



COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Proposed Collection, Comment Request: Final Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements

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”), Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information, including proposed extension of an existing collection of information, and to allow 60 days for public comment. This notice is being published concurrently with the publication and adoption of the final rule titled “Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements” (“Final Rule”), which addresses the cross-border application of the Commission’s margin requirements for uncleared swaps of covered swap entities (“CSEs”). This notice solicits comments on a new information collection that applies to CSEs that rely on a special provision of the Final Rule applicable to certain foreign jurisdictions where CSEs are unable to conclude, with a well-founded basis, that the netting agreement with a counterparty in that foreign jurisdiction meets the definition of an “eligible master netting agreement” set forth in the Commission’s final margin rule (“Final Margin Rule”) (“non-netting jurisdictions”).

This notice also solicits comments on a new information collection that applies to Foreign Consolidated Subsidiaries (as defined in the Final Rule) and foreign branches of U.S. CSEs that rely on a special provision of the Final Rule applicable to certain foreign jurisdictions where limitations in the legal or operational infrastructure of the jurisdiction make it impracticable for the CSE and its counterparty to post initial margin pursuant to custodial arrangements that comply with the Final Margin Rule (“non-segregation jurisdictions”). The new information collections covered by this notice require CSEs that avail themselves of the special provisions for non-netting jurisdictions and non-segregation jurisdictions, respectively, to maintain books and records properly documenting that all of the requirements of the special provision(s) upon which they rely are satisfied (including policies and procedures ensuring that they are in compliance with any applicable requirements).

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

ADDRESSES: You may submit comments, identified by “Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Comparability Determinations with Margin Requirements,” and “OMB Control No. 3038-0111,” 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: Christopher Kirkpatrick, 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/>. Follow the

instructions for submitting comments through the Portal.

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 <http://www.cftc.gov>.

FOR FURTHER INFORMATION CONTACT: Laura B. Badian, Assistant General Counsel, (202) 418-5969, lbadian@cftc.gov; Paul Schlichting, Assistant General Counsel, (202) 418-5884, pschlichting@cftc.gov; Elise Bruntel, Counsel, (202) 418-5577, ebruntel@cftc.gov; or Herminio Castro, Counsel, (202) 418-6705, hcastro@cftc.gov; Office of the General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY 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 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, 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, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

Title: Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Comparability Determinations with Margin Requirements. (OMB Control No. 3038-0111). This is a request for a revision of a currently approved information collection.

Abstract: Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”),¹ amended the Commodity Exchange Act (“CEA”), to add, as section 4s(e) thereof, provisions concerning the setting of initial and variation margin requirements for swap dealers and major swap participants.² Each swap dealer and major swap participant for which there is a Prudential Regulator, as defined in section 1a(39) of the CEA,³ must meet margin requirements established by the applicable Prudential Regulator, and each CSE must comply with the Commission's margin requirements. With regard to the cross-border application of the swap provisions enacted by Title VII of the Dodd-Frank Act, section 2(i) of the CEA provides the Commission with express authority over activities outside the United States relating to swaps when certain conditions are met. Specifically, section 2(i) of the CEA provides that the provisions of the CEA relating to swaps enacted by Title VII of the Dodd-Frank Act (including Commission rules and regulations promulgated thereunder) shall not apply to activities outside the United States unless those activities (1) have a direct and significant connection with activities in, or effect on, commerce of the United States or (2) contravene such rules or regulations as the Commission may prescribe or promulgate as

¹ Pub. L. 111–203, 124 Stat. 1376 (2010).

² 7 U.S.C. 6s(e).

³ 7 U.S.C. 1a(39).

are necessary or appropriate to prevent the evasion of any provision of Title VII.⁴

Because margin requirements are critical to ensuring the safety and soundness of a CSE and supporting the stability of the U.S. financial markets, the Commission believes that its margin rules should apply on a cross-border basis in a manner that effectively addresses risks to the registered CSE and the U.S. financial system.

Concurrently with this notice, the Commission published a Final Rule that establishes margin requirements for uncleared swaps of CSEs (with substituted compliance available in certain circumstances), except as to a narrow class of uncleared swaps between a non-U.S. CSE and a non-U.S. counterparty that fall within a limited exclusion (the “Exclusion”). As described below, the adopting release for the Final Rule contained a collection of information regarding requests for comparability determinations, which was previously included in the proposing release, and for which the Office of Management and Budget (“OMB”) assigned OMB control number 3038-0111, titled “Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Comparability Determinations with Margin Requirements.” In addition, the adopting release included two additional information collections regarding non-segregation jurisdictions⁵ and non-netting jurisdictions⁶ that were not previously proposed. Accordingly, the Commission, through this notice is requesting approval by OMB of this new information collection under OMB Control Number 3038-0111.

