

An option, in contrast, is only the option to undertake such a "sale", not the sale itself. The sale occurs only when the option is exercised. The option to buy or sell a commodity at some later point simply is not the same thing as the sale of that commodity itself. The Commission's Office of the General Counsel memorialized this interpretation in 1985:

[T]he [forward] contract must be a binding agreement on both parties to the contract: One must agree to make delivery and the other to take delivery of the commodity. Second, because forward contracts are commercial, merchandizing transactions which result in delivery, the courts and the Commission have looked for evidence of the transactions' use in commerce. Thus, the courts and the Commission have examined whether the parties to the contracts are commercial entities that have the capacity to make or take delivery and whether delivery, in fact, routinely occurs under such contracts

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Thus, an option is a contract in which only the grantor is obligated to perform. As a result, the option purchaser has a limited risk from adverse price movements. This characteristic distinguishes an option from a forward contract in which both parties must routinely perform and face the full risk of loss from adverse price changes since one party must make and the other take delivery of the commodity. In contrast, in an option, only the grantor of a call (put) is required to sell (buy) a given quantity of a commodity (or a futures contract on that commodity) on or by a specified date in the future if the option is exercised. "*Characteristics Distinguishing Cash and Forward Contracts and 'Trade Options'*", 50 FR 39656-02 (September 30, 1985)

The Commission ratified this interpretation in 1990 in its "*Statutory Interpretation Concerning Forward Transactions*", 55 FR 39188-03 (September 25, 1990) ("*Brent Interpretation*") and again in 2012 its final rule, "*Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based*

contract. Because a forward contract is a commercial merchandising transaction, intent to deliver historically has been an element of the CFTC's analysis of whether a particular contract is a forward contract. In assessing the parties' expectations or intent regarding delivery, the CFTC consistently has applied a "facts and circumstances" test. Therefore, the CFTC reads the "intended to be physically settled" language in the swap definition with respect to nonfinancial commodities to reflect a directive that intent to deliver a physical commodity be a part of the analysis of whether a given contract is a forward contract or a swap, just as it is a part of the CFTC's analysis of whether a given contract is a forward contract or a futures contract. Proposed rule on "*Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*", 76 FR 29818, 29828 (May 23, 2011) ("*Proposed Products Release*").

This interpretation was ratified in the final rule, "*Further Definition of 'Swap,' 'Security-Based Swap,' and 'Security-Based Swap Agreement'; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*", 77 FR 48208, 48227-48228 (August 13, 2012) ("*Products Release*").

*Swap Agreement Recordkeeping*, 77 FR 48208, 48227-48235 (August 13, 2012) ("*Products Release*"). In doing so, the Commission explicitly rejected the argument that physically-delivered commodity options could fall within the forward contract exclusion.<sup>2</sup>

The interpretation being promulgated today does not change this, and therein lays my concern regarding this interpretation's limits.

I think much of the confusion regarding the seven-part test has been based upon a failure to recognize the difference between forward and option contracts under the Commodity Exchange Act. The fact that a forward contract element and a commodity option are packaged together does not change the regulatory treatment of the different components. Hybrid or packaged instruments are common throughout the industry. There are hybrid or packaged instruments which may have characteristics of futures contracts and securities, swaps and security-based swaps, futures and forward transactions, and even forward contracts and commodity options. Each portion of the contract might be subject to different regulatory treatment. A security does not become a future, nor does a future become a security simply by virtue of being packaged in the same instrument.

Relevant to the instruments we are discussing today, forward contracts with embedded volumetric optionality, it seems that most of them, as described in the comments, have at least two separate, identifiable contractual obligations, each of which must be considered on their own merits. There is a forward contract element which binds the parties to make and take delivery of a set amount of a commodity. In addition, there is an embedded volumetric optionality element that binds the forward contract offeror to make or take delivery of an additional amount of the commodity if the embedded volumetric optionality is exercised by the forward contract offeree. The latter contractual obligation looks like a classic option.

The difficulty this interpretation faces in providing the relief industry seeks is this: Even though the embedded optionality has the form of an option, can it somehow fit within the forward exclusion? The answer this interpretation gives is, essentially, yes, it can, if it can be demonstrated that, despite the embedded optionality having the form of an option, it is utilized, in practice, as a forward contract. While the seven-prong test and the interpretive guidance around it do not provide an exact roadmap for determining when embedded volumetric optionality included in a forward contract may or may not fall into the option definition, or when embedded volumetric optionality may undermine a forward contract, I think it does provide a good sense of the factors that parties must consider in making those determinations for themselves.

