

SUPPORTING STATEMENT
FOR THE PAPERWORK REDUCTION ACT SUBMISSION FOR A NEW
INFORMATION COLLECTION
“IMPLEMENTING THE WHISTLEBLOWER PROVISIONS OF SECTION 21F OF
THE SECURITIES EXCHANGE ACT OF 1934”

A. JUSTIFICATION

1. NECESSITY OF INFORMATION COLLECTION

In Release No. 34-63237,¹ the Securities and Exchange Commission (the “Commission”) proposed a rule and form requirements under the Securities Exchange Act of 1934 relating to securities whistleblower incentives and protection. The proposal is designed to provide guidelines for the implementation of the Whistleblower Program, established by the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 (“Dodd-Frank”), which requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. The proposed rule defines certain terms critical to the operation of the Whistleblower Program, outlines the procedures for applying for awards and the Commission’s procedures for making decisions on claims, and generally explains the scope of the Whistleblower Program to the public and to potential whistleblowers. Although the proposed rule is comprehensive and will impose new burdens, the Commission believes that the rule will enhance investor protection and promote efficient capital formation.²

The proposed rule contains “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995. The titles for the collections of information contained in the proposed rule are:

- “Form TCR” (a proposed new collection of information);
- “Form WB-DEC” (a proposed new collection of information); and
- “Form WB-APP” (a proposed new collection of information).

¹ Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237(November 3, 2010) [__ FR ____].

² See Summary and Section I of Release No. 34-63237.

2. PURPOSE AND USE OF THE INFORMATION COLLECTION

The purpose of the proposed collections of information is to permit the Commission and its staff to collect information from whistleblowers regarding alleged violations of the federal securities laws and to determine claims for whistleblower awards.

3. CONSIDERATION GIVEN TO INFORMATION TECHNOLOGY

Each of the collections of information discussed above will be submitted to the Commission in paper format.³

4. DUPLICATION

We are not aware of any rules that conflict with or substantially duplicate the proposed rules.

5. REDUCING THE BURDEN ON SMALL BUSINESSES

The proposed rule would not impact small entities. Small entity is defined in 5 U.S.C. 601(6) to mean “small business,” “small organization,” and “small governmental jurisdiction” as defined in 5 U.S.C. 601(3) – (5). The definition of “small entity” does not include individuals. The proposed rule applies only to an individual, or individuals acting jointly, who provide information to the Commission relating to the violation of the securities laws. Companies and other entities are not eligible to participate in the program as whistleblowers. Consequently, the persons that would be subject to the proposed rule are not “small entities”

6. CONSEQUENCES OF LESS FREQUENT COLLECTION

The objectives of the Whistleblower Program under the Exchange Act could not be met with less frequent collection of this information.

³ The Commission anticipates that, by the time final rules are adopted to implement Section 21F, potential whistleblowers will be able to submit information to the Commission online through the Electronic Data Collection System, an interactive, web-based database for submission of tips, complaints and referrals. Both methods of submission are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. For purposes of these rules, the Commission is only discussing proposed Forms TCR, WB-DEC and WB-APP. The Commission will be separately submitting a request to the Office of Management and Budget for Paperwork Reduction Act approval of the new information collection titled “Electronic Data Collection System”.

7. SPECIAL CIRCUMSTANCES/INCONSISTENCIES WITH GUIDELINES IN 5 CFR 1320.5(d)(2)

In certain Commission cases and related actions a whistleblower's Form WB-DEC will need to be retained for more than three years. The proposed rule requires that an anonymous whistleblower's attorney retain the whistleblower's original signed Form WB-DEC until the Commission staff requests that the whistleblower disclose his or her identity. Section 21F-10(c) of the proposed rule requires that an anonymous whistleblower disclose his identity on Form WB-APP, which can only be submitted after the Commission has published a "Notice of Covered Action" signifying the entry of a final judgment or order in a covered action. On occasions in which an anonymous whistleblower submits his Form WB-APP more than three years after his attorney filed the Form WB-DEC with the Commission, that whistleblower's attorney must retain the original Form WB-DEC, signed by his client, beyond three years.

For the circumstance described above, the retention of Form WB-DEC for more than three years is necessary to satisfy the requirements of Section 922 of Dodd-Frank and the Commission's programmatic needs to allow whistleblowers to submit information anonymously and the Commission to verify the whistleblower's identity prior to the payment of any award. Because this is a proposed rule, the Commission does not currently have historical data to determine the frequency with which attorneys will need to retain the original Form WB-DEC longer than three years. However, the Commission will be able to collect, analyze and assess such data in the future after the Whistleblower Program is implemented.

