

Federal Trade Commission
Supporting Statement for the Affiliate Marketing Rule
16 C.F.R. Part 680
(OMB Control No. 3084-0131)

(1) & (2) Necessity for and Use of the Information Collection

The Fair and Accurate Credit Transactions Act (“FACT Act” or the “Act”), Pub. L. No.108-159 (December 4, 2003), amended the Fair Credit Reporting Act (“FCRA”), in part, for the purpose of allowing consumers to limit the use of eligibility information received from an affiliate to make solicitations to the consumer. Section 214 of the FACT Act added a new section 624 under the FCRA. This provision gave consumers the right to restrict a covered entity from using certain information about a consumer obtained from an affiliate to make marketing solicitations to that consumer.

Section 214 required the Federal Trade Commission (“FTC” or “Commission”), in consultation and coordination with various federal agencies charged with regulating affiliated companies, to issue “consistent and comparable” regulations to implement these provisions as to those entities over which it has enforcement jurisdiction. FACT Act § 214(b). On October 30, 2007, the Commission issued a final rule (“Rule”) to implement these consumer disclosure requirements as mandated by the FACT Act.

The Rule generally provides that, if a company communicates certain information about a consumer (“eligibility information”) to an affiliate, the affiliate may not use that information to make or send solicitations to the consumer unless the consumer is given notice and a reasonable opportunity to opt out of such use of the information and the consumer does not opt out. There are a number of exceptions to this requirement. Where the company has chosen to set a limited time period for the opt-out (no less than 5 years), the company must provide prior to the expiration of the opt-out, a notice that the consumer has a right to extend the opt-out for an additional period of time of at least 5 years (“extension notice”).

The Rule’s disclosure requirements are subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. Chapter 35 (“PRA”). The required disclosures are: (1) notice of the institution’s affiliate’s use of “eligibility information” for marketing solicitations to a consumer; (2) notice of a consumer’s right to opt out of the use of such information for some marketing solicitations; and (3) an “extension notice” and an additional opt-out opportunity where the duration of the opt-out is limited. The Rule provides model disclosures that covered entities may use. The Rule does not include recordkeeping requirements.

(3) Information Technology

The Rule gives explicit examples of electronic options that covered entities may use to transmit the affiliate marketing notice and opt-out notice (i.e., collections of information) that are required by the Rule. These electronic options help minimize the burden and cost of the Rule's

information collection requirements for entities subject to the Rule. Likewise, the Rule is consistent with the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note.

(4) Efforts to Identify Duplication

The Rule provides, as required under section 214(b)(3)(C) of the FACT Act, FCRA § 624(b), that the affiliate marketing notice and opt-out may be coordinated and consolidated with any other required notice, for example, the privacy notice mandated by the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801-6809, for financial institutions, thereby eliminating or reducing duplicate disclosures to consumers. Furthermore, the Rule provides that affiliated companies may send a joint disclosure to consumers, thereby eliminating the need for each affiliate to send a separate disclosure.

(5) Efforts to Minimize Small Organization Burden

The Commission drafted the Rule to minimize the compliance burden as much as possible. As noted above, the notice requirements are expressly mandated by the FACT Act. The Commission's Rule implements these requirements by providing model disclosures while affording small businesses (and all other regulated businesses) some flexibility in choosing the specific content of such disclosures. Staff believes that the model disclosures will help eliminate much of the administrative and legal costs that might be incurred by businesses seeking to comply with the Rule. In addition, the Rule provides some flexibility in choosing the means to deliver the disclosures. For example, the required disclosure may, depending upon the circumstances, be disclosed by hand-delivery, conventional, or electronic mail.

(6) Consequences of Conducting the Collection Less Frequently

A less frequent collection of information would violate both the express statutory language and intent of the FACT Act. See Section 214(a) of the FACT Act.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in the Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Public Comments/Consultation Outside the Agency

The Commission sought public comment on the various aspects of the Rule, including its PRA implications, in its notice of proposed rulemaking. Moreover, as required by the FACT Act, staff consulted with the other affected federal agencies on drafting the Rule, seeking to achieve clarity, consistency, and comparability among their respective rules implementing Section 214 of the FACT Act.

More recently, the Commission sought public comments on its request to extend OMB clearance for information collection requirements in the Rule.¹ No comments were received. Consistent with 5 C.F.R. 1320.12(c) (“Clearance of collections of information in current rules”), the Commission is providing an additional opportunity for public comment contemporaneous with this submission.

(9) Payments or Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

The requirements for which the Commission seeks OMB clearance do not involve disclosure of confidential respondent or customer information but, rather, the disclosure of covered entities’ practices regarding the use of certain “eligibility information” by affiliates for marketing solicitations to consumers.

