

SUPPORTING STATEMENT
Margin and Capital Requirements for Covered Swap Entities
(OMB Control No. 3064-0204)

INTRODUCTION

This ICR is being submitted in connection with a notice of proposed rulemaking that would remove the recordkeeping requirement in section 349.11(b) that a covered swap entity shall calculate the amount of initial margin that would be required to be posted to an affiliate that is a financial end user with material swaps exposure pursuant to section 349.3(b) and provide documentation of such amount to each affiliate on a daily basis.

A. JUSTIFICATION

1. Circumstances that make the collection necessary:

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) established a comprehensive regulatory framework for derivatives, which are generally characterized as swaps and security-based swaps.

Sections 731 and 764 of the Dodd-Frank Act require the registration and regulation of swap dealers and major swap participants and security-based swap dealers and major security-based swap participants, respectively (collectively, “swap entities”). For certain types of swap entities that are prudentially regulated by one of the Agencies,¹ sections 731 and 764 of the Dodd-Frank Act require the Agencies to jointly adopt rules for swap entities under their respective jurisdictions imposing: capital requirements and initial and variation margin requirements on all non-cleared swaps. Swap entities that are prudentially regulated by the Agencies and therefore subject to the proposed rule are referred to herein as “covered swap entities.”

Sections 731 and 764 of the Dodd-Frank Act require the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) to separately adopt rules imposing capital and margin requirements for swap entities for which there is no prudential regulator. The Dodd-Frank Act requires the CFTC, SEC, and the Agencies to establish and maintain, to the maximum extent practicable, capital and margin requirements that are comparable, and to consult with each other periodically (but no less than annually) regarding these requirements.

The capital and margin standards for swap entities imposed under sections 731 and 764 of the Dodd-Frank Act are intended to offset the greater risk to the swap

¹ The Agencies are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and the Farm Credit Administration.

entity and the financial system arising from the use of swaps and security-based swaps that are not cleared. They require that the capital and margin requirements imposed on swap entities must, to offset the greater risk to the swap entity and the financial system arising from the use of non-cleared swaps, help ensure the safety and soundness of the swap entity and be appropriate for the greater risk associated with the non-cleared swaps and non-cleared security-based swaps held as a swap entity. They also require the Agencies, in establishing capital rules for covered swap entities, to take into account the risks associated with other types of swaps or classes of swaps or categories of swaps engaged in and the other activities conducted by that person that are not otherwise subject to regulation applicable to that person by virtue of the status of the person as a swap dealer or a major swap participant.

The swaps-related provisions are intended to reduce risk, increase transparency, promote market integrity within the financial system, and, in particular, address a number of weaknesses in the regulation and structure of the swaps markets that were revealed during the financial crisis. During the financial crisis, the opacity of swap transactions among dealers and between dealers and their counterparties created uncertainty about whether market participants were significantly exposed to the risk of a default by a swap counterparty. A regulatory margin requirement for non-cleared swaps reduces the uncertainty around the possible exposures arising from non-cleared swaps.

In addition, the financial crisis revealed that a number of significant participants in the swaps markets had taken on excessive risk through the use of swaps without sufficient financial resources to make good on their contracts. By imposing an initial and variation margin requirement on non-cleared swaps, the ability of firms to take on excessive risks through swaps without sufficient financial resources will be reduced. The minimum margin requirement will reduce the amount by which firms can leverage the underlying risk associated with the swap contract.

The Agencies issued an interim final rule required by the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA).² Title III of TRIPRA, the “Business Risk Mitigation and Price Stabilization Act of 2015,” amended the statutory provisions added by the Dodd-Frank Act relating to margin requirements for non-cleared swaps and non-cleared security-based swaps. Section 302 of TRIPRA amends sections 731 and 764 of the Dodd-Frank Act to provide that the initial and variation margin requirements do not apply to certain transactions with specified counterparties that qualify for an exemption or exception from clearing. Non-cleared swaps and non-cleared security-based swaps that are exempt under section 302 of TRIPRA are not subject to the

² Pub. L. 114-1, 129 Stat. 3 (2015).

