

July 21, 2016

Department of the Treasury, Departmental Offices
Supporting Statement and Request for Clearance
Final Rule – 31 C.F.R. Part 148 – Qualified Financial Contracts Recordkeeping Related
to Orderly Liquidation Authority

A. Justification

1. Circumstances necessitating the collection of information

The Secretary of the Treasury (the “Secretary”), as Chairperson of the Financial Stability Oversight Council, is adopting final rules (the “Final Rules”) to implement the qualified financial contract (“QFC”) recordkeeping requirements of section 210(c)(8)(H) of the Dodd–Frank Wall Street Reform and Consumer Protection Act (“Act” or the “Dodd–Frank Act”) (12 U.S.C. § 5390(c)(8)(H)). Section 210(c)(8)(H) provides that if the Federal primary financial regulatory agencies (“PFRAs”) do not prescribe joint final or interim final regulations requiring financial companies to maintain records with respect to QFCs (as defined in section 210(c)(8)(D) of the Act) to assist the Federal Deposit Insurance Corporation (“FDIC”) as receiver for a covered financial company to exercise its rights under the Act and fulfill its obligations under section 210(c)(8), (9), or (10) of the Act within 24 months of the enactment of the Act, the Chairperson of the Financial Stability Oversight Council (the “Council”) shall prescribe, in consultation with the FDIC, such regulations. As the PFRAs did not prescribe such regulations by the statutory deadline, on January 7, 2015, the Secretary, as Chairperson of the Council, in consultation with the FDIC, requested public comment on proposed rules that would implement section 210(c)(8)(H) (the “Proposed Rules”).¹ The Secretary received comments on the Proposed Rules from trade associations, asset managers, insurance companies, clearing organizations, a nonprofit organization, and a private individual. In general, commenters acknowledged the need for the FDIC to have appropriate information in order to exercise its role as a receiver under Title II of Dodd-Frank. However, commenters also requested relief from aspects of the Proposed Rules that they argued were unduly burdensome.

The Secretary, in consultation with the FDIC, is adopting the Final Rules, which include substantial changes from the Proposed Rules in response to comments received. In making these changes, the Secretary has sought to reduce the burden of the rules while still providing the FDIC with the records it needs to exercise its authority to manage the QFC portfolio of a covered financial company. The Final Rules require recordkeeping by records entities with respect to positions, counterparties, legal documentation, and collateral. This information is necessary to assist the FDIC as receiver to: (a) fulfill its obligations under section 210(c)(8), (9), and (10) of the Act in deciding whether to transfer QFCs; (b) assess the consequences of decisions to transfer, disaffirm or repudiate, or allow the termination of, QFCs with one or more counterparties; (c) determine if any risks to financial stability are posed by the transfer, disaffirmance or repudiation, or termination of such QFCs; and (d) otherwise exercise its rights under the Act.

¹ 80 FR 966 (Jan. 7, 2015).

2. Method of Collection and Use of the Data

The Final Rules implement these requirements by requiring that a records entity maintain all records specified in the Final Rules in electronic form and be capable of transmitting such records electronically to the records entity's PFRA and the FDIC within 24 hours of a request by a PFRA. The Final Rules set forth various recordkeeping requirements with respect to, among other things, position-level data, counterparty netting-set data, legal documentation data (including copies of agreements governing QFC transactions and open confirmations), collateral detail data, corporate organization data, counterparty data, booking location data, and safekeeping agent data, and a list of vendors directly supporting QFC-related activities of the records entity and the vendors' contact information.

The Final Rules also provide that a records entity may request in writing an extension of time with respect to the compliance dates associated with the recordkeeping requirements. The Final Rules further provide that one or more records entities may request in writing an exemption from one or more of the recordkeeping requirements. Finally, the Final Rules provide a de minimis exemption under which a records entity that is a party to 50 or fewer open QFC positions is not required to maintain the records required in the appendix to the Final Rules.

3. Use of Information Technology

The Final Rules neither prescribe nor prohibit the use of any specific type of information technology, thereby permitting records entities maximum flexibility in the use of information technology to establish and maintain QFC records according to the recordkeeping requirements.

4. Efforts to Identify Duplication

The recordkeeping requirements do not duplicate any other Treasury recordkeeping requirements.