8. CONSULTATION OUTSIDE THE AGENCY

The Commission has issued a release soliciting comment on the new "collection of information" requirements and associated paperwork burdens. A copy of the release is attached. Comments on Commission releases are generally received from registrants, investors, and other market participants. In addition, the Commission and staff participate in ongoing dialogue with representatives of various market participants through public conferences, meetings and informal exchanges. The Commission will consider all comments received.

9. PAYMENT OR GIFT TO RESPONDENTS

Not applicable.

10. CONFIDENTIALITY

The information in the collections of information discussed above will not be made publicly available, except as provided by Section 21F(h)(2) of the Exchange Act. That provision states that, except as expressly provided:

[T]he Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission [or certain specific entities listed in subparagraph (C) of Section 21F(h)(2)].

Section 21F(h)(2) also allows the Commission to share information received from whistleblowers with certain domestic and foreign regulatory and law enforcement agencies. However, the statute requires the domestic entities to maintain such information as confidential, and requires foreign entities to maintain such information in accordance with such assurances of confidentiality as the Commission deems appropriate.

11. SENSITIVE QUESTIONS

Not applicable.

12. BURDEN OF INFORMATION COLLECTION

The paperwork burden estimates associated with the proposal include the burdens attributable to preparing, reviewing and reporting information to the Commission and retaining records. The total burden is estimated to be 10,734 hours annually.

Our PRA reporting burden estimates for each of the collections of information are based on average times and costs incurred by individuals to prepare a particular collection of information. Form TCR is a form that is submitted by whistleblowers who wish to provide information to the Commission and its staff regarding potential violations of the securities laws. Form WB-DEC is a form that is submitted by whistleblowers who wish to be considered for an award in connection with the information they provide to the Commission. Form WB-APP is a form that is submitted by whistleblowers filing a claim for a whistleblower award.

a. Form TCR

The Commission estimates that it would receive approximately 30,000 completed Forms TCR and electronic submissions through the Electronic Data Collection System

each year.⁴ Of those 30,000 submissions, the Commission estimates that it would receive approximately 3,000 Forms TCR each year.⁵ Each respondent would submit only one Form TCR and would not have a recurring obligation. The Commission also estimates that it would take a whistleblower, on average, one hour to complete Form TCR. The completion time will depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of the allegations. As a result, the Commission estimates that the estimated annual PRA burden of Form TCR is 3,000 hours. This is a mandatory form.

b. Form WB-DEC

The Commission estimates that it would receive a Form WB-DEC in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.⁶ As noted above, the Commission estimates that it would receive approximately 30,000 combined electronic submissions and submissions on Form TCR each year. Thus, the Commission estimates that it would receive approximately 15,000 Forms WB-DEC each year. Each respondent would submit only one Form WB-DEC and would not have a recurring obligation. The Commission also estimates that it would take a whistleblower, on average, 0.5 hours to complete Form WB-DEC. As a result, the Commission estimates that the annual PRA burden of Form WB-DEC is 7,500 hours. This is a mandatory form.

c. Form WB-APP

The Commission estimates that it would receive approximately 117 Forms WB-APP each year. This number is a staff estimate based upon several expectations: first, that the Commission would annually post approximately 130 of the prerequisite Notices of Covered Action⁷; second, that the Commission would receive Forms WB-APP in approximately 30 percent of cases in which it posts a Notice of Covered Action; and third, that we will receive approximately 3 Forms WB-APP in each of those cases. Because this is a new program, the staff does not have historical data on which it can base these estimates.

⁴ This number is a staff estimate based upon the volume of tips, complaints or referrals received by the Commission on a monthly basis during the past year. The staff believes that the volume of tips, complaints and referrals the Commission has received more recently, and particularly in the months since the passage of Dodd-Frank, provides a more accurate basis for estimating future volumes.

⁵ This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission would be submitted in hard copy on proposed Form TCR. The staff anticipates that most whistleblowers would elect to submit their information electronically.

⁶ This number is a staff estimate. Because this is a new program, the staff does not have historical data on which it can base its estimate.

⁷ A whistleblower could only submit a Form WB-APP after there has been a “Notice of Covered Action” published on the Commission’s website pursuant to Proposed Rule 21F-10.

