SUPPORTING STATEMENT
for the Paperwork Reduction Act New Information Collection Submission for Rule 3a68-2 (Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps) and Rule 3a68-4(c) (Process for Determining Regulatory Treatment for Mixed Swaps)
OMB Control no. 3235-0685

A. Justification

1. Information Collection Necessity

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") adds to the Commodity Exchange Act ("CEA") and the Securities Exchange Act of 1934 ("Exchange Act") definitions of the terms "swap," "security-based swap," and "mixed swap."[1]

Section 712(d)(1) of the Dodd-Frank Act provides that the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (together with the CFTC, the "Commissions"), in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement."

Under the comprehensive framework for regulating swaps and security-based swaps established in Title VII of the Dodd-Frank Act, the CFTC is given regulatory authority over swaps, the SEC is given regulatory authority over security-based swaps, and the Commissions shall jointly prescribe such regulations regarding mixed swaps as may be necessary to carry out the purposes of Title VII of the Dodd-Frank Act.

On July 10, 2012, the Commissions jointly adopted rules and interpretative guidance to further define the terms "swap," "security-based swap," and "security-based swap agreement," regarding "mixed swaps," and governing books and records with respect to "security-based swap agreements."[2] Section 712(d)(4) of the Dodd-Frank Act provides that any interpretation of, or guidance by, either the CFTC or SEC regarding a provision of Title VII of the Dodd-Frank Act shall be effective only if issued jointly by the Commissions (after consultation with the Board) on issues where Title VII of the Dodd-Frank Act requires the CFTC and SEC to issue joint regulations to implement the provision. The Commissions believe that any interpretation or guidance regarding whether a Title VII of the Dodd-Frank Act instrument is a swap, a security-based swap, or both (i.e., a mixed swap), must be issued jointly pursuant to this requirement.

There are instruments (or classes of instruments) that are difficult to categorize definitively as swaps or security-based swaps. Further, because mixed swaps are both swaps and security-based swaps, identifying a mixed swap is not always straightforward. In addition, because mixed swaps are both security-based swaps and swaps, absent a joint rule or order by

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[1] Citations to provisions of the CEA and the Exchange Act, 15 U.S.C. 78a et seq., in this document refer to the numbering of those provisions after the effective date of Title VII.

[2] See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48207 (August 13, 2012) ("Adopting Release").

the Commissions permitting an alternative regulatory approach, persons who desire or intend to list, trade, or clear a mixed swap (or class thereof) would be required to comply with all the statutory provisions in the CEA and the Exchange Act (including all the rules and regulations thereunder) that were added or amended by Title VII of the Dodd-Frank Act with respect to swaps or security-based swaps. Such dual regulation may not be appropriate in every instance and may result in potentially conflicting or duplicative regulatory requirements. Consequently, the SEC adopted Rule 3a68-2, which creates a process for interested persons to request a joint interpretation by the Commissions regarding whether a particular instrument (or class of instruments) is a swap, a security-based swap, or both (i.e., a mixed swap), as well as Rule 3a68-4(c), which establishes a process for persons to request that the Commissions issue a joint order permitting such persons (and any other person or persons that subsequently lists, trades, or clears that class of mixed swap) to comply, as to parallel provisions[3] only, with specified parallel provisions of either the CEA or the Exchange Act, and related rules and regulations (collectively "specified parallel provisions"), instead of being required to comply with parallel provisions of both the CEA and the Exchange Act.

Under Rule 3a68-2, a person provides to the Commissions a copy of all material information regarding the terms of, and a statement of the economic characteristics and purpose of, each relevant agreement, contract, or transaction (or class thereof), along with that person's determination as to whether each such agreement, contract, or transaction (or class thereof) should be characterized as a swap, security-based swap, or both (i.e., a mixed swap). The Commissions also may request the submitting person to provide additional information.

