

FTC Analysis of National Automobile Dealers Association Comment

In response to the request for comments on this application for renewed PRA clearance, 60 Fed. Reg. 11952 (Mar. 20, 2009), the Commission received one public comment, from the National Automobile Dealers Association (“NADA”).¹ NADA generally asserts that the estimated average annual recordkeeping burden for the telemarketing call provisions of the TSR is significantly understated, but does not provide any alternate suggested estimates to those used by the FTC in the notice seeking public comment. Staff has carefully considered NADA's arguments, but has concluded that they lack sufficient specificity to support any revisions of its prior estimates.

Specifically, regarding live telemarketing calls, NADA contends, first, that the FTC staff estimates fail to account for the recordkeeping cost of creating and maintaining compliance policies, and training its employees consistent with those policies in order to show that its members qualify for the safe harbor provided in section 310.4(b)(3)(i)-(ii) of the Rule. NADA provides no specific information on the time or cost associated with drafting written policies or training. Any such burden is not a “recordkeeping” burden for purposes of the Paperwork Reduction Act (44 U.S.C. Ch. 35), however, because these provisions of the TSR describe a defense from liability. Neither the recordkeeping requirements set out in section 310.5 nor any other provision of the TSR requires that sellers or telemarketers routinely create or maintain the records NADA identifies.

Secondly, NADA argues that the FTC staff estimates understate the costs of complying with safe harbor section 310.4(b)(3)(iv), either because of the “single look-up” option for access to the National Registry or because the National Registry must be checked at least every 31 days. Since all sellers may download five area codes for free, it is difficult to conceive that any NADA member would instead use the “single look-up” option, and NADA has provided no evidence that any of its member local car dealers need access to more than five area codes, or even make use of the “single look-up” option. If, instead, the download option is used, 12 monthly downloads can easily be completed within staff's estimate of one hour a year.

Additionally, NADA challenges staff's conclusion that non-labor capital and start-up costs for recordkeeping in connection with live telemarketing calls are “de minimis” because most entities would maintain the records required by the TSR in the ordinary course of business. NADA concedes that some records are retained in the ordinary course of business, but contends that a majority of the records required by section 310.5 of the TSR are retained solely for

¹ After checking for comments the day after the close of the comment period and finding none, FTC staff submitted the required 30-day notice to the Federal Register stating that no comments were received. It was not until three days after the close of the comment period that the FTC's Commentworks contractor informed staff that a comment had been received late in the final day of the 60-day comment period. Upon learning of the comment, staff was able to obtain from the Office of the Federal Register permission to make simple correction to the notice acknowledging that a comment was received (and providing readers with a weblink to the comment), but was unable to otherwise substantively revise the notice for publication prior to expiration of the Rule's existing clearance.

purposes of compliance with the TSR -- without identifying the types of records to which it is referring or providing an alternative estimate of the costs of retaining those records. NADA goes on to assert that, notwithstanding the fact that section 310.5(b) of the TSR permits sellers to keep required records "in any form," including electronic form, "many" of its members still retain paper records, often must store them off-site, and thus that a portion of the expenses related to collecting, transporting, and storing these records results directly from the TSR recordkeeping requirements. However, since nothing in the TSR requires that records be created or maintained on paper, these costs are not recordkeeping costs imposed by the TSR

NADA further faults FTC staff estimates on the cost of complying with the prerecorded call amendment, arguing, first, that new databases will have to be created to show compliance with the amendment's written agreement requirement that takes effect on September 1, 2009. The NADA comment appears to acknowledge, however, that its members maintain customer databases in the ordinary course of business; thus, electronic evidence of a customer's agreement to receive prerecorded calls would require only the addition of a single field to the member customer databases to record such agreements, as staff's estimates assume. While NADA also objects that an unspecified number of member car dealers still maintain paper records, notwithstanding the fact that dealer service departments typically keep computerized records of customer service visits, nothing in the prerecorded call amendment requires dealers to maintain paper records of agreements to receive prerecorded calls. On the contrary, in providing a one-year phase-in for the written agreement requirement, the Commission expressly permitted the use during that period of prerecorded calls to existing customers to obtain the required agreements electronically via a keypress or voice response, and emphasized that after the requirement takes effect, the required agreements could be solicited and obtained using forms provided in emails or on websites, in addition to paper or electronic sales or service agreements or receipts.

Finally, NADA disputes FTC staff's estimate of the cost of any legal advice sellers might wish to obtain in connection with the prerecorded call amendment, on the ground that its small business members do not have in-house counsel, and would have to hire outside counsel for any such advice. The Commission went to unusual lengths in issuing the amendment to provide a sample form for obtaining written agreements, in order to minimize, if not eliminate, the need for advice of counsel. The staff estimate for legal and other managerial/professional services was not "\$32 per hour," as NADA asserts, but \$42 per hour. This estimate accounts not only for the unusually detailed guidance provided by the Commission, but also for the likelihood that trade associations likewise would provide compliance advice to their members.

For the foregoing reasons, there is insufficient evidence in the record upon which to base any alteration in staff's estimates.