterparties are also preliminarily believed by the Commission to include Identified Financial Institutions using security-based swaps.[27] Accordingly, with respect to burdens applicable to all security-based swap counterparties that qualify for the end-user clearing exception, the Commission preliminarily believes that it is reasonable to use the figure of 4,000 respondents for purposes of estimating collection of information burdens under the Paperwork Reduction Act.

b. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission preliminarily believes the notification required by proposed Rule 3Cg-1(a)[28] imposes a limited reporting or record keeping burden, because it references commonly

---

25 Id.

26 This figure is based on the 5,000 total participants in the security-based swap market minus the 1,000 of those participants that qualify as financial entities.

27 For purposes of the discussion that follows, the term "non-financial entities" includes Identified Financial Institutions that would be excluded from the definition of "financial entity" in Exchange Act Section 3C(g)(3) in the event the proposed alternative language in Rules 3Cg-1(b) and (c) is adopted by the Commission.

28 For purposes of the discussion that follows, references to proposed Rule 3Cg-1 are to proposed Rule 3Cg-1 including the alternative proposed rule text, unless otherwise noted.

used market practices when defining whether a security-based swap hedges or mitigates commercial risk[29] and utilizes the proposed reporting and recordkeeping mechanism under Rule 901 of Regulation SBSR to meet the notice requirement contemplated by Exchange Act Section 3C(g)(1)(C).[30] Under proposed Rule 3Cg-1(a) the additional reporting burden on the party invoking the end-user clearing exception would be to identify and document the commercial risk being hedged and the effectiveness of the proposed security-based swap as a hedge, and then complete ten or, at the most, twelve additional data points in a larger set of transaction information that would be required to submitted to an SDR or the Commission under proposed Regulation SBSR. In addition, those entities that may be considered Identified Financial Institutions and therefore fall within the exemption under the proposed alternative language in Rule 3Cg-1(b) and (c) would be required to conduct an assessment under the proposed alternative language to determine whether they are entitled to elect to use the end-user clearing exception. The recordkeeping burden on the SDR would also be limited to storing the additional ten or twelve data points in the larger set of transaction information separately required to be delivered pursuant to proposed Regulation SBSR.

i. Estimated Number of Security-Based Swap Transactions

According to publicly available data from the Depository Trust Clearing Corporation ("DTCC") recently, there have been an average of approximately 20,000 new transactions in single-name credit default swap ("CDS") transactions per day,[31] corresponding to a total number

---

29 See Definitions Proposing Release, supra note 23.

30 See Regulation SBSR Proposing Release, supra note 3.

31 See, e.g., "Table 17: Summary of Weekly Transaction Activity," http://www.dtcc.com/products/derivserv/data_table_iii.php (weekly data as updated by DTCC).

of CDS transactions of approximately 5,200,000 per year.[32] The Commission preliminarily believes that CDS represent 85% of all security-based swap transactions.[33] Accordingly, and to the extent that historical market activity is a reasonable predictor of future activity,[34] the Commission preliminarily estimates that the total number of security-based swap transactions that would be subject to proposed Rule 3Cg-1 on an annual basis would be approximately 6,200,000.[35]

Based on publicly available information and consultation with industry sources, the Commission preliminarily believes that even the most active non-financial entity participants in the security-based swap market enter a relatively small number of new security-based swaps during any given period.[36] There are approximately 4,000 participants in the security-based swap

---

[32] Cf., Regulation SBSR Proposing Release, supra note 3, which used an estimate of 36,000 transactions in single name CDS transactions per day, referencing the same DTCC data. The difference is accounted for by differences in the scope of proposed Rule 3Cg-1 compared to proposed Regulation SBSR. Proposed Regulation SBSR encompasses both new transactions in security-based swaps and certain transactions occurring during the lifecycle of security-based swaps and therefore both of these elements are taken into account for purposes of its discussion of estimated burdens to be experienced by respondents as a result of the proposed regulation. Proposed Rule 3Cg-1 would only affect new transactions and therefore the estimated number of transactions used for purposes of the burden calculations is limited to new transactions.

[33] The Commission's estimate is based on internal analysis of available security-based swap market data. The Commission is seeking comment about the overall size of the security-based swap market.

[34] The Commission notes that regulation of the security-based swap markets, including by means of proposed Regulation SBSR and proposed Rule 3Cg-1, could impact market participant behavior.

[35] This figure is based on the following: (5,200,000 / 0.85) = 6,117,647.

[36] Information from ISDA surveys relating to collateralized swap transactions indicate that the average number of outstanding OTC derivative trades for non-bank firms generally average just 1% of all transactions in the marketplace, and this figure includes transactions associated with certain parties not entitled to invoke the end-user clearing exception, such as certain major swap participants, commodity pools as defined in section 1a(10) of the Commodity Exchange Act and private funds as defined in section 202(a) of the Investment Advisers Act of 1940. See ISDA Collateral Committee, ISDA Feasibility

marketplace that the Commission preliminarily believes could qualify for the end-user clearing exception and they represent approximately 80% of the total number of participants in the security-based swap market.[37] However, based on all information reviewed the Commission preliminarily estimates that non-financial entities account for 1% of all security-based swap transactions.[38]

ii. Reporting and Recordkeeping Burdens

To qualify for the end-user clearing exception proposed Rule 3Cg-1(a)(4) would require a non-financial entity to determine whether the terms of the proposed security-based swap and the manner in which it will be used satisfy the definition of hedging or mitigating commercial risk established by proposed Exchange Act Rule 3a67-4. To meet the requirements of the definition, subsection 3a67-4(a)(3) of proposed Rule 3a67-4 specifies that the counterparty to the security-based swap must identify and document one or more risks associated with the present or future conduct and management of the enterprise that are being reduced by the security-based swap and establish and document a method of assessing the effectiveness of the security-based swap as a hedge for such identified risks. In complying with proposed Rule 3a67-4, non-financial entities seeking to invoke the end-user clearing exception would need to establish and maintain an

---

Study: Extending Collateralized Portfolio Reconciliations (Dec. 18, 2009) (available at www.isda.org/c_and_a/pdf/ISDA-Portfolio-Reconciliation-Feasibility-Study.pdf). The Commission is seeking comment about the overall size of the security-based swap market.