Under Rule 3a68-4(c), a person provides to the Commissions a copy of all material information regarding the terms of, and the economic characteristics and purpose of, the specified (or specified class of) mixed swap. In addition, a person provides the specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for relevant mixed swap (or class thereof), and an analysis of: i) the nature and purposes of the parallel provisions that are the subject of the request; ii) the comparability of such parallel provision; and iii) the extent of any conflicts or differences between such parallel provisions. The Commissions also may request the submitting person to provide additional information.

2. Information Collection Purpose and Use

The SEC uses the information collected pursuant to Rule 3a68-2 to evaluate an agreement, contract, or transaction (or class thereof) in order to provide joint interpretations or joint notices of proposed rulemaking with the CFTC regarding whether these agreements, contracts, or transactions (or classes thereof) are swaps, security-based swaps, or both (i.e., mixed swaps) as defined in the Dodd-Frank Act.

The SEC uses the information collected pursuant to Rule 3a68-4(c) to evaluate a specified, or a specified class of, mixed swaps in order to provide joint orders or joint notices of proposed rulemaking with the CFTC regarding the regulation of that particular mixed swap or class of mixed swap.

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[3] For purposes of Rule 3a68-4(c) under the Exchange Act, "parallel provisions" means comparable provisions of the CEA and the Exchange Act that were added or amended by Title VII of the Dodd-Frank Act with respect to security-based swaps and swaps, and the rules and regulations thereunder.

The information provided to the SEC pursuant to Rules 3a68-2 and 3a68-4(c) also allows the SEC to monitor the development of new OTC derivatives products in the marketplace and determine whether additional rulemaking or interpretive guidance is necessary or appropriate.

3. Consideration Given to Information Technology

Rules 3a68-2 and 3a68-4(c) allows persons to submit requests to the Commissions for joint interpretations regarding whether a particular agreement, contract, or transaction (or class thereof) is a swap, security-based swap, or both (i.e., a mixed swap), and for joint orders permitting alternative regulatory treatment for particular mixed swaps. We understand from our staff's discussions with industry participants that information technology is commonly used to assist in the creation and maintenance of documentation as part of their ordinary course business and risk management practices, including documentation required by the rules for a request submitted pursuant to Rules 3a68-2 and 3a68-4(c); however, the rule does not mandate how an entity must gather or maintain the documentation required for a submission under Rules 3a68-2 and 3a68-4(c).

4. Duplication

The rule does not duplicate existing regulatory requirements. Moreover, we understand from our staff's discussions with industry participants that the persons likely to submit a request under Rules 3a68-2 and 3a68-4(c) may currently create and maintain, as part of their ordinary course business and risk management practices, some of the documentation that is required by Rules 3a68-2 and 3a68-4(c).[4]

5. Effect on Small Entities

For purposes of SEC rulemaking in connection with the Regulatory Flexibility Act, a small entity includes (i) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less,[5] or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act,[6] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a

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[4] The information required to be submitted to request an interpretation under Rule 3a68-2 is information about the nature of the instrument and the person's own determination, and reasons, regarding the instrument's status as a swap, security-based swap, or mixed swap. The information required to be submitted to request alternative regulatory treatment under Rule 3a68-4(c) is information about the nature of the mixed swap and the person's own determination, and reasons, regarding the proposed alternative regulatory treatment of the instrument. In the absence of a request pursuant to Rule 3a68-2 or 3a68-4(c), such persons would need to maintain certain information about such instruments, as well as make their own determination regarding the status of and regulatory regime applicable to the instrument, as a part of their ordinary business practices.

[5] See 17 CFR 240.0-10(a).