Agencies’³ rules implementing margin requirements.⁴ In section 303 of TRIPRA, Congress required that the Agencies implement the provisions of TRIPRA by promulgating an interim final rule and seeking public comment on the interim final rule.

The effect of the interim final rule was to augment provisions proposed by the Agencies in the September 2014⁵ proposed rule that would allow swap entities to collect no initial or variation margin from certain “other counterparties” like commercial end-users with a provision that grants an exception from the margin requirements for certain swaps with these and certain additional counterparties. The final rule also contained provisions allowing a covered swap entity to continue with the current practice of collecting initial or variation margin at such times and in such forms and amounts (if any) as the covered swap entity determines appropriate consistent with its overall credit risk management of its exposures to “other counterparties.”

The agencies issued another interim final rule (Brexit Interim Final Rule) that addresses a potential impact of the scenario in which the United Kingdom (U.K.) exits from the European Union (E.U.)—also known as Brexit—in the absence of a negotiated withdrawal agreement allowing financial services firms located in the U.K. to continue providing full-scope financial services in the E.U. In that event, numerous U.K. financial services firms may begin to transfer their existing swap portfolios that face counterparties located in the E.U. over to a related establishment of the U.K. financial services firm located within the E.U. or the U.S. The Brexit Interim Final Rule authorizes a financial entity with non-cleared swaps located in the U.K. to relocate existing swap portfolios to affiliates or other related entities located within the E.U. or U.S., without the legacy swaps in the portfolios becoming subject to the requirements of the Swap Margin Rule. The Brexit Interim Final Rule includes a new information collection requirement for transfers initiated by a covered swap entity’s counterparty. For those transfers, the counterparty must make a representation to the covered swap entity that the counterparty performed the transfer in compliance with the requirements of the rule. The representation must provide that (1) the swap was originally entered into before the relevant compliance date and was booked at an entity located in the U.K. and (2) the U.K. entity is amending the swap because of Brexit, transferring the swap to an affiliate in the E.U. or U.S., and the transferee is either a covered swap entity or the counterparty of a covered swap entity.

³ The Agencies are the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency.

⁴ The interim final rule is a companion rule to a final rule adopted to implement section 731 and 764 of the Dodd-Frank Act.

⁵ 79 FR 57348 (September 24, 2014).

2. Use of the information:

Section 349.1(h) specifies that transfers of legacy swaps initiated by a covered swap entity's counterparty require a representation to the covered swap entity that the counterparty carried out the swap in accordance with both elements of the purpose test in order to remain outside the scope of the rule.

Section 349.8 contains standards for the use of initial margin models. These standards include: (1) a requirement that the covered swap entity receive prior approval from the relevant Agency based on demonstration that the initial margin model meets specific requirements (§§ 349.8(c)(1) and 349.8(c)(2)); (2) a requirement that a covered swap entity notify the relevant Agency in writing 60 days before extending use of the model to additional product types, making certain changes to the initial margin model, or making material changes to modeling assumptions (§ 349.8(c)(3)); and (3) a variety of quantitative requirements, including requirements that the covered swap entity validate and demonstrate the reasonableness of its process for modeling and measuring hedging benefits, demonstrate to the satisfaction of the relevant Agency that the omission of any risk factor from the calculation of its initial margin is appropriate, demonstrate to the satisfaction of the relevant Agency that incorporation of any proxy or approximation used to capture the risks of the covered swap entity's non-cleared swaps or non-cleared security-based swaps is appropriate, periodically review and, as necessary, revise the data used to calibrate the initial margin model to ensure that the data incorporate an appropriate period of significant financial stress (§§ 349.8(d)(5), 349.8(d)(10), 349.8(d)(11), 349.8(d)(12), and 349.8(d)(13)). Also, if the validation process reveals any material problems with the initial margin model, the covered swap entity must promptly notify the Agency of the problems, describe to the Agency any remedial actions being taken, and adjust the initial margin model to ensure an appropriately conservative amount of required initial margin is being calculated (§ 349.8(f)(3)).