[37] This 80% figure is based on the quotient of dividing the 4,000 participants that could qualify for the end-user clearing exception by the estimated 5,000 participants in the security-based swaps marketplace.

[38] See supra note 36. An estimate that non-financial entities account for 1% of security-based swap transactions will be used for purposes of the calculations that follow below.

appropriate compliance mechanism including the necessary professional, legal, technical and administrative support to make and document the required assessment of hedging effectiveness.[39]

A. Recordkeeping

The Commission preliminarily believes that counterparties transacting in security-based swaps to hedge commercial risks ordinarily will have established risk management or financial control systems in place for other reasons which will likely be adjusted to accommodate the requirements of proposed Rule 3a67-4(a)(3).[40] Accordingly, the Commission preliminarily estimates that designing and implementing an appropriate compliance and support program to estimate the hedging effectiveness of security-based swaps would impose an initial one time aggregate recordkeeping burden of approximately 44,000 hours, corresponding to 11 recordkeeping burden hours for each reporting party, to adjust these established risk management or financial control systems to accommodate the requirements of proposed Rule 3a67-4.[41]

B. Reporting

---

[39] See Definitions Proposing Release, supra note 23.

[40] The Commission preliminarily believes some entities establish and follow these types of procedures so that their hedging transactions will qualify for hedge accounting treatment under generally accepted accounting principles, which require procedures similar to those contained in this proposed rule, or to meet other statutory requirements. While hedging relationships involving security-based swaps that qualify for the hedging or mitigating commercial risk exception within the proposed rule are not limited to those recognized as hedges for accounting purposes, we believe that entities that are not seeking hedge accounting treatment for their hedging transactions commonly identify and document their risk management activities as well as assess the effectiveness of those activities as a matter of good business practice. See also Item 305 of Regulation S-K, 17 CFR 229.305 (requiring SEC Filers to provide identified risk based disclosures relating to their activities in financial derivatives); Internal revenue Code Section 1259 (26 U.S.C. 1259) (recognizing hedging transactions as "constructive sales" of certain appreciated financial positions in specified circumstances).

[41] This figure is based on the following: (Senior Business Analyst at 4 hours) + (Compliance Manager at 4 hours) + (Director of Compliance at 2 hours) + (Compliance Attorney at 1 hour) x (4000 respondents) = 44,000 burden hours; (44,000 burden hours per year) / (4000 respondents) = 11 burden hours per year per respondent.

The Commission preliminarily estimates that to gather the information required to notify the Commission that a security-based swap is being used to hedge or mitigate commercial risk purposes of proposed Rule 3Cg-1(a)(4) would impose an ongoing aggregate annual reporting burden of approximately 62,000 burden hours for all respondents, which corresponds to an ongoing annual aggregate reporting burden of approximately 16 burden hours for each respondent.[42] The Commission expects that, on average, each respondent to the proposed collection will incur this reporting burden approximately 16 times each year.[43]

The Commission further preliminarily estimates that for a party to make an assessment required under proposed Rules 3Cg-1(b) and (c) of the proposed alternative rule text, if applicable, gather the remaining information required by proposed Rule 3Cg-1(a) and include the information in the security-based swap information delivered to an SDR as contemplated by proposed Regulation SBSR would impose an ongoing aggregate annual third-party reporting burden of approximately 31,000 burden hours for all respondents, which corresponds to an ongoing aggregate annual third-party reporting burden of approximately eight (8) burden hours for each respondent,[44] as each item of additional information is factual information known to the party invoking the end-user clearing exception and unlikely to vary from transaction to

---

[42] These figures are based on the following: (((Senior Business Analyst at 30 minutes) + (Compliance Manager at 30 minutes)) x (6,200,000 security-based swap transactions) x (1% transactions by parties eligible to invoke end-user clearing exception))) / 60 minutes = 62,000 burden hours per year; (62,000 burden hours per year) / 4,000 respondents = 15.5 burden hours per year per respondent.

[43] This figure is based on the following: (6,200,000 security-based swap transactions) x (1% transactions by parties eligible to invoke end-user clearing exception) / 4,000 respondents = 15.5 responses per year per respondent.

