

SUPPORTING STATEMENT FOR THE REVISION AND EXTENSION OF AN EXISTING INFORMATION COLLECTION

Adaptation of Regulations to Incorporate Swaps: Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold for Swaps with Special Entities

OMB CONTROL NUMBER 3038-0090

Justification

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.**

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act, Pub L. No. 111-203, 124 Stat. 1376 (2010)) amended the Commodity Exchange Act (CEA) to establish a comprehensive new statutory framework for swaps. These amendments required the Commodity Futures Trading Commission (“the Commission”) to amend several of its regulations to implement the new framework.

The information collection obligations imposed by the “Adaptation of Regulations to Incorporate Swaps” final regulations¹ are necessary to implement section 721 of the Dodd-Frank Act, which amended the definitions of futures commission merchant (“FCM”) and introducing broker (“IB”) to permit these intermediaries to trade swaps on behalf of customers. They also are necessary to implement section 733 of the Dodd-Frank Act which introduced swap execution facilities (“SEFs”) as a new trading platform for swaps. As a result of the enactment of sections 721 and 733, the Commission needed to amend certain recordkeeping regulations (1.31, 1.33, 1.35, 1.37, and 1.39) so that records of swap transactions are maintained analogously to how futures transactions are maintained.

Further, the “Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities”² regulation amended the Commission’s swap dealer definition to permit a person to exclude “utility operations-related swaps” with “utility special entities” in their de minimis threshold calculations. The regulation requires a person claiming the exclusion to maintain in accordance with Commission regulation 1.31 any written representations that the person receives from utility special entities related to this exclusion.

The information collection burdens associated with these regulations (collectively, the “Swap Recordkeeping Requirements”) are restricted to the costs associated with the recordkeeping and

¹ Adaptation of Regulations to Incorporate Swaps, 77 FR 66288 (Nov. 2, 2012).

² Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities, 79 FR 57767 (Sept. 26, 2014).

reporting requirements that these regulations impose upon affected registrants, registered entities, those registered entities' members, and other respondents covered by the final rules.³

2. Indicate how, by whom, and for what purpose the data would be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

Commission staff would use the information required to be preserved when conducting the Commission's examination and oversight program with respect to the affected registrants and when conducting investigations into potential violations of the CEA.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

In general, to the extent the Swap Recordkeeping Requirements address automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, persons covered by the final regulations already employ such techniques and/or technology. For example, because the rationale for allowing the existing entities (FCMs, IBs, commodity pool operators and commodity trading advisors) listed in regulation 1.4 to use electronic signatures (i.e., "[a]s part of [the Commission's] ongoing efforts to facilitate the use of electronic technology and media") applies equally to SDs and MSPs, final regulation 1.4 provides that an SD or MSP receiving an electronically signed document is in compliance with Commission regulations requiring signed documents, provided that the receiving SD or MSP generally accepts electronic signatures. Also, the Swap Recordkeeping Requirements permit the use of electronic storage media.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

The recordkeeping regulations amended in the Swap Recordkeeping Requirements are the only swap recordkeeping regulations affecting FCMs and IBs. The information collected pursuant to the Swap Recordkeeping Requirements is not collected by any other agency or available for public disclosure through any other source. To reduce duplicative recordkeeping, however, the Commission: (a) stated that reliance on a third party is appropriate where the records maintained by the third party duplicate the information otherwise required by regulation 1.35(a) to be kept by another party subject to the regulation; and (b) deleted Appendix C to Part 1 of its regulations because the procedures for bunched orders set forth therein also are set forth in regulation 1.35(a-1)(5) (re-designated as (b)(5)) and thus are duplicative and no longer necessary.

³ Regulation 1.31 dictates the form and manner in which certain records are kept. The costs of maintaining records in the required formats are embedded in the costs of the substantive recordkeeping requirements, and are therefore not calculated separately in this collection.

5. If the collection of information involves small business or other small entities (Item 5 of OMB Form 83-I), describe the methods used to minimize burden.

Some members of DCMs and SEFs, as well as certain intermediaries (e.g., some introducing brokers) may be small entities. Where possible, the Commission has implemented tiered recordkeeping requirements which are less burdensome on small entities. For example, Regulation 1.35(a)(3) exempts small introducing brokers from oral recordkeeping requirements.

