

## **SUPPORTING STATEMENT FOR NEW AND REVISED INFORMATION COLLECTIONS**

Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a  
Portfolio Margining Account in a Commodity Broker Bankruptcy

**OMB CONTROL NUMBER 3038-0075**

CFTC Regulations 23.701 & 23.704

### **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.**

On November 6, 2013, the Commission issued final rules implementing statutory provisions pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) and imposing requirements on SDs and MSPs with respect to the treatment of collateral posted by their counterparties to margin, guarantee, or secure uncleared swaps.<sup>1</sup> Additionally, the final rule includes revisions to ensure that, for purposes of subchapter IV of chapter 7 of the Bankruptcy Code, securities held in a portfolio margining account that is a futures account or a Cleared Swaps Customer Account constitute “customer property”; and owners of such accounts constitute “customers.”<sup>2</sup>

Specifically, section 724(c) of the Dodd-Frank Act amended the Commodity Exchange Act (“CEA”) to add, as section 4s(l) thereof, 7 U.S.C. § 6s(l), provisions concerning the rights of counterparties to swap dealers (“SDs”) and major swap participants (“MSPs”) with respect to the segregation of collateral supplied for margining, guaranteeing, or securing uncleared swaps. Section 4s(l) of the CEA sets forth certain requirements concerning the rights of counterparties of SDs and MSPs with respect to the segregation of money, securities, or other property used to margin, guarantee, or otherwise secure uncleared swaps. Regulation 23.701 implemented part of the statutory requirements by specifying that certain information must be provided to counterparties on an annual basis about the terms and conditions of segregation, including price information, to the extent that the SD or MSP has such information, and the identity of one or more independent depositories for segregated collateral. Regulation 23.704 implemented the requirements of CEA Section 4s(l)(4), which dictates that, in certain circumstances, an SD or MSP must report to the counterparty, on a quarterly basis, “that the back office procedures of the swap dealer or major swap participant relating to margin and collateral requirements are in compliance with the agreement of the counterparties.” On March 25, 2019, the Commission adopted amendments to revise the time frame for providing the notification to counterparties set forth in Regulation 23.701. As revised, Regulation 23.701 simply requires that the SD or MSP notify the counterparty at the beginning of the swap trading relationship of the counterparty’s

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<sup>1</sup> 78 FR 66621.

<sup>2</sup> Id.

right to require segregation of initial margin, and to permit the counterparty to change that election by written notice to the SD or MSP. The March 25, 2019 revision did not modify the collection requirements of Regulation 23.704 as originally adopted.

**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.**

As discussed above, the rules establish third party disclosure requirements that are mandated by Section 4s(1) of the CEA, which states that SDs and MSPs must notify their counterparties of the right to have their initial margin segregated. The third party disclosure requirements are necessary to implement the objectives of Section 4s(1). The data required to be compiled and maintained pursuant to Regulation 23.701 and 23.704 would be used by uncleared swap counterparties (and, in some instances, the CFTC and self-regulatory organizations).

For example, the information received by uncleared swap counterparties pursuant to Regulation 23.701 alerts counterparties to their statutory right, if they so choose, to have funds or property used as margin in uncleared swaps transactions with SDs and MSPs kept segregated from the property of the SD or MSP. Likewise, the information provided further alerts counterparties of the need to request such segregation if they wish to exercise this right. Similarly, the information received by uncleared swap counterparties pursuant to Regulation 23.704 confirms that the back office procedures followed by a SD or MSP with whom they are dealing comply with the agreement of the parties.

**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.**

The collections of information required by Regulations 23.701 and 23.704 may be conducted electronically.

**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 collections of information do not duplicate any existing collection of information. No laws or regulations requiring similar collections of information involving the relevant entities currently exist.

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

This collection of information will not have a significant impact on a substantial number of small entities.

**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.**

Prior to the amendment to Regulation 23.701 on March 7, 2019, SDs and MSPs were required to give counterparties notification of the right to segregation once per each year that a new swap is entered. The rule was amended to require only that the SD or MSP notify the counterparty at the beginning of the swap trading relationship of the counterparty's right to require segregation of initial margin, and to permit the counterparty to change that election by written notice to the SD or MSP. Commenters noted that very few counterparties have, over time, changed their initial election with regard to segregation. The general purpose of the amendments is to reduce burdens and improve the benefits intended by the rule. With regard to Regulation 23.704, there is no change to the quarterly reporting requirement of Regulation 23.704 as originally adopted.

If the collections of information required by Regulation 23.701 and 23.704 were performed less frequently it would not effectively serve the function of helping to ensure that counterparties receive the information and protections that they are required to receive under the CEA.

**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;**

The collections do not require respondents to report information to the agency more often than quarterly. Regulation 23.701 only requires reporting to each counterparty of the right to segregate once during the duration of the counterparty relationship. The requirement in Regulation 23.704 to report to each counterparty that did not elect segregation quarterly remains the same.

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

Regulation 23.701 requires that the SD or MSP notify the counterparty at the beginning of the swap trading relationship of the counterparty's right to require segregation of initial margin, and to permit the counterparty to change that election by written notice to the SD or MSP. Regulation 23.704 requires that an SD or MSP report certain information to the counterparty on a quarterly basis.

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

Respondents are not required to submit more than an original and two copies of any documents to the Commission or third parties.

- **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 expressly requires that books and records required to be kept by the CEA or Commission regulations be retained for certain specific periods. Other than with respect to oral communications and records exclusively created and maintained in paper, the shortest of these periods is five years from the date of creation.

- **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;**

Not applicable.

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

Not applicable.

- **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**

The collection does not involve any pledge of confidentiality.