The Final Rules may overlap with certain Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") recordkeeping requirements. However, the Secretary believes that requiring QFC information to be maintained in the standard format specified in the Final Rules is necessary to assist the FDIC as receiver for a covered financial company in deciding whether to: (1) transfer the covered financial company's QFCs under section 210(c)(9) and (10) of the Act within the limited timeframe afforded by the Act; (2) retain such QFCs within the receivership and allow a counterparty to terminate the QFCs; (3) retain the QFCs within the receivership and disaffirm or repudiate the QFCs; (4) exercise its rights to enforce certain QFCs of subsidiaries and affiliates under section 210(c)(16) within the limited timeframe afforded by the Act; and (5) assess the consequences of decisions to transfer, disaffirm or repudiate, retain, or not enforce QFCs, including the potential impact that such decisions

may have on the financial markets as a whole. Additionally, the Final Rules provide a conditional exemption from the requirements of the Final Rules for clearing organizations that are in compliance with CFTC or SEC recordkeeping rules, as applicable, and capable of and not restricted from transmitting them to the FDIC.

5. Impact on Small Entities

The Secretary believes that the Final Rules likely would not have a “significant economic impact on a substantial number of small entities.” The Act mandates that the Secretary prescribe regulations requiring financial companies to maintain records with respect to QFCs to assist the FDIC as receiver of a covered financial company in being able to exercise its rights under the Act and fulfill its obligations under section 210(c)(8), (9), or (10) of the Act. As a result, the economic impact on financial companies, including any small entities, flows directly from the Act, and not the Final Rules.

The Final Rules apply to financial companies that meet one of the following three criteria: (1) are designated pursuant to section 113 of the Act (12 U.S.C. 5323) to be a nonbank financial company that could pose a threat to the financial stability of the United States; (2) are designated pursuant to Section 804 of the Act (12 U.S.C. 5463) as a financial market utility that is, or is likely to become, systemically important; (3) are identified as a global systemically important bank holding company pursuant to 12 CFR Part 217; or (4) have total assets equal to or greater than \$50 billion, and either (i) total gross notional derivatives outstanding equal to or greater than \$250 billion, or (ii) derivative liabilities equal to or greater than \$3.5 billion. The Secretary believes that each financial company expected to be subject to the Final Rules under these criteria has revenues in excess of the Small Business Administration’s revised size standards for small entities. The Final Rules also apply to these large financial companies’ affiliated financial companies if they are not otherwise excluded or exempt under the Final Rules. However, such affiliated financial companies are not independently owned and operated.

Furthermore the Secretary believes that the large corporate groups that would be subject to the Final Rules would likely comply with the rules by utilizing a centralized recordkeeping system, whether by adapting an existing system or establishing a new system, that would obviate the need for each member of such corporate group to maintain its own recordkeeping system in order to comply with the rules. In addition, in response to comments and in consultation with the FDIC, the Secretary determined to include in the Final Rules a de minimis exemption from the preponderance of the recordkeeping requirements for certain records entities that have a minimal level of QFC activity.

6. Consequences of Less Frequent Collection and Obstacles to Burden Reduction

The recordkeeping requirements in the Final Rules are required by the Act.

7. Circumstances Requiring Special Information Collection

The recordkeeping requirements in the Act and in the Final Rules have no sunset date. However, the Final Rules only require that a records entity retain records based on end-of-day values and information for the five preceding business days.

8. Solicitation of Comments on Information Collection

In accordance with 5 C.F.R. § 1320.8(d)(3), the Treasury's Departmental Offices provided notice and the opportunity to comment on the Proposed Rules. The preamble to the Proposed Rules included the questions required by 5 C.F.R. § 1320.8(d)(1).

9. Provision of Payments to Recordkeepers

Not applicable. The Final Rules do not provide for making payments or gifts to recordkeepers.

10. Assurance of Confidentiality

Not applicable. The Final Rules contain no assurances of confidentiality from Treasury.

11. Justification of Sensitive Questions

Not applicable. The Final Rules neither contain questions of a sensitive nature nor require regulated entities in maintaining records to ask questions of a sensitive nature.

12. Estimate of the Hour Burden of Information Collection

The Secretary estimates that approximately 30 large corporate groups will meet the definition of records entity in section 148.2(o) of the Final Rules. The Final Rules would also apply to these large corporate groups' affiliated financial companies (regardless of their size) if an affiliated financial company otherwise qualifies as a "records entity" and is neither an "excluded entity" nor otherwise exempt under the Final Rules.