6. Describe the consequence to the Federal Program or policy activities if the collection were conducted less frequently as well as any technical or legal obstacles to reducing burden.

Failure to maintain the records required by the Swap Recordkeeping Requirements would adversely affect the Commission's ability to ensure the affected registrants' and their members' compliance with their obligations under the CEA and Commission regulations to document swap transactions. The Commission understands that recent advancements in technology, particularly with respect to capturing records and storing such records, will enable all affected entities to incorporate into their existing recordkeeping programs the enhanced requirements set forth in the final amendments.

7. Explain any special circumstances that require the collection to be conducted in a manner:

- **requiring respondents to report information to the agency more often than quarterly;**

This question does not apply. The Swap Recordkeeping Requirements do not impose any more-than-quarterly reporting requirements to the agency.

- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it:**

This question does not apply.

- **requiring respondents to submit more than an original and two copies of any document;**

This question does not apply. The Swap Recordkeeping Requirements do not impose any requirements that would obligate a respondent to submit more than an original and two copies of any document.

- **requiring respondents to retain records other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;**

Commission regulation 1.31 requires entities to keep regulatory records, including regulatory records of any swap or related swap forward transaction, for more than three years.

- **in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**

This question does not apply. The final regulations do not require nor involve any statistical surveys.

- **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**

This question does not apply. The final regulations do not require nor involve the use of any statistical data classification.

- **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**

This question does not apply. The final regulations do not make a pledge of confidentiality, let alone an unsupported confidentiality pledge.

- **requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

Final regulation 140.72 provides the Commission with the authority to disclose confidential information to SEFs and SDRs in order to effectuate the purposes of the CEA. The Commission has promulgated regulations to protect the confidentiality of any information collected from respondents. Such regulations are set forth in 17 CFR Part 145. Final regulation 145.9, as amended by the Swap Recordkeeping Requirements, expands the definition of “submitter” by adding SEFs and SDRs to the list of registered entities to which a person’s confidential information has been submitted, and which, in turn, submit that information to the Commission. This amendment allows individuals who have submitted information to a SEF or SDR to request confidential treatment under regulation 145.9.

8. **If applicable, provide a copy and identify the date and page number of publication in the *Federal Register* of the agency's notice required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.**

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping disclosure, or reporting format (if any, and on the data elements to be recorded, disclosed, or reported).

A *Notice of Intent to Revise and Extend Information Collection 3038-0090* was published on April 27, 2020 (“Notice”). See 85 FR 23331. The Notice requested comment on this information collection prior to submission to OMB. No relevant comments were received.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years - even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

As noted above, the Commission published a *Notice of Intent to Revise and Extend Information Collection 3038-0090* in the *Federal Register*. See 85 FR 23331 (April 27, 2020). The Notice provided a 60-day period during which the public was invited to comment on the information collection and the burdens imposed by it. Therefore, no such circumstances precluding consultation with respondents are anticipated.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

This question does not apply. The Commission has neither considered nor made any payment or gift to a respondent.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulations, or agency policy.

The Commission does not provide respondents with an assurance of confidentiality. The Commission fully complies with section 8(a)(1) of the CEA, which strictly prohibits the Commission, unless specifically authorized by the CEA, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission has procedures to protect the confidentiality of an applicant’s or registrant’s data. These are set forth in the Commission’s regulations at parts 145 and 147 of title 17 of the Code of Federal Regulations.

More specifically, final regulation 145.9, as amended by the Swap Recordkeeping Requirements, expands the definition of “submitter” by adding SEFs and SDRs to the list of registered entities to which a person’s confidential information has been submitted, and which, in turn, submit that information to the Commission. This amendment allows individuals who have submitted information to a SEF or SDR to request confidential treatment under regulation 145.9.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

This question does not apply. The final regulations do not request or require the provision of sensitive information, as that term is used in question 11.

12. Provide estimates of the hour burden of the collection of information. The Statement should:

- **Indicate the number of respondents, frequency of response, annual hour burden and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than ten) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
- **If the request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.**
- **Provide estimates of annualized cost to respondents for the hours burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.**

Requirement that FCMs, RFEDs, IBs, and members of DCMs and SEFs comply with Regulation 1.35 for any swap transactions they enter into:

This Swap Recordkeeping Requirements require FCMs, RFEDs, IBs, and members of DCMs and SEFs to comply with certain swap recordkeeping requirements. The Commission has estimated it will take each of the aforementioned entities approximately ½ hour to fulfill the recordkeeping requirement for each swap transaction.