Section 349.8 also contains requirements for the ongoing review and documentation of initial margin models. These standards include: (1) a requirement that a covered swap entity review its initial margin model annually (§ 349.8(e)); (2) a requirement that the covered swap entity validate its initial margin model at the outset and on an ongoing basis, describe to the relevant Agency any remedial actions being taken, and report internal audit findings regarding the effectiveness of the initial margin model to the covered swap entity's board of directors or a committee thereof (§§ 349.8(f)(2), 349.8(f)(3), and 349.8(f)(4)); (3) a requirement that the covered swap entity adequately document all material aspects of its initial margin model (§ 349.8(g)); and (4) that the covered swap entity must adequately document internal authorization procedures, including escalation procedures, that require review and approval of any change to the initial margin calculation under the initial margin model, demonstrable analysis that any basis for any such change is consistent with the

requirements of this section, and independent review of such demonstrable analysis and approval (§ 349.8(h)).

Section 349.9 addresses the treatment of cross-border transactions and, in certain limited situations, will permit a covered swap entity to comply with a foreign regulatory framework for non-cleared swaps (as a substitute for compliance with the prudential regulators' rule) if the prudential regulators jointly determine that the foreign regulatory framework is comparable to the requirements in the prudential regulators' rule. Section 349.9(e) allows a covered swap entity to request that the prudential regulators make a substituted compliance determination and must provide the reasons therefore and other required supporting documentation. A request for a substituted compliance determination must include a description of the scope and objectives of the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps; the specific provisions of the foreign regulatory framework for non-cleared swaps and security-based swaps (scope of transactions covered; determination of the amount of initial and variation margin required; timing of margin requirements; documentation requirements; forms of eligible collateral; segregation and re-hypothecation requirements; and approval process and standards for models); the supervisory compliance program and enforcement authority exercised by a foreign financial regulatory authority or authorities in such system to support its oversight of the application of the non-cleared swap and security-based swap regulatory framework; and any other descriptions and documentation that the prudential regulators determine are appropriate. A covered swap entity may make a request under this section only if directly supervised by the authorities administering the foreign regulatory framework for non-cleared swaps and non-cleared security-based swaps.

Section 349.2 defines terms used in the proposed rule, including the definition of "eligible master netting agreement," which provides that a covered swap entity that relies on the agreement for purpose of calculating the required margin must: (1) conduct sufficient legal review of the agreement to conclude with a well-founded basis that the agreement meets specified criteria; and (2) establish and maintain written procedures for monitoring relevant changes in law and to ensure that the agreement continues to satisfy the requirements of this section. The term "eligible master netting agreement" is used elsewhere in the proposed rule to specify instances in which a covered swap entity may: (1) calculate variation margin on an aggregate basis across multiple non-cleared swaps and security-based swaps; and (2) calculate initial margin requirements under an initial margin model for one or more swaps and security-based swaps.

Section 349.5(c)(2)(i) specifies that a covered swap entity shall not be deemed to have violated its obligation to collect or post margin from or to a counterparty if the covered swap entity has made the necessary efforts to collect or post the required margin, including the timely initiation and continued pursuit of formal dispute resolution mechanisms, or has otherwise demonstrated upon request to the

satisfaction of the agency that it has made appropriate efforts to collect or post the required margin.