(12) Estimated Annual Hours Burden

Except where otherwise specifically noted, staff’s estimates of burden are based on its knowledge of the consumer credit industries and knowledge of the entities over which the Commission has jurisdiction. This said, estimating PRA burden of the Rule’s disclosure requirements is difficult given the highly diverse group of affected entities that may use certain eligibility information shared by their affiliates to send marketing notices to consumers.

The estimates provided in this burden statement may well overstate actual burden. As noted above, verbatim adoption of the disclosure of information provided by the Federal government is not a “collection of information” to which to assign PRA burden estimates, and an unknown number of covered entities will opt to use the model disclosure language. Second, an uncertain, but possibly significant, number of entities subject to the FTC’s jurisdiction do not have affiliates and thus would not be covered by section 214 of the FACT Act or the Rule. Third, Commission staff does not know how many companies subject to the FTC’s jurisdiction under the Rule actually share eligibility information among affiliates and, of those, how many affiliates use such information to make marketing solicitations to consumers. Fourth, still other entities may choose to rely on the exceptions to the Rule’s notice and opt-out requirements.²

As in the past, staff’s estimates assume a higher burden will be incurred during the first year of the OMB clearance period with a lesser burden for each of the subsequent two years, since

¹ 75 Fed. Reg. 43526 (July 26, 2010).

² Exceptions include, for example, having a preexisting business relationship with a consumer, using information in response to a communication initiated by the consumer, and solicitations authorized or requested by the consumer.

the opt-out notice to consumers is required to be given only once. Institutions may provide for an indefinite period for the opt-out or they may time limit it, but for no less than five years. Given this minimum time period, Commission staff did not estimate the burden for preparing and distributing extension notices by entities that limit the duration of the opt-out time period. The relevant PRA time frame for burden calculation is the three year span between expiring OMB clearances (i.e., December 31, 2010 - December 31, 2013). The five-year notice period, however, will not begin until October 1, 2013 (five years removed from the Rule's effective date), very close to the end of the applicable period covered by the instant clearance request.

Staff's labor cost estimates take into account: managerial and professional time for reviewing internal policies and determining compliance obligations; technical time for creating the notice and opt-out, in either paper or electronic form; and clerical time for disseminating the notice and opt-out.³ In addition, staff's cost estimates presume that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the cost of compliance. Moreover, the Rule gives entities considerable flexibility to determine the scope and duration of the opt-out. Indeed, this flexibility permits entities to send a single joint notice on behalf of all of its affiliates.

Estimated total annual hours burden: 1,043,961 hours

Based, in part, on industry data regarding the number of businesses under various industry codes, staff estimates that 1,101,780 non-GLBA entities under FTC jurisdiction have affiliates and would be affected by the Rule.⁴ Staff further estimates that there are an average of 5 businesses per family or affiliated relationship, and that the affiliated entities will choose to send a joint notice, as permitted by the Rule. Thus an estimated 220,356 non-GLBA entities may send the new affiliate marketing notice. Staff also estimates that non-GLBA entities under the jurisdiction of the FTC would each incur 14 hours of burden during the three-year clearance period, comprised of a projected 7 hours of managerial time, 2 hours of technical time, and 5 hours of clerical assistance.

Based on the above, total burden for non-GLBA entities during the prospective three-year clearance period would be approximately 3,084,984 hours. Associated labor cost would be

³ No clerical time was included in staff's burden analysis for GLBA entities as the notice would likely be combined with existing GLBA notices.

⁴ This estimate is derived from an analysis of a database of U.S. businesses based on SIC codes for businesses that market goods or services to consumers, which includes the following industries: transportation services; communication; electric, gas, and sanitary services; retail trade; finance, insurance, and real estate; and services (excluding business services and engineering, management services). *See* <http://www.naics.com/search.htm>. This estimate excludes businesses not subject to the FTC's jurisdiction and businesses that do not use data or information subject to the Rule. To the resulting sub-total (6,677,796), staff applies a continuing assumed rate of affiliation of 16.75 percent, *see* 69 Fed. Reg. 33324, 33334 (June 15, 2004), reduced by a continuing estimate of 100,000 entities subject to the Commission's GLBA privacy notice regulations, *see id.*, applied to the same assumed rate of affiliation. The net total is 1,101,780.

approximately \$100,874,986.⁵ These estimates include the start-up burden and attendant costs, such as determining compliance obligations. Non-GLBA entities, however, will give notice only once during the clearance period ahead. Thus, averaged over that three-year period, the estimated annual burden for non-GLBA entities is 1,028,328 hours and \$33,958,329 in labor costs.⁶

