

**SUPPORTING STATEMENT for the Paperwork Reduction Act Information Collection  
Submission for Exchange Act Rule 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 certain cross-border security-based swap transactions conducted through a foreign branch of a U.S. bank. For example, in the final rules implementing the *de minimis* and position thresholds in the security-based swap dealer and major security-based swap participant definitions, a non-U.S. person would not be required to count its transactions with a U.S. person that constitute transactions conducted through a foreign branch of the counterparty, when the U.S. person counterparty is a registered security-based swap dealer.<sup>1</sup> Additionally, in the final rules implementing provisions of Title VII relating to business conduct standards and the designation of a chief compliance officer for security-based swap dealers and major security-based swap participants,<sup>2</sup> Rule 3a71-3(c) provides an exception from application of certain of the business conduct requirements to registered security-based swap dealers and major security-based swap participants to certain security-based swap transactions that are conducted through the foreign branch of a U.S.-person counterparty.

The Commission recognizes that verifying whether a security-based swap transaction falls within the definition of a “transaction conducted through a foreign branch” of a counterparty could require significant due diligence by transaction counterparties. The Commission believes that the representations described in Rule 3a71-3(a)(3)(ii) 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” of a counterparty, as defined in Rule 3a71-3(a)(3)(i), a party may rely on a representation from its counterparty “that the security-

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<sup>1</sup> See Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, Exchange Act Release 72472 (Jun. 25, 2014), 79 FR 47278 (Aug. 12, 2014). See also Security-Based Swap Transactions Connected with a Non-U.S. Person’s Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer *De Minimis* Exception, Exchange Act Release 77104 (Feb. 10, 2016), 81 FR 8597 (Feb. 19, 2016).

<sup>2</sup> See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release 77617 (Apr. 14, 2016), 81 FR 29959 (May 13, 2016) (“Business Conduct Adopting Release”). See also Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants; Correction, Exchange Act Release 77617A (May 19, 2016), 81 FR 32643 (May 24, 2016).

based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate; for the purposes of [the] final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all the facts of which the person is aware, that it is not accurate.”

Further, under the final rules, a non-U.S. person performing its security-based swap dealer or major security-based swap participant analysis require the non-U.S. person to determine whether its security-based swap counterparties are U.S. persons because certain security-based swaps in which the counterparty is not a U.S. person will not have to be counted against the applicable thresholds. The definition of “U.S. Person” as defined in Rule 3a71-3 includes a provision permitting persons to rely on representations from a counterparty that the counterparty does not satisfy the criteria set forth in Rule 3a71-3(a)(4)(i), unless such person knows or has reason to know that the representation is not accurate. For purposes of the final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

The Commission believes that this provision providing for representations should further facilitate consistent application of the “U.S. Person” definition to specific entities across market participants. The provisions should also help mitigate the operational difficulties and costs that could arise in connection with investigating the status of a counterparty. It permits the party best positioned to make this determination to perform an analysis of its own U.S.-person status and convey, in the form of a representation, the results of that analysis to its counterparty. In addition, such representations should help reduce the potential for inconsistent classification and treatment of a person by its counterparties and promote uniform application of Title VII. The final rule permitting reliance on representations with respect to a counterparty’s U.S.-person status applies only to the definition of “U.S. person” as used in the final rule and does not apply to any determinations of a person’s U.S.-person status under any other provision of the federal securities laws, including Commission rules, regulations, interpretations, or guidance.

## 2. Purpose and Use of the Information Collection

The representations contemplated by Rule 3a71-3 will be relied upon by counterparties to determine whether such transaction is a “transaction conducted through a foreign branch” of a counterparty, as defined in Rule 3a71-3(a)(3)(i), as well as to verify whether a security-based swap counterparty is a “U.S. person.” 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 certain Title VII requirements. Because any representations provided to counterparties under Rule 3a71-3 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 a person does not meet the criteria for U.S.-person status. 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 or the U.S.-person status 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 counterparty to the transaction and the transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States. 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.

Under the final rules, a non-U.S. person's security-based swap dealer and major security-based swap participant analysis require it to determine whether its security-based swap counterparties are U.S. persons because certain security-based swaps in which the counterparty is not a U.S. person will not have to be counted against the applicable thresholds. If the representations related to U.S.-person status are not obtained, and the corresponding information collection is not conducted, non-U.S. market participants could be required to perform their own analysis of their counterparties' U.S.-person status. The provisions should also help mitigate the operational difficulties and costs that could arise in connection with investigating the status of a counterparty.