Section 349.7 generally requires a covered swap entity to ensure that any initial margin collateral that it collects or posts is held at a third-party custodian. Section 349.7(c) requires the custodian to act pursuant to a custody agreement that: (1) prohibits the custodian from rehypothecating, repledging, reusing, or otherwise transferring (through securities lending, securities borrowing, repurchase agreement, reverse repurchase agreement or other means) the collateral held by the custodian, except that cash collateral may be held in a general deposit account with the custodian if the funds in the account are used to purchase an asset, such asset is held in compliance with this § 349.7, and such purchase takes place within a time period reasonably necessary to consummate such purchase after the cash collateral is posted as initial margin; and (2) is a legal, valid, binding, and enforceable agreement under the laws of all relevant jurisdictions, including in the event of bankruptcy, insolvency, or a similar proceeding. A custody agreement may permit the posting party to substitute or direct any reinvestment of posted collateral held by the custodian, provided that, with respect to collateral collected by a covered swap entity pursuant to § 349.3(a) or posted by a covered swap entity pursuant to § 349.3(b), the agreement requires the posting party to substitute only funds or other property that would qualify as eligible collateral under § 349.6, and for which the amount net of applicable discounts described in Appendix B would be sufficient to meet the requirements of § 349.3 and direct reinvestment of funds only in assets that would qualify as eligible collateral under § 349.6, and for which the amount net of applicable discounts described in Appendix B would be sufficient to meet the requirements of § 349.3.

Section 349.10 requires a covered swap entity to execute trading documentation with each counterparty that is either a swap entity or financial end user regarding credit support arrangements that: (1) provides the contractual right to collect and post initial margin and variation margin in such amounts, in such form, and under such circumstances as are required; and (2) specifies the methods, procedures, rules, and inputs for determining the value of each non-cleared swap or non-cleared security-based swap for purposes of calculating variation margin requirements, and the procedures for resolving any disputes concerning valuation.

The interim final rule implemented statutory language that requires certain swaps of certain counterparties that qualify for a statutory exemption or exception from clearing also to be exempt from the initial and variation margin requirements of the final rule. The reporting requirements found in § 349.1(d) refer to other statutory provisions that set forth conditions for an exemption from clearing. Section 349.1(d)(1) provides an exemption for non-cleared swaps if one of the counterparties to the swap is not a financial entity, is using swaps to hedge or mitigate commercial risk, and notifies the CFTC of how it generally meets its financial obligations associated with entering into non-cleared swaps. Section

349.1(d)(2) provides an exemption for security-based swaps if the counterparty notifies the SEC of how it generally meets its financial obligations associated with entering into non-cleared security-based swaps.

For example, TRIPRA provides that the initial and variation margin requirements of the final rule do not apply to a non-cleared swap or non-cleared security-based swap for which a counterparty qualifies for an exception under section 2(h)(7)(A) of the Commodity Exchange Act or section 3C(g)(1) of the Securities Exchange Act, which includes certain reporting requirements established by the applicable Commission.

The same notification requirements required for an exemption from the SEC and CFTC clearing requirements are required for an exception or exemption pursuant to § 349.1(d) from the initial and variation margin requirements for non-cleared swaps established by the Agencies under sections 731 and 764 of the Dodd-Frank Act. Because the interim final rule served to implement exemptions and exceptions by reference to existing statutory provisions, including the relevant existing reporting requirements, § 349.1(d) imposes new reporting requirements.

3. Consideration of the use of improved information technology:

Any information technology may be used that permits review by FDIC examiners.

4. Efforts to identify duplication:

The information required is unique. It is not duplicated elsewhere.

5. Methods used to minimize burden if the collection has a significant impact on a substantial number of small entities:

The information collection does not have a significant impact on a substantial number of small entities.

6. Consequences to the Federal program if the collection were conducted less frequently:

Conducting the collection less frequently would present safety and soundness risks.

7. Special circumstances necessitating collection inconsistent with 5 CFR Part 1320.5(d)(2):

None. The information collection is conducted in accordance with OMB guidelines in 5 CFR part 1320.

