

SUPPORTING STATEMENT FOR NEW AND REVISED INFORMATION COLLECTIONS

OMB CONTROL NUMBER 3038-0067

**Part 162 – Protection of Consumer Information under the Fair Credit Reporting Act  
(Business Affiliate Marketing and Disposal of Consumer Information Rules)**

Justification

1. Explain the circumstances that make the collection of information necessary . Identify any legal or administrative requirements that necessitate the collection.

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”) amends a number of federal consumer protection laws enacted prior to the Dodd-Frank Act including, in relevant part, the Fair Credit Reporting Act, 15 U.S.C. 1681-1681x (“FCRA”) and the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952, 1980 (2003) (“FACT Act”).

Section 1088 of the Dodd-Frank Act sets out two amendments to the FCRA and the FACT Act directing the Commission to promulgate regulations that are intended to provide privacy protections to certain consumer information held by an entity that is subject to the jurisdiction of the Commission. One provision of section 1088 amends section 214(b) of the FACT Act—which added section 624 to the FCRA in 2003—and directs the Commission to implement the provisions of section 624 of the FCRA with respect to persons that are subject to the Commission’s enforcement jurisdiction. Section 624 of the FCRA gives consumers the right to block affiliates of an entity subject to the Commission’s jurisdiction from using certain information obtained from such entity to make solicitations to that consumer (hereinafter referred to as the “affiliate marketing rules”). The other provision in section 1088 of the Dodd-Frank Act amends section 628 of the FCRA and mandates that the Commission implement regulations requiring persons subject to the Commission’s jurisdiction who possess or maintain consumer report information in connection with their business activities to properly dispose of that information (hereinafter referred to as the “disposal rules”).

The Commission proposes to apply the affiliate marketing rules and the disposal rules to the following entities, which are subject to the Commission’s jurisdiction: futures commission merchants, retail foreign exchange dealers, commodity trading advisors, commodity pool operators, introducing brokers, swap dealers and major swap participants.

2. Indicate how, by whom, and for what purpose the data would be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

Under the affiliate marketing rules, the entities covered by these proposed regulations will be expected to prepare and provide clear, conspicuous and concise opt-out notices to any consumers with which such entities have a pre-existing business relationship. A covered entity

only has to provide an opt-out notice to the extent that an affiliate of the covered entity plans to make a solicitation to any of the covered entity's consumers. The purpose of the opt-out notice is to provide consumers with the ability to prohibit marketing solicitations from affiliate businesses that do not have a pre-existing business relationship with the consumers, but that do have access to such consumers' nonpublic, personal information. Under the proposal, a covered entity is required to send opt-out notices at the maximum of once every five years.

Under the disposal rules, the entities covered by these proposed regulations will be expected to develop and implement a written disposal plan with respect to any consumer information within such entities' possession. The proposed regulations provide that a covered entity develop a written disposal plan that is tailored to the size and complexity of such entity's business. The purpose of the written disposal plan is to establish a formal plan for the disposal of nonpublic, consumer information, which otherwise could be illegally confiscated and used by unauthorized third parties. Under the proposal, a covered entity is required to develop a written disposal plan only once, but may subsequently amend such plan from time to time.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

Under the affiliate marketing rules, the required opt-out notices may be distributed to consumers electronically upon the consumer's consent. A covered entity may distribute an electronic notice in two ways. First, a covered entity may reasonably expect that a consumer who uses the entity's Internet web site to purchase or utilize the covered entity or its affiliate's financial products and services will receive an electronic opt-out notice if such notice is clearly and conspicuously posted on the covered entity or its affiliate's Internet web site. Second, a covered entity could send an opt-out notice *via* e-mail to a consumer.

The affiliate marketing rules also provide that a covered entity may provide an e-mail address or access to other electronic media as a reasonable means for the consumer to opt-out of an affiliate's use of the consumer's nonpublic, personal information for marketing purposes. This approach is only permissible under the proposal if it is reasonable and simple.

Under the disposal rules, a covered entity may develop its written disposal plan on a computer. There is no requirement that the disposal plan be printed on physical paper.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

The type of information required to be collected under the proposed regulations is not currently collected and is not available for public disclosure through any other source.

5. If the collection of information involves small business or other small entities (Item 5 of OMB From 83-1), describe the methods used to minimize burden.