Such a test, however, is necessarily a facts and circumstances test with no bright lines. Ensuring compliance with this interpretation poses a challenge, and, therefore, that is an area where I would like to see greater legal certainty for these contracts.

<sup>2</sup> See also, *Products Release* at 4236-37.

In closing, I support this final interpretation, but I think industry would benefit from broader relief that provides greater legal certainty. I look forward to continuing to work with my fellow Commissioners and staff to make sure that commercial entities have access to the tools they need to manage the commercial risks of their operations.

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## BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2015-0020]

### Agency Information Collection Activities: Comment Request

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Notice and request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (PRA), the Consumer Financial Protection Bureau (Bureau) is requesting to renew the approval for an existing information collection titled, "Mortgage Acts and Practices (Regulation N) 12 CFR 1014."

**DATES:** Written comments are encouraged and must be received on or before July 17, 2015 to be assured of consideration.

**ADDRESSES:** You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- Electronic: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552.
- Hand Delivery/Courier: Consumer Financial Protection Bureau (Attention: PRA Office), 1275 First Street NE., Washington, DC 20002.

*Please note that comments submitted after the comment period will not be accepted.* In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or social security numbers, should not be included.

**FOR FURTHER INFORMATION CONTACT:** Documentation prepared in support of this information collection request is available at [www.regulations.gov](http://www.regulations.gov). Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention:

PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435-9575, or email: [PRA@cfpb.gov](mailto:PRA@cfpb.gov). Please do not submit comments to this mailbox.

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Mortgage Acts and Practices (Regulation N) 12 CFR 1014.

*OMB Control Number:* 3170-0009.

*Type of Review:* Extension without change of a currently approved collection.

*Affected Public:* Businesses and other for-profit institutions.

*Estimated Number of Respondents:* 483.

*Estimated Total Annual Burden*

*Hours:* 242.

*Abstract:* Regulation N (12 CFR 1014), prohibits misrepresentations about the terms of mortgage credit products in commercial communications and requires that covered persons keep certain related records for a period of twenty-four (24) months from last dissemination. The information that Regulation N requires covered persons to retain is necessary to ensure efficient and effective law enforcement to address deceptive practices that occur in the mortgage advertising area.

*Request for Comments:* Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

Dated: May 15, 2015.

**Ashwin Vasana,**

*Chief Information Officer, Bureau of Consumer Financial Protection.*

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**CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**

**Proposed Information Collection; Comment Request**

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Notice.

**SUMMARY:** The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of the AmeriCorps Member Application Form. Applicants will respond to the questions included in this ICR in order to apply to serve as AmeriCorps members.

Copies of the information collection request can be obtained by contacting the office listed in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by July 17, 2015.

**ADDRESSES:** You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, AmeriCorps State & National; ATTN: Erin Dahlin, Deputy Chief of Program Operations, 1201 New York Avenue NW., Washington, DC 20525.

(2) *By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.*

(3) *Electronically through [www.regulations.gov](http://www.regulations.gov).*

Individuals who use a telecommunications device for the deaf (TTY-TDD) may call 1-800-833-3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Erin Dahlin, 202-606-6931 or [EDahlin@cns.gov](mailto:EDahlin@cns.gov).

**SUPPLEMENTARY INFORMATION:** CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary

for the proper performance of the functions of CNCS, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

**Background**

This Member Application Form will be used by applicants who are interested in serving as AmeriCorps members. The information requested in the application form makes it possible for programs to select members to serve. Programs also use this form as an example that they customize to develop their own recruitment materials.

**Current Action**

Changes have been made align form with program and technological needs and resources. The information collection will otherwise be used in the same manner as the existing application. CNCS also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on July 31, 2015.

*Type of Review:* Renewal.

*Agency:* Corporation for National and Community Service.

*Title:* AmeriCorps Member Application Form.

*OMB Number:* 3045-0054.

*Agency Number:* None.

*Affected Public:* Applicants applying to serve in AmeriCorps.

*Total Respondents:* 225,000.

*Frequency:* Ongoing.

*Average Time per Response:* Averages 1.25 hours.

*Estimated Total Burden Hours:* 281,250.

*Total Burden Cost (capital/startup):* None.

*Total Burden Cost (operating/maintenance):* None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.