The Secretary estimates that these large corporate groups collectively have 5,010 affiliated financial companies that may qualify as records entities based on discussions and consultations with several of the PFRAs who are familiar with financial company operations and have experience supervising financial companies with QFC portfolios. The Secretary recognizes that, based on a number of factors, the actual total number of respondents may differ significantly from this estimate. One such factor is that there is no information available to determine how many of the affiliated financial companies of a large corporate group are a party to an open QFC or guarantee or support an open QFC of an affiliate, and thus would qualify as records entities. At the same time, the inclusion and availability of the de minimis exemption in the Final Rules will have the effect of reducing the number of affiliates in many corporate groups subject to the entirety of the recordkeeping requirements. Finally, as previously noted, commenters did not provide requested comments, empirical data, or other analyses directly addressing the Secretary's estimates of the total number of respondents for purposes of the PRA discussion. For the

foregoing reasons, the Secretary has determined it is reasonable to assume that all 5,010 affiliated financial companies would qualify as record entities.

The Secretary's burden estimates for the initial recordkeeping, reporting, data retention, and records generation requirements of the Final Rules are based on discussions with several of the PFRAs regarding their prior experience with initial burden estimates for other recordkeeping systems. The Secretary also considered the burden estimates in rulemakings with similar recordkeeping and reporting requirements.²

In order to comply with the Final Rules, each of the large corporate group respondents will need to set up its network infrastructure to maintain data in the required format. This will likely impose a one-time initial burden on the large corporate group respondents in connection with the necessary updates to their recordkeeping systems, such as systems development or modifications. The initial burden for each large corporate group respondent to set up its network infrastructure will depend largely on whether the financial companies within the large corporate group already hold and maintain QFC data in an organized electronic format, and if so, whether the data currently resides on entirely different systems rather than on one centralized system. Large corporate group respondents may need to amend internal procedures, reprogram systems, reconfigure data tables, and implement compliance processes. Moreover, they may need to standardize the data and create records tables to match the format required by the Final Rules. However, this initial burden is mitigated to some extent because QFC data is likely already retained in some form by each respondent in the ordinary course of business.

The Secretary believes that each large corporate group and its affiliated financial companies subject to the Final Rules are likely to rely on a centralized system for their QFC activities that will perform most of the recordkeeping requirements set forth in the Final Rules. The entity responsible for this centralized system will likely operate and maintain a technology shared services model with the majority of the technology applications, systems, and data shared by the multiple affiliated financial companies within the large corporate group. Therefore, the Final Rules will impose the most significant burden on the entities responsible for these centralized systems within the large corporate group, and not the individual affiliated financial companies. The affiliated financial companies will likely have a much lower burden because they can utilize the technology and network infrastructure operated and maintained by the entity responsible for the centralized system at their respective large corporate groups. The Secretary also believes that affiliated financial companies will rely on large corporate group respondents to submit any requests for extensions of time under section 148.1(d)(3), or requests for exemption from one or more requirements of the Final Rules under 148.3(c)(3), or both.

Recordkeeping Burden

² See 76 FR 46960 (August 3, 2011); 76 FR 43851 (July 22, 2011); 77 FR 2136 (January 13, 2012); 75 FR 78162 (December 22, 2008).

The total estimated number of respondents is 5,040, consisting of 30 large corporate group respondents and 5,010 affiliated financial company respondents.

The estimated initial recordkeeping burden imposed by the Final Rules is 7,200 hours for each large corporate group respondent and 0.5 hours for each affiliated financial company respondent. This estimate is based on conversations with several of the PFRAs and estimates in rulemakings with similar recordkeeping requirements.³ The total estimated initial recordkeeping burden is 216,000 hours for large corporate group respondents and 2,505 hours for affiliated financial company respondents.

The estimated annual recordkeeping burden imposed by the Proposed Rules is 240 hours for each large corporate group respondent and 0.5 hours for each affiliated financial company respondent. This estimate is based on conversations with several of the PFRAs and estimates in rulemakings with similar recordkeeping requirements.⁴ The total estimated annual recordkeeping burden is 7,200 hours for large corporate group respondents and 2,505 hours for affiliated financial company respondents.