[44] These figures are based on the following: ((Compliance Manager at 30 minutes) x (6,200,000 security-based swap transactions) x (1% transactions by parties eligible to invoke end-user clearing exception)) / 60 minutes = 31,000 burden hours per year; (31,000 burden hours per year) / 4,000 respondents = 7.75 burden hours per year per respondent.

transaction.[45] The Commission expects that, on average, each respondent to the proposed collection will incur this third-party reporting burden approximately 16 times each year.[46]

The Commission preliminarily believes that proposed Rule 3Cg-1 would impose minimal additional burdens on either Reporting Parties not using the end-user clearing exception themselves or on SDRs. Reporting Parties would be required by proposed Regulation SBSR to report transaction information relating to security-based swaps in a specified manner, and the Commission therefore preliminarily believes reporting a limited number of additional data elements to the SDR in an equivalent manner will have a de minimis effect on the burdens they experience. Similarly, the Commission preliminarily believes that for an SDR to receive and retain these additional data fields would effectively impose minimal additional burdens, as the information would be transmitted and received electronically and would then be stored as part of the existing transaction data already required under proposed Regulation SBSR.

---

[45] For example, the Commission preliminarily expects that a counterparty's status as a non-financial entity, a finance affiliate or an SEC Filer would change infrequently. The Commission understands the time required to collect this information is likely to vary depending on whether the particular security-based swap is documented using electronic or manual processes. Electronic processes allow for fields of required information to be populated automatically, substantially reducing the time required for transaction processing and compliance confirmation. A high percentage of electronically eligible security-based swaps are currently transacted using electronic processes. See ISDA, 2010 ISDA Operations Benchmarking Survey (available at http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf) (showing that for credit derivatives 99% of transactions are eligible to be confirmed electronically and 98% of eligible transactions are confirmed electronically, while for equity derivatives 36% of transactions are eligible to be confirmed electronically and 81% of eligible transactions are confirmed electronically). The Commission preliminarily believes CDS transactions represent 85% of all security-based swap transactions. See supra note 33 and accompanying text. The 30 minutes of time estimated to be required to produce the information to comply with proposed Rule 3Cg-1 (other than the hedging or mitigating commercial risk requirement) is intended to account for both manually and electronically processed transactions.

[46] This figure is based on the following: (6,200,000 security-based swap transactions) x (1% transactions by parties eligible to invoke end-user clearing exception) / 4,000 respondents = 15.5 responses per year per respondent.

iii. Summary of Total Burden Hours

For the reasons described above, the Commission preliminarily estimates that the initial one-time aggregate burden associated with proposed Rule 3Cg-1 would be 44,000 hours, corresponding to 11 burden hours for each respondent,[47] and the recurring aggregate annualized burden associated with proposed Rule 3Cg-1 would be 93,000 burden hours, which corresponds to 23 annual burden hours per respondent.[48]

c. Costs Associated with the Burdens

i. Meeting Financial Obligations

Proposed Rule 3Cg-1(a)(5) requires the reporting of five specified items of information to satisfy the requirement under the Exchange Act Section 3C(g)(1)(C) for a non-financial entity invoking the end-user clearing exception to notify the Commission of "how it generally meets its financial obligations associated with non-cleared security-based swaps." Because non-cleared security-based swaps are not subject to uniform margin and collateral requirements such as those established by clearing agencies, providing this information will be useful in monitoring the extent to which non-financial entities that invoke the end-user exception are taking steps to mitigate credit risks associated with security-based swaps.

In order to understand these potential risks, proposed Rule 3Cg-1(a)(5) requires a counterparty invoking the end-user clearing exception to provide notification regarding how they expect to meet their financial obligations associated with the security-based swap by reporting specified information to a registered security-based swap depository. In particular, an entity invoking the end-user clearing exception must indicate in the materials provided to the SDR

---

47 See supra note 41 and accompanying text.

48 This figure is the sum of the calculations presented in notes 42 and 44 above. Summation differences between the final figures in the body of the text are due to the effects of rounding.

whether it provides security for the performance of its financial obligations by (i) transferring assets directly to the security-based swap counterparty pursuant to a written credit support agreement; (ii) pledging collateral pursuant to a security arrangement not requiring the transfer of collateral to the security-based swap counterparty; (iii) receiving credit support from a third-party pursuant to a written guarantee; (iv) solely relying on its available financial resources; or (v) using other means.

The Commission preliminarily estimates the costs associated with the notification required by Rule 3Cg-1(a)(5) will be limited, as the methods used to meet financial obligations associated with non-cleared security-based swaps are expected to be readily known to counterparties invoking the end-user clearing exception and unlikely to vary from transaction to transaction. The Commission preliminarily estimates there are 6,200,000 transactions in security-based swaps annually,[49] and that parties eligible to invoke the end-user clearing exception are counterparties in approximately 1% of all security-based swap transactions.[50] The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3Cg-1(a)(5) would impose an ongoing aggregate annual burden of approximately 15,500 burden hours for all respondents, which corresponds to a burden of four (4) burden hours for each respondent.[51] Accordingly, applying an estimated hourly cost of $316 for a compliance attorney to gather information about how the counterparty is meeting its

---

49 See supra note 35 and accompanying text.

50 Based on the information presented in note 36 above and the accompanying text, the Commission preliminarily estimates entities qualifying for the end-user exception are involved in roughly 1% of the estimated 6,200,000 annual security-based swap transactions, or 62,000 such transactions ((6,200,000 x 1%) = 62,000).

51 See supra note 44 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the other requirements of proposed Rule 3Cg-1, not including proposed Rule 3Cg-1(a)(4).