Number of respondents: **13,664⁴** (61 FCMs, 1,100 IBs, 3 RFEDs, 11,500 DCM members, 1,000 SEF members)

Frequency of collection: **As needed.**

Estimated number of annual responses per registrant: **252 responses per year**

Explanation:

252 responses per year * .5 hour per day = 126 hours per respondent per year

⁴ The Commission acknowledges that some entities may be double-counted in this estimate. For example, an FCM may be a member of a SEF.

126 hours per respondent per year * \$100 per hour = \$12,600 total average hour burden cost per respondent

13,664 respondents * 252 responses per year = 3,443,328 total annual responses

13,664 respondents * 126 hours per respondent per year = 1,721,664 total annual number of burden hours

13,664 respondents * \$12,600 total average hour burden cost per respondent = \$172,166,400 total annual burden hour cost of all responses

Requirement that futures commission merchants (“FCMs”) prepare swap confirmations and monthly statements describing customers’ swap positions (1.33)

Number of registrants: **61 FCMs.**

Frequency of collection: **As needed.**

Estimated number of annual responses per registrant: **167,569 swap confirmations**

Explanation:

5,110,862 cleared swaps per year⁵ * 2 counterparties per swap = 10,221,724 confirmations per year

10,221,724 confirmations per year / 61 FCMs = 167,569 confirmations per FCM per year

.05 hour per confirmation * 167,569 confirmations per year = 8,378 hours per FCM per year

61 FCMs x 8,378 hours per year = 511,058 aggregate burden hours

511,058 aggregate burden hours * \$100 per hour = \$51,105,800 total annual burden hour cost of all responses

The Commission does not have data regarding the number of clients an FCM has, and therefore cannot estimate the number of monthly statements an FCM sends.

Requirement that each person claiming the exclusion of utility operations-related swaps with utility special entities in its de minimis calculation to maintain written representations in accordance with Regulation 1.31 (1.3)

⁵ This estimate was derived from the Commission’s Weekly Swaps Report, which is published on its website at <https://www.cftc.gov/MarketReports/SwapsReports/index.htm>. Accordingly, such estimate excludes equity and commodity swaps. Certain estimates in Attachment A may vary slightly due to rounding.

Number of respondents: **2,000** (Estimated number of respondents availing themselves of this exception)

Frequency of collection: **As needed.**

Estimated number of annual responses per registrant: **1 response per year**

Explanation:

1 response per year * .5 hour per response = .5 hour per respondent per year

.5 hours per respondent per year * \$100 per hour = \$50 total average hour burden cost per respondent

2,000 respondents * 1 responses per year = 2,000 total annual responses

2,000 respondents * .5 hours per respondent per year = 1,000 total annual number of burden hours

2,000 respondents * \$50 total average hour burden cost per respondent = \$100,000 total annual burden hour cost of all responses

Requirement that each FCM, RFED, IB and DCM member keep records showing a customer's name, address, occupation or business, and the name of any other person guaranteeing the account or exercising any trading control over it for each swap transaction entered into. (1.37(a))

The Commission has estimated it will take each of the aforementioned entities approximately .4 hours to fulfill this recordkeeping requirement for each swap transaction.

While the Commission has an estimate for the total number of swaps entered into by FCMs, RFEDs, IBs, and members of DCMs and SEFs each year, the Commission cannot estimate the number of swaps entered into by FCMs, RFEDs, IBs, and DCM members on behalf of customers per year.

Requirement that each FCM carrying an omnibus account for another FCM, a foreign broker, a member of a DCM or any other person maintain a daily record for such account of the total open long contracts and the total open short contracts in each swap. (1.37(b))

The Commission has estimated it will take each FCM .4 hours to fulfill this recordkeeping requirement for each swap transaction.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* swap transactions involve an FCM carrying an omnibus account for another FCM, a foreign broker, DCM member, or any other person.

Requirement that swap execution facilities (“SEFs”) keep a record showing the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange (1.37(c))

The Commission has estimated it will take each SEF .4 hours to fulfill this recordkeeping requirement each time a foreign trader executes a transaction.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* swap transactions are executed on SEFs by foreign traders.