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 requested comment on the collection of information requirements in the proposing release in May 2013.<sup>3</sup> No comments were received regarding the Paperwork Reduction Act.

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”).<sup>4</sup> At the same time, however, Commission staff understands that there are instances when certain information (including, but not limited to, a person’s name, e-mail, 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, 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.

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<sup>3</sup> Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968, 31111 (May 23, 2013) (“Cross-Border Proposing Release”).

<sup>4</sup> 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.

## 12. Burden of Information Collection

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 that it does not meet the criteria of the "U.S. person" definition 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, where appropriate, standardized language across all of their security-based swap trading relationships. The Commission believes that this standardized language may be developed by individual respondents or through a combination of trade associations and industry working groups.

### a. Representations regarding a "transaction conducted through a foreign branch"

Pursuant to 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." The Commission staff estimated that a total of 50 entities may incur burdens under this collection of information, whether solely in connection with the business conduct requirements or also in connection with the application of the de minimis exception. 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 Commission estimates the one-time third-party disclosure burden associated with developing representations under this collection of information would be, for each U.S. bank counterparty that may make such representations, no more than five hours, and up to \$2,000 for the services of outside professionals, for an estimate of approximately 250 hours<sup>5</sup> or 83.33 hours<sup>6</sup> per year when annualized over three years, across all security-based swap counterparties that may make such representations.<sup>7</sup> This estimate assumes little or no reliance on standardized

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<sup>5</sup> 50 (total number of entities) \* 5 hours = 250 hours.

<sup>6</sup> 250 hours (total hours to develop representations) ÷ 3 years = 83.33 hours.

<sup>7</sup> See Business Conduct Adopting Release at 30096.

disclosure language.

The Commission expects that the majority of the 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 continues to believe that the ongoing third-party disclosure burden associated with this requirement will be 10 hours per U.S. bank counterparty for verifying representations with existing counterparties, for a total of approximately 500 hours<sup>8</sup> across all applicable U.S. bank counterparties.<sup>9</sup>

Collection of Information	Type of Burden	Total Number of Respondents	Total Number of Responses Per Year	Initial Burden Per Response Per Year Per Respondent	Ongoing Burden Per Response Per Year Per Respondent	Total Annualized Burden Per Year Per Respondent	Total Burden For All Respondents	Small Business Entities Affected
Representation Regarding a Transaction Conducted Through a Foreign Branch	Third-Party	50	1	5	10	11.67	583.33	0

b. Representations regarding U.S.-person status

Pursuant to Rule 3a71-3(a)(4)(iv), persons may rely on representations from a counterparty that the counterparty does not satisfy the criteria defining U.S. person set forth in Rule 3a71-3(a)(4)(i), unless such person knows or has reason to know that the representation is not accurate. Commission staff has estimated, based on its understanding of OTC derivatives markets, including the domiciles of counterparties that are active in the market, that up to 2,400 entities may provide representations that they do not meet the criteria necessary to be U.S. persons.

As with representations regarding whether a transaction is conducted through a foreign branch, the Commission estimates the maximum total third-party disclosure burden associated with developing new representations would be, for each counterparty that may make such representations, no more than five hours and up to \$2,000 for the services of outside professionals, for a maximum of approximately 12,000 hours<sup>10</sup> or 4,000 hours<sup>11</sup> per year when annualized over three years, across all security-based swap counterparties that may make such representations. This estimate assumes little or no reliance on standardized disclosure language.

<sup>8</sup> 50 (total number of entities) \* 10 hours = 500 hours.

<sup>9</sup> The Commission staff estimates that this burden would consist of 10 hours of in-house counsel time for each security-based swap market participant that may make such representations. See Business Conduct Adopting Release, at 30097, note 1581.

<sup>10</sup> 2,400 (total number of entities) \*5 hours = 12,000 hours.

<sup>11</sup> 12,000 hours (total hours to develop representations) ÷ 3 years = 4,000 hours.

The Commission expects that the majority of the 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 annual third-party disclosure burden associated with this requirement would be no more than approximately 10 hours per counterparty for verifying representations with existing counterparties and onboarding new counterparties, for a maximum of approximately 24,000 hours<sup>12</sup> across all applicable security-based swap counterparties.