Financial Notice Obligation,[52] the Commission preliminarily estimates proposed Rule 3Cg-1(a)(5) would result in an ongoing aggregate annual cost of $4,900,000 to the entire end-user community, which corresponds to an average ongoing aggregate annual cost of $1,225 per end-user.[53]

ii. Preventing Abuse of the End-User Clearing Exception

To aid the Commission's efforts to prevent abuse of the end-user clearing exception, proposed Rule 3Cg-1(a) requires notification of which of the counterparties to the security-based swap is invoking the end-user clearing exception, whether the counterparty invoking the exception is or is not a financial entity, whether the counterparty invoking the exception is a finance affiliate meeting the requirements of Exchange Act 3C(g)(4), whether the counterparty invoking the exception uses the security-based swap to hedge or mitigate commercial risk, and whether the counterparty invoking the exception is an SEC Filer. SEC Filers invoking the end-user clearing exception must provide their SEC Central Index Key number and confirm that an appropriate committee of the SEC Filer's board of directors or equivalent body has reviewed and approved the decision to enter into the security-based swap that is subject to the end-user clearing exception.

To qualify for the end-user clearing exception a non-financial entity would be required to determine whether the terms of the proposed security-based swap and the manner in which it will

---

52 The hourly rate for the compliance attorney is from SIFMA's Management & Professional Earnings in the Securities Industry 2009, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The remaining hourly rates for professionals used in this cost benefit analysis section are also derived from this source and modified in the same manner.

53 These monetized costs are calculated as follows: (15 minutes/60 minutes per hour) x ($316 dollars per hour) x (62,000 security-based swap transactions annually) = $4,898,000 annually; ($4,898,000 annually) / 4,000 respondents = $1,225 average annually per respondent.

be used satisfy the definition of hedging or mitigating commercial risk established by proposed Exchange Act Rule 3a67-4. To meet the requirements of the definition, subsection 3a67-4(a)(3) of proposed Rule 3a67-4 specifies that the counterparty to the security-based swap must identify and document one or more risks associated with the present or future conduct and management of the enterprise and establish and document a method of assessing the effectiveness of the security-based swap as a hedge for such identified risks.

The Commission preliminarily believes that non-financial entities seeking to invoke the end-user clearing exception would need to establish and maintain an appropriate compliance mechanism to meet the hedge or mitigate standard in proposed Rule 3a67-4 including the necessary professional, legal, technical and administrative support to make and document the required assessment of hedging effectiveness.[54] The Commission also preliminarily believes that counterparties transacting in security-based swaps to hedge commercial risks ordinarily will have established risk management systems in place for other reasons that can be adjusted to accommodate the requirements of proposed Rule 3Cg-1(a)(4) and proposed Rule 3a67-4.[55] Accordingly, the Commission preliminarily estimates that designing and implementing an appropriate compliance and support program to identify the risks being reduced and document the hedging effectiveness of security-based swaps would impose an initial one time initial aggregate cost of $13,200,000 to all end-users, which corresponds to and an average initial cost of $3300 per end-user.[56]

---

54 See supra note 39 and accompanying text.

55 See supra note 40 and accompanying text.

56 This figure is based on the following: (Senior Business Analyst at 4 hours x $234 per hour) + (Compliance Manager at 4 hours x $294 per hour) + (Director of Compliance at 2 hours x $426 per hour) + (Compliance Attorney at 1 hour x $316 per hour) x (4000 respondents) = $13,120,000; ($13,120,000 initial aggregate cost) / (4000 respondents) = $3,280 initial aggregate cost per respondent. See also supra note 41.

The Commission expects there would also be ongoing costs associated with determining whether the hedging or mitigating commercial risk standard is met for each security-based swap transaction for which the end-user clearing exception is invoked. The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3a67-4 and proposed Rule 3Cg-1(a)(4) would impose an ongoing aggregate annual burden of approximately 62,000 burden hours for all respondents, which corresponds to a burden of 16 burden hours for each respondent.[57] Assuming an hourly cost of $234 per hour for a senior business analyst and $294 per hour for a compliance manager to meet this requirement, proposed Rule 3Cg-1 would impose an annual cost of $16,400,000 to all end-users and an average annual cost of $4,100 dollars per end-user.[58]

It was estimated that to make an assessment required under proposed Rules 3Cg-1(b) and (c) of the alternative proposed rule text, if applicable, gather the information required by Rule 3Cg-1(a) besides the information with respect to hedging or mitigating commercial risk, would require the additional work of a compliance manager.[59] That information is factual information a

---

[57] See supra note 42 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the requirements of proposed Rule 3Cg-1, not including proposed Rules 3Cg-1(a)(4), given the comparable nature of the information required.

[58] This figure is based on the following: ((Senior Business Analyst at 30 minutes x $234 per hour) + (Compliance Manager at 30 minutes x $294 per hour)) x ((6,200,000 security-based swap transactions) x (1% transactions by parties eligible to invoke end-user clearing exception)) = $16,368,000 aggregate ongoing costs per year; ($16,368,000 aggregate ongoing costs per year) / (4,000 respondents) = $4,092 in aggregate ongoing costs per year per respondent. These figures do not include the costs associated with complying with proposed Rule 3Cg-1(a)(5), which are separately accounted for in note 53 above and the accompanying text, or costs associated with proposed Rule 3Cg-1 other than proposed Rules 3Cg-1(a)(4) and (5), which are separately accounted for in note 63 below and the accompanying text. See also supra note 42.