- **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.**

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.

**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.**

The Commission published a *Notice of Intent to Extend Collection 3038-0075: Protection of Collateral of Counterparties to Uncleared Swaps; Treatment of Securities in a Portfolio Margining Account in a Commodity Broker Bankruptcy* in the *Federal Register*. See 87 FR 9583 (Feb. 22, 2022). 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. The Commission did not receive any relevant comments on the 60-day *Federal Register* notice.

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

Not applicable. 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 beyond that provided by applicable law. 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 a respondent’s data set forth in parts 145 and 147 of the Code of Federal Regulations.

**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.**

The regulations covered by this collection do not require the giving 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.**

See Attachment A.

#### Section 23.701

The Commission continues to estimate the number of annual responses per SD or MSP to be 300, and the annual number of hours per SD or MSP to be 600, based on the rule and the Commission's implementation experience.<sup>3</sup> The Commission believes that the estimates herein align with the previous Commission numbers.

The Commission continues to estimate that disclosures required by Regulation 23.701 would require approximately 2 hours of work per disclosure. The Commission estimates that the average dollar cost of the disclosure per hour will be \$56.75, giving a cost of \$113.50 for 2 hours of work.<sup>4</sup>

After experience with the rule, and based on the increase (from 103 to 108) in the number of swap dealers, the Commission believes that Regulation 23.701 will require a total of approximately 32,400 disclosures per year, generating an estimated total annual information collection burden of approximately 64,800 hours and a burden hour cost of \$3,677,400.

#### Section 23.704

The Commission continues to estimate, with 108 swap dealers, that Regulation 23.704 would require a total of approximately 2600 disclosures and 806 hours per year per entity, for a total of approximately 280,800 disclosures and 87,048 hours per year, generating an estimated total annual information collection burden hour cost of approximately \$3,861,648.<sup>5</sup> The Commission assumes for purposes of this calculation that half of counterparties would elect not to segregate, and would receive the required quarterly disclosure, meaning that, on average, each SD (or MSP) would make the disclosure to 650 of its counterparties (1/2 of 1,300) four times per year, for a total of 2,600 disclosures per year.

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<sup>3</sup> The Commission estimates that each SD or MSP would, on average, have approximately 300 new counterparties each year for a total burden of 600 hours per registrant. The estimates also reflect an increase by five in the total number of registrants.

<sup>4</sup> This estimate is based on the assumption that about three quarters of the work will be done by junior level staff with a salary of approximately \$45 per hour and that about one quarter of the work will be done by senior level staff with a salary of approximately \$92 per hour. Compare U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, May 2021 National Industry-Specific Occupational Employment and Wage Estimates - NAICS 523000 - Securities, Commodity Contracts, and Other Financial Investments and Related Activities occupation code 13-1041 (annual mean wage for a compliance officer equaled \$92,750 per year, an hourly equivalent of approximately \$45), and occupation code 11-1000 (annual mean wage for a "top executive" equaled \$192,010 per year, an hourly equivalent of approximately \$92).

<sup>5</sup> This estimate is based on total number of responses of 280,800 multiplied by \$13.75 cost per response. The estimates also reflect an increase by five in the total number of registrants.

The Commission estimates the annual cost to be \$35,756 per SD/MSP comprising eighteen hours for the Chief Compliance Officer with a salary level of approximately \$92 per hour and the annual cost of 780 hours for junior compliance staff with a salary level of approximately \$45 per hour.<sup>6</sup>

**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.**
- **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.**

The disclosures required by Regulations 23.701 and 23.704 involve information that SDs and MSPs generate and use in the usual and customary ordinary course of their business. We estimate that the required disclosures will not require any modifications to, or any additional maintenance of, existing systems within SDs and MSPs.

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<sup>6</sup> This estimate is based on the assumption that junior compliance staff earn a salary of approximately \$45 per hour and that with a Chief Compliance Officer receives a salary of approximately \$92 per hour. Compare U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, May 2021 National Industry-Specific Occupational Employment and Wage Estimates - NAICS 523000 - Securities, Commodity Contracts, and Other Financial Investments and Related Activities occupation code 13-1041 (annual mean wage for a compliance officer equaled \$92,750 per year, an hourly equivalent of approximately \$45), and occupation code 11-1000 (annual mean wage for a “top executive” equaled \$192,010 per year, an hourly equivalent of approximately \$92).

**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.**

The collection of information is not expected to impose significant annual costs on the Federal Government because it principally involves a requirement for certain private parties to keep records and make disclosures in the ordinary course of business.

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

The burdens have been adjusted to reflect the increase in the number of swap dealers from 103 to 108. The aggregate burden hours (151,848) is an increase from the previous figure (143,994) reflecting this change.

**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.**

Does not apply.

**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.**

Does not apply.

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

Does not apply.



Attachment A

**OMB Collection File 3038-0075**

ANNUAL ESTIMATED BURDENS

THIRD-PARTY DISCLOSURE BURDEN

Regulations (17 CFR)	Estimated number of entities	Annual responses per entity	Total annual responses	Estimated number of hours per response	Estimated average cost per response	Total annual burden-hours	Total annual burden-hour cost
23.701	108*	300	32,400	2	\$113.50	64,800	\$3,677,400
23.704	108*	2,600**	280,800	.31	\$13.75	87,048	\$3,861.648
		2,900	313,200			151,848	\$7,539,048

\*As of January 18, 2022, 108 swap dealers had applied for provisional registration. No major swap participants have been registered.

\*\*The 2600 reports per annum estimate is based on each entity making quarterly reports to 650 counterparties (4 x 650 = 2600 reports per year).