⁴ 7 U.S.C. 2(i).

⁵ As used in the adopting release, a “non-segregation jurisdiction” is a jurisdiction where inherent limitations in the legal or operational infrastructure of the foreign jurisdiction make it impracticable for the CSE and its counterparty to post initial margin pursuant to custodial arrangements that comply with the Commission’s margin rules, as further described in section II.B.4.b of the adopting release.

⁶ As used in the adopting release, a “non-netting jurisdiction” is a jurisdiction in which a CSE cannot conclude, with a well-founded basis, that the netting agreement with a counterparty in that foreign jurisdiction meets the definition of an “eligible master netting agreement” set forth in the Final Margin Rule, as described in section II.B.5.b of the adopting release.

Section 23.160(d) of the Final Rule includes a special provision for non-netting jurisdictions. This provision allows CSEs that cannot conclude after sufficient legal review with a well-founded basis that the netting agreement with a counterparty in a foreign jurisdiction meets the definition of an “eligible master netting agreement” set forth in the Final Margin Rule to nevertheless net uncleared swaps in determining the amount of margin that they post, provided that certain conditions are met.⁷ In order to avail itself of this special provision, the CSE must treat the uncleared swaps covered by the agreement on a gross basis in determining the amount of initial and variation margin that it must collect, but may net those uncleared swaps in determining the amount of initial and variation margin it must post to the counterparty, in accordance with the netting provisions of the Final Margin Rule.⁸ A CSE that enters into uncleared swaps in “non-netting” jurisdictions in reliance on this provision must have policies and procedures ensuring that it is in compliance with the special provision’s requirements, and maintain books and records properly documenting that all of the requirements of this exception are satisfied.⁹

Section 23.160(e) of the Final Rule includes a special provision for non-segregation jurisdictions that allows non-U.S. CSEs that are Foreign Consolidated Subsidiaries (as defined in the Final Rule) and foreign branches of U.S. CSEs to engage

⁷ The Final Margin Rule permits offsets in relation to either initial margin or variation margin calculation when (among other things), the offsets related to swaps are subject to the same eligible master netting agreement. This ensures that CSEs can effectively foreclose on the margin in the event of a counterparty default, and avoids the risk that the administrator of an insolvent counterparty will “cherry-pick” from posted collateral to be returned.

⁸ In the event that the special provision for non-segregation jurisdictions applies to a CSE, then the special provision for non-netting jurisdictions would not apply to the CSE even if the relevant jurisdiction is also a “non-netting jurisdiction.” In this circumstance, the CSE must collect the gross amount of initial margin in cash (but would not be required to post initial margin), and post and collect variation margin in cash in accordance with the requirements of the special provision for non-segregation jurisdictions, as discussed in section II.B.4.b.

⁹ See § 23.160(d) of the Final Rule.

in swaps in foreign jurisdictions where inherent limitations in the legal or operational infrastructure make it impracticable for the CSE and its counterparty to post collateral in compliance with the custodial arrangement requirements of the Commission's margin rules, subject to certain conditions. In order to rely on this special provision, a Foreign Consolidated Subsidiary or foreign branch of a U.S. CSE is required to satisfy all of the conditions of the rule, including that (1) inherent limitations in the legal or operational infrastructure of the foreign jurisdiction make it impracticable for the CSE and its counterparty to post any form of eligible initial margin collateral for the uncleared swap pursuant to custodial arrangements that comply with the Commission's margin rules; (2) foreign regulatory restrictions require the CSE to transact in uncleared swaps with the counterparty through an establishment within the foreign jurisdiction and do not permit the posting of collateral for the swap in compliance with the custodial arrangements of section 23.157 of the Final Margin Rule in the United States or a jurisdiction for which the Commission has issued a comparability determination under the Final Rule with respect to section 23.157; (3) the CSE's counterparty is not a U.S. person and is not a CSE, and the counterparty's obligations under the uncleared swap are not guaranteed by a U.S. person;¹⁰ (4) the CSE collects initial margin in cash on a gross basis, in cash, and posts and collects variation margin in cash, for the uncleared swap in accordance with the Final Margin Rule; (5) for each broad risk category, as set out in § 23.154(b)(2)(v) of the Final Margin Rule, the total outstanding notional value of all uncleared swaps in that broad risk category, as to which the CSE is relying on § 23.160 (e), may not exceed 5