Requirement that SEFs record those buy- and sell-orders of different principals that SEF members have executed simultaneously (1.39)

The Commission has estimated it will take each SEF .1 hours to capture the required information each time SEF members simultaneously execute buy and sell orders of different principals, and that storage costs will be less than \$1 per record.

The Commission cannot estimate the aggregate burden for this amendment because it is not known, and it cannot be reasonably estimated, *how many* buy and sell orders are executed simultaneously on SEFs.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14).

- **The cost estimate should be split into two components; (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major costs factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software, monitoring, sampling, drilling and testing equipment, and record storage facilities.**

The are no start-up or operations and maintenance costs involved with this collection.

- **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate, agencies may consult with a sample of respondents (fewer than ten), utilize the 60-day pre-OMB submission public comment process and use**

existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.

- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

See Attachment A.

14. **Provide estimates of the annualized costs to the Federal Government. Also provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.**

It is not anticipated that the final regulations will impose any additional costs to the Federal Government.

15. **Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB Form 83-I.**

The Commission is amending the information collection under OMB Control No. 3038-0090 based on a review of available recent swap data and registrant information. Accordingly, the Commission's estimate of 13,664 swap recordkeeping respondents derives from combining the estimated number of FCMs (61—decreased from 141 in 2017), IBs (1,100), RFEDs (3), DCM members (11,500), and SEF members (1,000) as of March 31, 2020 (*see also* fns. 4 and 6). The Commission's estimate as to the number of de minimis special entities, at 2,000, remains unchanged from prior renewals.

16. **For collection of information whose results are planned to be published for statistical use, outline plans for tabulation, statistical analysis, and publication. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.**

Not applicable.

17. **If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.**

Not applicable.

18. Explain each exception to the certification statement identified in Item 19, “Certification for Paperwork Reduction Act Submissions,” of OMB Form 83-I.

None.

Attachment A

Amendments to Adapt CFTC Regulations to the Dodd-Frank Act: Regulation 1.33

See also responses to Questions 12 and 13, above.

C	2. Estimated Number of Respondents	3. Estimated Number of Responses by Each Respondent	4. Estimated Average Number of Burden Hours per Response	5. Annual Number of Burden Hours per Respondent (3 x 4)	6. Estimated Average Burden Hour Cost	7. Total Average Hour Burden Cost Per Respondent (5 x 6)	8. Total Annual Responses (2 x 3)	9. Total Annual Number of Burden Hours (2 x 5)	10. Total Annual Burden Hour Cost of All Responses (2 x 7)
1.35 – Swap Recordkeeping	13,664 ⁶	252 ⁷	0.5	126	\$100	\$12,600	3,443,328	1,721,664	\$172,166,400
1.33 - Swap Confirmations	61 ⁸	167,569	0.05	8,378	\$100 ⁹	\$837,800	10,221,709	511,058	\$51,105,800
1.3 – De Minimis Special Entities	2,000	1	0.5	0.5	\$100	\$50	2,000	1,000	\$100,000

⁶ Estimated number of FCMs (61), IBs (1,100), RFEDs (3), DCM members (11,500), and SEF members (1,000) as of March 31, 2020. The Commission notes that some entities may be included in multiple categories.

⁷ Total trading days per year.

⁸ Number of registered FCMs as of March 31, 2020.

⁹ The costs in this supporting statement were determined using an average salary of \$100 per hour. The Commission believes that this is an appropriate salary estimate for purposes of the regulation. In support of this determination, the Commission notes that the salary estimate is based upon May 2018 Bureau of Labor Statistics' findings of National Occupation Employment and Wage Estimates, United States, including the mean hourly wage of an employee under occupation code 23-1011, "Lawyers," that is employed by the "Securities, Commodity Contracts, and Other Financial Investments and Related Activities Industry," which is \$96.26; the mean hourly wage of an employee under occupation code 11-3031, "Financial Managers," in the same industry, which is \$100.56; and the mean hourly wage of an employee under occupation code-13-1041, "Compliance Officers" in the same industry, which is \$43.03. The Commission also notes that, the Commission took the foregoing data and then increased its hourly wage estimate in recognition of the fact that some respondents may be large financial institutions whose employees' salaries may exceed the mean wage.