

SUPPORTING STATEMENT for the Paperwork Reduction Act Information Collection
Submission for Exchange Act Rule 3a71-3
OMB Number 3235-0717

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

A. JUSTIFICATION

1. Information Collection Necessity

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 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 is not 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.¹ Additionally, in the 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,² 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 continues to believe that the representations described in Rule 3a71-3(a)(3)(ii) 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-

¹ 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).

² 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 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-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 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 do 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 rule a person has 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 continues to believe that this provision providing for representations further facilitate consistent application of the “U.S. Person” definition to specific entities across market participants. The provisions 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 help reduce the potential for inconsistent classification and treatment of a person by its counterparties and promote uniform application of Title VII. The 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 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.

Rule 3a71-3 is adopted and in effect. However, the compliance date for Rule 3a71-3 is dependent upon the adoption of another rule that has been proposed, but not yet adopted. As a consequence, no entity is currently required to comply with Rule 3a71-3, and the previously approved burdens and costs were not incurred.

2. Information Collection Purpose and Use

The representations contemplated by Rule 3a71-3 are to 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 constitute voluntary third-party disclosures, the Commission will 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 continues to believe that respondents will 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

There are no other rules governing cross-border security-based swap dealing activity and, therefore, Rule 3a71-3 does not duplicate any other information collection.

5. Effect on Small Entities

Not applicable. None of the respondents subject to the information collection are 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 in 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 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 do 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 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 required Federal Register notice with a 60-day comment period soliciting comments on this collection of information was published. No public comments were received.

9. Payment or Gift

Not applicable.

10. Confidentiality

The Commission will 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 will 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

The information collection does not prescribe any particular method of making representations and the Commission will not typically receive these disclosures. The information collection will constitute voluntary third-party disclosures that may include name and work contact information. The information is manually submitted via mail to counterparties and the collection will likely be incorporated into trade documentation. Based on the business practice of handling the information collection, the collection does not constitute a system of records under the Privacy Act and does not require a PIA of the E-Government Act of 2002.

12. Information Collection Burden

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 continues to believe that the representations contemplated by Rule 3a71-3 will, in most cases, be made through amendments to the parties' existing trading documentation (e.g., the schedule to a master agreement). The Commission continues to believe 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 will not change on a transaction-by-transaction basis and, therefore, such representations will 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 continues to anticipate that counterparties will 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 continues to believe that counterparties will be able to adopt, where appropriate, standardized language across all of their security-based swap trading relationships. The Commission continues to believe that this standardized language will 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 continues to estimate that, once the compliance date has passed, a total of 50 entities will 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 continues to estimate the one-time third-party disclosure burden associated with developing representations under this collection of information will be, for each U.S. bank counterparty that makes such representations, no more than five hours, and up to \$2,000 for the services of outside professionals, for an estimate of approximately 250 hours³ or 83.33 hours⁴ per year when annualized over three years, across all security-based swap counterparties that make such representations.⁵ This estimate assumes little or no reliance on standardized disclosure language.

The Commission continues to expect 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 hours⁶ across all applicable U.S. bank counterparties.⁷

³ 50 (total number of entities) * 5 hours = 250 hours.

⁴ 250 hours (total hours to develop representations) ÷ 3 years = 83.33 hours.

⁵ See Business Conduct Adopting Release at 30096.

⁶ 50 (total number of entities) * 10 hours = 500 hours.

⁷ The Commission staff estimates that this burden will consist of 10 hours of in-house

Collection of Information	Type of Burden	Small Business Entities Affected	Total Number of Respondents	Ongoing or Initial Burden	Total Number of Responses Per Year Per Respondent	Initial Burden Per Response Per Year	Annualized Burden Per Year Per Respondent	Ongoing Burden Per Response Per Year Per Respondent	Total Burden For All Respondents
Representation Regarding a Transaction Conducted Through a Foreign Branch	Third-Party	0	50	Initial	1	5	1.667	N/A	83.33
				Ongoing	1	N/A	10	10	500
TOTAL ANNUAL INDUSTRY BURDEN									583.33

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 continues to estimate, based on its understanding of OTC derivatives markets, including the domiciles of counterparties that are active in the market, that, once the compliance date has passed, up to 2,400 entities will 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 continues to estimate the maximum total third-party disclosure burden associated with developing new representations will be, for each counterparty that makes 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 hours⁸ or 4,000 hours⁹ per year when annualized over three years, across all security-based swap counterparties that makes such representations. This estimate assumes little or no reliance on standardized disclosure language.

