

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

**Swap Dealer and Major Swap Participant Conflicts of Interest and Business Conduct
Standards with Counterparties**

OMB CONTROL NUMBER 3038-0079

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.**

Section 731 of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ amended the Commodity Exchange Act (“CEA”) to add sections 4s(h) and 4s(j)(5)², which provide the Commodity Futures Trading Commission (the “Commission” or the “CFTC”) with both mandatory and discretionary rulemaking authority to impose business conduct requirements on swap dealers (“SDs”)³ and major swap participants (“MSPs”)⁴ in their dealings with counterparties, including “Special Entities,”⁵ and require that each SD and MSP implement conflicts of interest systems and procedures. Congress granted the Commission broad discretionary authority to promulgate business conduct requirements, as appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the CEA.⁶

Accordingly, the Commission has adopted subpart H of part 23 of its regulations (“EBCS

¹ Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² 7 U.S.C. 6s(h) and 6s(j)(5).

³ “Swap dealer” is defined in section 1a(49) of the CEA, 7 U.S.C. 1a(49); and § 1.3, 17 CFR 1.3.

⁴ “Major swap participant” is defined in section 1a(33) of the CEA, 7 U.S.C. 1a(33); and § 1.3, 17 CFR 1.3.

⁵ “Special Entity” is defined in § 23.401(c), 17 CFR 23.401(c). Such entities are generally defined to include Federal agencies, States and political subdivisions, employee benefit plans as defined under the Employee Retirement Income Security Act of 1974 (“ERISA”), governmental plans as defined under ERISA, and endowments.

⁶ See section 4s(h)(3)(D) of the CEA, 7 U.S.C. 6s(h)(3)(D) (“Business conduct requirements adopted by the Commission shall . . . establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of [the CEA]”); see also sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6) of the CEA; 7 U.S.C. 6s(h)(1)(D), 6s(h)(5)(B), and 6s(h)(6).

Rules”)⁷ and § 23.605,⁸ requiring SDs and MSPs to follow specified procedures and provide specified disclosures in their dealings with counterparties, to adopt and implement conflicts of interest procedures and disclosures, and to maintain specified records related to those requirements.

In addition, the Commission promulgated certain exceptions from the EBCS Rules for certain foreign swaps in § 23.23(e).⁹ To the extent a SD or MSP avails itself of one or more of these exceptions, § 23.23(h)(1) imposes information collection requirements in lieu of such requirements in the EBCS Rules.¹⁰

In its notice of proposed rulemaking (the “Proposal”), the Commission proposes to (1) amend certain business conduct standards for SDs and MSPs (together “Swap Entities”) in their dealings with counterparties contained in the EBCS Rules; and (2) amend the swap trading relationship documentation rule for Swap Entities in existing Commission regulation 23.504. These amendments would provide exceptions to compliance with such requirements when executing swaps that are: (1) intended by the parties to be cleared contemporaneously with execution; or (2) subject to prime broker arrangements that meet certain qualifying conditions. These proposed amendments, if adopted, are intended to supersede the Market Participants Division’s (“MPD”) no-action positions contained in CFTC Staff Letters 12-58, 13-11, 13-12, 19-06, and 23-01 (collectively, the “Covered Staff Letters”) and to make other adjustments to such rules in order to harmonize such requirements with those of the Securities and Exchange Commission (“SEC”) and the Municipal Securities Rulemaking Board to reduce administrative burdens on dually-registered entities. MPD expects that, upon the adoption of a final rule enacting the Proposal, it will withdraw some or all of the Covered Staff Letters.

The proposed definition and compliance exceptions, if adopted, would significantly reduce the number of required disclosures an SD would otherwise be required to make pursuant to Commission regulation 23.431,¹¹ including disclosure of the price of the swap and the so-called “pre-trade mid-market mark” (“PTMMM”) of a particular swap¹² and the scenario-analysis-upon-request requirement (“Scenario Analysis Requirement”) in Commission regulation 23.431(b).¹³

⁷ 17 CFR part 23, subpart H. Subpart H of part 23 (titled “Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing with Counterparties, Including Special Entities”) includes the following provisions: § 23.400 (Scope); § 23.401 (Definitions); § 23.402 (General Provisions); § 23.410 (Prohibition on fraud, manipulation and other abusive practices); § 23.430 (Verification of counterparty eligibility); § 23.431 (Disclosures of material information); § 23.432 (Clearing disclosures); § 23.433 (Communications—fair dealing); § 23.434 (Recommendations to counterparties—institutional suitability); § 23.440 (Requirements for swap dealers acting as advisors to Special Entities); § 23.450 (Requirements for swap dealers and major swap participants acting counterparties to Special Entities); and § 23.451 (Political contributions by certain swap dealers).