Entities that are subject to the Commission's GLBA privacy notice regulation already provide privacy notices to their customers.⁷ Because the FACT Act and the Rule contemplate that the affiliate marketing notice can be included in the GLBA notices, the burden on GLBA regulated entities is greatly reduced. Accordingly, the GLBA entities would incur 6 hours of burden during the first year of the clearance period, comprised of a projected 5 hours of managerial time and 1 hour of technical time to execute the notice, given that the Rule provides a model.⁸ Staff also estimates that 3,350 GLBA entities under the FTC's jurisdiction would be affected,⁹ so that the total burden for GLBA entities during the first year of the clearance period would approximate 20,100 hours and \$857,667 in associated labor costs.¹⁰ Allowing for increased familiarity with procedure, PRA burden in ensuing years would decline, with GLBA entities each incurring an estimated 4 hours of annual burden (3 hours of managerial time and 1

⁵ The associated labor cost is based on the labor cost burden per notice by adding the hourly mean private sector wages for managerial, technical, and clerical work and multiplying that sum by the estimated number of hours. The classifications used are "Management Occupations" for managerial employees, "Computer and Mathematical Science Occupations" for technical staff, and "Office and Administrative Support" for clerical workers. *See* National Compensation Survey: Occupational Earnings in the United States 2009, U.S. Department of Labor released August 2010, Bulletin 2738, Table 3 ("Summary: Full-time civilian workers: Mean and median hourly, weekly, and annual earnings and mean weekly and annual hours") <http://www.bls.gov/ncs/ocs/sp/nctb1346.pdf>. The respective private sector hourly wages for these classifications are \$43.99, \$36.07, and \$16.45. Estimated hours spent for each labor category are 7, 2, and 5, respectively. Multiplying each occupation's hourly wage by the associated time estimate, labor cost burden per notice equals \$462.32. This subtotal is then multiplied by the estimated number of non-GLB business families projected to send the affiliate marketing notice (220,356) to determine cumulative labor cost burden for non-GLBA entities (\$101,874,986).

⁶ $3,084,984 \text{ hours} \div 3 = 1,028,328$; $\$101,874,986 \div 3 = \$33,958,329$.

⁷ Financial institutions must provide a privacy notice at the time the customer relationship is established and then annually so long as the relationship continues. Staff's estimates assume that the affiliate marketing opt-out will be incorporated in the institution's initial and annual notices.

⁸ As stated above, no clerical time is included in the estimate because the notice likely would be combined with existing GLBA notices.

⁹ Based on the previously stated estimates of 100,000 GLBA business entities (*see supra* note 4) at an assumed rate of affiliation of 16.75 percent (16,750), divided by the presumed ratio of 5 businesses per family, this yields a total of 3,350 GLBA business families subject to the Rule. For simplicity, staff assumes that all of these entities are new establishments and/or newly integrating the affiliated opt-out notice with the GLBA notice in the first year of the prospective three-year clearance period; thus, the higher estimate of hours assigned to the first year. This, too, then, would effectively overstate actual burden.

¹⁰ $3,350 \text{ GLBA entities} \times [(\$43.99 \times 5 \text{ hours}) + (\$36.07 \times 1 \text{ hour})] = \$857,667$.

hour of technical time) during the remaining two years of the clearance, amounting to 13,400 hours and \$562,934 in labor costs in each of the ensuing two years.¹¹ Thus, averaged over the three-year clearance period, the estimated annual burden for GLBA entities is 15,633 hours and \$661,178 in labor costs.

Cumulatively for both GLBA and non-GLBA entities, the average annual burden over the prospective three-year clearance period, rounded, is approximately 1,043,961 burden hours and \$34,619,507 in labor costs.

(13) Estimated Capital/Other Non-Labor Costs Burden

Estimated annual non-labor cost burden: \$0 or minimal

GLBA entities are already providing notices to their customers so there are no new capital or other non-labor costs, as this notice may be consolidated into their current notices. For non-GLBA entities, the Rule provides simple and concise model forms that institutions may use to comply. Entities that already have on-line capabilities will offer consumers the choice to receive notices via electronic format (e.g., computer equipment and software), and covered entities are already equipped to provide disclosures (e.g., computers with word processing programs, copying machines, mailing capabilities). Thus, any capital or non-labor costs associated with compliance for these entities are negligible.

(14) Estimate of Cost to Federal Government

Staff estimates that the fiscal year cost to the FTC Bureau of Consumer Protection of enforcing the Rule's disclosure requirements will be approximately \$178,857 per year. This estimate is based on the assumption that 1.5 full attorney work years will be expended to enforce the Rule's requirements relating to disclosure. Clerical and other support services are also included in this estimate.

(15) Program Changes or Adjustments

There are no program changes. Staff has adjusted its previously stated estimate of burden hours and the number of non-GLBA entities that may send the affiliate marketing notice based on updated inputs within the SIC codes for businesses that market goods or services to consumers in certain industries.¹²

¹¹ 3,350 GLBA entities x [(\$43.99 x 3 hours) + (\$36.07 x 1 hour)] = \$562,934.

¹² See *supra* note 4.

(16) Statistical Use of Information

Not applicable. There are no plans to publish for statistical use any information required by the Rule.

(17) Display of Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to Certification

Not applicable.