The total estimated initial cost for large corporate group respondents to comply with the initial recordkeeping burden is \$21,384,000, based on the following formula: initial burden hours multiplied by the average hourly wage rate for recordkeepers (216,000 hours multiplied by \$99/hour). The total estimated initial cost for affiliated financial company respondents to comply with the initial recordkeeping burden is \$247,995, based on the following formula: initial burden hours multiplied by the average hourly wage rate for recordkeepers (2,505 hours multiplied by \$99/hour). The estimated average hourly wage rate for recordkeepers to comply with the initial and annual recordkeeping burden is approximately \$99 per hour based in part on the U.S. Department of Labor, Bureau of Labor Statistics' occupational employment statistics and wage statistics for financial sector occupations, dated May 2015.⁵ However, the Final Rules provide for compliance periods of between 540 days and four years after the effective date of the Final Rules, depending on the total assets of records entities. Thus, the initial recordkeeping burden is expected to occur over multiple years, resulting in a substantial reduction in the annual cost.

The total estimated annual cost for large corporate group respondents to comply with the annual recordkeeping burden is \$712,800, based on the following formula: annual burden hours multiplied by the average hourly wage rate for recordkeepers (7,200 hours multiplied by \$99/hour). The total estimated annual cost for affiliated financial company respondents to comply with the annual recordkeeping burden is \$247,995, based on the following formula: annual burden hours multiplied by the average hourly wage rate for recordkeepers (2,505 hours multiplied by \$99/hour).

³ See 76 FR 46960 (August 3, 2011).

⁴ See 76 FR 46960 (August 3, 2011).

⁵ See http://www.bls.gov/oes/current/oes_nat.htm (accessed May 2016). The \$99 hourly wage rate is based on the average hourly rates for the senior programmers, programmer analysts, senior system analysts, compliance managers, compliance clerks, directors of compliance, and compliance attorneys that will perform the recordkeeping burdens.

The initial and annual recordkeeping burden is imposed by the Act, which, as discussed above, requires that the Secretary prescribe regulations requiring financial companies to maintain records with respect to QFCs to assist the FDIC as receiver of a covered financial company in being able to exercise its rights under the Act and fulfill its obligations under section 210(c)(8), (9), or (10) of the Act.

Reporting Burden

The total estimated number of respondents is 30, consisting of large corporate group respondents.

The estimated frequency of reporting is once per year.

The estimated annual reporting burden imposed by the Final Rules is 50 hours for each large corporate group respondent. Under the Final Rules, a records entity may request in writing a request for an extension of time to comply under section 148.1(d)(3), or a request for exemption from one or more requirements of the Final Rules under 148.3(c)(3), or both. This estimate is based on conversations with several of the PFRAs. The total estimated annual reporting burden is 1,500 hours for the large corporate group respondents.

The total estimated annual cost for large corporate group respondents to comply with the annual reporting burden is \$288,000, based on the following formula: annual burden hours multiplied by the average hourly wage rate for recordkeepers (1,500 hours multiplied by \$192/hour). The estimated average hourly wage rate for recordkeepers to comply with the annual reporting burden is approximately \$192 per hour based in part on the U.S. Department of Labor, Bureau of Labor Statistics' occupational employment statistics and wage statistics for financial sector occupations, dated May 2015.⁶

13. Estimate of Total Annual Cost to Recordkeepers

Based on conversations with several of the PFRAs and estimates in rulemakings with similar recordkeeping requirements, the Secretary estimates that each of the 30 large corporate groups will incur approximately \$500,000 in systems development/modification costs, including the purchase of computer software. These costs will likely be borne by the entity responsible for maintaining the centralized system within each large corporate group.

14. Estimate of Annualized Cost to Treasury

It is estimated that the recordkeeping requirement will result in no costs to the Treasury's Departmental Offices. The Final Rules do not require recordkeepers to make the QFC records available to the Secretary.

⁶ See http://www.bls.gov/oes/current/oes_nat.htm (accessed May, 2016). The \$192 hourly wage rate is based on the average hourly rates for compliance managers, directors of compliance, and compliance attorneys that will perform the reporting burdens.

15. Any Program Changes or Adjustments

Not applicable. There are no program changes or adjustments.

16. Plans for Information Publication

Not applicable. The Secretary does not plan to publish the QFC records.

17. Reasons for Not Displaying Expiration Date of OMB Approval

The Treasury's Departmental Offices requests approval not to display in the Final Rules the expiration date of the OMB control number, because the recordkeeping requirement under the Act will extend beyond the standard 3-year expiration date. If OMB approves this recordkeeping requirement, the Treasury's Departmental Offices will timely request extensions of the OMB control number for this recordkeeping requirement, thereby rendering the display of an expiration date unnecessary.

18. Explanation of Exceptions to Certification Statement

Not applicable. There are no exceptions to the certification statement.

B. Collections of Information Employing Statistical Methods

Not applicable. This recordkeeping requirement does not involve statistical methods.