The requirements of these proposed regulations are mandated by the FCRA and FACT Act *vis-à-vis* the Dodd-Frank Act and, therefore, the Commission does not grant any exceptions to small entities from the requirements at this time. The proposed regulations do, however, provide substantial flexibility in several ways. For example, under the affiliate marketing rules, covered entities may consolidate their opt-out notices with other privacy notices required under other provisions of law (*e.g.*, initial, annual and opt-out notices under the Gramm-Leach-Bliley Act). In addition, covered entities may extend the opt-out period in perpetuity so that such entities need not send opt-out notices every five years to consumers before an affiliate makes a solicitation. To further minimize the burden to small businesses or other small entities, the Commission has provided a model notice in Appendix A to the proposal, which covered entities can use in complying with the proposal's notice content requirements.

The disposal rules also provide flexibility for small businesses and other small entities. In particular, under the proposal, each covered entity has the discretion to tailor its written disposal plan to fit the size and complexity of such entity's business.

6. Describe the consequence to the Federal Program or policy activities if the collection were conducted less frequently as well as any technical or legal obstacles to reducing burden.

The FCRA and the FACT Act mandate, *vis-à-vis* the Dodd-Frank Act, that: (1) with respect to the affiliate marketing rules, entities subject to the Commission's jurisdiction must provide opt-out notices to consumers with whom such entity has a pre-existing business relationship at most once every five years; and (2) with respect to the disposal rules, entities subject to the Commission's jurisdiction must develop and implement a written disposal plan only once (as such original plan may be amended from time to time). As a result of this mandate, these collections cannot be conducted any less frequently than what is required by law. The Commission is unaware of any technical or legal obstacles to reduce the burden to covered entities.

7. Explain any special circumstances that require the collection to be conducted in a manner:

- requiring respondents to report information to the agency more often than quarterly;

Notices and written plans required by these regulations are not required to be submitted to the Commission.

- requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;

This does not apply.

- requiring respondents to submit more than an original and two copies of any document;

This does not apply.

- requiring respondents to retain records other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;

Covered entities are required to retain information regarding a consumer's decision to opt out after such consumer has opted out. In addition, covered entities are required to develop and maintain a written disposal policy to the extent that such entities possess nonpublic, consumer information.

- in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;

The proposed regulations do not involve a statistical survey.

- requiring the use of a statistical data classification that has not been reviewed and approved by OMB;

The proposed regulations do not involve the use of statistical data.

- that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or

This does not apply.

- requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.

This does not apply.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice required by 5 C.F.R. 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

The proposed rule was published for a 60-day public comment period in the Federal Register -- 75 FR 66018 (10/27/2010).

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping disclosure, or reporting format (if any, and on the data elements to be recorded, disclosed, or reported.

The Commission consulted with other federal agencies, which have promulgated regulations under sections 624 and 628 of the FCRA with respect to the reporting requirements thereunder. Specifically, the Commission consulted with the Federal Trade Commission and the Securities and Exchange Commission.

In addition, in advance of the publication of the proposed regulations the Commission solicited general comments from the public on its Internet web site. The Commission did not receive any public comments to the proposed regulations prior to the publication of such regulations in the Federal Register.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every three years—even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

This question does not apply.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

This question does not apply.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulations, or agency policy.

The Commission does not provide respondents with an assurance of confidentiality, only to the extent permitted by law. The Commission fully complies with section 8(a)(1) of the Commodity Exchange Act, which strictly prohibits the Commission, unless specifically authorized by the Commodity Exchange Act, 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.”

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be

given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

The proposed regulations do not require the giving of sensitive information, as that term is used in Question 11.

12. Provide estimates of the hour burden of the collection of information. The Statement should:

- Indicate the number of respondents, frequency of response, annual hour burden and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than ten) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.
- If the request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13 of OMB Form 83-I.
- Provide estimates of annualized cost to respondents for the hours burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting hours or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.

See Attachment A.

A substantive public comment was received on the Proposed Rule from the Securities Industry and Financial Markets Association (“SIFMA”) addressing the merits of the Commission’s proposed PRA calculations. SIFMA proposed that the burden estimate for the affiliate marketing rules should be refined to account for burden hours associated with (a) monitoring the opt-out notice process; (b) addressing consumer questions and concerns about opt-out notices; and (c) adjusting records where a consumer changes his or her mind about his or her election to opt-in or out. SIFMA also proposed that the burden estimate for the disposal rules should be refined to (a) revise disposal plans to account for use of new technology, new business processes, etc., and conduct regular reviews of its disposal plan to determine when revisions are necessary or advisable.

Based on these comments, the Commission estimates that 3,172 covered entities may incur an additional 3.5 burden hours to those hours calculated in the proposed rule, when complying with the affiliate marketing rules, for an aggregate of 11,102 annual burden hours.