¹⁰ The Commission would expect the CSE's counterparty to be a local financial end user that is required to comply with the foreign jurisdiction's laws and that is prevented by regulatory restrictions in the foreign jurisdiction from posting collateral for the uncleared swap in the United States or a jurisdiction for which the Commission has issued a comparability determination under the Final Rule, even using an affiliate.

percent of the CSE's total outstanding notional value for all uncleared swaps in the same broad risk category; (6) the CSE has policies and procedures ensuring that it is in compliance with the requirements of this provision; and (7) the CSE maintains books and records properly documenting that all of the requirements of this provision are satisfied.¹¹ The new information collections covered by this notice require CSEs to have policies and procedures ensuring that they are in compliance with all of the requirements of the special provisions for non-netting jurisdictions and non-segregation provisions, respectively, and to maintain books and records properly documenting that all of the requirements of the special provisions for non-netting jurisdictions and non-segregation jurisdictions, respectively, are satisfied. Both information collections are necessary as a means for the Commission to be able to determine that CSEs relying on these special provisions are entitled to do so and are complying with the special provisions' requirements. Both information collections are also necessary to implement sections 4s(e) of the CEA, which mandates that the Commission adopt rules establishing minimum initial and variation margin requirements for CSEs on all swaps that are not cleared by a registered derivatives clearing organization, and section 2(i) of the CEA, which provides that the provisions of the CEA relating to swaps that were enacted by Title VII of the Dodd-Frank Act (including any rule prescribed or regulation promulgated thereunder) apply to activities outside the United States that have a direct and significant connection with activities in, or effect on, commerce of the United States. 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 OMB control number.

¹¹ See 17 CFR 23.160(e).

With respect to each new collection of information, the CFTC 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.

You should submit only information that you wish to make available publicly. 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.¹²

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene

¹² 17 CFR 145.9.

language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Burden Statement—Information Collection for Non-Netting Jurisdictions:

The Commission estimates that approximately 54 CSEs may rely on section 23.160(d) of the Final Rule.¹³ Furthermore, the Commission estimates that these CSEs would incur an average of 10 annual burden hours to maintain books and records properly documenting that all of the requirements of this exception are satisfied (including policies and procedures ensuring that they are in compliance). Based upon the above, the estimated hour burden for collection is calculated as follows:

Estimated number of respondents per year: 54.

Estimated burden hours per registrant: 10.

Estimated total annual burden hours: 540.

Frequency of collection: Once; As needed.

Burden Statement—Information Collection for Non-Segregation

Jurisdictions: The Commission currently estimates that there are between five and ten jurisdictions for which the first two conditions specified above for non-segregation jurisdictions are satisfied and where Foreign Consolidated Subsidiaries and foreign branches of U.S. CSEs that are subject to the Commission's margin rules may engage in swaps. The Commission estimates that approximately 12 Foreign Consolidated

¹³ Currently, there are approximately 106 swap entities provisionally registered with the Commission. The Commission estimates that of the approximately 106 swap entities that are provisionally registered, approximately 54 are CSEs that are subject to the Commission's margin rules as they are not subject to a Prudential Regulator. Because all of these CSEs are eligible to use the special provision for non-netting jurisdictions, the Commission estimates that 54 CSEs may rely on section 23.160(d) of the Final Rule.

Subsidiaries and foreign branches of U.S. CSEs may rely on section 23.160(e) of the Final Rule in some or all of these jurisdiction(s). The Commission estimates that each FCS or foreign branch of a U.S. CSE relying on this provision would incur an average 20 annual burden hours to maintain books and records properly documenting that all of the requirements of this provision are satisfied (including policies and procedures ensuring that they are in compliance) with respect to each jurisdiction as to which they rely on the special provision. The Commission further estimates that each FCS or foreign branch of a U.S. CSE relying on this provision would incur an average of 150 additional burden hours per year for all jurisdictions as to which they rely on the provision. Based upon the above, the estimated hour burden for collection is calculated as follows:

Estimated number of respondents per year: 12.

Estimated burden hours per registrant: 150.

Estimated total annual burden hours: 1,800 hours.

Frequency of collection: Once; As needed.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 et seq.)

Dated: May 24, 2016

Christopher J. Kirkpatrick,
Secretary of the Commission.

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