[59] See supra note 43 and accompanying text.

party is likely to have as a result of its existing compliance process and the information is unlikely to vary between transactions.[60] Costs associated with collecting requisite Financial Obligation Notice information required by proposed Rule 3Cg-1(a)(5) have already been discussed.[61] Therefore, the information collection and reporting costs that remain to be accounted for are those not associated with either proposed Rules 3Cg-1(a)(4) or (5). The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3Cg-1 other than proposed Rules 3Cg-1(a)(4) and (5) would impose an ongoing aggregate annual burden of approximately 15,500 burden hours for all respondents, which corresponds to a burden of four (4) burden hours for each respondent.[62] These remaining costs are estimated to impose an annual cost of approximately $4,600,000 on all respondents and an average annual cost of approximately $1,200 per respondent.[63]

iii. Form of Notice to the Commission

Exchange Act Section 3C(g)(1)(C) requires that a non-financial entity invoking the end-user clearing exception notify the Commission how it generally meets its financial obligations

---

60 See supra note 45.

61 See supra note 53 and accompanying text.

62 See supra note 44 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the requirements of proposed Rule 3Cg-1, not including proposed Rule 3Cg-1(a)(4), given the comparable nature of the information required.

63 These monetized costs are calculated as follows: (15 minutes/60 minutes per hour) x (Compliance Manager at $294 dollars per hour) x (62,000 security-based swap transactions annually) = $4,557,000 annually; ($4,557,000 dollars annually) / (4,000 respondents) = $1,139 average annually per respondent. These figures do not include the costs associated with complying with proposed Rule 3Cg-1(a)(5), which are separately accounted for in note 53 above and the accompanying text, and the costs associated with complying with proposed Rule 3Cg-1(a)(4), which are separately accounted for in note 58 above and the accompanying text.

and gives the Commission discretion to establish how to collect this information. To satisfy this requirement, proposed Rule 3Cg-1(a) requires entities invoking the end-user clearing exception to deliver specified information to a registered SDR in the form and manner required for delivery of information specified under proposed Rule 901(d) of Regulation SBSR. Under this approach, rather than collecting information through a separate process established by the Commission for these purposes, the information delivered in compliance with the requirements of proposed Rule 3Cg-1(a) and proposed Regulation SBSR would serve as the notice to the Commission necessary to invoke the end-user clearing exception.

Because the form of notice required by proposed Rule 3Cg-1(a) would use the existing reporting and recordkeeping mechanism for security-based swap transactions that is required by proposed Rule 901 of Regulation SBSR, the Commission preliminarily believes the form of notice required by proposed Rule 3Cg-1(a) would impose no additional burden on persons invoking the end-user clearing exception or SDRs other than those described above. The information required to be provided to the Commission pursuant to proposed Rule 3Cg-1(a) would be transmitted and received electronically and would be stored as part of the existing transaction materials that would be required to be prepared by proposed Regulation SBSR. The Commission preliminarily believes that information collected under proposed Rule 3Cg-1 will not be required to be publicly disseminated by the SDR, therefore the Commission preliminarily believes there will be no costs associated with organizing and posting such information under the requirements for public dissemination of information proposed to be met by SDRs.[64]

iv. Total Costs

[64] See Regulation SBSR Proposing Release, supra note 3, proposed Rule 902; Regulation SDR Release, supra note 14, proposed Rule 13n-4(b)(6).

In total, the Commission preliminarily estimates that proposed Rule 3Cg-1 would result in a one-time initial aggregate annualized cost of $13,200,000, or $3400 per covered entity[65] and an ongoing aggregate annualized cost of $25,900,000 for all covered entities, or approximately $6,500 per covered entity.[66]

13. Costs to Respondents

This collection does not result in any total annual costs to respondents other than those discussed in Section A.12 above.

14. Costs to Federal Government

The estimated cost to the federal government is $0.

15. Reason for Change

This collection does not result in any program changes or adjustments.

16. Information Collection Planned for Statistical Purposes

This collection is not planned for statistical purposes.

17. Display of OMB Approval Date

We request authorization to omit the expiration date of this due to the fact that information collected in accordance with this proposed rule will be provided to an SDR in the form and manner required by Regulation SBSR, rather than directly to the Commission on a separate form developed by the Commission for this collection.[67]

---

65 See supra note 56 and accompanying text.

66 These figures are based on the following: ($4,900,000 associated with proposed Rule 3Cg-1(a)(5)) + ($16,400,000 to comply with proposed Rule 3Cg-1(a)(4)) + ($4,600,000 to comply with other notification requirements established by Rule 3Cg-1) = $25,900,000; ($25,900,000 aggregate annual ongoing costs) / (4000 covered entities) = $6,475 per covered entity.

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

This collection does not involve statistical methods.

[67] Regulation SBSR contemplates that information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted by Regulation SBSR, such delivery would also meet the end-user clearing exception notice requirement.

APPENDIX A

SEC. 763. AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934.

(a) CLEARING FOR SECURITY-BASED SWAPS.—The Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) is amended by inserting after section 3B (as added by section 717 of this Act):

''SEC. 3C. CLEARING FOR SECURITY-BASED SWAPS.

''(a) IN GENERAL.—

''(1) STANDARD FOR CLEARING.—It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration under this Act if the security-based swap is required to be cleared.

''(2) OPEN ACCESS.—The rules of a clearing agency described in paragraph (1) shall—

''(A) prescribe that all security-based swaps submitted to the clearing agency with the same terms and conditions are economically equivalent within the clearing agency and may be offset with each other within the clearing agency; and

''(B) provide for non-discriminatory clearing of a security-based swap executed bilaterally or on or through the rules of an unaffiliated national securities exchange or security-based swap execution facility.