⁸ 17 CFR 23.605. Commission regulation 23.605 is titled *Conflicts of interest policies and procedures*.

⁹ 17 CFR 23.23(e). See Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sep. 14, 2020).

¹⁰ 17 CFR 23.23(h)(1).

¹¹ 17 CFR 23.431.

¹² 17 CFR 23.431(a)(3)(i).

¹³ 17 CFR 23.431(b).

The proposed rules, if adopted, would also expand other existing exceptions in Commission regulation 23.431.¹⁴ Meeting the requirements for certain of these exceptions may entail certain burdens and costs, but the Commission preliminarily believes that, in the aggregate, the modifications may reduce the burden of the regulations. However, in an effort to be conservative, because the number of swaps that will be eligible for the new and expanded exceptions is unknown, the Commission is leaving the estimated burden of the regulation associated with these amendments unchanged.

The information collection obligations imposed by the regulations are essential to ensuring that SDs and MSPs develop and maintain procedures and disclosures required by the CEA and Commission regulations.

- 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.**

The required records will be used by Commission staff to evaluate the procedures and disclosures required by the CEA and Commission regulations.

- 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 regulation requires that recordkeeping be performed in accordance with Commission regulation 1.31,¹⁵ which permits the use of electronic regulatory records.

- 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 required information is not already collected by the Commission for any other purpose, collected by any other agency, or available for public disclosure through any other source.

- 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.**

The collection of the required information does not involve any small businesses or 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.**

¹⁴ See 17 CFR 23.431.

¹⁵ 17 CFR 1.31.

Failure to maintain the policies, procedures and other records required by the regulation would adversely affect the Commission's ability to ensure the compliance of SDs and MSPs with their business conduct and conflict of interest obligations under the CEA and Commission regulations.

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. Respondents to this collection are only required to submit reports when requesting an exemption under section 23.451 of the Commission's regulation and are not required to submit reports more often than quarterly..¹⁶

- **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. Respondents are not required to submit more than an original and two copies of any document..¹⁷

- **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(b)¹⁸ expressly requires that books and records required to be kept by the CEA or Commission regulations be retained for certain specified periods. Other than with respect to oral communications, 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;**

This question does not apply. The regulation neither requires nor involves 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 regulation neither requires nor involves the use of any statistical data classification.

¹⁶ This burden includes all recordkeeping required under the EBCS Rules other than that already included under OMB Collection No. 3038-0087 in relation to records of communications under § 23.202.

¹⁷ *Id.*

¹⁸ 17 CFR 1.31(b).

- **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 regulation does not require a 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.**

This question does not apply. In any event, the Commission has promulgated regulations to protect the confidentiality of any information collected from respondents. Such regulations are set forth in 17 CFR parts 145 and 147.

- 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 is publishing the Proposal, which provides a 60-day period during which the public is invited to comment on the proposed rulemaking, the relevant information collection, and the burdens imposed by it.

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).

As set forth above, the Commission affirmatively sought comments on the information collection requirements described herein.

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.

No such circumstances 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.

- 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 assurance of confidentiality. The Commission fully complies with section 8(a)(1) of the CEA,¹⁹ 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.

- 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 regulation does not request nor 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.**

See Attachment A.

As detailed in Attachment A, the Commission estimates the overall burden to be approximately 2,173 hours per year per Swap Entity, at an annual cost of approximately \$217,300 [2,173 hrs. × \$100 per hour]. The aggregate cost for all SDs and MSPs is approximately 234,686 burden hours and \$23,468,600 [234,686 hrs. × \$100 per hour]. This burden results from the

¹⁹ 7 U.S.C. 12(a)(1).

recordkeeping, disclosure and optional reporting provisions of the regulations listed in Attachment A. The burden hours are not anticipated to vary widely among registrants.

The annualized costs per affected registrant and in the aggregate were determined using an average salary of \$100.00 per hour. The Commission believes that this is an appropriate salary estimate for purposes of this regulation. In support of this determination, the Commission notes that the salary estimate is based upon May 2024 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 are employed by the "Securities, Commodity Contracts, and Other Financial Investments and Related Activities Industry," which is \$128.34; the mean hourly wage of an employee under occupation code 11-3031, "Financial Managers," in the same industry, which is \$126.19; and the mean hourly wage of an employee under occupation code-13-1041, "Compliance Officers" in the same industry, which is \$49.34.²⁰

The Commission also notes that it 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. In addition, the Commission recognizes that some respondents may hire outside counsel with expertise in the various regulatory areas covered by the regulation and that outside counsel may be able to leverage its expertise to substantially reduce the number of hours needed to fulfill a requested assignment. While the Commission is uncertain about the billing rates that these respondents may pay for outside counsel, the Commission believes that such counsel may bill at a rate of several hundred dollars per hour. Any determination to use outside counsel, however, is at the discretion of the respondent.