[6] See 17 CFR 240.17a-5(d).

natural person) that is not a small business or small organization.[7] Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) for entities engaged in credit intermediation and related activities, entities with $175 million or less in assets;[8] (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with $7 million or less in annual receipts;[9] (iii) for entities engaged in financial investments and related activities, entities with $7 million or less in annual receipts;[10] (iv) for insurance carriers and entities engaged in related activities, entities with $7 million or less in annual receipts;[11] and (v) for funds, trusts, and other financial vehicles, entities with $7 million or less in annual receipts.[12]

Based on the SEC's existing information about the swap markets, we believe that the swap markets, while broad in scope, are largely dominated by entities such as those that are covered by the "swap dealer," "security-based swap dealer," "major swap participant," and "major security-based swap participant" definitions.[13] The SEC believes that such entities exceed the thresholds defining "small entities" set out above. Moreover, although it is possible that other persons may engage in swap, security-based swap, and mixed swap transactions, we do not believe that any of these entities are "small entities" as defined in Rule 0-10 under the Exchange Act.[14] Feedback from industry participants about the swap markets indicates that only persons or entities with assets significantly in excess of $5 million (or with annual receipts significantly in excess of $7 million) participate in the swap markets.

To the extent that a small number of transactions did have a counterparty that was defined as a "small entity" under SEC Rule 0-10, the SEC believes it is unlikely that the information collections under Rules 3a68-2 and 3a68-4(c) would have a significant economic impact on that entity. Rules 3a68-2 and 3a68-4(c) simply provide a process for such persons, if they desire, to request interpretations of whether agreements, contracts, and transactions are swaps, security-based swaps, or mixed swaps or to request alternative regulatory treatment for mixed swaps.

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7 See 17 CFR 240.0-10(c).

8 See 13 CFR 121.201 (Subsector 522).

9 See id.

10 See id. at Subsector 523.

11 See id. at Subsector 524.

12 See id. at Subsector 525.

13 See, e.g., CEA section 1a(49), 7 U.S.C. 1a(49) (defining "swap dealer"); section 3(a)(71)(A) of the Exchange Act, 15 U.S.C. 78c(a)(71)(A) (defining "security-based swap dealer"); CEA section 1a(33), 7 U.S.C. 1a(33) (defining "major swap participant"); section 3(a)(67)(A) of the Exchange Act, 15 U.S.C. 78c(a)(67)(A) (defining "major security-based swap participant"). See Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 FR 30596 (May 23, 2012) ("Entity Definitions Release"). Such entities also would include commercial entities that may use swaps to hedge or mitigate commercial risk.

14 See 17 CFR 240.0-10(a).

6. Consequences of Not Conducting Collection

The collection of information in Rule 3a68-2 is designed to provide the Commissions with sufficient information regarding the instrument at issue so that the Commissions can appropriately evaluate whether it is a swap, a security-based swap, or both (i.e., a mixed swap). We believe that, without the information in Rule 3a68-2, the SEC may not have sufficient information about instruments for which market participants are unsure of the characterization and thus may not be able to issue an interpretation of whether an instrument is a swap, security-based swap, or mixed swap. We further believe that, as a result, there is a possibility that market participants who engage in agreements, contracts, or transactions about which the status as a swap, security-based swap, or mixed swap is uncertain would face greater regulatory uncertainty regarding the status of such instruments.

The collection of information in Rule 3a68-4(c) is designed to provide the Commissions with sufficient information regarding the mixed swap at issue so that the Commissions can appropriately evaluate whether alternative regulatory treatment for the mixed swap is warranted. We believe that, without the information in 3a68-4(c), the SEC may not have sufficient information about such mixed swaps to permit alternative regulatory treatment. We further believe that, as a result, there is a possibility that market participants who engage in mixed swaps that might otherwise be appropriate for alternative regulatory treatment would face greater regulatory burdens regarding such instruments.

7. Inconsistencies with Guidelines in 5 CFR 1320.5(d)(2)

There are no special circumstances. These collections are consistent with the guidelines in 5 CFR 1320.5(d)(2), except potentially with respect to the confidentiality of information. There is no requirement that the collections of information in Rules 3a68-2 and 3a68-4(c) be provided to the SEC or a third party on a regular, ordinary course basis. However, such information may be considered proprietary financial information regarding an entity's swap, security-based swap, or mixed swap transactions, and thus confidentiality concerns may arise where the SEC has obtained information pursuant to Rule 3a68-2 or 3a68-4(c). In a situation where the SEC has obtained such information, the SEC would consider requests for confidential treatment of such information on a case-by-case basis.

