

# SUPPORTING STATEMENT FOR AMENDMENT TO INFORMATION COLLECTIONS

## Alternative to Fingerprinting Requirement For Foreign Natural Persons

OMB CONTROL NUMBER 3038-0072

### 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.**

Persons engaging in specified activities involving some or all commodity interests are required pursuant to the Commodity Exchange Act (“CEA” or “Act”) and/or regulations of the Commodity Futures Trading Commission (“Commission”) to register with the Commission in certain registration categories. These include registration as a futures commission merchant, retail foreign exchange dealer, introducing broker, commodity pool operator, commodity trading advisor, swap dealer, major swap participant, leverage transaction merchant, floor broker, and floor trader. For definitions of terms used herein, please see Section 1a of the CEA and Parts 1 and 5 of the Commission’s regulations. Pursuant to the registration process for determining a Commission registrant’s fitness in part 3 of the Commission’s regulations, natural persons that wish to be principals or associated persons of Commission registrants, or who are responsible for entry of orders from an FB’s or FT’s own account, are required to submit their fingerprints to the Commission (or its designee) (such requirements, collectively, the “Fingerprinting Requirement”).

The Commission is amending (the “Final Rule”) the Fingerprinting Requirement by adding a new sub-section (e) to the existing list of exemptions from the Fingerprinting Requirement in § 3.21 to codify and clarify CFTC Staff Letter No. 12-49 and CFTC Staff Letter No. 13-29, each issued by the Commission’s Division of Swap Dealer and Intermediary Oversight (together, the “DSIO No-Action Letters” and the relief provided by such letters, the “DSIO No-Action Relief”). These letters provide an alternative to certain portions of the Fingerprinting Requirement for certain persons who have not resided in the United States since reaching the age of 18 years. The Final Rule extends the alternative provided in the DSIO No-Action Relief to certain natural persons connected to FBs and FTs and includes all requirements to provide a fingerprint card under Part 3 of the Commission’s regulations, whereas the DSIO No-Action Relief is more limited.

The collection of information in the Final Rule is necessary to provide an optional alternative to complying with the Fingerprinting Requirement. Specifically, sub-section (e)(2) of § 3.21 provides that the obligation to provide a fingerprint card for a Foreign Natural Person under part 3 of the Commission’s regulations shall be deemed satisfied for a Certifying Firm (each, as defined in the Final Rule) if: (a) such Certifying Firm causes a criminal history background check of such Foreign Natural Person to be performed; (b) such criminal history background check does not reveal any matters that constitute a disqualification under Sections

8a(2) or 8a(3) of the CEA, other than those disclosed to the National Futures Association (“NFA”); and (c) a person authorized by such Certifying Firm submits, in reliance on such criminal history background check, a certification by such Certifying Firm to NFA.

The certification must: (i) state that the conditions described above have been satisfied; and (ii) be signed by a person authorized by such Certifying Firm to make such certification. In addition, each criminal history background check must: (a) be of a type that would reveal all matters listed under Sections 8a(2)(D) or 8a(3)(D), (E), or (H) of the CEA relating to the Foreign Natural Person and (b) be completed not more than one calendar year prior to the date that such Certifying Firm submits the certification to NFA described in the proposed rule.

**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.**

NFA staff will use the information required in lieu of a fingerprint card, as set forth in Item 1 above, to process each Form 8-R for Foreign Natural Persons that wish to avail themselves of the alternative provided in the Final Rule. Additionally, Commission staff will use the records required to be preserved under the Final Rule when conducting the Commission’s examination and oversight program and when conducting investigations into potential violations of the CEA. The requirement to keep records current and readily available enables the Commission to pursue potential violations in a timely manner and assists the Commission in its efforts to seek to freeze and recover any profits received from illegal activity.

**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.**

The Commission is committed to utilizing technology in order to reduce reporting burdens for respondents in respect of the Final Rule. Information may be submitted electronically to NFA. The Commission anticipates that nearly 100% of the collection of information will 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.**

The information required under the Final Rule is not already collected by the Commission for any other purpose, collected by any other agency, or 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 Form 83-I), describe the methods used to minimize burden.**

The Final Rule solely provides an optional alternative to complying with the Fingerprinting Requirement, which already applies to any affected small entities, and will, therefore, not impose any new regulatory obligations on such entities. The Final Rule is not expected to impose any new burdens on market participants. Rather, to the extent that this Final Rule provides an alternative means to comply with the Fingerprinting Requirement and is elected by a market participant, the Commission believes it is reasonable to infer that the alternative is less burdensome to such participant. The Commission does not, therefore, expect small entities to incur any additional costs as a result of the Final Rule.

**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.**

Failure to provide the certification in lieu of the fingerprint card and to maintain the records required by Commission Regulation 1.31 under the Final Rule would adversely affect the Commission's ability to ensure that those availing themselves of the alternative to fingerprinting provided in the Final Rule have satisfied each of the Final Rule's requirements. Failure to maintain such records also would adversely affect the Commission's examination and investigation efforts.

**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;**

As noted above, the Final Rule solely provides an optional alternative to the Fingerprinting Requirement. Because this election is solely at the discretion of the respondent, the final regulations do not require respondents to report information to the Commission more often than quarterly (or at any time).

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

As noted above, this collection is optional, and, thus, does not require respondents to submit a written response at any time.

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

As noted above, this collection is optional, and, thus, does not require respondents to submit a written response. If a respondent elects to avail itself of the alternative provided in the Final Rule, it is not required to submit more than one original or 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;**

The Final Rule requires that the Certifying Firm maintain, in accordance with § 1.31, records documenting that the criminal history background check discussed above was completed and the results thereof. Commission rule 1.31 requires that:

"All books and records required to be kept by the (Commodity Exchange) Act or by these regulations shall be kept for a period of five years from the date thereof and shall be readily accessible during the first 2 years of the 5-year period . . . . All such books and records shall be open to inspection by any representative of the Commission or the U.S. Department of Justice."

