

**SUPPORTING STATEMENT FOR NEW AND
REVISED INFORMATION COLLECTIONS**

OMB CONTROL NUMBER 3038-0082

Justification

1. Explain the circumstances that make the collection of information necessary . Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.

Section 23 of the Commodity Exchange Act, 7 U.S.C. 1 et seq, directs that the Commission establish a fund from which to pay awards of 10 to 30 percent of sanctions collected from successful enforcement of covered judicial or administrative actions, or related actions, to individuals who provide information that leads to the successful enforcement of an action in which sanctions exceeding \$1,000,000 are obtained; and to finance customer education regarding whistleblower initiatives. Section 23(c) establishes procedures for the determination or denial of an award. Rules 165.3 and 165.7 implement these statutory provisions. Rule 165.3 establishes the procedures for submitting original information to the Commission. Rule 165.7 establishes the procedures for award applications and Commission award determinations.

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.

The information received pursuant to rules 165.3 would enable the Commission to receive original information in support of whistleblower tips that can elicit sufficient information to determine whether that alleged conduct suggests a violation of the CEA. Ultimately, the receipt of such tips can lead to the successful enforcement of Commission administrative or injunctive actions achieving total sanctions in excess of \$1,000,000 or related actions. Rule 165.7 would require the whistleblower to apply for an award, and likewise enable the Commission to make a determination of the amount of an award or denial of an award based upon certain criteria.

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.

Information may be submitted electronically.

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.

Not applicable. Under the statute, the required information sought is to be original information from an original source.

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

This collection of information will be from individuals and not small businesses or entities.

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.

If the information required under this collection of information were not collected, application of Commission rules would be adversely affected.

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;**
- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **requiring respondents to submit more than an original and two copies of any document;**
- **requiring respondents to retain records other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;**
- **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;**
- **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **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**
- **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.**

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 CFR 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.

A copy of the *Federal Register* notice soliciting comments on this collection is attached. Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodity Exchange Act, Release No. 3038-AD04, 75 Fed. Reg. 75728 (Dec. 6, 2010) (“NOPR”).

The comment period for the NOPR opened on December 6, 2010 and closed Friday, February 4, 2011. Under the Commission’s Proposed Rules, whistleblowers will be required to file with the Commission three forms: they must submit their information to the Commission using a Form TCR (“Tip, Complaint or Referral”) (see Proposed Rule 165.3; and 75 Fed. Reg. at 75750 - 75752); and when the whistleblower makes an application to the Commission for an award, the whistleblower must submit a Form WB-DEC (“Declaration Concerning Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act”), and a Form WB-APP (“Application for Award For Original Information Provided Pursuant to Section 23 of the Commodity Exchange Act”) (see Proposed Rule 165.7; and 75 Fed. Reg. 75753 – 75760).

Comments Received and Revisions to Proposed Forms

The CFTC received comments from two commenters regarding the NOPR’s proposed forms. These comment letters are attached and the relevant portions of those letters are summarized below.

1. The American Bar Association (“ABA”) – Business Law Section/Committee on Derivatives and Futures Law and the Committee on Federal Regulation of Securities (“ABA”) suggested that the proposed Form TCR should be subject to the penalty of perjury. ABA at 26. ABA further suggested that the Commission require attorneys who handle anonymous whistleblower reports should be required to certify on the Form TCR that “the client can show *particularized* facts suggesting a *reasonable probability* that a violation has actually occurred or is occurring.” *Id.*
2. U.S. Chamber of Commerce stated that the proposed application forms, Form WB-DEC and Form WB-APP, “do not provide enough information for the Commission to determine whether the exclusions [in the definition of ‘Independent Knowledge’ Rule 165.2(g)] apply.” U.S. Chamber of Commerce at 21.

After consideration of the comments received, and in the interest in harmonization with the Securities and Exchange Commission, which had issued final rules implementing its similar whistleblower provision under the Dodd-Frank Act, the Commission decided to adopt the Whistleblower Incentives and Protection rules with changes. See Whistleblower Incentives and Protection, 76 Fed. Reg. 53172 (Aug. 25, 2011) (to be codified at 17 C.F.R. pt. 165) (“Final Rulemaking”).

First, the Commission reduced the total number of forms from three to two. The Commission did away with Form WB-DEC, and instead incorporated the substance of Form WB-DEC into both the Form TCR and WB-APP (see final forms attached and at 76 Fed. Reg. at 53209-53222). Second, both Form TCR and WB-APP were changed to advise potential whistleblowers (and their attorneys) that the forms must be completed under oath and subject to the penalty of perjury. Third, the Commission revised Form TCR to provide sufficient information for the Commission to make preliminary exclusion determinations.

Total Annual Reporting and Recordkeeping Burden

The Commission revised and sharpened its estimate of the recordkeeping burden imposed by this collection of information in light of revisions to both the required forms and the Commission's estimate of the number of forms it would receive, based, in part, on the actual volume of whistleblower tips, complaints and referrals that the Commission received in the first eleven months after the enactment of the Dodd-Frank Act. Compare NOPR, 75 Fed. Reg. at 75742 with Final Rulemaking, 76 Fed. Reg. at 53199.

In the NOPR, the Commission estimated that approximately 160 individuals per fiscal year would each file a Form TCR, WB-DEC and WB-APP. The Commission estimated that the proposed collection would involve approximately: 2 burden hours per Form TCR; 0.5 burden hours per Form WB-DEC; and 10 burden hours per Form WB-APP; for an annual aggregate 2,000 burden hours per fiscal year.

In the Final Rulemaking, the Commission assumed that it will receive approximately 100 Forms TCR, and nine Forms WB-APP annually. The Commission estimated that this collection would involve approximately: 2.5 burden hours per Form TCR; and 10 burden hours per Form WB-APP; for an annual aggregate 340 burden hours per fiscal year.

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 sought public comments on the collection of information.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 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.

Not applicable.

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

Does not apply.

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

Section 23(h)(2)(A) of the CEA provides that the Commission, its officers and employees shall not disclose any information, including that provided by the whistleblower, that could reasonably be expected to reveal the identity of a whistleblower except under certain limited conditions.

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.

None of the regulations 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 out 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. The Commission estimates that 100 respondents will file a total of 100 submissions of original information (Form TCR) and 9 respondents will file a total of 9 requests for determinations of whistleblower awards (Form WB-APP). The Commission estimated that this collection would involve approximately: 2.5 burden hours per Form TCR; and 10 burden hours per Form WB-APP; for an annual aggregate 340 burden hours per fiscal year.

The Commission estimates the cost of the hourly burden to be between \$10 and \$60 per hour for respondents to complete the required forms themselves. The Commission also estimates that respondents will pay hourly fees to counsel for the submission of approximately five Forms TCR and one Form WB-APP annually. The Commissioner further estimates that counsel retained by respondents pursuant to an hourly fee arrangement will charge on average \$400 per hour.

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.**

Total costs are included in the answer to question 12.

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.

The proposed rule requires start-up or operations and maintenance costs related to receiving, managing and processing whistleblower tips and making award determinations. See Attachment A.

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

Not applicable. This is the implementation of a new program.

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.