8. Efforts to consult with persons outside the agency:

On November 7, 2019, the FDIC published a Notice of Proposed Rulemaking in the Federal Register (84 FR 59970) that includes a request for comments on the proposed extension, with revisions of this information collection. Any Paperwork Reduction Act comments received will be addressed in the final rule.

9. Payments or gifts to respondents:

None.

10. Any assurance of confidentiality:

Information will be kept private to the extent allowed by law.

11. Justification for questions of a sensitive nature:

No information of a sensitive nature is requested.

12. Estimate of hour burden including annualized hourly costs:

Estimated Annual Burden

Regulation	Type of Burden	Number of Respondents	Estimated Annual Frequency	Estimated Average Hours Per Response	Estimated Annual Burden Hours
§ 349.1(d)(1), (d)(2) Meeting criteria for exemption	Reporting	1	1,000	1	1,000
§ 349.1(h)	Disclosure	1	1	1	1
§ 349.2 Definition of “Eligible Master Netting Agreement,” paragraphs (4)(i) and (ii) § 349.8(g) Documentation § 349.10 Documentation of Margin Matters	Recordkeeping	1	1	5	5
§ 349.5(c)(2)(i) Required Margin	Recordkeeping	1	1	4	4
§ 349.7(c) Custody Agreement	Recordkeeping	1	1	100	100
§ 349.8(c) and (d) Initial Margin Model	Reporting	1	1	240	240
§ 349.8(e) Periodic Review § 349.8(f) Control, Oversight, and Validation	Recordkeeping	1	1	40	40

Regulation	Type of Burden	Number of Respondents	Estimated Annual Frequency	Estimated Average Hours Per Response	Estimated Annual Burden Hours
Mechanisms					
§ 349.8(f)(3) Initial Margin Modeling Report	Reporting	1	1	50	50
§ 349.8(h) Escalation Procedures	Recordkeeping	1	1	20	20
§ 349.9(e) Requests for Determinations	Reporting	1	3	10	30
Totals					1,490

Annualized Cost of Internal Hourly Burden:

$$1,490 \times \$114 = \$169,860$$

To estimate wages, we reviewed May 2018 data for wages (by industry and occupation) from the U.S. Bureau of Labor Statistics (BLS) for credit intermediation and related activities excluding nondepository credit intermediaries (NAICS 5220A1). To estimate compensation costs associated with the rule, we use \$114 per hour, which is based on the average of the 90th percentile for nine occupations adjusted for inflation (2.8 percent as of Q1 2019 according to the BLS), plus an additional 33.2 percent for benefits (based on the percent of total compensation allocated to benefits as of Q4 2018 for NAICS 522: credit intermediation and related activities).

13. Estimate of start-up costs to respondents:

None.

14. Estimate of annualized costs to the government:

None.

15. Analysis of change in burden:

Existing Burden: 1,000 hours
Proposed Burden: 1,490 hours
Change in Burden: increased by 490 hours

There are no FDIC-supervised institutions subject to the proposed rule. FDIC is showing one respondent to preserve the burden estimates in the event an FDIC supervised institution becomes subject to the rule in the future. The increase in

burden of 490 hours is due to the alignment of the burden presentation with the OCC and the Board. Due to the fact that FDIC has had zero respondents for this ICR, FDIC had reported a single IC for the entire information collection at an estimated total annual burden of 1,000 hours. The current burden presentation adopted by all agencies consists of 10 ICs and, even though for the other agencies (who do have numerous respondents) the effect of the revisions proposed in this NPR result in a reduction in burden, the estimated total annual burden for the one FDIC placeholder institution is now 1,490. The change in burden is attributable to the alignment of the FDIC burden presentation to that of the other agencies.

16. Information regarding collections whose results are planned to be published for statistical use:

The result of this collection will not be published for statistical use.

17. Display of expiration date:

Not applicable.

18. Exceptions to Certification

Not applicable.

B. Collection of Information Employing Statistical Methods

Not Applicable.