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**

²⁰ See <https://data.bls.gov/oes/#/industry/523000>.

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 information collection required by the regulation does not involve any capital or start-up capital, operations or maintenance costs, as the Commission anticipates that SDs and MSPs already maintain mechanisms to preserve records of their compliance with regulatory requirements as part of their customary or usual business practices.

- 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 regulation would not 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.**

In connection with the Proposal, the Commission is proposing to amend the information collection under OMB Control No. 3038–0079 to reduce the burden for SDs. As discussed in the Proposal, the Commission preliminarily estimates that eliminating the requirement to provide a PTMMM will decrease SDs’ burden hours incurred for each swap transaction under Commission regulation 23.431 by 10% on average across all SDs; and eliminating the Scenario Analysis Requirement as proposed will decrease a SD’s burden hours incurred for each swap transaction under Commission regulation 23.431 by 5% on average across all SDs. Thus, the Commission estimates that the burden hours for compliance with Commission regulation 23.431 will decrease by 15% (from app. 129,540 to 110,108 burden hours). This results in an overall decrease in the Commission’s estimate of total annual burden hours from 254,118 to 234,686 (a decrease of 19,432 annual burden hours), as well as a decrease in associated labor costs from \$235,294 to \$217,302 (a reduction in annual labor costs of \$17,992).²¹

- 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.**

²¹ The Commission has updated its estimate of the number of respondents based on the current number of registered SDs (108 as opposed to the 105 reflected in the previous renewal of this collection). Because the Commission has increased the estimated number of respondents to reflect current registration numbers, these burden estimates likely understate the overall deregulatory reduction in burden associated with the rule amendments.

This question 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.**

This question 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.**

This question does not apply.

Attachment A

Part 23 – Swap Dealer and Major Swap Participant Conflicts of Interest and Business Conduct Standards with Counterparties

OMB Collection File 3038-0079

Annual Estimated Burdens

| Regulation | Estimated # of Registrants Per Year | # of Annual Responses Per Registrant | Total #Annual Responses | Estimated Average # of Hours Per Response (Rounded) | Estimated Total # of Hours of Annual Burden in Fiscal Year (Rounded) | Estimated Annual Cost Per Registrant (\$100/hr) |
|--|-------------------------------------|--------------------------------------|-------------------------|---|--|---|
| 23.605 Recordkeeping | 108 ²² | 21 | 2,268 | 0.6 | 1,296 | \$1,200 |
| 23.605 Disclosure | 108 | 65 | 7,020 | 0.5 | 3,510 | \$3,250 |
| 23.402 Recordkeeping ^{23, 24} | 108 | 252 | 27,216 | 4.3 | 117,720 | \$109,000 |
| 23.430 Disclosure | 108 | 1 | 108 | 1.0 | 108 | \$100 |
| REVISED: 23.431 Disclosure | 108 | 1,000 | 108,000 | 1.2 1.0 | 110,108 | \$101,952 |
| 23.432 Disclosure | 108 | 1 | 108 | 1.0 | 108 | \$100 |
| 23.434 Disclosure | 108 | 1 | 108 | 1.0 | 108 | \$100 |
| 23.440 Disclosure | 108 | 1 | 108 | 1.0 | 108 | \$100 |
| 23.450 Disclosure | 108 | 1 | 108 | 10.0 | 1,080 | \$1,000 |
| 23.451 Reporting ²⁵ | 108 | 1 | 108 | 5.0 | 540 | \$500 |
| Total | 108 | | 145,152 | | 234,686 | \$217,302 |

²² The Commission has updated its estimate of the number of respondents based on the current number of registered SDs (108 as opposed to the 105 reflected in the previous renewal of this collection).

²³ This burden includes all recordkeeping required under the EBCS Rules other than that already included under OMB Collection No. 3038-0087 in relation to records of communications under § 23.202.

²⁴ The Commission expects the paperwork burden of § 23.23(h)(1), where applicable, in relation to exceptions from the EBCS Rules in § 23.23(e) would be less than that of the EBCS Rules. However, in an effort to be conservative, because the Commission does not know how many SDs and/or MSPs will choose to avail themselves of the exceptions in § 23.23(e) and for how many of their swaps, the Commission is not reducing the estimated burden of these rules to reflect the availability of such exceptions.

²⁵ Reporting under § 23.451 (Political contributions by certain swap dealers) is optional and it is unknown how many registrants, if any, will engage in such reporting and how much burden, if any, will be incurred. Nevertheless, the Commission is providing this estimate of the regulation's burden for purposes of the PRA.