''(b) COMMISSION REVIEW.—

''(1) COMMISSION-INITIATED REVIEW.—

''(A) The Commission on an ongoing basis shall review each security-based swap, or any group, category, type, or class of security-based swaps to make a determination that such security-based swap, or group, category, type, or class of security-based swaps should be required to be cleared.

''(B) The Commission shall provide at least a 30-day public comment period regarding any determination under subparagraph (A).

''(2) SWAP SUBMISSIONS.—

''(A) A clearing agency shall submit to the Commission each security-based swap, or any group, category, type, or class of security-based swaps that it plans to accept for clearing and provide notice to its members (in a manner to be determined by the Commission) of such submission.

''(B) Any security-based swap or group, category, type, or class of security-based swaps listed for clearing by a clearing agency as of the date of enactment of this subsection shall be considered submitted to the Commission.

''(C) The Commission shall—

‘‘(i) make available to the public any submission received under subparagraphs (A) and (B);
‘‘(ii) review each submission made under subparagraphs (A) and (B), and determine whether the security-based swap, or group, category, type, or class of security-based swaps, described in the submission is required to be cleared; and
‘‘(iii) provide at least a 30-day public comment period regarding its determination whether the clearing requirement under subsection (a)(1) shall apply to the submission.
‘‘(3) DEADLINE.—The Commission shall make its determination under paragraph (2)(C) not later than 90 days after receiving a submission made under paragraphs (2)(A) and (2)(B), unless the submitting clearing agency agrees to an extension for the time limitation established under this paragraph.
‘‘(4) DETERMINATION.—
‘‘(A) In reviewing a submission made under paragraph (2), the Commission shall review whether the submission is consistent with section 17A.
‘‘(B) In reviewing a security-based swap, group of security-based swaps or class of security-based swaps pursuant to paragraph (1) or a submission made under paragraph (2), the Commission shall take into account the following factors:
‘‘(i) The existence of significant outstanding notional exposures, trading liquidity and adequate pricing data.
‘‘(ii) The availability of rule framework, capacity, operational expertise and resources, and credit support infrastructure to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded.
‘‘(iii) The effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the clearing agency available to clear the contract.
‘‘(iv) The effect on competition, including appropriate fees and charges applied to clearing.
‘‘(v) The existence of reasonable legal certainty in the event of the insolvency of the relevant clearing agency or 1 or more of its clearing members with regard to the treatment of customer and security-based swap counterparty positions, funds, and property.
‘‘(C) In making a determination under subsection (b)(1) or paragraph (2)(C) that the clearing requirement shall apply, the Commission may require such terms and conditions to the requirement as the Commission determines to be appropriate.
‘‘(5) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules

for a clearing agency's submission for review, pursuant to this subsection, of a security-based swap, or a group, category, type, or class of security-based swaps, that it seeks to accept for clearing. Nothing in this paragraph limits the Commission from making a determination under paragraph (2)(C) for security-based swaps described in paragraph (2)(B).

''(c) STAY OF CLEARING REQUIREMENT.—

''(1) IN GENERAL.—After making a determination pursuant to subsection (b)(2), the Commission, on application of a counterparty to a security-based swap or on its own initiative, may stay the clearing requirement of subsection (a)(1) until the Commission completes a review of the terms of the securitybased swap (or the group, category, type, or class of securitybased swaps) and the clearing arrangement.

''(2) DEADLINE.—The Commission shall complete a review undertaken pursuant to paragraph (1) not later than 90 days after issuance of the stay, unless the clearing agency that clears the security-based swap, or group, category, type, or class of security-based swaps, agrees to an extension of the time limitation established under this paragraph.

''(3) DETERMINATION.—Upon completion of the review undertaken pursuant to paragraph (1), the Commission may—

''(A) determine, unconditionally or subject to such terms and conditions as the Commission determines to be appropriate, that the security-based swap, or group, category, type, or class of security-based swaps, must be cleared pursuant to this subsection if it finds that such clearing is consistent with subsection (b)(4); or

''(B) determine that the clearing requirement of subsection (a)(1) shall not apply to the security-based swap, or group, category, type, or class of security-based swaps.

''(4) RULES.—Not later than 1 year after the date of the enactment of this section, the Commission shall adopt rules for reviewing, pursuant to this subsection, a clearing agency's clearing of a security-based swap, or a group, category, type, or class of security-based swaps, that it has accepted for clearing.

''(d) PREVENTION OF EVASION.—

''(1) IN GENERAL.—The Commission shall prescribe rules under this section (and issue interpretations of rules prescribed under this section), as determined by the Commission to be necessary to prevent evasions of the mandatory clearing requirements under this Act.

''(2) DUTY OF COMMISSION TO INVESTIGATE AND TAKE CERTAIN ACTIONS.—To the extent the Commission finds that a particular security-based swap or any group, category, type, or class of security-based swaps that would otherwise be subject to mandatory clearing but no clearing agency has listed the security-based swap or the group, category, type, or class of security-based swaps for clearing, the Commission shall—

''(A) investigate the relevant facts and circumstances;