- **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;**

No statistical surveys are involved.

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

The requirements do not involve use of any statistical data classification.

- **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**

The requirements do not involve a pledge of confidentiality regarding the collection of data.

- **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.**

The Commission has procedures to protect the confidentiality of a respondent's information. These are set forth in the Commission's regulations at parts 145 and 147 of Title 17 of the Code of Federal Regulations.

**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 information collection (81 FR 1359, January 12, 2016) is attached. No comments were received.

**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 recordkeep-**

**ing disclosure, or reporting format (if any, and on the data elements to be recorded, disclosed, or reported.**

As set forth above, the Commission affirmatively sought comments on the information collection requirements described herein.

**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. No such circumstances are anticipated.

**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 beyond that provided by applicable 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.” The Commission has procedures to protect the confidentiality of a respondent’s data. These are set forth in the Commission’s regulations at parts 145 and 147 of the Code of Federal Regulations.

**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.**

This question does not apply. None of the required information is sensitive, 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.

**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.**

The Commission estimates that each respondent will spend 2.5 hours per year in start-up/maintenance costs researching reputable commercial services that conduct criminal history background checks and retaining such services at a cost of \$250.00 (2.5 hours x \$100/hour<sup>1</sup>). The Commission estimates that there will be 2 respondents resulting in an aggregate cost per year of \$500.00 (\$250.00 x 2 respondents).

**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.**

There are no new annualized costs to the Commission in connection with the Final Rule. NFA will receive, review, and process the certifications discussed above. Commission staff periodically conducts reviews of NFA's registration processing program, and its review of how NFA is processing the certifications will be folded into the existing review scheme.

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

The Final Rule generally codifies the DSIO No-Action Letters to provide in § 3.21 of the Commission's regulations an alternative to the Fingerprinting Requirement for Foreign Natural Persons. The Commission believes the Final Rule, in providing certainty to market participants by way of Commission regulation, makes the commodity interest markets it oversees more liquid, competitive, and accessible by enabling Foreign Natural Persons to demonstrate that they meet the minimum standards for fitness and competency without undue burden. The alternative to fingerprinting removes an impediment to participation in United States' markets by Foreign Natural Persons, recognizing the limitations on usefulness of fingerprints of foreign nationals while also ensuring the continued protection of market participants and the public. While the Final Rule adds a new information collection that reflects a burden increase to OMB Control Number 3038-0072, the Final Rule solely provides an optional alternative to complying with the Fingerprinting Requirement, which already applies to any affected entities, and, therefore, does not impose any new regulatory obligations on such entities. The Final Rule is not expected to impose any new burdens on market participants. Rather, to the extent that this Final Rule provides an alternative means to comply with the Fingerprinting Requirement and is elected by a market participant, the Commission believes it is reasonable to infer that the alternative is less burdensome to such participant.

**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**

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<sup>1</sup> To determine the cost per hour used in this estimate," the Commission first reviewed the May 2014 Bureau of Labor Statistics data to determine the hourly wage of a compliance officer. According to the Bureau of Labor Statistics, the mean hourly wage for an employee under occupation code 13-1041, "Compliance Officer," that is employed by the "Securities and Commodity Contracts Intermediation and Brokerage" industry is \$38.23. Because potential respondents include large financial institutions whose employee salaries may exceed the mean wage, the Commission has taken the more conservative approach of estimating the cost burden based upon a compliance officer salary of \$100 per hour.

**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.

## Attachment A

### Alternative to Fingerprinting Requirement For Foreign Natural Persons

#### OMB Collection File 3038-0072

The Commission estimates the aggregate additional hours burden associated with the information collection in the Final Rule is 5.0 hours. This burden results from: (i) respondents providing necessary information to commercial service provider(s) to conduct a criminal history background check for a Foreign Natural Person; (ii) respondents preparing and submitting the certification described herein; and (iii) respondents maintaining, in accordance with Commission regulation 1.31, records documenting that the criminal history background check was completed and the results thereof.

The estimated aggregate burden was calculated as follows:

Respondents/Affected Entities: 2  
 Estimated number of responses per respondent: 1  
 Estimated total annual burden on each respondent: 2.5 hours  
 Frequency of collection: As needed.  
 Burden statement: 2 respondents x 2.5 hours = 5.0 hours

Commission staff estimates an aggregate cost burden per respondent annually of \$250.00 (2.5 hours x \$100/hour<sup>2</sup>) and a total annual burden for all respondents of \$500.00 (\$250.00 x 2 respondents).

1. Regulation	2. Estimated No. of Respondents	3. Estimated No. of Reports by Each Respondent	4. Estimated Average No. of Burden Hours per Response	5. Annual No. of Burden Hours per Respondent (3 x 4)	6. Estimated Average Burden Hour Cost	7. Total Average Hour Burden Cost Per Respondent (5 x 6)	8. Total Annual Responses (2 x 3)	9. Total Annual Burden Hours (2 x 5)	10. Total Annual Burden Hour Cost of All Responses (2 x 7)
3.21(e) Third Party Disclosure	2.0	1.0	2.0	2.0	\$100	\$200	2.0	4.0	\$400
3.21(e) Recordkeeping	2.0	1.0	.5	.5	\$100	\$50	2.0	1.0	\$100
<b>Total Burden Hours/Cost:</b>			2.5	2.5		<b>\$250</b>		5	<b>\$500</b>

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<sup>2</sup> See n.1, *supra*.