Collection of Information	Type of Burden	Total Number of Respondents	Total Number of Responses Per Year	Initial Burden Per Response Per Year Per Respondent	Ongoing Burden Per Response Per Year Per Respondent	Total Annualized Burden Per Year Per Respondent	Total Burden For All Respondents	Small Business Entities Affected
Representations Regarding U.S.-Person Status	Third-Party	2,400	1	5	10	11.67	28,000	0

### 13. Costs to Respondents

#### a. Representations regarding a “transaction conducted through a foreign branch”

The Commission believes that some of the entities that will have to comply with Rule 3a71-3 would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission assumes that all 50 respondents would seek outside counsel for the first year only and would, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also assumes that none of the 50 respondents would seek outside legal services for year two or year three. Thus, the cost over the three-year period would be \$100,000<sup>13</sup> or \$33,333<sup>14</sup> per year when annualized over three years, across all security-based swap counterparties that may make such representations. The total labor cost per respondent would be approximately \$666.67<sup>15</sup> when annualized over three years.

<sup>12</sup> 2,400 (total number of entities) \* 10 hours = 24,000 hours.

<sup>13</sup> 50 (estimated number of entities) \* \$2,000 (cost of outside counsel) = \$100,000.

<sup>14</sup> \$100,000 (total cost to seek outside counsel over three years) ÷ 3 years = \$33,333.33.

<sup>15</sup> \$33,333 (total labor cost to seek outside counsel per year) ÷ 50 (estimated number of entities that would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3(a)(3)(ii)) = \$666.67.

Collection of Information	Type of Burden	Total Number of Respondents	Total Number of Responses Per Year	Initial Cost Per Response Per Year Per Respondent	Ongoing Cost Per Response Per Year Per Respondent	Total Annualized Cost Per Year Per Respondent	Total Cost For All Respondents	Small Business Entities Affected
Representation Regarding a Transaction Conducted Through a Foreign Branch	Third-Party	50	1	\$2,000	\$0	\$666.67	\$33,333.33	0

b. Representations regarding U.S.-person status

The Commission believes that some of the entities that will have to comply with Rule 3a71-3 would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission assumes that all 2,400 respondents would seek outside legal for the first year only and would, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also assumes that none of the 2,400 respondents would seek outside legal services for year two or year three. Thus, the cost over the three-year period would be \$4,800,000<sup>16</sup> or \$1,600,000<sup>17</sup> per year when annualized over three years, across all security-based swap counterparties that may make such representations. The total labor cost per respondent would be approximately \$666.67<sup>18</sup> when annualized over three years.

Collection of Information	Type of Burden	Total Number of Respondents	Total Number of Responses Per Year	Initial Cost Per Response Per Year Per Respondent	Ongoing Cost Per Response Per Year Per Respondent	Total Annualized Cost Per Year Per Respondent	Total Cost For All Respondents	Small Business Entities Affected
Representations Regarding U.S.-Person Status	Third-Party	2,400	1	\$2,000	\$0	\$666.67	\$1,600,000.00	0

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

The estimates of burdens regarding representations as to whether a transaction is a “transaction conducted through a foreign branch” are unchanged from the proposal. The total

<sup>16</sup> 2,400 (total number of entities) \* \$2,000 = \$4,800,000.

<sup>17</sup> \$4,800,000 (total cost over three years) ÷ 3 years = \$1,600,000.

<sup>18</sup> \$1,600,000 (total labor cost to seek outside counsel per year) ÷ 2,400 (estimated number of entities that would seek outside counsel to help them develop new representations contemplated by Rule 3a71-3(4)(iv)) = \$666.67.



estimates of burdens have been reduced from the proposal, reflecting a reduction in the number of entities that would rely on representations for counterparties when determining whether a transaction is a “transaction conducted within the United States.” The proposal estimated that 250 entities would make a representation that a security-based swap is not a “transaction conducted within the United States,” but because the final rules do not require security-based swap dealers to look to the location of activity of their counterparties for purposes of counting transactions towards the de minimis threshold, no entities will need to make this representation.

The estimates of burdens regarding representations as to whether a counterparty is a “U.S. person” reflect a similar analysis to that used in estimating the burdens regarding representations as to whether a transaction is a “transaction conducted through a foreign branch.” The proposal did not include a provision for this type of representation, but the final rule permits reliance on such representations, partially in response to comments received on the proposal. The scope and context of the analysis required to make these representations is similar to that required for the representations concerning whether a transaction is a “transaction conducted through a foreign branch.”

16. Information Collections Planned for Statistical Purposes

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

17. OMB Expiration Date Display Approval

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

18. Exceptions to Certification for Paperwork Reduction Act Submissions

This collection complies with the requirements in 5 CFR 1320.9.

**B. Collection of Information Employing Statistical Methods**

This collection does not involve statistical methods.