‘‘(B) within 30 days issue a public report containing the results of the investigation; and
‘‘(C) take such actions as the Commission determines to be necessary and in the public interest, which may include requiring the retaining of adequate margin or capital by parties to the security-based swap or the group, category, type, or class of security-based swaps.
‘‘(3) EFFECT ON AUTHORITY.—Nothing in this subsection—
‘‘(A) authorizes the Commission to adopt rules requiring a clearing agency to list for clearing a securitybased swap or any group, category, type, or class of security-based swaps if the clearing of the security-based swap or the group, category, type, or class of security-based swaps would threaten the financial integrity of the clearing agency; and
‘‘(B) affects the authority of the Commission to enforce the open access provisions of subsection (a)(2) with respect to a security-based swap or the group, category, type, or class of security-based swaps that is listed for clearing by a clearing agency.
‘‘(e) REPORTING TRANSITION RULES.—Rules adopted by the Commission under this section shall provide for the reporting of data, as follows:
‘‘(1) Security-based swaps entered into before the date of the enactment of this section shall be reported to a registered security-based swap data repository or the Commission no later than 180 days after the effective date of this section.
‘‘(2) Security-based swaps entered into on or after such date of enactment shall be reported to a registered securitybased swap data repository or the Commission no later than the later of—
‘‘(A) 90 days after such effective date; or
‘‘(B) such other time after entering into the securitybased swap as the Commission may prescribe by rule or regulation.
‘‘(f) CLEARING TRANSITION RULES.—
‘‘(1) Security-based swaps entered into before the date of the enactment of this section are exempt from the clearing requirements of this subsection if reported pursuant to subsection (e)(1).
‘‘(2) Security-based swaps entered into before application of the clearing requirement pursuant to this section are exempt from the clearing requirements of this section if reported pursuant to subsection (e)(2).
‘‘(g) EXCEPTIONS.—
‘‘(1) IN GENERAL.—The requirements of subsection (a)(1) shall not apply to a security-based swap if 1 of the counterparties to the security-based swap—
‘‘(A) is not a financial entity;
‘‘(B) is using security-based swaps to hedge or mitigate commercial risk; and

‘‘(C) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

‘‘(2) OPTION TO CLEAR.—The application of the clearing exception in paragraph (1) is solely at the discretion of the counterparty to the security-based swap that meets the conditions of subparagraphs (A) through (C) of paragraph (1).

‘‘(3) FINANCIAL ENTITY DEFINITION.—

‘‘(A) IN GENERAL.—For the purposes of this subsection, the term ‘financial entity’ means—

‘‘(i) a swap dealer;

‘‘(ii) a security-based swap dealer;

‘‘(iii) a major swap participant;

‘‘(iv) a major security-based swap participant;

‘‘(v) a commodity pool as defined in section 1a(10) of the Commodity Exchange Act;

‘‘(vi) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80–b–2(a));

‘‘(vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

‘‘(viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.

‘‘(B) EXCLUSION.—The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including—

‘‘(i) depository institutions with total assets of $10,000,000,000 or less;

‘‘(ii) farm credit system institutions with total assets of $10,000,000,000 or less; or

‘‘(iii) credit unions with total assets of $10,000,000,000 or less.

‘‘(4) TREATMENT OF AFFILIATES.—

‘‘(A) IN GENERAL.—An affiliate of a person that qualifies for an exception under this subsection (including affiliate entities predominantly engaged in providing financing for the purchase of the merchandise or manufactured goods of the person) may qualify for the exception only if the affiliate, acting on behalf of the person and as an agent, uses the security-based swap to hedge or mitigate the commercial risk of the person or other affiliate of the person that is not a financial entity.

‘‘(B) PROHIBITION RELATING TO CERTAIN AFFILIATES.—The exception in subparagraph (A) shall not apply if the affiliate is—

‘‘(i) a swap dealer;

‘‘(ii) a security-based swap dealer;

‘‘(iii) a major swap participant;
‘‘(iv) a major security-based swap participant;
‘‘(v) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for paragraph (1) or (7) of subsection (c) of that Act (15 U.S.C. 80a–3(c));
‘‘(vi) a commodity pool; or
‘‘(vii) a bank holding company with over $50,000,000,000 in consolidated assets.
‘‘(C) TRANSITION RULE FOR AFFILIATES.—An affiliate, subsidiary, or a wholly owned entity of a person that qualifies for an exception under subparagraph (A) and is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from the margin requirement described in section 15F(e) and the clearing requirement described in subsection (a) with regard to security-based swaps entered into to mitigate the risk of the financing activities for not less than a 2-year period beginning on the date of enactment of this subparagraph.
‘‘(5) ELECTION OF COUNTERPARTY.—
‘‘(A) SECURITY-BASED SWAPS REQUIRED TO BE CLEARED.—With respect to any security-based swap that is subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major securitybased swap participant, the counterparty shall have the sole right to select the clearing agency at which the security-based swap will be cleared.
‘‘(B) SECURITY-BASED SWAPS NOT REQUIRED TO BE CLEARED.—With respect to any security-based swap that is not subject to the mandatory clearing requirement under subsection (a) and entered into by a security-based swap dealer or a major security-based swap participant with a counterparty that is not a swap dealer, major swap participant, security-based swap dealer, or major securitybased swap participant, the counterparty—
‘‘(i) may elect to require clearing of the securitybased swap; and
‘‘(ii) shall have the sole right to select the clearing agency at which the security-based swap will be cleared.
‘‘(6) ABUSE OF EXCEPTION.—The Commission may prescribe such rules or issue interpretations of the rules as the Commission determines to be necessary to prevent abuse of the exceptions described in this subsection. The Commission may also request information from those persons claiming the clearing exception as necessary to prevent abuse of the exceptions

