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## COMMODITY FUTURES TRADING COMMISSION

### Agency Information Collection Activities; Proposed Collection, Comment Request:

Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping: Book-out Agreement Confirmation

**AGENCY:** Commodity Futures Trading Commission

**ACTION:** Notice

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501 *et seq.*, Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information and to allow 60 days for public comment. The Commission recently adopted a final rule and interpretations, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), requiring that oral book-out agreements must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form. This notice solicits comments on the recordkeeping requirement that is embedded in the final interpretation’s reporting requirement.

**DATES:** Comments must be submitted on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may submit comments, regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, by any of the following methods:

- Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for CFTC, 725 17th Street, Washington, DC 20503.

Comments may also be submitted by any of the following methods:

- The Agency's web site, at <http://comments.cftc.gov/>. Follow the instructions for submitting comments through the web site.
- Mail: David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- Hand Delivery/Courier: Same as mail above.
- Federal eRulemaking Portal: <http://www.regulations.gov>.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.<sup>1</sup>

**FOR FURTHER INFORMATION:** Julian E. Hammar, Assistant General Counsel, at 202-418-5118, [jhammar@cftc.gov](mailto:jhammar@cftc.gov); Lee Ann Duffy, Assistant General Counsel, at 202-418-6763, [lduffy@cftc.gov](mailto:lduffy@cftc.gov); or David E. Aron, Counsel, at 202-418-6621, [daron@cftc.gov](mailto:daron@cftc.gov), Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581

**SUPPLEMENTAL INFORMATION:** Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget ("OMB") for each collection of information they conduct or sponsor. "Collection of Information" is defined in 44 U.S.C. 3502(3) and 5 C.F.R. 1320.3 and includes agency requests or requirements that members of the public submit reports,

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<sup>1</sup> See 17 CFR 145.9.

keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information before submitting the collection to OMB for approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. To comply with this requirement, the CFTC is publishing the notice of the proposed collection of information listed below.

**Abstract:** In accordance with section 712(a)(8), section 712(d)(1), sections 712(d)(2)(B) and (C), sections 721(b) and (c), and section 761(b) of the Dodd-Frank Act, on July 10, 2012, the Commodity Futures Trading Commission (“CFTC”) and the Securities and Exchange Commission (“SEC”) (collectively, “Commissions”), in consultation with the Board of Governors of the Federal Reserve System (“Board”), jointly adopted new rules and interpretations under the Commodity Exchange Act (“CEA”) and the Securities Exchange Act of 1934 (“Exchange Act”) to further define the terms “swap,” “security-based swap,” and “security-based swap agreement” (collectively, “Product Definitions”); regarding “mixed swaps;” and governing books and records with respect to “security-based swap agreements” (collectively, “Adopting Release”).<sup>2</sup>

In the Adopting Release, the CFTC clarified that its “Brent Interpretation” regarding book-outs developed in connection with the forward exclusion from futures applies to the forward exclusion from the swap definition as well. As noted in the Adopting Release, the issue of book-outs first arose in 1990 in the CFTC’s Brent Interpretation. Citing to the Brent Interpretation’s description of book-outs, the Adopting Release stated:

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<sup>2</sup> 77 FR 48207, August 13, 2012 (“Product Definitions”)

It is noteworthy that while such [book-out] agreements may extinguish a party's delivery obligation, they are separate, individually negotiated, new agreements, there is no obligation or arrangement to enter into such agreements, they are not provided for by the terms of the contracts as initially entered into, and any party that is in a position in a distribution chain that provides for the opportunity to book-out with another party or parties in the chain is nevertheless entitled to require delivery of the commodity to be made through it, as required under the contracts.<sup>3</sup>

In response to a comment to the proposed rule, the interpretation included in the Adopting Release clarified that an oral book-out agreement must be followed in a commercially reasonable timeframe by a confirmation in some type of written or electronic form. If a party to a contract elects to enter into such a book-out agreement, the collection of information would be mandatory to qualify for the Brent Interpretation Safe Harbor. If the Commission obtains information required to be kept through this collection, it would protect proprietary information in accordance with the Freedom of Information Act and 17 CFR part 145, "Commission Records and Information." In addition, Section 8(a)(1) of the CEA 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."<sup>4</sup> The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974, 5 U.S.C. 552a.

**Burden Statement:** The respondent burden for this collection is estimated to be 10 minutes per response. This estimate includes the time to prepare the written or electronic confirmation to an oral book-out agreement. The Commission estimates the average burden of this collection of information as follows:

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<sup>3</sup> Statutory Interpretation Concerning Forward Transactions, 55 FR 39188, 39192 Sept. 25, 1990, ("Brent Interpretation").

<sup>4</sup> 7 U.S.C. 12(a)(1).

Estimated Annual Reporting Burden Hours					
17 C.F.R.	Annual Number of Respondents	Frequency of Response per Respondent	Hours per Response and cost	Total Annual Responses	Total Hours Cost
17 C.F.R. Part 1	30,000	On occasion, 1- 2 annually	10 minutes per response (.166 hour), at \$16.60 per response. <sup>5</sup>	45,000, (average of 1-2 annually for a total of 30,000 – 60,000 annually)	7,470 (average of 5,000 -10,000 total hours annually <sup>6</sup> ; \$747,000, based on \$100/hour. <sup>7</sup>

<sup>5</sup> Cost per response: .166 x \$100, Average: 1.5 x .166 x \$100. The Commission estimates that entities will spend \$100 per hour. The \$100 per hour estimate was used as the average hourly wage rate in the PRA section of the Internal Business Conduct Standards for Swap Dealers and Major Swap Participants final rule (See 77 FR 20128, 20194) and the wage rate for Chief Compliance Officers under the Derivatives Clearing Organization final rules (See 76 FR 69344, 69428). As the Commission explained in the Internal Business Conduct Standards final rule, the estimate of \$100 per hour was based on recent Bureau of Labor Statistics findings, including the mean hourly wage of an employee under occupation code 23-1011, “Lawyers,” that is employed by the “Securities and Commodity Contracts Intermediation and Brokerage Industry,” which is \$82.22. The mean hourly wage of an employee under occupation code 11-3031, “Financial Manager,” in the same industry is \$74.41. Additionally, SIFMA’s “Report on Management & Professional Earnings in the Securities Industry – 2010” estimates the average wage of a compliance attorney and a compliance staffer in the U.S. at only \$46.31 per hour. As in those rules, the Commission is using a \$100 per hour wage rate in calculating the cost burdens imposed by this collection of information and requests comment on the accuracy of its estimate.

Respondents/Affected Entities: 30,000.

Estimated average number of responses: 45,000 [1-2 annually for a total of 30,000 – 60,000 annually]

Estimated total average annual burden on respondents: 7,470 [5,000 – 10,000] hours

Frequency of collection: Occasionally, 1-2 annually.

Average total cost: \$747,000

There are no capital costs or operating and maintenance costs associated with this collection. The Commission believes that, as part of customary and usual business practices, most respondents already create and store book-out agreements in either a written or electronic format.

The Commission invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

Dated: August 13, 2012

Sauntia Warfield

Assistant Secretary of the Commission

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<sup>6</sup> Total number of hours arrived by multiplying the average number of responses,  $[(30,000 + 60,000)/2] \times .166$  minutes = 7,470 hours.

<sup>7</sup> 7,470 hours x \$100 per hour = \$747,000

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