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

There are no payments or gifts to respondents in the information collection.

10. Confidentiality

There is no requirement that the collections of information in Rules 3a68-2 and 3a68-4(c) be provided to the SEC or a third party on a regular, ordinary course basis. No assurances of confidentiality are provided in the rules. In a situation where the SEC has obtained the information, the SEC would consider requests for confidential treatment on a case-by-case basis.

11. Sensitive Questions

The information collection does not collect personally identifiable information. The agency has determined that neither a PIA nor a SORN are required in connection with the collection of information.

12. Information Collection Burden

Summary of Hourly Burdens

Nature of burden	**Number of Annual Requests**	**Time per Request (Hours)**	**Total Burden (Hours)**
Rule 3a68-2 requests	25	20	500
Rule 3a68-4(c) requests in connection with 3a68-2	9	20	180
Rule 3a68-4(c) requests without rule 3a68-2 request	1	30	30
Total Aggregate Burden			710

Rule 3a68-2

The SEC expects 25 requests pursuant to Rule 3a68-2 per year. The SEC estimates the total paperwork burden associated with preparing and submitting each request would be 20 hours to retrieve, review, and submit the information associated with the submission. This 20 hour burden is divided between the SEC and the CFTC, with 10 hours per response regarding reporting to the SEC and 10 hours of response regarding third party disclosure to the CFTC.[15] The SEC estimates this would result in an aggregate annual burden of 500 hours (25 requests x 20 hours/request).

Rule 3a68-4(c)

The SEC expects ten requests pursuant to Rule 3a68-4(c) per year. The SEC estimates that nine of these requests will have also been made in a request for a joint interpretation pursuant to Rule 3a68-2, and one will not have been. The SEC estimates the total burden for the one request for which the joint interpretation pursuant to 3a68-2 was not requested would be 30 hours, and the total burden associated with the other nine requests would be 20 hours per request because some of the information required to be submitted pursuant to Rule 3a68-4(c) would have already been submitted pursuant to Rule 3a68-2. The burden in both cases is evenly divided between the SEC and the CFTC.

[15] The burdens imposed by the CFTC are included in this collection of information.

13. Costs to Respondents

Rule 3a68-2

The SEC estimates that the total annual costs resulting from a submission under Rule 3a68-2 would be approximately $12,000 for the services of outside attorneys to retrieve, review, and submit the information associated with the submission. This cost is divided between the SEC and the CFTC, with $6,000 per response regarding reporting to the SEC and $6,000 per response regarding third party disclosure to the CFTC. Assuming 25 requests each year, as discussed above, the SEC estimates that this would result in aggregate costs each year of $300,000 for the services of outside professionals (e.g., attorneys) (25 requests x 30 hours/request x $400 in hourly legal fees).

Rule 3a68-4(c)

The SEC estimates that the total costs resulting from a submission under Rule 3a68-4(c) would be approximately $20,000 for the services of outside attorneys to retrieve, review, and submit the information associated with the submission of the one request for which a request for a joint interpretation pursuant to Rule 3a68-2 was not previously made (1 request x 50 hours/request x $400). For the nine requests for which a request for a joint interpretation pursuant to Rule 3a68-2 was previously made, the SEC estimates the total costs associated with preparing and submitting a party's request pursuant to Rule 3a68-4(c) would be $6,000 less per request because, as discussed above, some of the information required to be submitted pursuant to Rule 3a68-4(c) already would have been submitted pursuant to Rule 3a68-2. The SEC estimates this would result in an aggregate cost each year of $126,000 for the services of outside attorneys (9 requests x 35 hours/request x $400).

14. Costs to Federal Government

There are no estimated operation costs to the federal government associated with this rule.

15. Changes in Burden

There have been no changes in the Costs to Respondents from those most recently submitted.

16. Information Collection Planned for Statistical Purposes

Not applicable. The information collection is not used for statistical purposes.

17. Approval to Omit OMB Expiration Date

The Commission is not seeking approval to omit the 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.