

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. 34-64565,¹ the Securities and Exchange Commission (the “Commission”) adopted a rule and forms to implement Section 21F of the Securities Exchange Act of 1934 entitled “Securities Whistleblower Incentives and Protection.”² The Rule describes the Whistleblower Program that the Commission has established pursuant to 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 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.³ Although the Rule is comprehensive and will impose new burdens, the Commission believes that the Rule will enhance investor protection and promote efficient capital formation.

The 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 Rule are:

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

¹ Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545 (June 13, 2011) [76 FR 34299].

² Pub. L. No. 111-203, § 922(a), 124 Stat 1841 (2010).

³ See Summary and Section I of Release No. 34-64565.

2. PURPOSE AND USE OF THE INFORMATION COLLECTION

The purpose of the 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.⁴

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 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 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.

⁴ Potential whistleblowers are now able to submit information to the Commission electronically through the Electronic Data Collection System (“TCR Database”), the Commission’s interactive, web-based database for submission of tips, complaints and referrals. Both the online database and proposed Form TCR are designed to elicit substantially similar information concerning the individual submitting the information and the violation alleged. On November 9, 2010, we separately submitted a request to the Office of Management and Budget (“OMB”) for Paperwork Reduction Act approval of the TCR Database. On December 21, 2010, we received OMB Control Number 3235-0672 for the TCR Database. Accordingly, for purposes of this Supporting Statement, we are only discussing Forms TCR and WB-APP.

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

In certain Commission cases and related actions a whistleblower's Form TCR will need to be retained for more than three years. Rule 21F-9(c) requires a special process when a whistleblower provides information to the Commission anonymously. In that situation, the Form TCR must be submitted to the Commission by an attorney for the whistleblower, the whistleblower must provide the attorney with a completed Form TCR signed under penalty of perjury, and the attorney must certify that he or she consents to be legally obligated to provide the whistleblower's original signed Form TCR if the Commission requests it. Rule 21F-10(c) 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. In some cases, it will be longer than three years after the filing of the Form TCR before there is a final judgment or order that leads to the filing of the Form WB-APP and the resolution of the whistleblower's claim for an award. Accordingly, if these cases involve a Form TCR filed by an anonymous whistleblower, the attorney for the anonymous whistleblower will be required to retain the original Form TCR, signed by his client, for more than three years.

For the circumstance described above, the retention of Form TCR 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 but still be able to verify the whistleblower's identity prior to the payment of any award. Because this is a newly implemented Rule, the Commission does not currently have historical data to determine the frequency with which attorneys will need to retain the original Form TCR 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 issued a release soliciting comment on the new "collection of information" requirements and associated paperwork burdens. A copy of the proposed release is attached.⁵ The Commission considered all comments received and revised certain aspects of the proposed forms to incorporate comments received from the public. For example, the proposed rule set forth a two-step process for the submission of original information requiring the submission of two different forms, Forms TCR and WB-DEC.

⁵ Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Release No. 34-63237 ("Proposing Release").

In response to comments, to minimize the burden of the collection of information on respondents we are adopting a more streamlined process that requires submitting only one form, Form TCR, signed under penalty of perjury.⁶ In response to comments urging us to include a question on our form asking whether the whistleblower reported the matter to a company's internal compliance program, we amended questions 4a and 4b of proposed Form TCR, which asked the whistleblower to provide details about any prior action taken regarding the complaint, to specifically state whether the whistleblower reported the violation internally.⁷ To further enhance the quality, utility and clarity of the information collected, in response to comments suggesting that the counsel certification places an undue burden on counsel for anonymous whistleblowers, we have amended the counsel certification provision to include the phrase "true, correct and complete to the best of [counsel's] knowledge, information and belief." The addition of this phrase makes clear that attorneys are not responsible for guaranteeing the accuracy of information they submit on behalf of a whistleblower, but they must possess a good-faith belief that the information submitted is true, correct and complete.⁸ Moreover, in response to comments, we revised Form TCR to allow for joint submissions by more than one whistleblower.⁹ With respect to the claims application process, we have increased the period for claimants to file their claim for an award from sixty (60) days to ninety (90) days to make the time constraints less burdensome.¹⁰

9. PAYMENT OR GIFT TO RESPONDENTS

Not applicable.

⁶ See, e.g., letters from National Coordinating Committee for Multiemployer Plans, Dec. 17, 2010; Corporation, Finance and Securities Law Section of the District of Columbia Bar, Dec. 17, 2010; Georg Merkl, Dec. 20, 2010. See also letter from Goodwin Proctor, LLP, and Dec. 29, 2010, which recommended that we require proposed Form TCR to be signed under penalty of perjury, similar to the requirement for proposed Form WB-DEC.

⁷ See, e.g., Letters from Securities Industry and Financial Markets Association, Dec. 17, 2010; Investment Company Institute, Dec. 17, 2010; Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, Dec. 17, 2010.

⁸ See letter from Eric Dixon, LLC., Dec. 13, 2010.

⁹ Letter from Wu, Grohovsky & Whipple, Dec. 16, 2010.

¹⁰ See, e.g., Letters from Voices for Corporate Responsibility, Dec. 17, 2010 (raising concerns regarding requirement in proposed rules that a whistleblower submit an award application within 60 days of a Notice of Covered Action); National Whistleblower Center, March 17, 2011 (same).