The Commission also estimates that it would take a whistleblower, on average, two hours to complete Form WB-APP. The completion time would depend largely on the complexity of the alleged violation and the amount of information the whistleblower possesses in support of his application for an award. As a result, the Commission estimates that the annual PRA burden of Form WB-APP is 234 hours. This is a mandatory form.

13. COST BURDEN TO RESPONDENTS/RECORDKEEPERS

Under the Proposed Rules, a whistleblower who discloses his identity may elect, and an anonymous whistleblower is required, to retain counsel to represent the whistleblower in the Whistleblower Program. The Commission expects that in most of those instances the whistleblower's counsel will complete, or assist in the completion, of some or all of the required forms on behalf of the whistleblower. However, the Commission also expects that in the vast majority of cases in which a whistleblower is represented by counsel, the whistleblower will enter into a contingency fee arrangement with counsel, providing that counsel will be paid a fixed percentage of any recovery by the whistleblower under the Program. Thus, most whistleblowers will not incur any direct, quantifiable expenses for attorneys' fees for the completion of the required forms.

The Commission anticipates that a small number of whistleblowers (no more than five percent of all whistleblowers) will enter into hourly fee arrangements with counsel.⁸ In those cases, a whistleblower will incur direct expenses for attorneys' fees for the completion of the required forms. To estimate those expenses, the Commission makes the following assumptions:

- (i) The Commission will receive approximately 3,000 Forms TCR, 15,000 Forms WB-DEC, and 117 Forms WB-APP annually⁹;
- (ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 150 Forms TCR, 750 Forms WB-DEC, and 6 Forms WB-APP annually¹⁰;
- (iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average \$400 per hour¹¹; and

⁸ This estimate is based, in part, on the Commission's belief that most whistleblowers likely will not retain counsel to assist them in preparing the forms.

⁹ The bases for these assumed amounts are explained in Section 12 above.

¹⁰ These amounts are based on the assumption, as noted above, that no more than 5 percent of all whistleblowers will be represented by counsel pursuant to an hourly fee arrangement. The estimate of the number of Forms TCR submitted by attorneys on behalf of whistleblowers may turn out to be high because it is likely that most attorneys will submit tips electronically, rather than use the hard-copy Form TCR. However, in the absence of any historical data to rely upon, the Commission assumes that attorneys will submit hard-copy Forms TCR in the same percentages as all whistleblowers.

¹¹ The Commission uses this hourly rate for estimating the billing rates of securities lawyers for purposes of other rules. Absent historical data for the Commission to rely upon in connection with the Whistleblower Program, the Commission believes that this billing rate estimate is appropriate, recognizing that some attorneys representing whistleblowers may or may not be securities lawyers.

- (iv) Counsel will bill on average: (i) 2 hours to complete a Form TCR, (ii) .5 hours to complete a Form WB-DEC, and (iii) 10 hours to complete a Form WB-APP.¹²

Based on those assumptions, the Commission estimates that each year whistleblowers will incur the following total amounts of attorneys' fees for completion of the Whistleblower Program forms: (i) \$120,000 for the reporting burden of Form TCR; (ii) \$75,000 for the reporting burden of Form WB-DEC and \$75,000 for the recordkeeping burden of Form WB-DEC; and (iii) \$24,000 for the reporting burden of Form WB-APP, totaling \$294,000 annually.

14. COSTS TO FEDERAL GOVERNMENT

The collections of information referenced in this supporting statement are new. Therefore the Commission staff does not have historical data on which to prepare a reliable estimate of the cost to the government. After the whistleblower program is in place and the staff has reviewed the associated costs, the staff will provide an estimate.

15. REASON FOR CHANGE

Not applicable. This is the first request for approval of the collection of information for this rule.

16. INFORMATION COLLECTIONS PLANNED FOR STATISTICAL PURPOSES

Not applicable.

17. DISPLAY OF OMB APPROVAL DATE

Not applicable.

18. EXCEPTIONS TO CERTIFICATION

Not applicable.

¹² The Commission expects that counsel will likely charge a whistleblower for additional time required to gather from the whistleblower or other sources relevant information needed to complete Forms TCR and WB-APP. Accordingly, the Commission estimates that on average counsel will bill a whistleblower two hours for the completion of Form TCR and ten hours for completion of Form WB-APP (even though the Commission estimates that a whistleblower will be able to complete Form TCR in one hour and Form WB-APP in two hours).

B. INFORMATION COLLECTION EMPLOYING STATISTICAL METHODS

Not applicable. This collection does not involve statistical methods.