These additional burden hours are attributable to monitoring the opt-out notice process, addressing consumer questions and concerns about opt-out notices, and adjusting customer records.

In addition, the Commission estimates that 3,172 covered entities may incur an additional 2.4 burden hours when complying with the disposal rules, for an aggregate of 7,612.8 annual burden hours. These additional burden hours are attributable to revise and update disposal plans on an ongoing basis, and conduct regular reviews of its disposal plan as necessary or advisable.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 and 14).

- The cost estimate should be split into two components; (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major costs factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software, monitoring, sampling, drilling and testing equipment, and record storage facilities.
- If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate, agencies may consult with a sample of respondents (fewer than ten), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.
- Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.

See Attachment B.

14. Provide estimates of the annualized costs to the Federal Government. Also provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing and support staff), and any other expense that would not have been incurred without this collection of

information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

Covered entities are not required to provide copies of opt-out notices or written disposal plans to the Commission, and the Commission is not required to review each entity's opt-out notices and written disposal plans. Consequently, the annualized cost to the Commission should be minimal, except in cases where the Commission initiates an enforcement proceeding against an institution for non-compliance with the proposal.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB Form 83-I.

This question does not apply.

16. For collection of information whose results are planned to be published for statistical use, outline plans for tabulation, statistical analysis, and publication. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

This question does not apply.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

This question does not apply.

18. Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submissions," of OMB Form 83-I.

This question does not apply.



**Part 162**  
**Protection of Consumer Information under the Fair Credit Reporting Act**

| Est'd #<br>of<br>Covered<br>Entities<br>(a) | Est'd #<br>Opt-out<br>Notices<br>per 5 year<br>period<br>(b) | Est'd #<br>of<br>Written<br>Disposal<br>Plans<br>(c) | Est'd<br>Avg. # of<br>Hrs. Per<br>Opt-out<br>Notice<br>(d) | Est'd<br>Avg. # of<br>Hrs. Per<br>Written<br>Disposal<br>Plan<br>(e) | Est'd<br>Total<br>Annual<br>Burden<br>Hrs. -<br>Opt-out<br>(a)x(b)x(d)<br>/5 years | Est'd Total<br>Annual<br>Burden Hrs.<br>– Disposal<br>Plan<br>(c)x(e) |
|---|--|--|--|--|--|---|
| 3,172                                       | 412,000*   | 3,172  | 0.01   | 3.5  | 2,613.73   | 11,102  |

Estimated Total Annual Burden Hours for Both Rules:      13,715.73

\* This number reflects an estimation of the number of individual commodity interest accounts (roughly 412,000), taking into account the possibility of multiple notices for each account (*e.g.*, from an futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, swap dealers and major swap participants) as well as joint notices from each entity associated with a particular account.

**Part 162**  
**Protection of Consumer Information under the Fair Credit Reporting Act**  
**Estimate of Total Annual Cost Burden**

Start-up cost burden:

(a) For the affiliate marketing rules, Commission staff has estimated that a covered entity would require 1 hour of professional time (at \$200 per hour) and 2 hours of IT, clerical or administrative time (at \$25 per hour) to prepare and transmit opt-out notices to consumers.

$$((1 * \$200) + (2 * \$25)) * 3,172 = \$713,700$$

(b) For the disposal rules, Commission staff has estimated that a covered entity would require an average of 2.5 hours of professional time (at \$200 per hour) and 1 hour of clerical or administrative time (at \$25 per hour) to prepare its written disposal plan:

$$((2.5 * \$200) + (1 * \$25)) * 3,172 = \$1,665,300$$

$$\text{Total start-up cost component (a+b)} = \$ 2,379,000$$

The start-up costs are based upon the number of covered entities during the year who will be: (a) preparing and transmitting opt-out notices to consumers, and (b) preparing written disposal plans. There are 3,172 such entities: 112 futures commission merchants, 1,428 introducing brokers, 347 commodity pool operators, 975 commodity trading advisors, 250 swap dealers, and 50 major swap participants.

Annual cost burden:

With respect to the affiliate marketing rules, the Commission estimates that the cost of mailing approximately 412,000 opt-out notices annually for 412,000 individual accounts at an average additional cost per mailing of \$0.04 per notice will be \$16,840. The Commission assumes that most covered entities will include opt-out notices to consumers along with other privacy notices pursuant to other provisions of law, or account statements that the consumers currently receive from the covered entities.

There is no annual cost burden associated with the disposal rules because all costs are front-loaded.