described in this subsection.
‘‘(h) TRADE EXECUTION.—
‘‘(1) IN GENERAL.—With respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1), counterparties shall—
‘‘(A) execute the transaction on an exchange; or
‘‘(B) execute the transaction on a security-based swap execution facility registered under section 3D or a securitybased swap execution facility that is exempt from registration under section 3D(e).
‘‘(2) EXCEPTION.—The requirements of subparagraphs (A) and (B) of paragraph (1) shall not apply if no exchange or security-based swap execution facility makes the security-based swap available to trade or for security-based swap transactions subject to the clearing exception under subsection (g).
‘‘(i) BOARD APPROVAL.—Exemptions from the requirements of this section to clear a security-based swap or execute a securitybased swap through a national securities exchange or securitybased swap execution facility shall be available to a counterparty that is an issuer of securities that are registered under section 12 or that is required to file reports pursuant to section 15(d), only if an appropriate committee of the issuer’s board or governing body has reviewed and approved the issuer’s decision to enter into security-based swaps that are subject to such exemptions.
‘‘(j) DESIGNATION OF CHIEF COMPLIANCE OFFICER.—
‘‘(1) IN GENERAL.—Each registered clearing agency shall designate an individual to serve as a chief compliance officer.
‘‘(2) DUTIES.—The chief compliance officer shall—
‘‘(A) report directly to the board or to the senior officer of the clearing agency;
‘‘(B) in consultation with its board, a body performing a function similar thereto, or the senior officer of the registered clearing agency, resolve any conflicts of interest that may arise;
‘‘(C) be responsible for administering each policy and procedure that is required to be established pursuant to this section;
‘‘(D) ensure compliance with this title (including regulations issued under this title) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under this section;
‘‘(E) establish procedures for the remediation of noncompliance issues identified by the compliance officer through any—
‘‘(i) compliance office review;
‘‘(ii) look-back;
‘‘(iii) internal or external audit finding;
‘‘(iv) self-reported error; or
‘‘(v) validated complaint; and
‘‘(F) establish and follow appropriate procedures for the handling, management response, remediation, retesting,

and closing of noncompliance issues.
''(3) ANNUAL REPORTS.—
''(A) IN GENERAL.—In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of—
''(i) the compliance of the registered clearing agency or security-based swap execution facility of the compliance officer with respect to this title (including regulations under this title); and
''(ii) each policy and procedure of the registered clearing agency of the compliance officer (including the code of ethics and conflict of interest policies of the registered clearing agency).
''(B) REQUIREMENTS.—A compliance report under subparagraph (A) shall—
''(i) accompany each appropriate financial report of the registered clearing agency that is required to be furnished to the Commission pursuant to this section; and
''(ii) include a certification that, under penalty of law, the compliance report is accurate and complete.''.
(b) CLEARING AGENCY REQUIREMENTS.—Section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) is amended by adding at the end the following:
''(g) REGISTRATION REQUIREMENT.—It shall be unlawful for a clearing agency, unless registered with the Commission, directly or indirectly to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to a security-based swap.
''(h) VOLUNTARY REGISTRATION.—A person that clears agreements, contracts, or transactions that are not required to be cleared under this title may register with the Commission as a clearing agency.
''(i) STANDARDS FOR CLEARING AGENCIES CLEARING SECURITYBASED SWAP TRANSACTIONS.—To be registered and to maintain registration as a clearing agency that clears security-based swap transactions, a clearing agency shall comply with such standards as the Commission may establish by rule. In establishing any such standards, and in the exercise of its oversight of such a clearing agency pursuant to this title, the Commission may conform such standards or oversight to reflect evolving United States and international standards. Except where the Commission determines otherwise by rule or regulation, a clearing agency shall have reasonable discretion in establishing the manner in which it complies with any such standards.
''(j) RULES.—The Commission shall adopt rules governing persons that are registered as clearing agencies for security-based swaps under this title.
''(k) EXEMPTIONS.—The Commission may exempt, conditionally or unconditionally, a clearing agency from registration under this

section for the clearing of security-based swaps if the Commission determines that the clearing agency is subject to comparable, comprehensive supervision and regulation by the Commodity Futures Trading Commission or the appropriate government authorities in the home country of the agency. Such conditions may include, but are not limited to, requiring that the clearing agency be available for inspection by the Commission and make available all information requested by the Commission.

''(l) EXISTING DEPOSITORY INSTITUTIONS AND DERIVATIVE CLEARING ORGANIZATIONS.—

''(1) IN GENERAL.—A depository institution or derivative clearing organization registered with the Commodity Futures Trading Commission under the Commodity Exchange Act that is required to be registered as a clearing agency under this section is deemed to be registered under this section solely for the purpose of clearing security-based swaps to the extent that, before the date of enactment of this subsection—

''(A) the depository institution cleared swaps as a multilateral clearing organization; or

''(B) the derivative clearing organization cleared swaps pursuant to an exemption from registration as a clearing agency.

''(2) CONVERSION OF DEPOSITORY INSTITUTIONS.—A depository institution to which this subsection applies may, by the vote of the shareholders owning not less than 51 percent of the voting interests of the depository institution, be converted into a State corporation, partnership, limited liability company, or similar legal form pursuant to a plan of conversion, if the conversion is not in contravention of applicable State law.

''(3) SHARING OF INFORMATION.—The Commodity Futures Trading Commission shall make available to the Commission, upon request, all information determined to be relevant by the Commodity Futures Trading Commission regarding a derivatives clearing organization deemed to be registered with the Commission under paragraph (1).

''(m) MODIFICATION OF CORE PRINCIPLES.—The Commission may conform the core principles established in this section to reflect evolving United States and international standards.''.