10. CONFIDENTIALITY

The information in the collections of information discussed above will not be made publicly available, except as provided by the Privacy Act of 1974 (5 U.S.C. 552a) and/or Section 21F(h)(2) of the Exchange Act. Section 21F(h)(2) provides 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 whistleblower identifying information 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 Rule include the burdens attributable to preparing, reviewing and reporting information to the Commission and retaining records. The total burden is estimated to be 10,758 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-APP is a form that is submitted by whistleblowers filing a claim for a whistleblower award.

a. Form TCR

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

each year.¹¹ Of those 30,000 submissions, the Commission estimates that it will receive approximately 3,000 Forms TCR each year.¹² Each respondent will submit only one Form TCR and will not have a recurring obligation. In the proposing release, we proposed that a whistleblower will have to complete two forms, proposed Form TCR and proposed Form WB-DEC, to be eligible for an award. In the Final Rules, we have eliminated Form WB-DEC and added the eligibility questions from that proposed form to Form TCR.

The Commission estimates that it will take a whistleblower, on average, one hour to complete the portion of Form TCR that does not include the questions that had previously been included in proposed Form WB-DEC. 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 annual PRA burden of Form TCR is 3,000 hours.

A person who submits information through a Form TCR or the Electronic Data Collection System and who wishes to be eligible for an award under the Program must complete the remainder of Form TCR (the additional questions related to eligibility that had been included in Proposed Form WB-DEC- now called “TCR Step 2”). The Commission estimates that it will receive this additional information in roughly 50 percent of the cases in which the Commission receives a Form TCR or an electronic submission of information.¹³ As noted above, the Commission estimates that it will receive approximately 30,000 combined electronic submissions and submissions on Form TCR each year. Thus, the Commission estimates that it will receive responses to these additional questions in approximately 15,000 instances. We estimate that it will take a whistleblower, on average, 0.5 hours to complete the remainder of Form TCR.¹⁴ Accordingly, we estimate that the annual PRA burden of the remainder of Form TCR is 7,500 hours. Form TCR is a mandatory form.

¹¹ 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.

¹² This number is a staff estimate based upon the expectation that roughly 10 percent of all tips received by the Commission will be submitted in hard copy on Form TCR. The staff anticipates that most whistleblowers will elect to submit their information electronically.

¹³ This number is a staff estimate. Because this is a new program, the staff does not have prior relevant data on which it can base its estimate.

¹⁴ This is consistent with our estimate of the time it would take a whistleblower, on average, to complete proposed Form WB-DEC.

b. Form WB-APP

The Commission estimates that it will receive approximately 129 Forms WB-APP each year. This number is a staff estimate based upon several expectations: first, that the Commission would annually post approximately 143 of the prerequisite Notices of Covered Action¹⁵; second, that the Commission will 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 prior relevant data on which it can base these estimates.

The Commission also estimates that it will take a whistleblower, on average, two hours to complete Form WB-APP. The completion time will 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 258 hours. This is a mandatory form.

13. COST BURDEN TO RESPONDENTS/RECORDKEEPERS

Under the Proposed Rules, an anonymous whistleblower is required, and a whistleblower whose identity is known may elect, 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 for the representation through 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) will enter into hourly fee arrangements with counsel.¹⁶ 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:

¹⁵ A whistleblower can only submit a Form WB-APP after there has been a "Notice of Covered Action" published on the Commission's website pursuant to Rule 21F-10.

¹⁶ 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.

- (i) The Commission will receive approximately 3,000 Forms TCR, 1,500 of which contain eligibility-related information previously contained in Proposed Form WB-DEC, and 129 Forms WB-APP annually¹⁷;
- (ii) Whistleblowers will pay hourly fees to counsel for the submission of approximately 75 Forms TCR, and 6 Forms WB-APP annually¹⁸;
- (iii) Counsel retained by whistleblowers pursuant to an hourly fee arrangement will charge on average \$400 per hour¹⁹; and
- (iv) Counsel will bill on average: (i) 2.5 hours to complete a Form TCR²⁰, and (ii) 10 hours to complete a Form WB-APP.²¹

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) \$75,000 for the reporting burden of Form TCR; and (ii) \$24,000 for the reporting burden of Form WB-APP, totaling \$99,000 annually.

¹⁷ The bases for these assumed amounts are explained in Section 12 above.

¹⁸ 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.

¹⁹ 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 not be securities lawyers and may charge different average hourly rates.

²⁰ In the proposing release, we estimated that it would take an attorney, on average, 2 hours to complete proposed Form TCR. As noted above, in the Final Rules, we have added to Form TCR questions regarding eligibility that had been in proposed Form WB-DEC. As a result, we estimate that it will take an attorney, on average, 2.5 hours to complete Form TCR.

²¹ 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 2.5 hours for the completion of Form TCR and 10 hours for completion of Form WB-APP (even though the Commission estimates that a whistleblower will be able to complete the entire Form TCR (including the eligibility questions that had been found in Form WB-DEC) in 1.5 hours and Form WB-APP in two hours).

Under the proposed rules, we estimated an annual cost burden to the public of \$294,000. Therefore, as a result of changes we have made to the Forms in response to public comments, we have reduced the annual cost burden to the public by \$195,000.

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.

B. INFORMATION COLLECTION EMPLOYING STATISTICAL METHODS

Not applicable. This collection does not involve statistical methods.