The Commission continues to expect 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 annual third-party disclosure burden associated with this requirement will be no more than approximately 10 hours per counterparty for verifying representations with existing

counsel time for each security-based swap market participant that makes such representations. See Business Conduct Adopting Release, at 30097, note 1581.

⁸ 2,400 (total number of entities) *5 hours = 12,000 hours.

⁹ 12,000 hours (total hours to develop representations) ÷ 3 years = 4,000 hours.

counterparties and onboarding new counterparties, for a maximum of approximately 24,000 hours¹⁰ across all applicable security-based swap counterparties.

Collection of Information	Type of Burden	Small Business Entities Affected	Total Number of Respondents	Ongoing or Initial Burden	Total Number of Responses Per Year Per Respondent	Initial Burden Per Response Per Year	Annualized Burden Per Year Per Respondent	Ongoing Burden Per Response Per Year Per Respondent	Total Burden For All Respondents
Representations Regarding U.S.-Person Status	Third-Party	0	2,400	Initial	1	5	1.667	N/A	4,000
				Ongoing	1	N/A	10	10	24,000
TOTAL ANNUAL INDUSTRY BURDEN									28,000

13. Costs to Respondents

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

The Commission continues to believe that some of the entities that will have to comply with Rule 3a71-3 once the compliance date has passed, will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission continues to assume that all 50 respondents will seek outside counsel for the first year only and will, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also continues to assume that none of the 50 respondents will seek outside legal services for year two or year three. Thus, the cost over the three-year period will be \$100,000¹¹ or \$33,333¹² per year when annualized over three years, across all security-based swap counterparties that make such representations. The total labor cost per respondent will be approximately \$666.67¹³ when annualized over three years.

¹⁰ 2,400 (total number of entities) * 10 hours = 24,000 hours.

¹¹ 50 (estimated number of entities) * \$2,000 (cost of outside counsel) = \$100,000.

¹² \$100,000 (total cost to seek outside counsel over three years) ÷ 3 years = \$33,333.33.

¹³ \$33,333 (total labor cost to seek outside counsel per year) ÷ 50 (estimated number of entities that will 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	Small Business Entities Affected	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
Representation Regarding a Transaction Conducted Through a Foreign Branch	Third-Party	0	50	1	\$2,000	\$0	\$666.67	\$33,333.33

b. Representations regarding U.S.-person status

The Commission continues to believe that some of the entities that will have to comply with Rule 3a71-3 once the compliance date has passed, will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3. For PRA purposes, the Commission continues to assume that all 2,400 respondents will seek outside legal for the first year only and will, on average, consult with outside counsel for a cost of up to \$2,000. The Commission also continues to assume that none of the 2,400 respondents will seek outside legal services for year two or year three. Thus, the cost over the three-year period will be \$4,800,000¹⁴ or \$1,600,000¹⁵ per year when annualized over three years, across all security-based swap counterparties that make such representations. The total labor cost per respondent will be approximately \$666.67¹⁶ when annualized over three years.

Collection of Information	Type of Burden	Small Business Entities Affected	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
Representations Regarding U.S.-Person Status	Third-Party	0	2,400	1	\$2,000	\$0	\$666.67	\$1,600,000.00

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.

¹⁴ 2,400 (total number of entities) * \$2,000 = \$4,800,000.

¹⁵ \$4,800,000 (total cost over three years) ÷ 3 years = \$1,600,000.

¹⁶ \$1,600,000 (total labor cost to seek outside counsel per year) ÷ 2,400 (estimated number of entities that will seek outside counsel to help them develop new representations contemplated by Rule 3a71-3(4)(iv)) = \$666.67.

15. Changes in Burden

There is no change in burden. As noted above, the compliance date for Rule 3a71-3 has not yet passed, and the staff has not changed its estimates of the burdens and costs the respondents will incur when the compliance date is in effect.

16. Information Collections Planned for Statistical Purposes

Not applicable. The information collection is not used 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.